FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THIS IS THE BEGINNING OF MUR # 3708

DATE FILMED 5-5-93 CAMERA NO. 4

CAMERAMAN E.E.S.

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PERKINS COIE

A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
607 FOURTEENTH STREET, N.W. • WASHINGTON, D.C. 20005-2011 • (202) 628-6600

MUR 3708

RECEIVED
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL
92 NOV 19 PM 12:29

November 19, 1992

Lawrence Noble, Esq.
Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Dear Mr. Noble:

This is a complaint filed pursuant to 2 U.S.C. § 437g(a)(1) by the Democratic Senatorial Campaign Committee (the "DSCC"). The National Republican Senatorial Committee ("NRSC") has pending an Advisory Opinion Request, AOR 1992-39, seeking to overrule the opinion issued to Sala Burton (AO 1983-16) some years ago on the application of the coordinated expenditure provision to general election runoffs. According to press accounts, the NRSC has exhausted the authority available under 2 U.S.C. § 441a(d) for the support of its Senate candidate in Georgia, Paul Coverdell. See Attachment A. NRSC is seeking, by a reversal of the Commission position, additional § 441a(d) authority for the pending runoff.

The Commission has not yet ruled. Your office has taken the position that the Sala Burton opinion should not be overturned.

Nevertheless, the NRSC has begun to spend monies again in plain violation of the Commission's position in the Burton opinion. See Attachment B. It has done so, though because of its pending AOR, it is evidently aware of the Burton opinion and of the likelihood that only a reversal of the Commission's position would validate its action. In this sense, it is plainly proceeding in knowing and willful violation of the statute.

The Burton opinion states in relevant part:

> . . . the Commission concludes that for § 441a(d) purposes the runoff election . . . may be viewed as a continuation of the general

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[04005-0001/DA923240.006]

> election campaign . . . . <u>However, the Commission also concludes that the runoff is not a separate or additional general election</u>.
>
> (Emphasis added.)

This applies to any runoff in which a party committee might be active under the coordinated expenditure provision. It applies as much to a Senate general election runoff as it does to a House general election runoff. The NRSC moreover is plainly aware that it is applicable to Senate runoffs, having approached the Commission effectively for reversal of this opinion so it could spend up to another $500,000 to support its candidate in Georgia.

This is a blatant attempt to disregard the election laws only for the advantage that this infraction would confer upon a Republican Senate candidate.

The Commission should take immediate action, including injunctive relief, to stop this clear effort to avoid the lawful spending limits imposed by the statute.

Very truly yours,

Robert F. Bauer
Judith L. Corley
Attorneys for the Democratic Senatorial Campaign Committee

SUBSCRIBED AND SWORN to before me this 19th day of November, 1992.

Notary Public
My Commission Expires: 10/31/93
DINA POWELL
Notary Public, Washington, D.C.

RFB:dml

93040942701

A

GA-Coverdell

SB AP 11-05-92 01:36 AHT 67 LINES
PM-GA-ELN-U.S. Senate, Ga Bjt,570 Fowler, Coverdell Begin Runoff Campaigns

ATLANTA (AP) Armed with the endorsement of the third-place finisher, Republican Paul Coverdell is trying again to unseat Democratic Sen. Wyche Fowler, this time in a runoff.

Fowler, meanwhile, says he's counting on help from President-elect Clinton and Vice President-elect Al Gore in the three-week campaign.

The Nov. 24 runoff, unprecedented in the state, was required because no candidate received a majority of the votes cast Tuesday. Until Tuesday, no candidate had ever failed to win a majority in a general election in the state.

In returns from 99 percent of 2,801 precincts, Fowler had 1,098,211 votes, or 49 percent; Coverdell had 1,066,250, or 48 percent and Libertarian Jim Hudson had 69,756, or 3 percent.

Fowler was unsure why the election was so tight.

"There were a lot of cross-currents. I don't know what the Perot factor was, what the lottery factor was," he said Wednesday.

"The issues I discussed are the same agenda as (that of) the president-elect," Fowler said at a news conference. "A vote for me would help enact that agenda. A vote for my opponent would just further the gridlock."

Fowler said he can help Clinton carry out his mandate for change but Coverdell "cannot and will not do that."

Coverdell said the vote was close because he exposed the first-term Democrat as a liberal whose views are to the left of many Georgians'.

"Fowler is on the opposite side of where Georgia voters are ... that is where the decision will be made in the final analysis," he said.

In endorsing Coverdell, Hudson said, "He combines the qualities of being fiscally conservative and socially tolerant and he remains committed to fighting crime."

The campaigns are low on cash. Coverdell aides said they have about $20,000 on hand, while Fowler campaign manager Bill Johnstone said the Democratic candidate has about $75,000 to spend.

While the National Republican Senatorial Committee has spent the maximum $535,000 helping Coverdell, its Democratic counterpart still has about $200,000 it can pour into Georgia in support of Fowler.

Fowler carried traditionally Democratic big cities on Tuesday but lost in the Republican suburbs and in some normally Democratic farm-belt counties.

Coverdell, an ex-state legislator who was President Bush's Peace Corps director, used searing attack ads to catapult from a double-digit deficit in pre-election polls to a near win.

Secretary of State Max Cleland, the state's top election official, called the runoff "an omen of things to come unless that law is changed."

The runoff law was adopted as a reform move after no one captured a majority in the 1966 governor's race. Under the laws in effect at the time, the Legislature had to choose a governor. Dominated by Democrats, the Legislature chose its party's nominee, segregationist Lester Maddox.

That was long before third parties became a continuing threat, said Cleland.

On Fowler's showing, Cleland said, "I think the anti-incumbent thing was present. Also, the Republican base vote in this state inches up each election."

Agriculture Commissioner Tommy Irvin, also a Democrat, was surprised by the close vote. "I'd have to say he did not do as good as I anticipated. I expect he got caught with some of this anti-incumbency."

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RECEIVED
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL
92 NOV 19 PM 12: 30

B

NAB FORM PB 13 April 1980 - Interim Form To Be Used Until New FCC Disclosure Requirements Adopted

NAB BROADCASTERS

AGREEMENT FORM FOR POLITICAL BROADCASTS

STATION and LOCATION WXIA-TV 19 92

I, _____ (being) (on behalf of) PAUL COVERDELL

a legally qualified candidate of the REPUBLICAN political party for the office of U.S. SENATE

in the RUN-OFF election to be held on _____, do hereby request station time as follows:

Length of Broadcast	Hour	Days	Class of of Time	Times Per Week	Part of Package or Rotation	Total No. Weeks	Rate
SEE ATTACHED							

Date of First Broadcast	Date of Last Broadcast
11/17	11/18

Total Charges: $20,350

The broadcast time will be used by PAUL COVERDELL

I represent that the advance payment for the above-described broadcast time has been furnished by Coverdell for Senate Committee and the Republican Senatorial Committee

_____ and you are authorized to announce the program as paid for by such person or entity. The entity furnishing the payment, if other than an individual person, is ( ) a corporation; ( ) a committee; ( ) an association; or ( ) other unincorporated group. The names and offices of the chief executive officers of the entity are:

Pual Coverdell - Candidate

Tom Perdue - Campaign Manager

I agree to indemnify and hold harmless the station for any damages or liability, including reasonable attorney's fees, that may ensue from the performance of the above-stated broadcasts. For the above-stated broadcasts I also agree to prepare a script or transcription, which will be delivered to the station at least _____ before the time of the scheduled broadcasts. *(Note: the two preceding sentences are not applicable if the candidate is personally using the time.)*

Date: 11/16/92 Tom K Perdue

(Candidate, Supporter or Agent)

☐ Accepted ☐ Rejected By _____ Title CAMPAIGN MANAGER

This application, whether accepted or rejected, will be available for public inspection for a period of two years.

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P.2

NAB FORM PE 13 April 1989 Interim Form To Be Used Until New FCC Disclosure Requirements Adopted

NAB BROADCASTERS

AGREEMENT FORM FOR POLITICAL BROADCASTS

STATION and LOCATION WSB-TV 19 92

I, _____ (being) (on behalf of) PAUL COVERDELL

a legally qualified candidate of the REPUBLICAN political party for the office of U.S. SENATE

in the RUN-OFF election to be held on _____, do hereby request station time as follows:

Length of Broadcast	Hour	Days	Class of of Time	Times Per Week	Part of Package or Rotation	Total No. Weeks	Rate

SEE ATTACHED

Date of First Broadcast	Date of Last Broadcast
11/17	11/18

Total Charges: $34,400

The broadcast time will be used by PAUL COVERDELL

I represent that the advance payment for the above-described broadcast time has been furnished by Coverdell for Senate Committee and the Republican Senatorial Committee

_____ and you are authorized to announce the program as paid for by such person or entity. The entity furnishing the payment, if other than an individual person, is ( ) a corporation; ( ) a committee; ( ) an association; or ( ) other unincorporated group. The names and offices of the chief executive officers of the entity are:

Pual Coverdell - Candidate

Tom Perdue - Campaign Manager

I agree to indemnify and hold harmless the station for any damages or liability, including reasonable attorney's fees, that may ensue from the performance of the above-stated broadcasts. For the above-stated broadcasts I also agree to prepare a script or transcription, which will be delivered to the station at least _____ before the time of the scheduled broadcasts. *(Note: the two preceding sentences are not applicable if the candidate is personally using the time.)*

Date: 11/16/92 Tom K Perdue
(Candidate, Supporter or Agent)

☐ Accepted ☐ Rejected By _____ Title CAMPAIGN MANAGER

This application, whether accepted or rejected, will be available for public inspection for a period of two years.

NAB FORM PB 13 April 1991 Interim Form To Be Used Until New FCC Disclosure Requirements Adopted

NAB BROADCASTERS

AGREEMENT FORM FOR POLITICAL BROADCASTS

STATION and LOCATION WGNX-TV Atlanta, GA 19 92

I, _____ (being) (on behalf of) PAUL COVERDELL

a legally qualified candidate of the REPUBLICAN political party for the office of U.S. SENATE

in the RUN-OFF election to be held on _____, do hereby request station time as follows:

Length of Broadcast	Hour	Days	Class of of Time	Times For Week	Part of Package or Rotation	Total No. Weeks	Rate
SEE ATTACHED							

Date of First Broadcast	Date of Last Broadcast
11/19/92	11/23/92

Total Charges: 8,250.00

The broadcast time will be used by PAUL COVERDELL

I represent that the advance payment for the above-described broadcast time has been furnished by Coverdell for Senate Committee and the Republican Senatorial Committee

_____ and you are authorized to announce the program as paid for by such person or entity. The entity furnishing the payment, if other than an individual person, is ( ) a corporation; ( ) a committee; ( ) an association; or ( ) other unincorporated group. The names and offices of the chief executive officers of the entity are:

Pual Coverdell - Candidate

Tom Perdue - Campaign Manager

I agree to indemnify and hold harmless the station for any damages or liability, including reasonable attorney's fees, that may ensue from the performance of the above-stated broadcasts. For the above-stated broadcasts I also agree to prepare a script or transcription, which will be delivered to the station at least _____ before the time of the scheduled broadcasts. *(Note: the two preceding sentences are not applicable if the candidate is personally using the time.)*

Date: 11/16/92 Tom K Perdue
(Candidate, Supporter or Agent)

☐ Accepted ☐ Rejected By _____ Title CAMPAIGN MANAGER

This application, whether accepted or rejected, will be available for public inspection for a period of two years.

P.2

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

November 25, 1992

Marvin Smith, Treasurer
Coverdell Senate Committee
1730 N.E. Expressway, 2nd Floor
Atlanta, GA 30329

RE: MUR 3708

Dear Mr. Smith:

The Federal Election Commission received a complaint which indicates that Coverdell Senate 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 3708. 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 or 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 Dawn M. Odrowski, the attorney assigned to this matter, at (202) 219-3400. For your information, we have enclosed a brief description of the Commission's procedures for handling complaints.

Sincerely,

Lisa E. Klein
Assistant General Counsel

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

93040942707

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

November 25, 1992

Robert F. Bauer, Esq.
Judith L. Corley, Esq.
Perkins Coie
607 Fourteenth St. N.W.
Washington, D.C. 20005-2011

RE: MUR 3708

Dear Mr. Bauer and Ms. Corley:

This letter acknowledges receipt on November 19, 1992, of a complaint you filed on behalf of your client, the Democratic Senatorial Campaign Committee, alleging possible violations of the Federal Election Campaign Act of 1971, as amended ("the Act"), by the National Republican Senatorial Committee and James L. Hagen, as treasurer, and Coverdell Senate Committee and Marvin Smith, 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 3708. 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,

Lisa E. Klein
Assistant General Counsel

Enclosure
Procedures

93040942708

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

November 25, 1992

James L. Hagen, Treasurer
National Republican Senatorial Committee
425 Second Street, N.E.
Washington, D.C. 20002

RE: MUR 3708

Dear Mr. Hagen:

The Federal Election Commission received a complaint which indicates that the National Republican Senatorial Committee ("NRSC") 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 3708. 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 NRSC 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 Dawn M. Odrowski, the attorney assigned to this matter, at (202) 219-3400. For your information, we have enclosed a brief description of the Commission's procedures for handling complaints.

Sincerely,

Lisa E. Klein
Assistant General Counsel

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

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OBC # 7944

WILEY, REIN & FIELDING

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

December 17, 1992

JAN WITOLD BARAN
(202) 429-7330

FACSIMILE
(202) 429-7049
TELEX 248349 WYRN UR

RECEIVED
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL
92 DEC 17 PM 5:34

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

Attn: Dawn M. Odrowski

Re: MUR 3708 (National Republican Committee, et al.)

Dear Mr. Noble:

This Response, including the attached affidavit, is submitted on behalf of the National Republican Senatorial Committee ("NRSC") and Sonya M. Vazquez,[1] as Treasurer, as well as on behalf of the Coverdell for Senate Campaign and Marvin A. Smith, as Treasurer ("Respondents") in reply to a complaint filed by Robert F. Bauer on behalf of the Democratic Senatorial Campaign Committee and designated Matter Under Review ("MUR") 3708. Executed Statement of Designation of Counsel Forms are attached. For the reasons set forth herein, the Federal Election Commission ("FEC" or "Commission") should find no reason to believe that Respondents violated any provisions of the Federal Election Campaign Act of 1971, as amended ("the Act").

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[1] An amended Statement of Organization naming Ms. Vazquez as Treasurer was filed with the Commission on December 17, 1992.

THE COMPLAINT

The Complaint in this Matter states that the National Republican Senatorial Committee made coordinated expenditures pursuant to 2 U.S.C. § 441a(d) on behalf of its candidate for United States Senator from the State of Georgia. The Complaint alleges that making such expenditures was in contravention to Advisory Opinion 1983-16 issued by the Commission to Sala Burton. Finally, the complainant alleges that, based on an Agreement Form for Political Broadcasters, the NRSC made these expenditures while seeking a reversal of the Sala Burton opinion.

FACTS

On November 3, 1992 the General Election for United States Senator from the State of Georgia was held. There were three candidates on the ballot. Because Georgia law requires a majority vote, no candidate was elected. Thus, on November 24, 1992 a second election was held between Paul Coverdell, the Republican nominee for United States Senator, and Wyche Fowler, the Democratic nominee for United States Senator.

On November 6, 1992, the National Republican Senatorial Committee submitted an Advisory Opinion Request to the Federal Election Commission. See, AOR 1992-39. Specifically, the NRSC asked:

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> May the NRSC (and its Democratic national committee counterpart) make full new 441a(d)(3) expenditures on behalf of its U.S. Senate candidate in Georgia given the fact that the initial general election is complete and that a second election is to occur?

Written comments on the request could have been filed through November 16, 1992, pursuant to 11 C.F.R. § 112.3. No comments were filed. On November 19, 1992, the Commission, by a vote of 3-3, failed to adopt a Draft Advisory Opinion proposed by FEC staff. Three separate Statements of Reasons were issued; a joint Statement of Reasons by Commissioners Joan D. Aikens and Lee Ann Elliott, a Statement of Reasons by Commissioner Trevor Potter, and a Statement of Reasons by Commissioner Scott Thomas (copies attached). Three Commissioners (Aikens, Elliott and Potter) concluded that it was appropriate for political parties to have a separate coordinated expenditure limit in connection with the November 24 election.

On November 20, 1992, the day after the Commission determination, the NRSC for the first time made coordinated expenditures in connection with the November 24 election. Affidavit of Sonya M. Vazquez Before the Federal Election Commission at ¶ 3. NRSC's coordinated expenditures were within the dollar limits provided by 2 U.S.C. § 441a(d), and have been

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reported as required by the Act. Id. The NRSC made no coordinated expenditures prior to that time.[2] Id. ¶ 4.

RESPONSE

The Complaint in this matter raises an issue already addressed by the Commission through the Advisory Opinion process. One-half of the Commission has determined that it was appropriate for the NRSC and its Democratic counterpart (complainant in this matter, DSCC) to make coordinated expenditures in connection with the November 24, 1992, election in which the United States Senator from Georgia was elected. Further, as recognized by the United States Court of Appeals for the District of Columbia "[s]ince those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reason for acting as it did." FEC v. National Republican Senatorial

---

[2] The Agreement Forms for Political Broadcasters attached to the Complaint are not evidence of coordinated expenditures. Rather, those forms signed by Tom Perdue, Campaign Manager for the Coverdell for Senate Committee, state that advance payment for the specified broadcast was provided by both the Coverdell campaign and the NRSC. The advertisements were the same advertisements which were used in connection with the November 3, 1992, General Election. Prior to November 3, NRSC helped pay for the production of those advertisements and reported those costs as part of its coordinated expenditures in connection with the November 3 election. Thus, NRSC did not make any payments to air the advertisements prior to November 20, 1992. Nonetheless, the disclaimer on the advertisements remained the same because of NRSC's prior payments for the production of the advertisements. Id. ¶ 4.

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Committee, 966 F.2d 1471, 1476 (D.C. Cir. 1992). Thus, NRSC made these coordinated expenditures consistent with the Commission's action.[3]

In sum, having sought an Advisory Opinion from the Commission with regard to the very issue complained of, NRSC believes that this complaint should be dismissed. Three Commissioners agreed that it was appropriate for both parties to have a separate coordinated expenditure limit in connection with the November 24 election. Based upon the FEC's action, NRSC made coordinated expenditures in connection with the election. The Commission should find no reason to believe that either the National Republican Senatorial Committee and James L. Hagen, as Treasurer,

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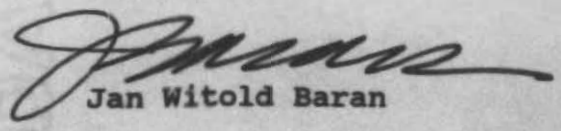
[3] For the record, the NRSC neither sought a reversal of the Sala Burton opinion, nor was such a reversal necessary to the ability of the NRSC to make such coordinated expenditures. As the Commission well knows, prior advisory opinions may be used as precedent when there are no materially distinguishable facts. 11 C.F.R. § 112.5(a)(2). The facts of the Burton case were not analogous to the facts of this matter, and thus were not controlling. Furthermore, an advisory opinion cannot be the vehicle for establishing a "rule of law." The Act requires that any "rule of law" not stated in the statutes "may be initially proposed by the Commission only as a rule or regulation." 2 U.S.C. § 437d(b) (emphasis added). Both Commissioners Potter and Thomas correctly allude to the glaring need for rulemaking to establish clear guidelines on limits in the Georgia and other special situations.

or the Coverdell for Senate Committee and Marvin A. Smith, as Treasurer violated the Act.[4]

Sincerely,



Jan Witold Baran

Counsel for the National
Republican Senatorial Committee
and Sonya M. Vazquez, as Treasurer,
and Coverdell for Senate Committee
and Marvin A. Smith, as Treasurer

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[4] Unlike the situation in FEC v. NRSC, NRSC, while not required to, in this case sought an advisory opinion. However, like FEC v. NRSC, the absence of majority guidance contributes to dangerous vagueness. As the Court of Appeals noted:

> In light of the First Amendment associational interests implicated by appellants' [i.e., NRSC's] primary conduct, see generally Buckley v. Valeo, 424 U.S. 1, 22 (1976), the lack of precision is troubling.

966 F.2d at 1477. If now a majority were to find reason to believe that NRSC violated the law by doing that which less than one month ago no FEC majority thought was illegal, the Commission would be exposed to legitimate charges that it was behaving arbitrarily, capriciously, and irrationally, and at the expense of NRSC's legal and constitutional rights. Accordingly, the entire FEC should act responsibly and find no reason to believe NRSC violated the Act.

STATEMENT OF DESIGNATION OF COUNSEL

MUR 3708

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.

Date

Signature: James L. Hagen

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

ADDRESS: 425 - 2nd St., N.E.
Washington, D.C. 20002

TELEPHONE: HOME( )
BUSINESS( )

9304094271 7

STATEMENT OF DESIGNATION OF COUNSEL

MUR 3708

NAME OF COUNSEL: Jan Witold Baran, Esq.

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.

12/8/92
Date

Marvin A. Smith
Signature

RESPONDENT'S NAME: Coverdell Senate Committee and Marvin A. Smith, as Treasurer

ADDRESS:

TELEPHONE: HOME ( )

BUSINESS ( )

93040942718

BEFORE THE FEDERAL ELECTION COMMISSION

City of Washington	)	
	)	MUR 3708
District of Columbia	)	

AFFIDAVIT OF SONYA M. VAZQUEZ

Sonya M. Vazquez, first being duly sworn, deposes and says:

1. I am Sonya M. Vazquez. I serve as Treasurer of the National Republican Senatorial Committee (NRSC), an authorized national committee of the National Republican Party.

2. I am familiar with the Complaint filed with the Federal Election Commission styled Matter Under Review ("MUR") 3708. That Complaint states that NRSC made coordinated expenditures in connection with the November 24, 1992, election for United States Senator from Georgia prior to the Commission's ruling on Advisory Opinion Request 1992-39.

3. In fact, NRSC did not make any coordinated expenditures in connection with the Special Election until November 20, 1992, the day after the Commission consideration of NRSC's Advisory Opinion Request. These expenditures were within the dollar limit provided by 2 U.S.C. § 441a(d). NRSC reported those coordinated expenditures on its 1992 Post General Election Report.

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4. Finally, Agreement Forms for Political Broadcasters dated November 16, 1992 were attached to that Complaint. While those forms suggest that NRSC paid for broadcast time on behalf of the Coverdell for Senate Campaign, in fact NRSC had paid for production costs associated with the advertisements prior to the November 3, 1992 General Election and appropriately reported its expenditures. Thus, the disclaimers on the advertisements appropriately stated that they had been paid for by the Coverdell for Senate Committee and the National Republican Senatorial Committee. As noted above, however, NRSC did not make any coordinated expenditures until November 20, 1992.

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

Sonya N. Vazquez

Signed and sworn to before me
this 17 day of December, 1992

Notary Public

My Commission Expires: 7/14/97

NOTARY PUBLIC

93040942720

FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

November 20, 1992

Jay Velasquez, Legal Counsel
National Republican Senatorial Committee
425 Second Street, NE
Washington, D.C. 20002

Dear Mr. Velasquez:

Enclosed is the joint statement for the record in Advisory Opinion Request 1992-39, as submitted by Commissioners Aikens and Elliott.

The joint statement was received in this office on November 20, 1992, and will become part of the public record for Advisory Opinion Request 1992-39.

Sincerely,

N. Bradley Litchfield
Associate General Counsel

Enclosure

93040942721

FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

STATEMENT OF
COMMISSIONER JOAN D. AIKENS
AND
COMMISSIONER LEE ANN ELLIOTT
ON
ADVISORY OPINION REQUEST 1992-39

In Advisory Opinion Request 1992-39, the Republican National Senatorial Committee inquired about making expenditures under 2 U.S.C. § 441a(d)(3) during a run-off election in Georgia.

The General Counsel's draft response, which failed to pass by the required four votes, was based on Advisory Opinion 1983-16, and concluded that the run-off was not a separate election for the purpose of § 441a(d).

Advisory Opinion 1983-16 concerned a June 21st "special primary" to fill a vacancy for a House seat. All candidates of whatever party affiliation were together on one ballot. If any candidate received a majority, he or she would be declared the winner. If no majority was achieved, a subsequent run-off election would be held and the top vote getter from each "political party or political body" would be on the new ballot.

The question asked in Advisory Opinion 1983-16 was whether the "special primary" would fit the definition of a general election for purposes of 441a(d) expenditures. The Commission ruled that the election held on June 21st, though labeled a "special primary," would fit the definition of "special general election" because it was held to fill a vacancy in a federal office (i.e., a special election) and was intended to result in a final selection of the individual to fill the seat (i.e., a general election).

The Commission further concluded, though the question was not asked, that if a run-off were held it would be viewed as a "continuation" of the general election campaign and was not a separate or additional election for 441a(d) expenditure purposes.

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While we voted for Advisory Opinion 1983-16, we believe its superfluous statement about one "continuing general election campaign" in the run-off without a separate 441a(d) limit is non-binding and erroneous. Nowhere in the FECA is there a definition of, or provision for, a "continuation of an election." Its use in Advisory Opinion 1983-16 was an accommodation to the requester to permit the spending of the 441a(d) limits in the "special primary election." Had Sala Burton not received a majority in the June 21st election, there would have been a second election which could have had as many as 5 or 6 candidates on the ballot - the highest vote getters in each "political party or political body." The first election was similar to the primary system in Louisiana. There it is possible to win the seat by winning a majority in the primary - making a general election unnecessary.

Georgia, however, is a different situation.1/ Unlike the primary situation in Louisiana or the California special, this is a special run-off election <u>after</u> the general election.

The Georgia law provides for a run-off election following the general election if none of the candidates receive a majority vote. Only the two highest vote getters are on the ballot and write-in votes are prohibited. While the Burton election was a "special election," the election in Georgia is a run-off election - which the law defines as a separate election. 2 U.S.C. § 431(1)(A). The Commission has, in fact, designated both the California and Georgia elections as two elections for purposes of the 441a(a) contribution limits.

1/ The Georgia law is unique and was changed in 1966 after a bitter and tightly fought gubernatorial race. This is the first election to which the amended provisions of the Georgia statute have been applied. It is reported that the Georgia legislature is prepared to repeal this provision in the near future.

9304094227 23

The General Counsel's draft relies on the language in the Georgia law for purposes of who is permitted to vote as an underlying reason for calling this a "continuation" of the election. However, this provision is aimed at preventing voter fraud by closing registration rolls between the two elections and has no bearing on campaign finance law.

It would seem that since this election is designated in Georgia law as a run-off election (a term defined in the FECA), and since the Commission has allowed separate contribution limits for general and run-off elections, and since this election will definitively decide which of two candidates will serve in the U.S. Senate, we believe the Commission should permit both parties to spend additional 441a(d) money on behalf of their candidates.2/ As Commissioner Josefiak stated in his Concurring Opinion in Advisory Opinion 1986-31, with which we concurred, "increased party support for candidates, where the candidates and parties are being treated equally, does not constitute a threat to our political system."

2/ We also agree with Commissioner Potter's statement that there is no support in the FECA for the restrictive definition of 11 C.F.R. § 100.2(b) the General Counsel advocated in its draft.

Joan D. Aikens
Joan D. Aikens
Commissioner

Lee Ann Elliott
Lee Ann Elliott
Commissioner

November 20, 1992

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Statement of Vice Chairman Scott E. Thomas

re Advisory Opinion Request 1992-39

I agree with the analysis set forth by the Office of General Counsel. The runoff in Georgia does not qualify as a "general election" under the plain language of our regulations at 11 C.F.R. § 100.2(b). Therefore, an additional coordinated expenditure allowance under 2 U.S.C. § 441a(d) is not warranted. Under the precedent of Advisory Opinion 1983-16, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5717, however, the runoff may be considered a continuation of the general election for purposes of § 441a(d). The legal conclusion seems cut and dried.

Some might question the rationale for not giving the parties an additional § 441a(d) allowance for the runoff. It may not be unwise, though, to limit party committees to 'only' $535,606 (the combined state and national allowance) in coordinated expenditures in connection with the Senate election in Georgia. The proposition that party committees are purifying filters not capable of conveying the appearance of quid pro quo arrangements is 'softly' being eroded. On the question of letting monies unexpended in the general election be spent in the runoff, there is some merit in letting the parties read the election code, evaluate the risk of a runoff, and spend the allotted $535,606 as they see fit.

The state and local party committees in Georgia will be able to engage without limit in activities exempt from the definition of "contribution" or "expenditure," such as the distribution through volunteers of campaign brochures, newsletters, posters, or yard signs supporting the party nominee in question. 2 U.S.C. § 431(8)(B)(x), (9)(B)(viii). The parties also have some flexibility to solicit, collect, and forward earmarked contributions from the formidable party contributor base without having to attribute the contributions to the parties' own limit on giving to the candidate in question. FEC v. National Republican Senatorial Committee, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9316 (D.C. Cir. 1992). The parties will have their day on November 24th.

Like Commissioner Potter, I would be willing to reexamine the regulations to determine if a wiser rule can be written. The Commission might at the same time wish to revisit the ruling that

allows persons who have won election outright at the open primary stage in Louisiana to nonetheless have an additional general election contribution allowance. Advisory Opinion 1984-54, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5794. Perhaps there should be limits on limits in that situation, as well.

19 November 1992
Date

Scott E. Thomas
Vice Chairman

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**STATEMENT OF COMMISSIONER POTTER
IN ADVISORY OPINION REQUEST 1992-39**

During the November 12, 1992 discussion of Advisory Opinion Request 1992-39, and as reflected in the subsequent Commission tally vote, the Commission was unable to reach the requisite four vote consensus to provide an answer to the requester in this matter. The request presented the following two issues in light of a Georgia state law mandating a run-off election when no federal candidate receives a majority of the votes cast for the office in the regularly scheduled general election: 1) whether national party and/or state party committees are entitled to additional coordinated party expenditure limits under 2 U.S.C. § 441a(d)(3) for such a new run-off election and 2) whether national party and/or state party committees are prohibited from making any 441a(d)(3) expenditures in any new run-off election (including 441a(d)(3) funds remaining from the previously inconclusive general election).[1]

The General Counsel's draft Advisory Opinion cites as a basis for its conclusion the Commission's regulation

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1. Advisory Opinion Request 1992-39 was made by Jay Velasquez on behalf of the National Republican Senatorial Committee in connection with the Georgia run-off election for the United States Senate. This election is required by state law to take place 21 days after the November 3, 1992 general election in which no candidate for the U.S. Senate seat in Georgia received a majority of the vote.

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[11 C.F.R. 100.2(b)(2)] which defines a "general election" as "an election which is held to fill a vacancy in a Federal office (i.e., a special election) and which is intended to result in the final selection of a single individual to the office at stake . . .." The General Counsel interprets this section of the Commission's regulations in tandem with 11 C.F.R 100.2(b)(1) to limit the definition of "general election" solely to those elections either in even numbered years on the Tuesday following the first Monday in November, or special elections to fill vacancies. I can find no support in the Act for this restrictive definition.

A better view of "general election" would be "any election which may have the legal result of electing a single individual to the office at stake," or similar language. Not only is such a definition consistent with the language of the Act, but it logically follows from the Commission's previous position that special elections, general elections and run-off elections each have a separate $1,000 limit on individuals, multi-candidate political committees, and other persons pursuant to 2 U.S.C. § 441a(a)(1) and (2). See Advisory Opinions 1986-31 and 1984-42. It seems more than illogical to say that this November 24, 1992 election is merely a continuation of the general election for the purposes of political party limits, but a new and separate election for individual and political action committee contribution purposes. Why should party committee's be the only entities prohibited from treating each election as

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distinct?

As a public policy matter I see no harm in allowing a separate and distinct 441a(d) coordinated party expenditure limit for unforeseen "run-off" general elections that have the legal result of electing a single individual to the office at stake, and are in all ways equivalent to any other general election. In fact I believe such a separate limit is beneficial to the political process. First, if a run-off general election is seen as a possibility, a separate and distinct limit encourages candidates to campaign wholeheartedly for the initial contest without holding back 441a(d) funds out of fear of needing them in a second run-off general election. Second, if neither candidate has gained a majority of the votes cast and a new run-off general election is required to be scheduled relatively soon after the inconclusive general election (in the Georgia case before us a mere 21 days separates the inconclusive general election and the new general election), each candidate will quickly need to raise additional funds to communicate with voters. Without funds for campaigning, and for get out the vote projects, the run-off general election may provide a classic case study in low voter turn-out. By placing each candidate on an equal footing and treating each "general election" as distinct with a new 441a(d) limit and no carry over from the previous inconclusive election, candidates may rely on the party funds, instead of spending much of the 21 day election period at private fundraising functions. This is not a mere theoretical proposition: the potential overall 441a(d) limits for each

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party in Georgia are $535,600, more than enough to finance a serious, short, campaign.

Ultimately, these ideas need to be debated and commented upon in a rulemaking. Of necessity, the Act and regulations need to balance the specificity to deal with complicated issues and the breadth to deal with aberrant situations. Unfortunately as written, the present regulatory definition of "general election" does neither. Furthermore, to deny party committees a distinct 441a(d) expenditure limit for this new and decisive election would thwart the intent of the Act as it relates to a group specifically guaranteed a central place in the political process. Finally, I believe that the conclusion of Advisory Opinion 1983-16, which is relied on by the General Counsel here and which in dicta establishes a new contribution limit for individuals and political action committees, but denies such a separate limit to party committees, is illogical and ill-advised. For these reasons, I was not prepared at this time to support the General Counsel's draft in Advisory Opinion 1992-39.

Trevor Potter
Commissioner

November 19, 1992

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

SENSITIVE

FIRST GENERAL COUNSEL'S REPORT

MUR # 3708
DATE COMPLAINT RECEIVED
BY OGC: November 19, 1992
DATE OF NOTIFICATION TO
RESPONDENTS: November 25, 1992
STAFF MEMBER: Dawn M. Odrowski

COMPLAINANT: Democratic Senatorial Campaign Committee

RESPONDENTS: National Republican Senatorial Committee and Sonya M. Vazquez, as treasurer,[1] and Coverdell Senate Committee and Marvin Smith, as treasurer

RELEVANT STATUTES: 2 U.S.C. § 431(1)(A)
2 U.S.C. § 441a(d)
2 U.S.C. § 441a(a)(1), (2) and (6)
11 C.F.R. § 100.2(b), (d) and (f)

INTERNAL REPORTS CHECKED: Committee Reports

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTER

This matter arises from a complaint filed by the Democratic Senatorial Campaign Committee ("Complainant") alleging violations of the Federal Election Campaign Act of 1971, as amended ("FECA"), relating to coordinated party expenditures made by the National Republican Senatorial Committee and Sonya M. Vazquez, as treasurer, ("NRSC"). Complainant alleges that the NRSC exceeded the coordinated party expenditure limit

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1. The NRSC filed an amended Statement of Organization on December 17, 1992 naming Ms. Vazquez as the new treasurer. At the time the complaint was filed James L. Hagen was the treasurer.

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of 2 U.S.C. § 441a(d) in its support of Paul Coverdell, the Republican Senate candidate, in connection with Georgia's November 3 and 24, 1992 general and run-off elections. Attachment 1. A joint response was received on December 17, 1992, from the NRSC and the Coverdell Senate Committee and Marvin Smith, as treasurer ("Committee")(collectively, "Respondents"). Attachment 2.

II. FACTUAL AND LEGAL ANALYSIS

A. Law

Section 441a of the Federal Election Campaign Act of 1971, as amended ("the Act") sets forth limits on contributions that can be made to candidates and their authorized political committees as well as expenditures that can be made by party committees in connection with certain elections. See generally, 2 U.S.C. § 441a. Specifically, the Act prohibits persons and multicandidate political committees from making contributions to authorized committees "with respect to any election for Federal office," which in the aggregate, exceed $1,000 and $5,000, respectively. 2 U.S.C. § 441a(a)(1)(A) and (2)(A). These limitations on contributions apply separately with respect to each election. 2 U.S.C. § 441a(a)(6). In addition, national and state political party committees may each make limited expenditures "in connection with the general election campaign" of a candidate for federal office who is affiliated with such party. 2 U.S.C § 441a(d)(3); 11 C.F.R. § 110.7(b). The expenditure limit for election to office of Senator is the greater of $20,000 or 2 cents multiplied by the

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voting age population of the state in which the candidate is running. 2 U.S.C. § 441a(d)(3)(A). Annual increases in the expenditure limit are based on a formula set forth at 2 U.S.C. § 441a(c). The 1992 limit for the United States Senate general election campaign in Georgia was $267,803.52

Candidates and political committees are prohibited from knowingly accepting contributions or making expenditures in violation of the Act. 2 U.S.C. § 441a(f). Additionally, no officer or employee of a political committee shall knowingly make any expenditure on behalf of a candidate in violation of any limitation imposed on contributions and expenditures under Section 441a. Id.

The Act defines "election" in pertinent part as "a general, special, primary or run-off election." 2 U.S.C. § 431(1)(A). Although the Act does not define "general election," Commission regulations define it as:

> . . . an election which meets either of the following conditions:
> (1) An election held in even numbered years on the Tuesday following the first Monday in November is a general election.
> (2) An election held to fill a vacancy in a Federal office (i.e., a special election) and which is intended to result in the final selection of a single individual to the office at stake is a general election.

11 C.F.R. § 100.2(b).[2] A special election is one held to fill a vacancy in a Federal office and may be a primary, general or

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2. See also U.S. Const. art I, §4, cl.1 (establishing right of Congress to set the time and manner of holding elections for U.S. Senators) and 2 U.S.C. §§ 1 and 7 (setting the time for election of Senators to be the same day as election of U.S. Representatives -- the first Tuesday in even numbered years).

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run-off election. 11 C.F.R. § 100.2(f). A run-off election, in turn, is defined in pertinent part, as an election held after a general election and prescribed by applicable State law as the means for deciding which candidate should be certified as an officeholder elect. 11 C.F.R. § 100.2(d)(2).

Unlike the contribution limits which apply to each separate election, coordinated expenditures can only be made in connection with the general election. The Commission first addressed the question of what constitutes a general election for purposes of 441a(d) in Advisory Opinion 1983-16. There, the Commission answered two questions: (1) whether a "special primary" held in California to fill a vacancy for a House seat was a general election such that coordinated expenditures could be made on behalf of the candidate's campaign and (2) whether a subsequent run-off election, required in the event no candidate received a majority of the votes in the special primary, was a separate general election permitting a new Section 441a(d) limit.

California law required that all candidates enter the first election, the "special primary," whether or not affiliated with a political party. If one candidate received a majority of all votes cast, the candidate would be declared the winner and no further election would be held. If no candidate secured a majority, candidates in the subsequent run-off election were limited to the top vote getter in each qualified political party or political body and any independent candidates entered in the first election.

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The Commission concluded that the "special primary" was a general election for purposes of Section 441a(d) because it fit the definition of "general election" found at 11 C.F.R. § 100.2(b)(2). The Commission took special note that the election was intended to result in the selection of a single individual since it required all candidates to enter and be named on a single ballot. The necessity of a possible subsequent run-off election did not change the status of the first election as a general election.

The Commission also concluded that the second, run-off election could not be viewed as a separate or additional general election permitting a new 441a(d) limit because Commission regulations provided that special elections could only be a primary, general or a run-off and could not be characterized as both a general and a run-off. The Commission further concluded, however, that "in view of the somewhat unique circumstances of the special election process in California", the second election could be viewed as a continuation of the general election which began with the first election. Thus, although only one Section 441a(d) limit was available, it could be used in connection with both elections.

The Commission also considered the issue of the coordinated expenditure limit in Advisory Opinion 1992-39 which involved the election at issue. Prior to the DSCC's filing of the complaint in this matter, the NRSC requested an advisory opinion from the Commission on November 6, 1992, as to whether it was entitled to a new Section 441a(d)(3) coordinated expenditure limit for the

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Georgia run-off election. If not, the NRSC asked whether any such expenditures were permitted given the fact that the general election had passed. Both the Republican National Committee and the State Republican Party of Georgia had authorized the NRSC to expend their share of any remaining or new Section 441a(d)(3) coordinated expenditures for Coverdell's benefit.

The Commission considered the NRSC's advisory opinion request on November 19, 1992, but by a vote of 3-3, failed to approve the Office of General Counsel's Final Draft Advisory Opinion. The Final Draft Advisory Opinion, based on Advisory Opinion 1983-16, concluded that an additional Section 441a(d)(3) limit was not available for the run-off election, but that the NRSC could spend for the run-off election any amounts remaining in its Section 441a(d) general election limit. AO 1992-39 at 4-5.[3]

B. Analysis

Complainant states that the NRSC spent the maximum amount permitted by 2 U.S.C. § 441a(d) in support of Paul Coverdell in the November 3 general election. Attachment 1 at 1 and 3. Consequently, Complainant contends that the NRSC could make no coordinated expenditures in support of Coverdell in the November 24, 1992 run-off election based on the Commission's conclusion in Advisory Opinion 1983-16. According to

3. The Commission also recently addressed the availability of coordinated expenditures in the upcoming Texas special elections in Advisory Opinion 1993-2. The Commission concluded that only one limit was available although individual Commissioners differed about the reasons for this conclusion.

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Complainant, the NRSC nevertheless continued to spend monies in support of Coverdell after the general election as evidenced by three "Agreement Forms for Political Broadcasts," copies of which are attached to the complaint. Attachment 1 at 4-6. These agreements contain form language stating that advance payments for the ads were furnished by the Committee and the NRSC and that the broadcasters could announce the program as paid for by these entities. Id.

Complainant further contends that NRSC's spending for the run-off election was a knowing and willful violation of the Act since, at the time the NRSC made the purported additional expenditures, Advisory Opinion 1983-16 governed its actions and the Commission had not yet considered NRSC's November 6 advisory opinion request. Attachment 1 at 1-2.

Georgia law provides that a candidate cannot be nominated for, or elected to, public office in any election unless the candidate receives a majority of the votes cast for the nomination or office. Ga. Code Ann. § 21-2-501(a) (1987). If no candidate receives a majority, a run-off election between the two top vote getters is held 21 days after the preceding election, unless postponed by a court order. Id.

No candidate received a majority of the votes cast for the U.S. Senate seat on November 3, 1992.[4] Consequently, a run-off

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4. The State Elections Division of the Georgia Secretary of State's Office reports that the Democratic incumbent Senator Wyche Fowler received 1,108,416 votes, or 49.22% of the votes cast, Republican Paul Coverdell received 1,073,282 or 47.66% and Libertarian Jim Hudson received 69,878 or 3.1%.

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election was held on November 24, 1992, between Democratic incumbent Senator Wyche Fowler and Republican Paul Coverdell, the candidates receiving the two highest votes in the general election. Paul Coverdell won the run-off election with 51% of the vote.

The NRSC's disclosure reports show that it made coordinated expenditures totaling $535,607 (the combined coordinated expenditure limit of the national and state party committees) on behalf of Coverdell for media services before the November 3, 1992 election.[5] As of March 23, 1993, the NRSC reports making additional coordinated expenditures totaling $448,879.88 on behalf of Coverdell for the November 24 run-off election.[6] Sonya Vazquez, the NRSC's current treasurer, states that the NRSC made no coordinated expenditures in connection with the run-off election until November 20, the day after the Commission considered the NRSC's advisory opinion request. Affidavit of

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5. The NRSC reports making the following coordinated expenditures in connection with the November 3 general election:

10/1/92 - $255,348 to Media Solutions for media service
10/13/92 - $208,012 to Media Solutions for media service
10/27/92 - $72,247 to Media Solutions for media service

6. The NRSC reports making the following coordinated expenditures in support of Coverdell in connection with the run-off election:

11/20/92 - $535,607 to Media Solutions for media service
12/3/92 - ($275,131) refund from Media Solutions for media service
12/11/92 - $42,000 to Windsor Marketing for media service
12/18/92 - $48,158.08 to Optima Direct Inc. for telemarketing
12/18/92 - $98,245.80 to Optima Direct Inc. for telemarketing

Sonya Vazquez, Attachment 2 at 7-8.[7] Since the NRSC admits to making coordinated expenditures of $448,879.88 in connection with the run-off election, the issue presented is whether that election constituted a separate "general election campaign" within the meaning of Section 441a(d)(3) such that an additional coordinated expenditure limit was available to the NRSC.

The November 3, 1992 election clearly fits the definition of general election: it was held in an even-numbered year on the Tuesday following the first Monday in November. 11 C.F.R. § 100.2(b)(1). Conversely, the November 24, 1992 election qualifies as a run-off election -- an election held after a general election and prescribed by state law as a means for deciding which candidate shall be certified as an officeholder elect. 11 C.F.R. § 100.2(d). As reasoned in Advisory Opinion 1983-16, neither the regulations nor the Act contemplate that an election can be characterized as both a run-off and a general election. See 11 C.F.R. § 100.2(f) ("a special election may be a primary, general or run-off election") and 2 U.S.C. § 431(1)(A) ("an election means a general, special, primary or run-off election"). Consequently, in accordance with Commission

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7. Respondents maintain that the NRSC's name appears on the November 16 broadcast agreements, which state that the Committee and NRSC furnished advance payment, because it helped pay for production costs of the ads. Respondents say the November 16 ads were the same ads aired on behalf of Coverdell in the November 3 election. They deny making any payments to air the ads before November 20. See Response and Vazquez Affidavit, Attachment 2 at 4 (footnote 2) and 8. To the extent the broadcast agreement forms represent a contract, promise or agreement to make an expenditure, however, the broadcast ad expenditures were made as of November 16, the date of the agreements. See 11 C.F.R. § 100.8(a)(2).

regulations and consistent with the reasoning of Advisory Opinion 1983-16, this Office concludes the November 24 run-off election was not a separate general election permitting an additional Section 441a(d)(3) limit.

Although the November 24 run-off was not a separate general election, it too may be viewed as a continuation of the general election campaign similar to the California run-off considered in Advisory Opinion 1983-16. Like the California "special primary" run-off, the Georgia run-off election closely followed an election fitting the definition of "general election" -- both preceding elections could have resulted in the selection of an office-holder. Moreover, like the California run-off, the Georgia run-off was limited to certain candidates who had run in the prior general election. In the case of California, the run-off was limited to top vote getters in each qualified political party or body and any independent candidates entered in the first election. In Georgia, the run-off election was limited further -- to the two candidates receiving the most votes in the first election. Thus, the run-off is an integral part of Georgia's general election "process." Indeed, the Georgia law prescribing the general run-off election apparently considers the run-off to be a continuation of the general election campaign. It provides:

> . . . The run-off primary or run-off election shall be a continuation of the primary or election for the particular office concerned, and only the electors who were entitled to vote in the primary or election for candidates for that particular office shall be entitled to vote therein; and only those votes cast for the persons designated as candidates in such run-off primary or run-off election

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> shall be counted in the tabulation and canvass of the votes cast. . .

Ga. Code Ann. § 21-2-501(a) (1987).

The plain language and the legislative history of the Act also support a single Section 441a(d) limit. Whereas contribution limits from individuals and political committees apply separately to each election (defined at 2 U.S.C. § 431(1) as a general, primary, special or run-off election), coordinated party expenditures are permitted only in connection with the general election. The Conference Report for the 1976 Amendments indicates that Section 441a(d) provides "limited permission" allowing political parties "to make contributions in kind by spending money for certain functions to aid the individual candidates who represent the party during the election process" (emphasis added). See H.R. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976), reprinted in Legislative History of Federal Election Campaign Act Amendments of 1976 at 1053. The report makes clear that party expenditures would be subject to the contribution limitations of 2 U.S.C. § 441a(a) but for this provision. Id. Thus, Section 441a(d) is intended to preserve a role for political parties in support of their chosen candidates during the general election "process" while also meeting the Act's objective of imposing overall limitations on campaign expenditures and contributions. This Office, therefore,

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concludes that a single Section 441a(d)(3) limit was available for both the November 3 and 24 elections.[8]

Based on the foregoing, this Office recommends that the Commission find reason to believe that National Republican Senatorial Committee and Sonya M. Vazquez, as treasurer, violated 2 U.S.C. § 441a(f) by exceeding its coordinated expenditure limit in connection with the election of Senator Paul Coverdell.[9] This Office also recommends that the Commission find no reason to believe that the Coverdell Senate Committee and Marvin Smith, as treasurer, violated the Act based on this complaint.

III. RECOMMENDATIONS

1. Find reason to believe that National Republican Senatorial Committee and Sonya M. Vazquez, as treasurer, violated 2 U.S.C. § 441a(f).

2. Find no reason to believe that the Coverdell Senate Committee and Marvin Smith, as treasurer, violated the Act on the basis of the complaint in MUR 3708.

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8. While one limit means that less money may be available from the party for its candidate, separate contributions can be solicited from party committees and others for the run-off election even before the need for a run-off is determined. See AOs 1980-68 and 1983-39. Thus, fundraising need not be limited to the time between the general and run-off elections.

9. Respondents maintain that the Commission should find no reason to believe because of the Commission's 3-3 vote in Advisory Opinion 1992-39. This Office recognizes the difficulty presented in pursuing this matter given the outcome in the NRSC's advisory opinion request; however, 2 U.S.C. § 437f(c) provides a safe harbor only for activity approved by the Commission pursuant to the advisory opinion procedures of the Act. Here, no activity was sanctioned given the Commission's deadlock on the NRSC's request; hence, at the time of the Georgia run-off election, Advisory Opinion 1983-16 represented the Commission's pronouncement with regard to coordinated expenditures for run-off elections.

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3. Approve the attached Factual and Legal Analysis and the appropriate letters.

3/29/93
Date

Lawrence M. Noble
General Counsel

Attachments:
1. Complaint
2. NRSC/Coverdell Response
3. Factual and Legal Analysis

93040942743

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel

DATE: March 29, 1993

SUBJECT: MUR 3708 - First General Counsel's Report

The attached is submitted as an Agenda document for the Commission Meeting of _____

Open Session _____

Closed Session _____

CIRCULATIONS		DISTRIBUTION	
72 Hour Tally Vote	[XX]	Compliance	[XX]
Sensitive	[XX]		
Non-Sensitive	[ ]	Audit Matters	[ ]
24 Hour Tally Vote	[ ]	Litigation	[ ]
Sensitive	[ ]		
Non-Sensitive	[ ]	Closed Letters	[ ]
		MUR	[ ]
		DSP	[ ]
24 Hour No Objection	[ ]		
Sensitive	[ ]		
Non-Sensitive	[ ]	Status Sheets	[ ]
Information	[ ]	Advisory Opinions	[ ]
Sensitive	[ ]		
Non-Sensitive	[ ]		
Other	[ ]	Other (See Distribution below)	

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FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

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

DATE: MARCH 30, 1993

SUBJECT: MUR 3708 - FIRST GENERAL COUNSEL'S REPORT DATED MARCH 29, 1993.

The above-captioned document was circulated to the Commission on Tuesday, March 30, 1993 at 11:00 a.m.

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

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

This matter will be placed on the meeting agenda for Tuesday, April 13, 1993.

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

93040942745

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

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

DATE: APRIL 1, 1993

SUBJECT: MUR 3708 - FIRST GENERAL COUNSEL'S REPORT DATED MARCH 29, 1993.

The above-captioned document was circulated to the Commission on Tuesday, March 30, 1993 at 11:00 a.m.

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

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

This matter will be placed on the meeting agenda for Tuesday, April 13, 1993.

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

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

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

DATE: APRIL 2, 1993

SUBJECT: MUR 3708 - FIRST GENERAL COUNSEL'S REPORT DATED MARCH 29, 1993.

The above-captioned document was circulated to the Commission on Tuesday, March 30, 1993 at 11:00 a.m.

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

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

This matter will be placed on the meeting agenda for Tuesday, April 13, 1993.

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

93040942747

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 3708
National Republican Senatorial Committee	)	
and Sonya M. Vazquez, as treasurer;	)	
Coverdell Senate Committee and Marvin	)	
Smith, as treasurer.	)	

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on April 27, 1993, do hereby certify that the Commission took the following actions in MUR 3708:

1. Failed in the vote of 3-3 to pass a motion to:

   a) Find reason to believe that National Republican Senatorial Committee and Sonya M. Vazquez, as treasurer, violated 2 U.S.C. § 441a(f).

   b) Find reason to believe that the Coverdell Senate Committee and Marvin Smith, as treasurer, violated 2 U.S.C. § 441a(f).

   c) Direct the General Counsel to send an appropriate Factual and Legal Analysis and appropriate letters pursuant to the above findings.

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

(continued)

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2. Decided by a vote of 6-0 to close the file in this matter and direct the Office of General Counsel to send appropriate letters pursuant to this action.

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

Commissioners Aikens, Elliott, McDonald, McGarry, Potter, and Thomas stated intent to file Statements of Reason with respect to this matter.

It is noted for the record that Special Deputy Wyche Fowler recused himself with respect to MUR 3708 and was not present during its consideration.

Attest:

4-28-93
Date

Marjorie W. Emmons
Secretary of the Commission

9304094274 9

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAY 3, 1993

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

RE: MUR 3708
National Republican Senatorial Committee
and Sonya M. Vazquez, as treasurer
Coverdell Senate Committee
and Marvin Smith, as treasurer

Dear Mr. Baran:

On November 25, 1992, the Federal Election Commission notified your clients, National Republican Senatorial Committee and Sonya M. Vazquez, as treasurer ("NRSC"), and Coverdell Senate Committee and Marvin Smith, as treasurer ("Coverdell"), of a complaint alleging that your clients had violated certain sections of the Federal Election Campaign Act of 1971, as amended (the "Act").

On April 27, 1993, the Commission considered the complaint but was equally divided on whether to find reason to believe NRSC and Coverdell violated 2 U.S.C. § 441a(f).

The confidentiality provisions at 2 U.S.C. § 437g(a)(12) no longer apply and this matter is now public. In addition, although the complete file must be placed on the public record within 30 days, this could occur at any time following certification of the Commission's vote. If you wish to submit any factual or legal materials to appear on the public record, please do so as soon as possible. While the file may be placed on the public record before receiving your additional materials, any permissible submissions will be added to the public record upon receipt.

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

Sincerely,

Lawrence M. Noble
General Counsel

BY: Lois G. Lerner
Associate General Counsel

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAY 3, 1993

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Robert F. Bauer, Esq.
Judith L. Corley, Esq.
Perkins Coie
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2011

RE: MUR 3708

Dear Mr. Bauer and Ms. Corley:

The Federal Election Commission has reviewed the allegations contained in your complaint dated November 19, 1992. On April 27, 1993, the Commission considered your complaint, but was equally divided on whether to find reason to believe National Republican Senatorial Committee and Sonya M. Vazquez, as treasurer and Coverdell Senate Committee and Marvin Smith, as treasurer, violated the Federal Election Campaign Act of 1971, as amended (the "Act").

Accordingly, on April 27, 1993, the Commission closed the file in this matter. One or more Statements of Reasons providing a basis for the Commission's decision will follow. The Federal Election Campaign Act allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

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

Sincerely,

Lawrence M. Noble
General Counsel

BY: Lois G. Lerner
Associate General Counsel

Enclosure
General Counsel's Report
Certification

93040942751

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

In the Matter of	)	
	)	
National Republican Senatorial Committee and Sonya M. Vazquez, as treasurer	)	MUR 3708
	)	
Coverdell Senate Committee and Marvin Smith, as treasurer	)	

STATEMENT FOR RELEASE OF THE RECORD

CHAIRMAN SCOTT E. THOMAS
COMMISSIONER JOHN WARREN MCGARRY
COMMISSIONER DANNY L. MCDONALD

In Matter Under Review ("MUR") 3708, the Commission split 3-3 on whether the National Republican Senatorial Committee (the "NRSC") could spend an extra $448,879 on behalf of Paul Coverdell in connection with the November 24, 1992, runoff election in Georgia. Applying the Commission's regulations, as well as Commission precedent on this precise legal issue, we agree with the General Counsel's legal analysis and recommendation to find reason to believe that the NRSC violated 2 U.S.C. §441a(f).

This is not a complicated case. Commission regulations and Commission precedent clearly establish that the November 24, 1992, runoff does not constitute a general election triggering an additional coordinated party expenditure allowance. As the Commission said in Advisory Opinion 1983-16 (an opinion joined by two of our colleagues who are now on the other side of the issue for the purpose of this matter): "[T]he Commission... concludes that the...runoff is not a separate or additional general election." Rather, the Commission in that Advisory Opinion held that a runoff election is merely "a continuation of the general election campaign" and does not trigger a new set of coordinated expenditure limits for party committees.

Fidelity to the regulations and prior rulings takes the capricious element out of the law and provides stability and uniformity to the decision-making process. It serves neither the Commission nor the regulated community well for there to be one rule for Monday, another for Tuesday.

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The Commission's 3-3 split on the Georgia runoff issue when considering Advisory Opinion Request 1992-39 does not overrule the Commission's regulations or the near unanimous precedent of Advisory Opinion 1983-16. That the respondent in this case proceeded to spend the money in the face of existing law warranted severe action by the Commission.

We will be submitting a more detailed statement of reasons for our position in MUR 3708 within the next several weeks.

4/30/93
Date

Scott E. Thomas
Chairman

4/30/93
Date

John Warren McGarry
Commissioner

4-30-93
Date

Danny L. McDonald
Commissioner

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT FROM THE OFFICE OF VICE CHAIRMAN POTTER CONCERNING MUR 3708

This matter is an outgrowth of the Commission's split in Advisory Opinion Request 1992-39. In that Advisory Opinion Request the National Republican Senatorial Committee ("NRSC") asked whether the Democratic and Republican party committees had a separate and distinct spending limit for a run-off general election scheduled for November 24, 1992 in Georgia. That election was mandated by a little-known and untried provision of Georgia law which established a run-off general election if no candidate received a majority in the regularly scheduled general election held on November 3, 1992. The NRSC evidently believed, and I concur, that the Commission had not previously faced a situation in which a regularly scheduled general election for federal office was followed by a run-off general election. Therefore, the NRSC quite correctly sought an Advisory Opinion from the Federal Election Commission in an attempt to determine the applicable expenditure limitation.

For reasons which I have discussed in considerable detail previously (SEE Statement in AOR 1992-39 and Dissent in AO 1993-2 by Vice Chairman Potter, copies attached) I believe that the Federal Election laws should have been read to provide both political parties with a new, separate and distinct spending limit for the November 24, 1992 run-off general election. Two of my colleagues also reached this same conclusion, while three members of the Commission disagreed with this result. Because of this three-three split, the Commission was forced to inform the NRSC that it was unable to advise them whether or not a separate expenditure limit existed for the second general election.

A three-three tie of the voting Commissioners which prevents us from issuing an Advisory Opinion is a regrettable, if infrequent, event for the Commission. Still, the Commission's even-numbered membership structure was intentionally created by Congress in 1975 to ensure that no single party or partisan interest could dominate the Commission. The practical result of Congress' action is that we occasionally deadlock on the meaning of our statute and regulations, or the advisability of taking particular actions. Such splits are not necessarily along party lines, although that was the case in AOR 1992-39. The reason for such deadlocks may include the sometimes confusing or unclear phrasing of the statute, the

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differing conclusions of Commissioners about the best public-policy result, and conflicting interpretations of the meaning of previous Commission pronouncements. The antidote for the potential gridlock created by such three-three ties is appeal to the Courts for clarification of the law (when available), or appeal to Congress for revision of the underlying statutory provision. Chairman Thomas has suggested in the past that Congress should consider establishing a procedure for expedited Court review of three-three ties, at least when such ties may have a direct and immediate effect on a particular prospective election. Such a procedure would have much to commend it, and I personally hope Congress will examine the proposal carefully.

The vote in this matter, though, centers on the question of whether the Commission should now penalize the NRSC for proceeding to make expenditures in Georgia after the Commission was unable to respond to their advisory opinion request. The NRSC made their expenditures in the exercise of their best judgment as to the requirements of the federal election laws. That judgment was informed by the public discussion of the Commissioners at the November 12, 1992 open meeting, at which the Advisory Opinion Request was debated.

The Commission's three-three vote in itself was evidence that this issue involved an ambiguous question of law to which even the expert agency could not provide a clear answer. In fact, both Chairman Thomas and I suggested in our separate written statements that the Commission should consider holding a Rulemaking to clarify this area of law. Under these circumstances, I do not believe we should penalize a national party committee for any expenditures made in Georgia in the belief that the law permitted additional party spending in connection with the November 24, 1992 election. In my view either party could have legitimately decided in these circumstances that it was permissible to make expenditures against a separate general election limit for the second election, as did the NRSC. It is the responsibility of Congress to make the laws, the Commission to interpret them, and the Courts (when called upon) to determine whether our interpretation is reasonable. In this matter, guidance was not available to the party committees from any of these sources.

A legal Statement of Reasons will be forthcoming from Vice Chairman Potter's office for inclusion in the official record of MUR 3708.

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**STATEMENT OF COMMISSIONER POTTER
IN ADVISORY OPINION REQUEST 1992-39**

During the November 12, 1992 discussion of Advisory Opinion Request 1992-39, and as reflected in the subsequent Commission tally vote, the Commission was unable to reach the requisite four vote consensus to provide an answer to the requester in this matter. The request presented the following two issues in light of a Georgia state law mandating a run-off election when no federal candidate receives a majority of the votes cast for the office in the regularly scheduled general election: 1) whether national party and/or state party committees are entitled to additional coordinated party expenditure limits under 2 U.S.C. § 441a(d)(3) for such a new run-off election and 2) whether national party and/or state party committees are prohibited from making any 441a(d)(3) expenditures in any new run-off election (including 441a(d)(3) funds remaining from the previously inconclusive general election).[1]

The General Counsel's draft Advisory Opinion cites as a basis for its conclusion the Commission's regulation

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1. Advisory Opinion Request 1992-39 was made by Jay Velasquez on behalf of the National Republican Senatorial Committee in connection with the Georgia run-off election for the United States Senate. This election is required by state law to take place 21 days after the November 3, 1992 general election in which no candidate for the U.S. Senate seat in Georgia received a majority of the vote.

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[11 C.F.R. 100.2(b)(2)] which defines a "general election" as "an election which is held to fill a vacancy in a Federal office (i.e., a special election) and which is intended to result in the final selection of a single individual to the office at stake . . . ." The General Counsel interprets this section of the Commission's regulations in tandem with 11 C.F.R 100.2(b)(1) to limit the definition of "general election" solely to those elections either in even numbered years on the Tuesday following the first Monday in November, or special elections to fill vacancies. I can find no support in the Act for this restrictive definition.

A better view of "general election" would be "any election which may have the legal result of electing a single individual to the office at stake," or similar language. Not only is such a definition consistent with the language of the Act, but it logically follows from the Commission's previous position that special elections, general elections and run-off elections each have a separate $1,000 limit on individuals, multi-candidate political committees, and other persons pursuant to 2 U.S.C. § 441a(a)(1) and (2). See Advisory Opinions 1986-31 and 1984-42. It seems more than illogical to say that this November 24, 1992 election is merely a continuation of the general election for the purposes of political party limits, but a new and separate election for individual and political action committee contribution purposes. Why should party committee's be the only entities prohibited from treating each election as

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distinct?

As a public policy matter I see no harm in allowing a separate and distinct 441a(d) coordinated party expenditure limit for unforeseen "run-off" general elections that have the legal result of electing a single individual to the office at stake, and are in all ways equivalent to any other general election. In fact I believe such a separate limit is beneficial to the political process. First, if a run-off general election is seen as a possibility, a separate and distinct limit encourages candidates to campaign wholeheartedly for the initial contest without holding back 441a(d) funds out of fear of needing them in a second run-off general election. Second, if neither candidate has gained a majority of the votes cast and a new run-off general election is required to be scheduled relatively soon after the inconclusive general election (in the Georgia case before us a mere 21 days separates the inconclusive general election and the new general election), each candidate will quickly need to raise additional funds to communicate with voters. Without funds for campaigning, and for get out the vote projects, the run-off general election may provide a classic case study in low voter turn-out. By placing each candidate on an equal footing and treating each "general election" as distinct with a new 441a(d) limit and no carry over from the previous inconclusive election, candidates may rely on the party funds, instead of spending much of the 21 day election period at private fundraising functions. This is not a mere theoretical proposition: the potential overall 441a(d) limits for each

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party in Georgia are $535,600, more than enough to finance a serious, short, campaign.

Ultimately, these ideas need to be debated and commented upon in a rulemaking. Of necessity, the Act and regulations need to balance the specificity to deal with complicated issues and the breadth to deal with aberrant situations. Unfortunately as written, the present regulatory definition of "general election" does neither. Furthermore, to deny party committees a distinct 441a(d) expenditure limit for this new and decisive election would thwart the intent of the Act as it relates to a group specifically guaranteed a central place in the political process. Finally, I believe that the conclusion of Advisory Opinion 1983-16, which is relied on by the General Counsel here and which in dicta establishes a new contribution limit for individuals and political action committees, but denies such a separate limit to party committees, is illogical and ill-advised. For these reasons, I was not prepared at this time to support the General Counsel's draft in Advisory Opinion 1992-39.

Trevor Potter
Commissioner

November 19, 1992

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**DISSENT OF VICE CHAIRMAN POTTER
TO ADVISORY OPINION 1993-2**

This Advisory Opinion Request concerns the provisions of federal election law allowing the national and state committees of a political party to "make expenditures in connection with the general election campaign of candidates for Federal office," subject to certain limits. See 2 U.S.C. § 441a(d).

We start with the fact that the term "general election" is nowhere defined in the Act. How, then, should we interpret this term? I believe State law, established political practice, and public policy arguments all lead to the conclusion that "general elections" should be defined as those elections which may directly result in the election of persons to Congress.[1]

In Advisory Opinion 1983-16 the Commission dealt with a California law which called for an election, open to all candidates, with the power to elect a Member of Congress. If no one candidate obtained a majority of the votes cast, however, then state law provided for a subsequent election between the two top vote getters. In that Advisory Opinion the Commission, without being asked, or having the issue briefed by the parties, stated that the first election was the only "general election," and that if a second election were held it would be a "run-off election" not entitled to its own general election Section 441a(d) political party coordinated expenditure limit. Had I been a Commissioner in 1983, I would not have voted for that result. Rather, I would have applied California law as found in Kellam v. Eu, 83 Cal. App. 3d 463, (1978), which was cited (but not followed) in Advisory Opinion 1983-16. Kellam v. Eu held that under California law there could be two "general elections": a preliminary general election, followed if needed by a run-off general election.

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1. See Statement of Commissioner Potter in Advisory Opinion Request 1992-39, involving the November 24, 1992 Georgia run-off election for the United States Senate.

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to explicate. Further, I believe the Commission benefits from full public comment and discussion when it deals with issues which may be contentious or controversial. For these reasons, I would support a Rulemaking for the purpose of clarifying our Regulations in this area, if that were my colleagues' desire.

However, as a legal matter the Commission may over-rule a previous Advisory Opinion if four Commissioners agree that the previous AO wrongly interpreted the statute. Thus, a rulemaking is not, as a matter of law, necessary to over-rule Advisory Opinion 1983-16.

While I respect my colleagues' differing views, and understand them, I do not subscribe to the result in this Advisory Opinion. For all of the above reasons, I believe the preferable reading of the statute to be that there may be two general elections with separate Section 441a(d) limits in the 1993 Texas Senate race.

Trevor Potter
Vice Chairman

Dated: March 4, 1993

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THIS IS THE END OF MUR # 3708

DATE FILMED 5-5-93 CAMERA NO. 4

CAMERAMAN E.E.S.

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

✓ Microfilm

_____ Public Rcds

_____ Press

THE FOLLOWING DOCUMENTATION IS ADDED TO

THE PUBLIC RECORD IN CLOSED MUR 3708.

5/12/93

23040943323

CED Staff

WILEY, REIN & FIELDING

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

JAN WITOLD BARAN
(202) 429-7330

FACSIMILE
(202) 429-7049
TELEX 248349 WYRN UR

May 6, 1993

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

Re: MUR 3708, National Republican Senatorial Committee, et al.

Dear Mr. Noble:

On May 5, 1993, I received your letter of May 3 regarding the above-captioned Matter. I wish to protest the manner in which this case was closed.

The public record reflects that this case was closed and made public before any of the parties were notified of the FEC's rulings. In fact, the file was made public on the same day the notification letter apparently was written. The notification letter also failed to mention or include the unadopted First General Counsel's Report, the April 30 Statement by Commissioners Thomas, McGarry and McDonald, and Commissioner Potter's undated Statement, documents which are part of the public record, but never were provided to respondents or their counsel by the FEC.

The respondents were the last to know of formal government actions that affected them. Beyond the question of common courtesy, this episode suggests that the FEC method of closing cases, notifying parties, and publicizing its actions is ad hoc and not systematic. Arbitrary public disclosures make FEC practices susceptible to charges of official abuse, manipulation, incompetence, and even partisanship.

Since the FEC has already made the file public before notifying respondents or providing them an opportunity to file rebuttals to legal documents (which previously were not provided to them), the offer in your May 3 letter to file

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additional "materials" is a hollow gesture. How would those who have already inspected the public record learn of any such materials?

I urge the FEC take immediate steps to implement fair, consistent policies with respect to notifications and public release. Of course, the FEC's procedures should themselves be known to parties and the public.

Sincerely,

Jan Witold Baran

cc: The Hon. Scott Thomas
The Hon. Trevor Potter
The Hon. Joan Aikens
The Hon. Lee Ann Elliott
The Hon. Danny Lee McDonald
The Hon. John Warren McGarry
Jay Velasquez, Esq.
Robert F. Bauer, Esq.

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

✓ Microfilm

_____ Public Rcds

_____ Press

THE FOLLOWING DOCUMENTATION IS ADDED TO

THE PUBLIC RECORD IN CLOSED MUR 3708.

5/20/93

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OGC 8758

PERKINS COIE

A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
607 FOURTEENTH STREET, N.W. • WASHINGTON, D.C. 20005-2011 • (202) 628-6600

May 14, 1993

RECEIVED
FEDERAL ELECTION COMMISSION
93 MAY 14 PM 3:57

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

Re: MUR 3708

Dear Mr. Noble:

Our firm filed a complaint with the Federal Election Commission on behalf of the Democratic Senatorial Campaign Committee against the National Republican Senatorial Campaign Committee involving excessive § 441a(d) expenditures in the Georgia run-off.

We have read now about the Commission's action in this case in several newspaper accounts and was even mailed a press release from your agency dated May 6, 1992 announcing the release of the file the public. We have not, however, had the courtesy of any official communication from your office about this matter.

If it is not too much trouble, would it be possible to obtain a copy of the General Counsel's report in this matter and copies of the Commissioners' explanations for their votes apparently provided at least to the press.

Thank you for your courtesy in this matter.

Very truly yours,

Robert F. Bauer
Judith L. Corley
Counsel to DSCC

[04005-0001/DA931340.001]

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TELEX: 44-0277 PCSO UI • FACSIMILE: (202) 434-1690
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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

✓ Microfilm

_____ Public Rcds

_____ Press

THE FOLLOWING DOCUMENTATION IS ADDED TO

THE PUBLIC RECORD IN CLOSED MUR 3708.

7/2/93

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CLOSED

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

JUNE 3, 1993

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

RE: MUR 3708
National Republican Senatorial Committee
and Sonya M. Vazquez, as treasurer
Coverdell Senate Committee
and Marvin Smith, as treasurer

Dear Mr. Baran:

By letter dated May 3, 1993, the Office of the General Counsel informed you of determinations made with respect to the complaint filed against your clients, the National Republican Senatorial Committee and Sonya M. Vazquez, as treasurer, and Coverdell Senate Committee and Marvin Smith, as treasurer.

Enclosed please find three Statements of Reasons each explaining the respective votes of Commissioner Potter, Commissioners Aikens and Elliott, and Commissioners McDonald, McGarry and Thomas. These documents will be placed on the public record as part of the file of MUR 3708.

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

Sincerely,

Dawn M. Odrowski

Dawn M. Odrowski
Attorney

Enclosure
Statements of Reasons (3)

93040950669

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

JUNE 3, 1993

Robert F. Bauer, Esq.
Judith L. Corley, Esq.
Perkins Coie
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2011

RE: MUR 3708

Dear Mr. Bauer and Ms. Corley:

By letter dated May 3, 1993, the Office of the General Counsel informed you of determinations made with respect to the complaint filed by you against the National Republican Senatorial Committee and Sonya M. Vazquez, as treasurer, and Coverdell Senate Committee and Marvin Smith, as treasurer. Enclosed with that letter was a copy of the First General Counsel's Report and a Certification of the Commission's action.

Enclosed please find three Statements of Reasons each explaining the respective votes of Commissioner Potter, Commissioners Aikens and Elliott, and Commissioners McDonald, McGarry and Thomas. These documents will be placed on the public record as part of the file of MUR 3708.

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

Sincerely,

Dawn M. Odrowski

Dawn M. Odrowski
Attorney

Enclosure
Statements of Reasons (3)

93040950670

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THIS IS THE BEGINNING OF MUR # 3708

DATE FILMED 3-6-96 CAMERA NO. 3

CAMERAMAN JMW

Case reopened per U.S.D.C.
See 93040942699
93040943586

9304372164

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

Dec 12 1 39 PM '94

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

December 12, 1994

DEC 13 1994

EXECUTIVE SESSION

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Lawrence M. Noble
General Counsel

SUBJECT: MUR 3708 -- National Republican Senatorial Committee

Attached is a copy of Judge Greene's order in DSCC v. FEC, received today by facsimile. Judge Greene denied the NRSC's pending motions to intervene, to stay the court's November 14 decision and to reconsider and dismiss the case. The judge's order also gives the Commission 30 days from the date of this latest order, until January 5, 1995, to conform to the court's November 14 decision. The General Counsel's report recommending compliance with the decision is scheduled for consideration at tomorrow's executive session. Since there are no other scheduled executive sessions between tomorrow's meeting and the court's new deadline, we recommend that the Commission proceed to consider the General Counsel's Report dated December 7, 1994 at tomorrow's meeting.

Attachment
Court Order

9604372165

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEMOCRATIC SENATORIAL
CAMPAIGN COMMITTEE,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Action No. 93-1321
(HHG)

FILED
DEC 07 1994
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

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Order

The Court granted summary judgment in favor of the plaintiff in this matter on November 14, 1994, and directed the defendant to initiate enforcement proceedings within 30 days against the National Republican Senatorial Committee ("NRSC"). The NRSC has now filed a motion for leave to intervene, an emergency motion to stay the November 14 Order, and a motion to reconsider and dismiss. The plaintiff has opposed these motions. The defendant has opposed the NRSC's motion to intervene, and has suggested that the Court stay the 30-day deadline imposed by the November 14 Order until all pending motions are resolved.

The Court finds that the NRSC's motion to intervene as a party, filed four days after the final judgment in this action, is untimely. See Dimond v. District of Columbia, 792 F.2d 179, 193 (D.C. Cir. 1986). Moreover, the NRSC's alleged interest in intervening, to brief the constitutionality of the Federal Election Campaign Act, is not ripe as the defendant has not yet determined what specific action it will take against the NRSC. Accordingly,

(N)

39

it is this 6th day of December, 1994

ORDERED that the National Republican Senatorial Committee's motion for leave to intervene be and it is hereby DENIED; and it is further

ORDERED that the National Republican Senatorial Committee's motion to reconsider and dismiss and its emergency motion to stay the November 14 Order be and they are hereby DENIED as moot; and it is further

ORDERED that the Federal Election Commission shall conform with the November 14 decision within 30 days of the issuance of this Order, and that the Federal Election Commission's suggestion that the Court stay the 30-day deadline is moot.

HAROLD H. GREENE
United States District Judge

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SENSITIVE

DEC 1 3 1994

EXECUTIVE SESSION

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
National Republican Senatorial Committee and Stan Huckaby, as treasurer,[1] and	)	MUR 3708
Coverdell Senate Committee and Marvin Smith, as treasurer	)	

GENERAL COUNSEL'S REPORT

I. BACKGROUND

This matter was generated by an administrative complaint filed by the Democratic Senatorial Campaign Committee ("DSCC") on November 19, 1992. The DSCC alleged that the National Senatorial Campaign Committee ("NRSC") violated the Federal Election Campaign Act (the "Act") by exceeding the coordinated party expenditure limit of 2 U.S.C. § 441a(d)(3) in support of Paul Coverdell, the Republican Senate candidate, in connection with Georgia's November 3 general election and a runoff election held on November 24, 1992.[2] The DSCC's complaint was filed the same day the Commission considered an Advisory Opinion Request from the NRSC asking whether an additional Section 441a(d) limit was available for the November 24, 1992 election. The Commission

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1. James L. Hagen was treasurer of the National Republican Senatorial Committee ("NRSC") at the time the DSCC filed its administrative complaint in MUR 3708. Sonya Vazquez succeeded him and was named as the treasurer respondent in the First General Counsel's Report. Stan Huckaby is the NRSC's current treasurer.

2. Georgia law requires a candidate for any office to win a majority of the votes cast. Since no Senate candidate received a majority of the vote for the U.S. Senate seat in the November 3, 1992 general election, a November 24, 1992 runoff election was held.

failed by a vote of 3-3 to approve the General Counsel's Final Draft Advisory Opinion which concluded that no additional Section 441a(d) limit was available for the November 24 election. See Advisory Opinion 1992-39.

In considering the DSSC's complaint on April 27, 1993, the Commission was equally divided on whether to approve the General Counsel's recommendation to find reason to believe that the NRSC had violated the Act.[3] Accordingly, the Commission unanimously decided to close the file in MUR 3708. The Commissioners filed Statements of Reason for their votes, and on June 25, 1993, the DSCC filed suit in district court challenging the Commission's dismissal of its administrative complaint.

The district court issued its decision on the merits in the DSCC's lawsuit on November 14, 1994. DSCC v. FEC, Civil Action No. 93-1321 (HHG) (D.D.C. November 14, 1994). Attachment 1. In that decision, the district court held that the Commission's dismissal of the DSCC's administrative complaint in MUR 3708 was contrary to law. Specifically, the court held that the November 24, 1992, election was a runoff election under the plain meaning of 11 C.F.R. § 100.2, and accordingly, that the Commission erred in not finding reason to believe that the NRSC

3. The Commission also split 3-3 on the General Counsel's recommendation to find no reason to believe whether the Coverdell Senate Committee and its treasurer violated the Act. Commissioners McGarry, McDonald and Thomas supported a reason to believe finding against the Coverdell committee based on the view that amounts in excess of the permissible Section 441a(d) limit constituted an excessive contribution. See Statement of Reasons for MUR 3708 by Commissioners Thomas, McGarry and McDonald, dated May 25, 1993, at footnote 3.

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had violated the Act when it expended funds in excess of the 441a(d) limit in support of Coverdell. In accord with 2 U.S.C. § 437g(a)(8)(C), the court ordered that the Commission conform to its declaration that the dismissal was contrary to law within 30 days and ordered the Commission to vacate its dismissal of MUR 3708 and to initiate appropriate enforcement proceedings against the NRSC. Attachment 1 at 9.

On November 29, 1994, the Commission deadlocked 3-3 on the Office of General Counsel's recommendation to appeal the district court decision, necessitating Commission action to conform to the court's order by December 14. However, pending motions filed by the NRSC in the district court case may alter the decision and order. The NRSC has filed an Emergency Motion to Stay the November 14 Order, a Motion for Leave to Intervene and a proposed Motion to Reconsider the November 14 Decision and Order and Dismiss. On behalf of the Commission, this Office has requested an expedited decision on the motion to stay and has also asked that the Court inform the Commission of its ruling on that motion by December 12, 1994.[4]

Absent further action by the court, the court's November 14 decision constitutes the law of this case. Thus, in the event the court denies the motion to stay or does not rule on the

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4. This Office will advise the Commission of any decisions rendered on the NRSC's pending motions. The request for an expedited decision was filed on December 2, 1994, simultaneously with the Commission's responses to the NRSC's Emergency Motion to Stay and Motion for Leave to Intervene. The NRSC's proposed Motion to Reconsider will not be considered on the merits unless the court permits the NRSC to intervene.

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motion by December 12, the General Counsel recommends that, consistent with the court's decision and order, the Commission reopen MUR 3708 and find reason to believe that the NRSC violated 2 U.S.C. § 441a(f).

II. ANALYSIS

In assessing whether the NRSC violated 2 U.S.C. § 441a(f) by exceeding the permissible Section 441a(d) coordinated expenditure limit for the 1992 general election, the court examined the Commission's regulations at 11 C.F.R. § 100.2. The court first noted that 11 C.F.R. § 100.2(b) defines "general election" as:

> . . . an election which meets either of the following conditions:
>
> (1) An election held in even numbered years on the Tuesday following the first Monday in November is a general election.
>
> (2) An election which is held to fill a vacancy in a Federal office (i.e., a special election) and which is intended to result in the final selection of a single individual to the office at stake is a general election. . .

It further noted that a "runoff election" is defined at 11 C.F.R. § 100.2(d), in pertinent part, as:

> . . . (2) The election held after a general election and prescribed by applicable State law as the means for deciding which candidate should be certified as an officeholder elect is a runoff election.

The court concluded that under the plain meaning of the Commission regulations at 11 C.F.R. § 100.2, the November 24, 1992 election could be considered only a runoff election and not a general election. Consequently, no additional 441a(d)(3) limit was available. Attachment 1 at 5 and 7-8.

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Specifically, the court reasoned that the November 24 election did not meet the definition of "general election" found at 11 C.F.R. § 100.2(b) but rather "fits far more snugly and directly" into the definition of "runoff election" found at 11 C.F.R. § 100.2(d). Attachment 1 at 6 and 7. According to the court, the November 24 election failed to qualify as a general election since it was neither an election held on the Tuesday following the first Monday in November as defined at 11 C.F.R. § 100.2(b)(1) nor was it held to fill a "vacancy" as required in 11 C.F.R. § 100.2(b)(2). In the court's view, no vacancy was created by the failure to elect a Senator in the November 3 election because a vacancy occurs "when an office is no longer occupied or when it is occupied by a person who has not been authorized by the voters to fill that office, such as when the elected officeholder dies or resigns." Attachment 1 at 6. The court found that neither of those situations existed in Georgia in November 1992, noting that Wyche Fowler, the incumbent Senator, had an "additional two months at minimum in which to occupy the office." Id. Finally, the court reasoned that even if the November 24 election could be viewed as an election to fill a vacancy, that election better fit the definition of "runoff election" since it was held after a general election and prescribed by state law as the means for deciding which candidate should be certified as officeholder elect. Attachment 1 at 6-7.

The court further determined that the regulatory scheme of 11 C.F.R. § 100.2 precluded the November 24 election from being

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considered both a general election and a runoff election. According to the court, Commission regulations expressly state when the election definitions overlap. For example, 11 C.F.R. § 100.2(f) states that a "special election" may be a primary, general or runoff election. The absence of any similar statement recognizing that a runoff election could also be a general election was viewed by the court as "strong evidence" that such a conclusion could not be reached. Attachment 1 at 7.

In light of the district court's determination that the November 24 election was a runoff election, no additional Section 441a(d)(3) limit was available. The NRSC's disclosure reports show that it spent $505,570 in support of Coverdell for the November 24 election in addition to spending $535,607 on his behalf for the November 3 election. Therefore, in accordance with the district court's November 14 order and decision, this Office recommends that the Commission reopen MUR 3708, find reason to believe that the NRSC and Stan Huckaby, as treasurer, violated 2 U.S.C. § 441a(f) and approve the attached factual and legal analysis and proposed letters to counsel for the complainant and respondents. This Office makes no recommendation regarding the Coverdell Senate Committee and its treasurer since the district court's decision does not address them and its order specifically directs the Commission to initiate enforcement proceedings against the NRSC. See Attachment 1 at 9.

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III. RECOMMENDATIONS

1. Reopen Matter Under Review 3708 for further proceedings consistent with the district court's November 14, 1994 decision in DSCC v. FEC, Civil Action No. 93-1321 (HHG) (D.D.C. November 14, 1994).

2. Find reason to believe that National Republican Senatorial Committee and Stan Huckaby, as treasurer, violated 2 U.S.C. § 441a(f).

3. Approve the attached Factual and Legal Analysis and the attached letters to counsel for the complainant and respondents.

December 7, 1994
Date

Lawrence M. Noble (by FEK)
Lawrence M. Noble
General Counsel

Attachments:
1. District Court Decision & Order
2. Proposed Factual and Legal Analysis
3. Proposed Letters (2)

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FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

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

DATE: DECEMBER 6, 1994

SUBJECT: MUR 3701 - GENERAL COUNSEL'S REPORT DATED DECEMBER 1, 1994.

The above-captioned document was circulated to the Commission on Thursday, December 1, 1994 at 4:00 p.m.

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

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

This matter will be placed on the meeting agenda for Tuesday, December 13, 1994.

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 3708
National Republican Senatorial	)	
Committee and Stan Huckaby,	)	
as treasurer, and	)	
Coverdell Senate Committee and	)	
Marvin Smith, as treasurer	)	

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on December 13, 1994, do hereby certify that the Commission decided by a vote of 6-0 to take the following actions with respect to MUR 3708:

1. Vacate the dismissal in MUR 3708 and reopen Matter Under Review 3708 for further proceedings consistent with the district court's November 14, 1994 decision in DSCC v. FEC, Civil Action No. 93-1321 (HHG) (D.D.C. November 14, 1994).

2. Notify the National Republican Senatorial Committee and Stan Huckaby, as treasurer, and provide them fifteen days to respond.

(continued)

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3. File a motion with Judge Harold H. Greene seeking clarification of the Court's Order as it relates to 2 U.S.C. § 437g(a)(8)(C).

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

Attest:

12-14-94
Date

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

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 16, 1994

Robert F. Bauer, Esq.
Judith L. Corley, Esq.
Perkins Coie
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2011

RE: MUR 3708

Dear Mr. Bauer and Ms. Corley:

As you know, on November 14, 1994, the United States District Court for the District of Columbia vacated the Federal Election Commission's April 27, 1993 dismissal of Matter Under Review ("MUR") 3708, the administrative complaint filed by your client, the Democratic Senatorial Campaign Committee ("DSCC"). The district court remanded the enforcement matter to the Commission with directions to conform with the court's declaration that the dismissal was contrary to law within thirty days from the court's order; to vacate its dismissal of the DSCC's complaint; and to initiate appropriate enforcement proceedings. On December 6, 1994, the court issued an additional order which, inter alia, gave the Commission until January 5, 1995, to conform to the November 14 order.

This is to notify you that on December 13, 1994, the Commission voted to vacate its dismissal of MUR 3708 and reopen the matter in accordance with the district court's order. You will be notified as soon as the Commission takes final action on this matter. In the interim, please be advised that the statutory confidentiality provisions are once again in effect unless and until the respondents notify the Commission in writing that they wish the matter to be made public. See 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A).

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

Sincerely,

Lawrence M. Noble
General Counsel

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 16, 1994

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

RE: MUR 3708
National Republican Senatorial Committee and Stan Huckaby, as treasurer
Coverdell Senate Committee and Marvin Smith, as treasurer

Dear Mr. Baran:

On November 14, 1994, the United States District Court for the District of Columbia vacated the Federal Election Commission's April 27, 1993 dismissal of Matter Under Review ("MUR") 3708, the administrative complaint filed by the Democratic Senatorial Campaign Committee ("DSCC") against your clients, the National Republican Senatorial Committee and the Coverdell Senate Committee and their respective treasurers. The district court remanded the enforcement matter to the Commission with directions to conform with the court's declaration that the dismissal was contrary to law within thirty days from the court's order; to vacate its dismissal of the DSCC's complaint; and to initiate appropriate enforcement proceedings. As you know, the court issued an additional order on December 6, 1994 which, inter alia, gave the Commission until January 5, 1995, to conform to the November 14 order. A copy of the court's decision and orders is enclosed.

This is to notify you that on December 13, 1994, the Commission voted to vacate its dismissal of MUR 3708 and to reopen the matter in accordance with the district court's order. Please submit within 15 days of your receipt of this letter, any response which you believe is relevant to the Commission's further consideration of this matter. 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.

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

Sincerely,

Lawrence M. Noble
General Counsel

Enclosure
District Court Decision & Orders

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WILEY, REIN & FIELDING

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

JAN WITOLD BARAN
(202) 429-7330

FACSIMILE
(202) 429-7049
TELEX 248349 WYRN UR

December 28, 1994

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

Attn: Dawn M. Odrowski

Re: MUR 3708 (National Republican Senatorial Committee and Stan Huckaby, as Treasurer; Coverdell Senate Committee and Marvin Smith, as Treasurer)

Dear Mr. Noble:

I am in receipt of your letter of December 16, 1994, notifying the National Republican Senatorial Committee ("NRSC") and Stan Huckaby, as Treasurer, and the Coverdell Senate Committee and Marvin A. Smith, as Treasurer ("Respondents") that the Commission vacated its dismissal of Matter Under Review ("MUR") 3708 on December 13, 1994, and requesting that Respondents submit any response which they believe may be relevant to the Commission's further consideration of this matter.

The Commission's letter arrived on December 19, 1994. Thus, a response would currently be due on January 3, 1995. However, our clients have not been available for consultation due to the intervening holidays. As a result, we respectfully request an additional twenty days to and including January 23, 1995, to respond to the Commission's request.

Should the Commission deny this request, Respondent's refer the Commission to Respondents' December 17, 1992, Response to the Complaint in MUR 3708, to the Commission's own pleadings in Democratic Senatorial Campaign Committee v. FEC, Civil Action No. 93-1321, and to footnote 3 of Judge Greene's November 14, 1994, Opinion in this matter.

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We look forward to the Commission's favorable consideration of this request.

Sincerely,

Jan Witold Baran

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 29, 1994

BY FACSIMILE & FIRST-CLASS MAIL

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

RE: MUR 3708
National Republican Senatorial Committee and Stan Huckaby, as treasurer
Coverdell Senate Committee and Marvin Smith, as treasurer

Dear Mr. Baran:

This responds to your letter dated December 28, 1994, requesting an extension of 20 days to respond to the Commission's reopening of MUR 3708 in accordance with the district court's order of November 14, 1994. After considering the circumstances presented in your letter, the Office of the General Counsel has granted the requested extension. Accordingly, your response is due by the close of business on January 23, 1995.

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

Sincerely,

Dawn M. Odrowski

Dawn M. Odrowski
Attorney

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WILEY, REIN & FIELDING

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

RECEIVED
FEDERAL ELECTION
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OFFICE OF GENERAL
COUNSEL

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JAN WITOLD BARAN
(202) 429-7330

January 23, 1995

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: Dawn M. Odrowski

Re: MUR 3708 (National Republican Senatorial Committee and Stan Huckaby, as Treasurer; Coverdell Senate Committee and Marvin Smith, as Treasurer)

Dear Mr. Noble:

This letter constitutes a response to your letter of December 16, 1994, notifying the National Republican Senatorial Committee ("NRSC") and Stan Huckaby, as Treasurer, and the Coverdell Senate Committee and Marvin A. Smith, as Treasurer ("Respondents") that the Commission vacated its dismissal of Matter Under Review ("MUR") 3708 on December 13, 1994. You further requested that Respondents submit any response which they believe may be relevant to the Commission's further consideration of this matter.

While Respondents appreciate the opportunity to share their views with the Commission, one cannot help pointing out that the Commission could have obviated the need to seek Respondents' advice. First, the Commission could have appealed the ruling in Democratic Senatorial Campaign Committee v. FEC, Civil Action No. 93-1321 (HHG) in order to vindicate itself as well as negate the need to prolong this enforcement action. For unexplained reasons, the Commission did not appeal. Second, the Commission could have consented to the NRSC's Motion for Leave to Intervene in order to allow the NRSC an opportunity to either seek reconsideration or to appeal. However, unlike plaintiff DSCC, the Commission opposed the NRSC's Motion thus barring timely appellate review of the FEC's dismissal and the District Court's order. Having made these two decisions, the FEC has put both itself and Respondents in this case in a peculiar situation.

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One result of this predicament is that, on the very same day which the Commission issued its letter to Respondents, the Commission also filed a Motion to Clarify in Democratic Senatorial Campaign Committee v. FEC, Civil Action No. 93-1321 (HHG) seeking guidance from the Court as to possible avenues the Commission may take in MUR 3708 in light of the Court's November 14, 1994 Order. Filing such a motion implies that the Commission itself does not believe the Court's Order requires it to find reason to believe any violation occurred in this matter, a position with which Respondents agree.

As indicated in NRSC's response to the Commission's Motion to Clarify, it is NRSC's position that by vacating the Commission's original dismissal of MUR 3708 the Commission has complied with the Court's Order. That Order stated only that the "Commission shall vacate its dismissal of the complaint of the Democratic Senatorial Campaign Committee and it shall initiate appropriate enforcement proceedings against the National Republican Senatorial Committee." November 14, 1994 Order. Simply by virtue of vacating its dismissal of the complaint the FEC has in fact initiated an "appropriate" enforcement action against the NRSC. Having complied with the Court's order, it is now appropriate for the Commission to find no reason to believe or take no further action based on prosecutorial discretion.[1] Indeed, the General Counsel's Office, in defending the Commission's dismissal of this action in the first instance, argued that prosecutorial discretion was an appropriate basis upon which to uphold the decision. Prosecutorial discretion was not rejected by the Court as an appropriate basis from dismissal. Rather, the Court did not address that issue.

One ground for exercising prosecutorial discretion is the fact that the NRSC requested and the Commission failed to issue an Advisory Opinion with respect to the treatment of the 2 U.S.C. § 441a(d) limit in connection with the November 24, 1992 election for United States Senator from Georgia. The Commission need not limit the exercise of its prosecutorial discretion to its failure to issue an advisory opinion, however. Instead, the Commission can rely on the fact that during the past two years it has dismissed numerous enforcement actions on the grounds of prosecutorial

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[1] Specifically, the Court's opinion stated that "[i]n fashioning an appropriate remedy, the Commission might take into account its less than lucid action with respect to its decision whether to issue an advisory opinion." November 14, 1994, Opinion at 8, n.3.

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discretion. This includes several cases dismissed at the end of 1994 involving the 1992 election cycle in which the Commission did not find reason to believe but simply took no action or those in which the Commission did find reason to believe but nonetheless took no further action. See, e.g., Federal Election Commission Press Release dated December 13, 1993; Federal Election Commission Press Release dated July 6, 1994; and Federal Election Commission Press Release dated December 20, 1994.

Having repeatedly relied on prosecutorial discretion as an appropriate basis upon which to dismiss complaints prior to finding reason to believe, the Commission is obviously prepared to defend itself in the general exercise of prosecutorial discretion against any claim that it is arbitrary, capricious, or abusing its discretion. This position is consistent with the Supreme Court's holding in Heckler v. Chaney, 470 U.S. 821, 831 (1985) in which the Court found that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to the agency's absolute discretion" given the "many variables" that affect an agency's "proper ordering of its priorities."

Respondents believe that there is no basis for the Commission to take any further action in this matter or to find reason to believe that a violation occurred. Indeed, it would be unjustified and grossly unfair to Respondents for the Commission to make such a finding under the circumstances. However, should the Commission believe it necessary to find "reason to believe" in order to comply with the Court's order, which, as seen above, it is not, the Commission should nonetheless take no further action at the same time. The Commission has never taken the position that it is bound to make a probable cause to believe finding, or even to pursue an investigation in any action in which it has found reason to believe. Thus, consistent with prior Commission precedent the Commission may take no further action against the Respondents in this matter even after an unwarranted finding of a violation. Any decision to the contrary would result in the penalization of the Respondents for the Commission's own failure to issue an Advisory Opinion.

In sum, the Commission should take no further action in this matter.

Sincerely,

Jan Witold Baran

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FEDERAL ELECTION
COMMISSION
SECRETARIAT

FEB 23 10 25 AM '95

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

February 23, 1995

MEMORANDUM

SENSITIVE

TO: The Commission

FROM: Lawrence M. Noble
General Counsel

SUBJECT: MUR 3708 -- National Republican Senatorial Committee

On December 13, 1994, the Commission voted to vacate its dismissal of this matter in accordance with an order by the U.S. District Court for the District of Columbia and to notify the National Republican Senatorial Campaign Committee ("NRSC") of its action and give it 15 days to respond. In the meantime, on December 16, 1994, this Office, on behalf of the Commission, filed a Motion to Clarify with the district court. Specifically, the motion requests the court to clarify whether the Commission may comply with its order by certifying that, after considering the court's opinion and the administrative complaint, it did not find reason to believe that the NRSC violated the Act, thereby allowing the court to permit complainant, the Democratic Senatorial Campaign Committee ("DSCC") to bring its own action against the NRSC pursuant to 2 U.S.C. § 437g(a)(8)(C). An oral argument on the motion was requested.

The NRSC filed a response to the Commission's notification regarding the reopening of MUR 3708 on January 23, 1995, after receiving an extension. However, we are still awaiting a decision by the district court on the motion to clarify. Both the DSCC and the NRSC have filed responses to the motion to clarify. Our reply was filed on January 6, 1995. We have as yet received no notification of any court action on our request for oral argument or on the motion generally.

We will keep the Commission advised of further developments in this matter.

Staff Assigned: Dawn M. Odrowski

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BEFORE THE FEDERAL ELECTION COMMISSION

SENSITIVE

In the Matter of	)	
	)	
National Republican Senatorial Committee and Stan Huckaby, as treasurer,[1] and Coverdell Senate Committee and Marvin Smith, as treasurer	)	MUR 3708

GENERAL COUNSEL'S REPORT

I. BACKGROUND

This matter was generated by an administrative complaint filed by the Democratic Senatorial Campaign Committee ("DSCC") on November 19, 1992. The DSCC alleged that the National Senatorial Campaign Committee ("NRSC") violated the Federal Election Campaign Act (the "Act") by exceeding the coordinated party expenditure limit of 2 U.S.C. § 441a(d)(3) in support of Paul Coverdell, the Republican Senate candidate, in connection with Georgia's November 3 general election and a runoff election held on November 24, 1992.[2] The DSCC's complaint was filed the same day the Commission considered an Advisory Opinion Request from the NRSC asking whether an additional Section 441a(d) limit was

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1. James L. Hagen was treasurer of the National Republican Senatorial Committee ("NRSC") at the time the DSCC filed its administrative complaint in MUR 3708. Sonya Vazquez succeeded him and was named as the treasurer respondent in the First General Counsel's Report. Stan Huckaby is the NRSC's current treasurer.

2. Georgia law requires a candidate for any office to win a majority of the votes cast. Since no Senate candidate received a majority of the vote for the U.S. Senate seat in the November 3, 1992 general election, a runoff election was held on November 24, 1992.

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available for the November 24, 1992 election. The Commission failed by a vote of 3-3 to approve the General Counsel's Final Draft Advisory Opinion which concluded that no additional Section 441a(d) limit was available for the November 24 election. See Commission certification dated November 19, 1992 for Advisory Opinion Request 1992-39 and First Draft of Advisory Opinion 1992-39 dated November 18, 1992.

In considering the DSSC's complaint on April 27, 1993, the Commission was equally divided on whether to approve the General Counsel's recommendation to find reason to believe that the NRSC had violated the Act.[3] Accordingly, the Commission unanimously decided to close the file in MUR 3708. The Commissioners filed Statements of Reason for their votes, and on June 25, 1993, the DSCC filed suit in district court challenging the Commission's dismissal of its administrative complaint.

The district court issued its decision on the merits in the DSCC's lawsuit on November 14, 1994. DSCC v. FEC, Civil Action No. 93-1321 (HHG) (D.D.C. November 14, 1994). Attachment 1. In that decision, the district court held that the Commission's dismissal of the DSCC's administrative complaint in MUR 3708 was contrary to law. Specifically, the court held that the

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3. The Commission also split 3-3 on the General Counsel's recommendation to find no reason to believe that the Coverdell Senate Committee and its treasurer violated the Act. Commissioners McGarry, McDonald and Thomas supported a reason to believe finding against the Coverdell committee based on the view that amounts in excess of the permissible Section 441a(d) limit constituted an excessive contribution. See Statement of Reasons for MUR 3708 by Commissioners Thomas, McGarry and McDonald, dated May 25, 1993, at footnote 3.

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November 24, 1992 election was a runoff election under the plain meaning of 11 C.F.R. § 100.2, and accordingly, that the Commission erred in not finding reason to believe that the NRSC had violated the Act when it expended funds in excess of the 441a(d) limit in support of Coverdell. In accord with 2 U.S.C. § 437g(a)(8)(C), the court ordered that the Commission conform to its declaration that the dismissal was contrary to law within 30 days and ordered the Commission to vacate its dismissal of MUR 3708 and to initiate appropriate enforcement proceedings against the NRSC. Attachment 1 at 9. The court subsequently gave the Commission additional time, until January 15, 1995, to conform to its order when ruling on several post-order motions filed by the NRSC.[4]

On November 29, 1994, the Commission deadlocked 3-3 on the Office of General Counsel's recommendation to appeal the district court decision, necessitating Commission action to conform to the court's order. Accordingly, the Commission unanimously voted on December 13, 1994, to vacate the dismissal in MUR 3708, to reopen the matter consistent with the court's order and to notify the NRSC of its actions, giving them an opportunity to respond. Counsel for the NRSC and the Coverdell Senate Committee ("Respondents") filed a response on January 23, 1995, in which they assert that it would be appropriate for the Commission to find no reason to believe or to take no further action without

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4. The NRSC, an amicus in the district court proceeding, filed an Emergency Motion to Stay the November 14 Order, a Motion for Leave to Intervene and a proposed Motion to Reconsider the November 14 Decision and Order and Dismiss. The court denied those motions on December 6, 1994.

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making a reason to believe finding based on the Commission's prosecutorial discretion. Attachment 2.

Concurrently with the reopening of MUR 3708, on December 16, 1994, the Commission filed a motion with the district court seeking clarification of the district court's order. The motion requested the court to clarify whether the Commission could comply with its order by certifying that, after considering the court's opinion and the administrative complaint, it was still unable to find reason to believe that the NRSC violated the Act, thereby allowing the court to permit complainant DSCC to bring its own action against Respondents pursuant to 2 U.S.C. § 437g(a)(8)(C).

The district court denied the Commission's Motion to Clarify, viewing it as a request to amend its order. Attachment 4. The court ruled that "[t]he requested order would be contrary to the intention of the Court in issuing its order granting summary judgment in favor of the DSCC" and concluded that since it resolved the issues in favor of DSCC "it would be contrary to its Opinion to now permit the Commission to not find that the Act was violated." Attachment 4 at 2.[5]

The district court's November 14 decision constitutes the law of this case. Thus, the General Counsel recommends that, consistent with the court's decision and order, the Commission find reason to believe that the NRSC violated 2 U.S.C. § 441a(f). Additionally, since Respondents already have had an opportunity to

5. The Court did not address what sanctions, if any, it would impose if the Commission continued to split 3-3 on whether there was reason to believe the NRSC had violated the Act.

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respond and no investigation appears necessary, we also recommend that the Commission enter into pre-probable cause conciliation and approve the attached conciliation agreement.

II. ANALYSIS

In assessing whether the NRSC violated 2 U.S.C. § 441a(f) by exceeding the permissible Section 441a(d) coordinated expenditure limit for the 1992 general election, the district court examined the Commission's regulations at 11 C.F.R. § 100.2. The court first noted that 11 C.F.R. § 100.2(b) defines "general election" as:

> . . . an election which meets either of the following conditions:
>
> (1) An election held in even numbered years on the Tuesday following the first Monday in November is a general election.
>
> (2) An election which is held to fill a vacancy in a Federal office (i.e., a special election) and which is intended to result in the final selection of a single individual to the office at stake is a general election. . .

It further noted that a "runoff election" is defined at 11 C.F.R. § 100.2(d), in pertinent part, as:

> . . . (2) The election held after a general election and prescribed by applicable State law as the means for deciding which candidate should be certified as an officeholder elect is a runoff election.

The court concluded that under the plain meaning of the Commission regulations at 11 C.F.R. § 100.2, the November 24, 1992 election could be considered only a runoff election and not a general election. Consequently, no additional Section 441a(d)(3) limit was available. Attachment 1 at 5 and 7-8.

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Specifically, the court reasoned that the November 24 election did not meet the definition of "general election" found at 11 C.F.R. § 100.2(b) but rather "fits far more snugly and directly" into the definition of "runoff election" found at 11 C.F.R. § 100.2(d). Attachment 1 at 6 and 7. According to the court, the November 24 election failed to qualify as a general election since it was neither an election held on the Tuesday following the first Monday in November as defined at 11 C.F.R. § 100.2(b)(1) nor was it held to fill a "vacancy" as required in 11 C.F.R. § 100.2(b)(2). In the court's view, no vacancy was created by the failure to elect a Senator in the November 3 election because a vacancy occurs "when an office is no longer occupied or when it is occupied by a person who has not been authorized by the voters to fill that office, such as when the elected officeholder dies or resigns." Attachment 1 at 6. The court found that neither of those situations existed in Georgia in November 1992, noting that Wyche Fowler, the incumbent Senator, had an "additional two months at minimum in which to occupy the office." Id. Finally, the court reasoned that even if the November 24 election could be viewed as an election to fill a vacancy, that election better fit the definition of "runoff election" since it was held after a general election and prescribed by state law as the means for deciding which candidate should be certified as officeholder elect. Attachment 1 at 6-7.

The court further determined that the regulatory scheme of 11 C.F.R. § 100.2 precluded the November 24 election from being considered both a general election and a runoff election.

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According to the court, Commission regulations expressly state when the election definitions overlap. For example, 11 C.F.R. § 100.2(f) states that a "special election" may be a primary, general or runoff election. The absence of any similar statement recognizing that a runoff election could also be a general election was viewed by the court as "strong evidence" that such a conclusion could not be reached. Attachment 1 at 7.

Thus, in light of the district court's determination that the November 24 election was a runoff election, no additional Section 441a(d)(3) limit was available. The NRSC's disclosure reports show that it spent $509,570 in support of Coverdell for the November 24 election in addition to spending $535,607 on his behalf for the November 3 election. Since the total Section 441a(d)(3) coordinated expenditure limit available for the 1992 general election in Georgia was $535,607,[6] the NRSC exceeded the limit by $509,570.

Contrary to Respondents' suggestion, Attachment 2 at 2, the mere act of vacating the prior dismissal and reopening this MUR does not appear to be sufficient to comply with the court's November 14 order.[7] Indeed, the court's recent ruling issued in

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6. This amount represents the combined Section 441a(d)(3) limit available to the National Republican Committee and the Republican Party of Georgia, both of whom apparently designated the NRSC as their agent for purpose of expending these funds.

7. As noted, Respondents argue the Commission should find no reason to believe or take no further action without making a reason to believe finding based on prosecutorial discretion. Respondents cite two grounds for this exercise of prosecutorial discretion: the Commission's failure to issue an Advisory Opinion regarding the availability of a separate 441a(d) limit for the November 24 election and the

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connection with the Motion to Clarify explicitly states that "it would be contrary to its Opinion to now permit the Commission to not find that the Act was violated." Therefore, in accordance with the district court's decision and orders, this Office recommends that the Commission find reason to believe that the NRSC and Stan Huckaby, as treasurer, violated 2 U.S.C. § 441a(f) and approve the attached Factual and Legal Analysis. Attachment 5.[8]

III. CONCILIATION

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(Footnote 7 continued from previous page)
Commission's dismissal of various enforcement matters during the last two years on grounds of prosecutorial discretion. Attachment 2 at 2. Alternatively, Respondents argue that these same factors would warrant taking no further action should the Commission believe it necessary to find "reason to believe" in order to comply with the court order. Attachment 2 at 3.

8. No recommendation is made regarding the Coverdell Senate Committee and its treasurer since the district court's decision does not address them and its order specifically directs the Commission to initiate enforcement proceedings against the NRSC. See Attachment 1 at 9.

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IV. RECOMMENDATIONS

1. Find reason to believe that the National Republican Senatorial Committee and Stan Huckaby, as treasurer, violated 2 U.S.C. § 441a(f).

2. Approve the attached Factual and Legal Analysis.

3. Enter into pre-probable cause conciliation with the National Republican Senatorial Committee and Stan Huckaby, as treasurer, and approve the attached proposed conciliation agreement and the appropriate letter.

3/17/95
Date

Lawrence M. Noble
General Counsel

Attachments:
1. November 14, 1994 Court Decision & Order
2. NRSC's response to MUR 3708 reopening
3. FEC Motion to Clarify
4. March 3, 1995 Court Order Denying Motion to Clarify
5. Proposed Factual and Legal Analysis
6. Proposed Conciliation Agreement

Staff Assigned: Dawn M. Odrowski

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
National Republican Senatorial Committee and Stan Huckaby, as treasurer; Coverdell Senate Committee and Marvin Smith, as treasurer	)	MUR 3708

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on March 21, 1995, do hereby certify that the Commission decided by a vote of 6-0 to take the following actions in MUR 3708:

1. Find reason to believe that the National Republican Senatorial Committee and Stan Huckaby, as treasurer, violated 2 U.S.C. § 441a(f).

2. Approve the Factual and Legal Analysis attached to the General Counsel's March 17, 1995 report.

3. Enter into pre-probable cause conciliation with the National Republican Senatorial Committee and Stan Huckaby, as treasurer, and approve the proposed conciliation agreement and appropriate letter as recommended in the General Counsel's March 17, 1995 report.

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

Attest:

3-22-95
Date

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

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

March 27, 1995

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

RE: MUR 3708
National Republican Senatorial Committee and Stan Huckaby, as treasurer

Dear Mr. Baran:

On December 16, 1994, the Federal Election Commission notified you that, in accordance with a November 14, 1994 decision and order by the U.S. District Court for the District of Columbia, it had voted to vacate its dismissal of MUR 3708 and reopen the matter. A copy of the court's decision and order were forwarded to you at that time and you were afforded an opportunity to respond.

On March 3, 1995, the district court denied the Commission's Motion to Clarify the November 14 order. Thus, upon review of the court's decision and orders and your January 23 response, the Commission, on March 21, 1995, found that there is reason to believe the National Republican Senatorial Committee and Stan Huckaby, as treasurer, violated 2 U.S.C. § 441a(f). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

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

In order to expedite the resolution of this matter, the Commission has also decided to offer to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. Enclosed is a conciliation agreement that the Commission has approved.

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If you are interested in expediting the resolution of this matter by pursuing preprobable cause conciliation and if you agree with the provisions of the enclosed agreement, please sign and return the agreement, along with the civil penalty, to the Commission. In light of the fact that conciliation negotiations, prior to a finding of probable cause to believe, are limited to a maximum of 30 days, you should respond to this notification as soon as possible.

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 Dawn M. Odrowski, the attorney assigned to this matter, at (202) 219-3400.

Sincerely,

Danny L. McDonald
Chairman

Enclosures
Factual & Legal Analysis
Conciliation Agreement

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

In the Matter of	)	
	)	
National Republican Senatorial Committee and	)	MUR 3708
	)	
Stan Huckaby, as treasurer[1]	)	

I. BACKGROUND

This matter was generated by an administrative complaint filed by the Democratic Senatorial Campaign Committee ("DSCC") on November 19, 1992. The DSCC alleged that the National Senatorial Campaign Committee ("NRSC") violated the Federal Election Campaign Act (the "Act") by exceeding the coordinated party expenditure limit of 2 U.S.C. § 441a(d)(3) in support of Paul Coverdell, the Republican Senate candidate, in connection with Georgia's November 3 general election and a runoff election held on November 24, 1992.[2] The DSCC's complaint was filed the same day the Commission considered an Advisory Opinion Request from the NRSC asking whether an additional Section 441a(d) limit was available for the November 24, 1992 election. The Commission failed by a vote of 3-3 to approve the General Counsel's Final Draft Advisory Opinion

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1. James L. Hagen was treasurer of the National Republican Senatorial Committee ("NRSC") at the time the DSCC filed its administrative complaint in MUR 3708. Sonya Vazquez succeeded him and was named as the treasurer respondent in the First General Counsel's Report. Stan Huckaby is the NRSC's current treasurer.

2. Georgia law requires a candidate for any office to win a majority of the votes cast. Since no Senate candidate received a majority of the vote for the U.S. Senate seat in the November 3, 1992 general election, a November 24, 1992 runoff election was held.

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which concluded that no additional Section 441a(d) limit was available for the November 24 election. See Commission certification dated November 19, 1992 for Advisory Opinion Request 1992-39 and First Draft of Advisory Opinion 1992-39 dated November 18, 1992.

In considering the DSSC's complaint on April 27, 1993, the Commission was equally divided on whether to approve the General Counsel's recommendation to find reason to believe that the NRSC had violated the Act.[3] Accordingly, the Commission unanimously decided to close the file in MUR 3708. The Commissioners filed Statements of Reason for their votes, and on June 25, 1993, the DSCC filed suit in district court challenging the Commission's dismissal of its administrative complaint.

The district court issued its decision on the merits in the DSCC's lawsuit on November 14, 1994. DSCC v. FEC, Civil Action No. 93-1321 (HHG) (D.D.C. November 14, 1994). In that decision, the district court held that the Commission's dismissal of the DSCC's administrative complaint in MUR 3708 was contrary to law. Specifically, the court held that the November 24, 1992 election was a runoff election under the plain meaning of 11 C.F.R. § 100.2, and accordingly, that the Commission erred in not finding

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3. The Commission also split 3-3 on the General Counsel's recommendation to find no reason to believe that the Coverdell Senate Committee and its treasurer violated the Act. Commissioners McGarry, McDonald and Thomas supported a reason to believe finding against the Coverdell committee based on the view that amounts in excess of the permissible Section 441a(d) limit constituted an excessive contribution. See Statement of Reasons for MUR 3708 by Commissioners Thomas, McGarry and McDonald, dated May 25, 1993, at footnote 3.

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reason to believe that the NRSC had violated the Act when it expended funds in excess of the 441a(d) limit in support of Coverdell. In accord with 2 U.S.C. § 437g(a)(8)(C), the court ordered that the Commission conform to its declaration that the dismissal was contrary to law within 30 days and ordered the Commission to vacate its dismissal of MUR 3708 and to initiate appropriate enforcement proceedings against the NRSC. The court subsequently gave the Commission additional time, until January 15, 1995, to conform to its order when ruling on several post-order motions filed by the NRSC.[4]

In compliance with the court's order, the Commission unanimously voted on December 13, 1994, to vacate the dismissal in MUR 3708, to reopen the matter consistent with the court's order and to notify the NRSC of its actions, giving them an opportunity to respond. Counsel for the NRSC and the Coverdell Senate Committee ("Respondents") filed a response on January 23, 1995, in which they assert that it would be appropriate for the Commission to find no reason to believe or to take no further action without making a reason to believe finding based on the Commission's prosecutorial discretion.

Concurrently with the reopening of MUR 3708, on December 16, 1994, the Commission filed a motion with the district court seeking clarification of the district court's order. The motion

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4. The NRSC, an amicus in the district court proceeding, filed an Emergency Motion to Stay the November 14 Order, a Motion for Leave to Intervene and a proposed Motion to Reconsider the November 14 Decision and Order and Dismiss. The court denied those motions on December 6, 1994.

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requested the court to clarify whether the Commission could comply with its order by certifying that, after considering the court's opinion and the administrative complaint, it was still unable to find reason to believe that the NRSC violated the Act, thereby allowing the court to permit complainant DSCC to bring its own action against Respondents pursuant to 2 U.S.C. § 437g(a)(8)(C).

The district court denied the Commission's Motion to Clarify, viewing it as a request to amend its order. The court ruled that "[t]he requested order would be contrary to the intention of the Court in issuing its order granting summary judgment in favor of the DSCC" and concluded that since it resolved the issues in favor of DSCC "it would be contrary to its Opinion to now permit the Commission to not find that the Act was violated." Thus, the district court's November 14 decision constitutes the law of this case.

II. ANALYSIS

In assessing whether the NRSC violated 2 U.S.C. § 441a(f) by exceeding the permissible Section 441a(d) coordinated expenditure limit for the 1992 general election, the court examined the Commission's regulations at 11 C.F.R. § 100.2. The court first noted that 11 C.F.R. § 100.2(b) defines "general election" as:

> . . . an election which meets either of the following conditions:
>
> (1) An election held in even numbered years on the Tuesday following the first Monday in November is a general election.
>
> (2) An election which is held to fill a vacancy in a Federal office (i.e., a special election) and which is intended to result in the final selection of a single individual to the office at stake is a general election.

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It further noted that a "runoff election" is defined at 11 C.F.R. § 100.2(d), in pertinent part, as:

> . . . (2) The election held after a general election and prescribed by applicable State law as the means for deciding which candidate should be certified as an officeholder elect is a runoff election.

The court concluded that under the plain meaning of the Commission regulations at 11 C.F.R. § 100.2, the November 24, 1992 election could be considered only a runoff election and not a general election. Consequently, no additional Section 441a(d)(3) limit was available. See Decision and Order dated November 14, 1994, in DSCC v. FEC, Civil Action No. 93-1321 (HHG) (D.D.C. November 14, 1994) at pages 5 and 7-8 (cited hereafter as "Decision at page ___").

Specifically, the court reasoned that the November 24 election did not meet the definition of "general election" found at 11 C.F.R. § 100.2(b) but rather "fits far more snugly and directly" into the definition of "runoff election" found at 11 C.F.R. § 100.2(d). Decision at pages 6 and 7. According to the court, the November 24 election failed to qualify as a general election since it was neither an election held on the Tuesday following the first Monday in November as defined at 11 C.F.R. § 100.2(b)(1) nor was it held to fill a "vacancy" as required in 11 C.F.R. § 100.2(b)(2). In the court's view, no vacancy was created by the failure to elect a Senator in the November 3 election because a vacancy occurs "when an office is no longer occupied or when it is occupied by a person who has not been authorized by the voters to fill the office, such as when the

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elected officeholder dies or resigns." Decision at page 6. The court found that neither of those situations existed in Georgia in November 1992, noting that Wyche Fowler, the incumbent Senator, had an "additional two months at minimum in which to occupy the office." Id. Finally, the court reasoned that even if the November 24 election could be viewed as an election to fill a vacancy, that election better fit the definition of "runoff election" since it was held after a general election and prescribed by state law as the means for deciding which candidate should be certified as officeholder elect. Decision at pages 6-7.

The court further determined that the regulatory scheme of 11 C.F.R. § 100.2 precluded the November 24 election from being considered both a general election and a runoff election. According to the court, Commission regulations expressly state when the election definitions overlap. For example, 11 C.F.R. § 100.2(f) states that a "special election" may be a primary, general or runoff election. The absence of any similar statement recognizing that a runoff election could also be a general election was viewed by the court as "strong evidence" that such a conclusion could not be reached. Decision at page 7.

In light of the district court's determination that the November 24 election was a runoff election, no additional Section 441a(d)(3) limit was available. The NRSC's disclosure reports show that it spent $509,570 in support of Coverdell for the November 24 election in addition to spending $535,607 on his behalf for the November 3 election. Since the total Section

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441a(d)(3) coordinated expenditure limit available for the 1992 general election in Georgia was $535,607,[5] the NRSC exceeded the limit by $509,570.

Contrary to Respondents' suggestion, the mere act of vacating the prior dismissal and reopening this MUR does not appear to be sufficient to comply with the court's November 14 order.[6] Indeed, the court's recent ruling issued in connection with the Motion to Clarify explicitly states that "it would be contrary to its Opinion to now permit the Commission to not find that the Act was violated." Therefore, in accordance with the district court's decision and orders, there is reason to believe that the National Republican Senatorial Committee and Stan Huckaby, as treasurer, violated 2 U.S.C. § 441a(f).

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5. This amount represents the combined Section 441a(d)(3) limit available to the National Republican Committee and the Republican Party of Georgia, both of whom apparently designated the NRSC as their agent for the purpose of expending these funds.

6. As noted, Respondents argue the Commission should find no reason to believe or take no further action without making a reason to believe finding based on prosecutorial discretion. Respondents cite two grounds for this exercise of prosecutorial discretion: the Commission's failure to issue an Advisory Opinion regarding the availability of a separate 441a(d) limit for the November 24 election and the Commission's dismissal of various enforcement matters during the last two years on grounds of prosecutorial discretion. Alternatively, Respondents argue that these same factors would warrant taking no further action should the Commission believe it necessary to find "reason to believe" in order to comply with the court order.

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April 18, 1995

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

Attn: Dawn M. Odrowski, Esq.

Re: MUR 3708 (National Republican Senatorial Committee and Stan Huckaby, as Treasurer)

Dear Mr. Noble:

I am in receipt of Chairman McDonald's letter of March 27, 1995 notifying the National Republican Senatorial Committee ("NRSC") and Stan Huckaby, as Treasurer ("Respondent") that the Commission found reason to believe that Respondent violated 2 U.S.C. § 441a(f) in Matter Under Review ("MUR") 3708 in light of the district court's decision and orders and enclosing a proposed conciliation agreement.

Respondent welcomes the opportunity to enter into pre-probable cause conciliation in this matter. In so doing, however, we wish to point out the following unique characteristics attributable to this enforcement action and its accompanying litigation.

- The NRSC requested an Advisory Opinion from the Commission on the precise issue at question in the enforcement matter. The Commission deadlocked 3-3 and therefore did not issue an opinion.

- After likewise dismissing this enforcement action 3-3, the matter was reviewed by a federal district court judge who found that the Commission had acted contrary to law in not finding a violation against the NRSC. Nonetheless, the

district court specifically stated that the Commission should take into account its 3-3 vote regarding the advisory opinion in fashioning a remedy in this matter.

- The Commission deadlocked 3-3 in deciding whether to appeal this matter to the United States Court of Appeals for the District of Columbia Circuit. Thus, no appeal was taken.

- The Commission opposed the NRSC's Motion to Intervene for the purpose of appealing this matter, effectively blocking any possible appeal.

Furthermore, the Georgia state legislature has amended its statute so that the general election is now decided by a plurality vote rather than by a majority vote. Thus, it is unlikely that this situation ever will occur again even if litigated.

Sincerely,

Jan Witold Baran

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COMMISSION
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COUNSEL
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JAN WITOLD BARAN
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September 8, 1995

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Lisa E. Klein, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 3708 (National Republican Senatorial Committee and Stan Huckaby, as Treasurer)

Dear Ms. Klein:

Since then, on June 19, 1995, the United States Court of Appeals for the District Columbia Circuit issued an opinion in General Electric v. EPA, 53 F.3d 1324 (1995) which fully supports Respondent's position. In GE, the Court held that because the EPA did not provide GE with fair warning of its interpretation of an EPA

regulation, GE could not be "punished." Thus, the Court prohibited the EPA from holding "GE responsible in any way--either financially or in future enforcement proceedings--" for the activity in question in that case. Id. at 1334.

In determining that GE did not receive fair notice the court looked to the regulation's lack of clarity, internal divisions regarding the application of the regulation, the fact that the agency's other policy statements were unclear, and the fact that the agency was itself "struggl[ing] to provide a definitive reading of the regulatory requirements." Id. Each of these factors is equally, if not more, applicable to this matter.

In this case, the NRSC asked for explicit guidance regarding the application of the Federal Election Campaign Act and FEC regulations. However, the Commission failed to issue an advisory opinion. Unquestionably it failed to provide adequate notice that this activity would later be interpreted to violate the Act. Indeed, the Commission subsequently did not find that the NRSC violated the Act. But for the district court's decision in DSCC v. FEC, which was not appealed, the Commission would not have made a reason to believe finding in this matter.

A copy of the GE opinion is enclosed for your reference. Please contact me if you have any questions

Sincerely,

Jan Witold Baran

Encl.
cc: John Heubusch

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GENERAL ELECTRIC COMPANY,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

No. 93-1807.

United States Court of Appeals, District of Columbia Circuit.

Argued Feb. 3, 1995.

Decided May 12, 1995.

As Corrected June 19, 1995.

Company charged with violating polychlorinated biphenyl (PCB) regulations under Toxic Substances Control Act petitioned for review of order of Environmental Protection Agency (EPA) imposing $25,000 fine. The Court of Appeals, Tatel, Circuit Judge, held that: (1) EPA's interpretation of regulations mandating disposal of dirty PCB solvent through incineration as requiring immediate incineration of entire mixture drained from transformer, with no intervening distillation, was permissible, but (2) EPA did not provide company with fair warning of its interpretation of regulations, which were unclear, and EPA therefore could not hold company responsible for actions charged.

Ordered accordingly.

1. Administrative Law and Procedure ⇐413

Policy favoring deference to administrative agency's interpretation of its own regulations is particularly important where technically complex statutory scheme is backed by even more complex and comprehensive set of regulations.

2. Administrative Law and Procedure ⇐413

Statutes ⇐219(1)

Court of Appeals may defer to agency's reading of statute even where that reading would not be obvious to most astute reader, even where petitioner advances more plausible reading of regulations than that offered by agency, it is agency's choice that receives substantial deference.

3. Administrative Law and Procedure ⇐413, 423.1

Through policy of deference to agency's interpretation of its own regulations, agencies, not courts, retain control over which permissible reading of regulations they will enforce, which is appropriate, as it is agencies, not courts, that have technical expertise and political authority to carry out statutory mandates.

4. Health and Environment ⇐25.5(5.5)

Environmental Protection Agency's (EPA's) interpretation of Toxic Substances Control Act regulations mandating disposal of dirty polychlorinated biphenyl (PCB) solvent through incineration as requiring immediate incineration of entire mixture drained from transformer, with no intervening distillation, was permissible; EPA could permissibly conclude that distillation was type of "disposal," it reasonably asserted that distillation was different in kind from mere pre-incineration storage or transportation, for which there was implicit permission, and it permissibly concluded that regulation allowing parties to process PCBs for purposes of disposal as exemption to "use" regulations which did not authorize parties to "dispose" of PCB liquids except as authorized by disposal regulations. Toxic Substances Control Act, § 6(e), as amended, 15 U.S.C.A. § 2605(e); 40 C.F.R. §§ 761.3, 761.20(c)(2), 761.60(a), (b)(1)(i)(B).

See publication Words and Phrases for other judicial constructions and definitions.

5. Constitutional Law ⇐278(1.1)

Due process requires that parties receive fair notice before being deprived of property. U.S.C.A. Const.Amend. 14.

6. Constitutional Law ⇐318(1)

Absent notice, such as where regulation is not sufficiently clear to warn party of what is expected of it, agency may not deprive party of property by imposing civil or criminal liability. U.S.C.A. Const.Amend. 14.

7. Administrative Law and Procedure ⇐408, 413

Although agency must always provide fair notice of its regulatory interpretations to regulated public, in many cases agency's pre-enforcement efforts to bring about compliance will provide adequate notice. U.S.C.A. Const.Amend. 14.

8. Administrative Law and Procedure ⇐409, 413

If agency informs regulated party that it must seek permit for particular process, but party begins processing without seeking permit, agency's pre-violation contact with regulated party has provided requisite notice, and Court of Appeals will enforce finding of liability as long as agency's interpretation of regulation being enforced was permissible. U.S.C.A. Const.Amend. 14.

9. Administrative Law and Procedure ⇐409, 413, 423.1

If agency provides no pre-enforcement warning, effectively deciding to use citation or other punishment as initial means for announcing particular interpretation of regulation, or for making its interpretation clear, Court of Appeals must ask whether regulated party received, or should have received, notice of agency's interpretation by reading regulations; if, by reviewing regulations and other public statements issued by agency, regulated party acting in good faith would be able to identify, with ascertainable certainty, standard with which agency expects party to conform, then agency has fairly notified party of agency's interpretation. U.S.C.A. Const.Amend. 14.

10. Health and Environment ⇐25.5(5.5)

Environmental Protection Agency (EPA) did not provide sanctioned company with adequate notice of EPA's interpretation of Toxic Substances Control Act regulations as requiring immediate incineration of dirty polychlorinated biphenyl (PCB) solvent drained from transformer, with no intervening distillation, and, thus, EPA could not hold company responsible, either financially or in future enforcement proceedings, for noncompliance; regulations apparently permitted distillation, regulations under EPA's interpretation would apparently not authorize on their face any steps between draining of fluid and its incineration, even though such steps were necessary, there had been difficulty in even identifying portion of regulation applicable to disposal of dirty solvent, there had been confusion at regional level as to necessity of EPA authorization for distillation, policy statement on PCB "separation activities" did not provide sufficiently clear notice of EPA's interpretation, and company's seeking permit for alternative method of disposing of entire transformers did not establish that it was on notice. U.S.C.A. Const.Amend. 14; Toxic Substances Control Act, §§ 2-30, as amended, 15 U.S.C.A. §§ 2601-2629; 40 C.F.R. §§ 761.20(c)(2), 761.60(a), (b)(1)(i)(B), 761.3.

Petition for Review of an Order of the Environmental Protection Agency.

Andrew J. Pincus, Washington, DC, argued the cause, for petitioner. With him on the briefs, were John J. Sullivan, John P. Schmitz, Washington, DC, and Francis S. Blake, Schenectady, NY.

Robert I. Dodge, Atty., U.S. Dept. of Justice, Washington, DC, argued the cause, for respondent. With him on the brief were Lois J. Schiffer, Asst. Atty. Gen., U.S. Dept. of Justice and James H. Curtin, Atty., U.S. E.P.A., Washington, DC. Mary E. Cheaves and Russell M. Young, Washington, DC, entered appearances.

Before: WALD, SILBERMAN, and TATEL, Circuit Judges.

TATEL, Circuit Judge:

The Environmental Protection Agency fined the General Electric Company $25,000 after concluding that it had processed polychlorinated biphenyls in a manner not authorized under EPA's interpretation of its regulations. We conclude that EPA's interpretation of those regulations is permissible, but because the regulations did not provide GE with fair warning of the agency's interpretation, we vacate the finding of liability and set aside the fine.

I.

GE's Apparatus Service Shop in Chamblee, Georgia decommissioned large electric transformers. Inside these transformers was a "dielectric fluid" that contained high concentrations of polychlorinated biphenyls ("PCBs"), which are good conductors of electricity. PCBs are also dangerous pollutants. "[A]mong the most stable chemicals known," they are extremely persistent in the environment and have both acute and chronic affects on human health. 3 William H. Rodgers, Environmental Law § 6.9, at 461 (1988) (internal quotation marks and citations omitted). Recognizing the dangers of PCBs, Congress has required their regulation under the Toxic Substances Control Act. 15 U.S.C. §§ 2601–29 (1988 & Supp. V 1993) ("TSCA"); *id.* at § 2605(e). Pursuant to TSCA, the EPA promulgated detailed regulations governing the manufacture, use, and disposal of PCBs. *See* 40 C.F.R. pt. 761 (1994).

Because GE's transformers were contaminated with PCBs, the company had to comply with the disposal requirements of 40 C.F.R. § 761.60. Section 761.60(b)(1) requires the disposal of transformers by either incinerating the transformer, 40 C.F.R. § 761.60(b)(1)(i)(A), or by placing it into a chemical waste landfill after the PCB-laced dielectric fluid has been drained and the transformer rinsed with a PCB solvent, *id.* at [illegible]. GE chose the "drain-and-landfill" option of section 761.60(b)(1)(i)(B).

The drain-and-landfill alternative required GE to dispose of the liquid drained from the transformer "in accordance with" the terms of section 761.60(a). *Id.* Since the dielectric fluid contained extremely high concentrations of PCBs, the relevant provision of section 761.60(a) was section (1), a catch-all section applicable to liquids contaminated with more than 500 parts per million ("ppm") of PCBs. This section required those disposing of these particularly dangerous materials to do so solely by incineration in an approved facility. 40 C.F.R. § 761.60(a). In accord with that requirement, GE incinerated the dielectric fluid after draining it from the transformers. It then soaked the transformers in a PCB solvent—in this case, freon—for 18 hours, drained the contaminated solvent, and immediately incinerated it as well.

In March, 1987, GE changed these procedures, beginning a process that ultimately led to the EPA complaint in this case. While GE continued to incinerate the dielectric fluid, it began a recycling process that recovered a portion of the dirty solvent through distillation. After soaking the transformer, GE poured the dirty solvent into a still that heated the freon, boiling off about 90% of it. The 10% of the liquid that was left, which was highly contaminated with presumably all the PCBs that had been rinsed from the transformer, was immediately incinerated. Meanwhile, the vapor from the still was cooled, recondensing into nearly pure liquid freon that contained less than the regulatory threshold of 50 ppm PCBs and, as an administrative law judge later found, probably less than the detectable level of 2 ppm. *See General Electric Co.*, EPA Docket No. TSCA-IV-89-0016, 1992 TSCA LEXIS 2, at *69 (Feb. 7, 1992) [hereinafter *ALJ Decision*]. GE then used this recycled solvent to rinse other transformers.

GE and EPA agree that the regulations require the incineration of the solvent. They disagree about whether the intervening distillation and recycling process violated the regulations. EPA argues that section 761.60(b)(1)(i)(B) required GE to dispose of all the dirty solvent "in accordance with the requirements of [section 761.60(a)(1)]"—i.e., by immediate incineration. § 761.60(b)(1)(i)(B). GE did not think that section prohibited it from taking intermediate steps like distillation prior to incinerating the PCBs. To GE, distillation was permitted by section 761.20(c)(2), which allows the processing and distribution of PCBs "for purposes of disposal in accordance with the requirements of § 761.60." 40 C.F.R. § 761.20(c)(2). GE believed that this section authorized intermediate processing "for purposes of disposal"—processing such as distillation—as long as it complied with the other requirements of the PCB regulations like those relating to the management of spills, storage, and labelling of PCB materials. EPA has not alleged that GE's distillation process failed to comply with those requirements. In fact, as the ALJ later concluded, distillation reduced the amount of contaminated materials, thus producing environmental benefits. *See ALJ Decision*, 1992 TSCA LEXIS 2, at *73.

Despite those benefits, EPA charged the company with violating the PCB disposal regulations. After a hearing, an ALJ agreed and assessed a $25,000 fine. On appeal, the Environmental Appeals Board modified the ALJ's reasoning, but agreed with the disposition of the complaint and upheld the $25,000 penalty. *See General Electric Co.*, TSCA Appeal No. 92-2a, 1993 TSCA LEXIS 265 (Envtl.App.Bd., Nov. 1, 1993) [hereinafter *Appeal Decision*]. In other proceedings, the agency found the company liable for distillation it performed in six other locations, but suspended the fines for those violations pending the outcome of this appeal.

II.

[1] GE argues that EPA's complaint is based on an arbitrary, capricious, and otherwise impermissible interpretation of its regulations. *See* 5 U.S.C. § 706(2)(A) (1988). To prevail on this claim, GE faces an uphill battle. We accord an agency's interpretation of its own regulations a "high level of deference," accepting it "unless it is plainly wrong." *General Carbon Co. v. OSHRC*, 860 F.2d 479, 483 (D.C.Cir.1988) (internal punctuation and citations omitted); *see also Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390, 1395 (D.C.Cir.1991) (court will not reverse unless interpretation is "plainly erroneous or inconsistent with the regulation" (internal punctuation and citation omitted)). Under this standard, we must defer to an agency interpretation so long as it is "logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function." *Rollins Envtl. Servs., Inc. v. EPA*, 937 F.2d 649, 652 (D.C.Cir. 1991). The policy favoring deference is particularly important where, as here, a technically complex statutory scheme is backed by an even more complex and comprehensive set of regulations. In such circumstances, "the arguments for deference to administrative expertise are at their strongest." *Psychiatric Inst. of Washington, D.C. v. Schweiker*, 669 F.2d 812, 813–14 (D.C.Cir. 1981); *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 865, 104 S.Ct. 2778, 2792, 81 L.Ed.2d 694 (1984).

[2] In adhering to this policy, we occasionally defer to "permissible" regulatory interpretations that diverge significantly from what a first-time reader of the regulations might conclude was the "best" interpretation of their language. *Cf. American Fed. Gov't Employees v. FLRA*, 778 F.2d 850, 856 (D.C.Cir.1985) ("As a court of review . . . we are not positioned to choose from plausible readings the interpretation we think best." (internal punctuation and citation omitted)). We may defer where the agency's reading of the statute would not be obvious to "the most astute reader." *Rollins*, 937 F.2d at 652. And even where the petitioner advances a more plausible reading of the regulations than that offered by the agency, it is "the agency's choice [that] receives substantial deference." *Id.*

[3] Through this policy of deference, agencies, not courts, retain control over which permissible reading of the regulations they will enforce. Appropriately so, since it is the agencies, not the courts, that have the technical expertise and political authority to carry out statutory mandates. *See Chevron*, 467 U.S. at 864–66, 104 S.Ct. at 2792–93.

[4] In this case, EPA's Appeals Board concluded that section 761.60(b)(1)(i)(B) of the regulations required GE to dispose of the dirty solvent "in accordance with" a disposal method approved under section 761.60(a). Because distillation was not such a method, it concluded that GE had violated the regulations. GE argues that EPA's reading of the regulations is impermissible because all the solvent was eventually incinerated, because distillation is not a means of disposal but merely pre-disposal processing, and because the regulations explicitly allow pre-disposal processing to occur prior to the ultimate incineration. While GE's claims have merit, they do not demonstrate that the agency's interpretation of this highly complex regulatory scheme is impermissible.

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Section 761.60(b)(1)(i)(B) required the incineration of the dirty solvent. GE argues that it complied with this requirement since all the solvent was or ultimately would have been incinerated: it immediately incinerated the concentrated PCB liquid left in the still, while the "clean," distilled solvent would also be incinerated—that is, eventually incinerated—since 40 C.F.R. § 761.1(b), known as the "anti-dilution" provision, required GE to treat the clean solvent as if it contained the same concentration of PCBs as the more highly contaminated PCB liquids with which it had been in contact. *See Rollins*, 937 F.2d at 652. To the EPA, however, the regulation required immediate incineration of the entire mixture drained from the transformer. While GE is correct that section 761.60(b)(1)(i)(B) does not explicitly impose such a requirement, the agency's reading is plausible.

GE complains that distillation could not have violated the disposal requirements because it is not a means of "disposal." But the regulations broadly define "disposal" to include "actions related to containing, transporting, destroying, degrading, decontaminating, or confining PCBs and PCB Items." 40 C.F.R. § 761.3. It was therefore permissible for EPA to conclude that distillation was a type of disposal, and, since section 761.60(a) does not authorize distillation as a means of disposal, to conclude that the process violated section 761.60(b)(1)(i)(B). After although through distillation nearly 90% of the liquid avoided, until some time in the future, the imminent incineration that EPA interpreted section 761.60(b)(1)(i)(B) to require.

Finally, GE asserts that the agency's reading would illogically bar all handling of PCB liquids after they were drained from transformers, including the storage and transportation of PCB liquids to their incineration site. EPA responds, not unreasonably, that such "incidental" treatment of the dirty solvent is implicitly authorized by the disposal regulations. In contrast, the agency argues, no such implicit permission exists for distillation, a process which alters the physical state of PCB liquids and is thus of a different kind and quality than mere storage or transportation. According to GE, no implicit permission is necessary since distillation merely involves processing PCBs "for purposes of disposal," and section 761.20(c)(2) explicitly allows parties to process PCBs "for purposes of disposal." But the agency points out—again, not unreasonably—that section 761.20(c)(2) is contained in and is an exemption to the "use" regulations. Thus, the agency claims, although section 761.20(c)(2) authorizes "use" of PCBs, it does not authorize parties to *dispose* of PCB liquids in any way other than through those processes authorized by the disposal regulations.

Particularly in the context of this comprehensive and technically complex regulatory scheme, EPA's interpretation of the regulations is permissible. Although GE's interpretation may also be reasonable, at stake here is the proper disposal of a highly toxic substance. We defer to the reasonable judgment of the agency to which Congress has entrusted the development of rules and regulations to ensure its safe disposal.

Had EPA merely required GE to comply with its interpretation, this case would be over. But EPA also found a violation and imposed a fine. Even if EPA's regulatory interpretation is permissible, the company argues, the violation and fine cannot be sustained consistent with fundamental principles of due process because GE was never on notice of the agency interpretation it was fined for violating. It is to this issue that we now turn.

III.

[5, 6] Due process requires that parties receive fair notice before being deprived of property. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). The due process clause thus "prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C.Cir.1986). In the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability. Of course, it is in the context of criminal liability that this "no punishment without notice" rule is most commonly applied. *See, e.g., United States v. National Dairy Corp.*, 372 U.S. 29, 32–33, 83 S.Ct. 594, 598, 9 L.Ed.2d 561 (1963) ("[C]riminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed."). But as long ago as 1968, we recognized this "fair notice" requirement in the civil administrative context. In *Radio Athens, Inc. v. FCC*, we held that when sanctions are drastic—in that case, the FCC dismissed the petitioner's application for a radio station license—"elementary fairness compels clarity" in the statements and regulations setting forth the actions with which the agency expects the public to comply. 401 F.2d 398, 404 (D.C.Cir.1968); *see also Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1558 (D.C.Cir.1987) (describing FCC's legal duty to provide adequate notice of requirements). This requirement has now been thoroughly "incorporated into administrative law." *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C.Cir.1987); *see also Rollins*, 937 F.2d at 654 n. 1, 655 (Edwards, J., dissenting in part and concurring in part) (principle is not constitutional, but "basic hornbook law in the administrative context," and "simple principle of administrative law").

[7–9] Although the agency must always provide "fair notice" of its regulatory interpretations to the regulated public, in many cases the agency's pre-enforcement efforts to bring about compliance will provide adequate notice. If, for example, an agency informs a regulated party that it must seek a permit for a particular process, but the party begins processing without seeking a permit, the agency's pre-violation contact with the regulated party has provided notice, and we will enforce a finding of liability as long as the agency's interpretation was permissible. In some cases, however, the agency will provide no pre-enforcement warning, effectively deciding "to use a citation [or other punishment] as the initial means for announcing a particular interpretation"—or for making its interpretation clear. *E.g. Martin v. OSHRC*, 499 U.S. 144, 158, 111 S.Ct. 1171, 1180, 113 L.Ed.2d 117 (1991) (noting that such a decision may raise a question about "the adequacy of notice to regulated parties"). This, GE claims, is what happened here. In such cases, we must ask whether the regulated party received, or should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations. If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with "ascertainable certainty," the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation. *See Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir.1976).

Three recent cases in this circuit illustrate the application of the fair notice rule to agency regulatory interpretations. *Gates & Fox Co. v. OSHRC* involved OSHA regulations that required employers who were constructing tunnels to provide emergency breathing equipment for employees working on the "advancing face" of the tunnel, and also required "[s]uch equipment . . . [to] be on the haulage equipment and in other areas where employees might be trapped by smoke or gas." 790 F.2d at 155 (citation omitted). An OSHA investigator cited Gates & Fox for not providing breathing equipment in an area in which, while nowhere near an "advancing face," employees might nonetheless have been "trapped by smoke or gas." *Id.* The agency's Review Commission was unable to agree on whether the regulation could be read to require breathing equipment in such areas. It compromised by finding a violation, although not a willful one. Writing for the court, then-Judge Scalia concluded that OSHA had not provided Gates & Fox with "constitutionally adequate notice." *Id.* at 156. Pointing out that the language of the regulation regarding "areas where employees might be trapped" could "reasonably be read to refer only to . . . areas near an advancing face," we held that the regulation failed to "give fair notice" that breathing equipment was necessary in *all* areas where employees might be trapped. *Id.* However, we "expressed no opinion on whether, in a non-penal context, the [agency's] interpretation of [the regulation] might be permissible." *Id.*

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We therefore left open the possibility that we would have deferred to the agency's interpretation had it merely required Gates & Fox to provide such apparatus and not punished it until after it had given notice of that requirement.

In *Satellite Broadcasting Co. v. FCC*, the FCC dismissed Satellite's application for a microwave radio station because it was filed in Washington, D.C., not in Gettysburg, Pa., as the FCC determined the regulations to require. But the specific regulation governing the filing of the application was silent on the appropriate location to file, and other regulations offered "baffling and inconsistent" advice. 824 F.2d at 2. Assuming "arguendo" that the interpretation was permissible, we ruled that the Commission should not have dismissed Satellite's application: "[T]he Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules. . . . The agency's interpretation is entitled to deference, but if it wishes to use that interpretation to cut off a party's right, it must give full notice of its interpretation." *Id.* at 4.

In *Rollins Environmental Services, Inc. v. EPA*, as in this case, the EPA accused the petitioner of failing properly to incinerate a solvent that it had used to rinse out containers—in that case, concrete basins—that had once contained PCBs. 937 F.2d at 651. The relevant rule for rinsing basins stated that "[t]he solvent may be reused for decontamination until it contains 50 ppm PCB. The solvent shall then be disposed of as a PCB in accordance with § 761.60(a)." *Id.* (citation omitted). Rollins reused the solvent several times, but it never reached a concentration of 50 ppm PCBs, and so Rollins disposed of the solvent in a way that was not TSCA-approved. An ALJ found a violation of the regulation, but a second ALJ assessed no financial penalty because he thought the regulations "unclear" and that Rollins' interpretation "had a definite plausibility." *Id.* On appeal within the agency, the reviewing officer concluded that the regulation was clear and imposed a $25,000 fine. *Id.* at 652.

Although we held that EPA's interpretation of the regulations was permissible, we agreed with the second ALJ that the language of the regulation was ambiguous and that both interpretations were reasonable. We also pointed out that "significant disagreement" existed among EPA's various offices regarding the proper interpretation of the language. *Id.* at 653. But Rollins had failed to raise the due process issue in his briefs or before the agency, so we allowed the violation to stand. Nonetheless, we concluded that the ambiguity of the regulation justified rescinding the fine against Rollins under TSCA's mitigation provision, which required the agency to take into account the "extent, and gravity of the violation . . . the degree of culpability, and such other matters as justice may require" in setting the amount of the penalty. *Id.* at 654 (citing 15 U.S.C. § 2615(a)(2)(B)). Dissenting in part, now-Chief Judge Edwards concluded that Rollins had adequately raised the "fair notice" issue and that the regulation clearly did not provide fair notice. He would have vacated the violation altogether, thereby precluding the EPA from using the violation as a basis for increasing fines against the company in later liability proceedings. *Id.* at 654–57 & n. 2.

[10] Unlike in *Rollins*, GE has clearly raised the due process "notice" issue in this case. Although we defer to EPA's interpretation regarding distillation because it is "logically consistent with the language of the regulation[s]," *Rollins*, 937 F.2d at 652, we must, because the agency imposed a fine, nonetheless determine whether that interpretation is "ascertainably certain" from the regulations, *see Diamond Roofing*, 528 F.2d at 649. As in *Gates & Fox* and *Satellite Broadcasting*, we conclude that the interpretation is so far from a reasonable person's understanding of the regulations that they could not have fairly informed GE of the agency's perspective. We therefore reverse the agency's finding of liability and the related fine.

On their face, the regulations reveal no rule or combination of rules providing fair notice that they prohibit pre-disposal processes such as distillation. To begin with, such notice would be provided only if it was "reasonably comprehensible to people of good faith" that distillation is indeed a means

of "disposal." *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1358 (D.C.Cir.1993) (internal punctuation, citations, and emphasis omitted). While EPA can permissibly conclude, given the sweeping regulatory definition of "disposal," that distillation is a means of disposal, such a characterization nonetheless strays far from the common understanding of the word's meaning. *Cf. American Mining Congress v. EPA*, 824 F.2d 1177, 1184 (D.C.Cir.1987) (noting that the plain meaning of the term "discarded" was "disposed of," "thrown away," or "abandoned"). A person "of good faith," *McElroy*, 990 F.2d at 1358, would not reasonably expect distillation—a process which did not and was not intended to prevent the ultimate destruction of PCBs—to be barred as an unapproved means of "disposal."

Not only do the regulations fail clearly to bar distillation, they apparently permit it. Section 761.20(c)(2) permits processing and distribution of PCBs "for purposes of disposal." This language would seem to allow parties to conduct certain pre-disposal processes without authorization as long as they facilitate the ultimate disposal of PCBs and are done "in compliance with the requirements of this Part"—i.e., in accordance with other relevant regulations governing the handling, labelling, and transportation of PCBs. § 761.20(c)(2). EPA argues—permissibly, as we concluded above—that the section allows parties to "use" PCBs in the described manner, but that those uses must still comply with the disposal requirements of section 761.60, including the requirement that unauthorized methods of disposal receive a disposal permit from the agency. This permissible interpretation, however, is by no means the most obvious interpretation of the regulation, particularly since, under EPA's view, section 761.20(c)(2) would not need to exist at all. If every process "for purposes of disposal" also requires a disposal permit, section 761.20(c)(2) does nothing but lull regulated parties into a false sense of security by hinting that their processing "for purposes of disposal" is authorized. While the mere presence of such a regulatory trap does not reflect an irrational agency interpretation, *see Radio Athens*, 401 F.2d at 404 ("[T]he process of interpretation is never completely devoid of surprise."), it obscures the agency's interpretation of the regulations sufficiently to convince us that GE did not have fair notice that distillation was prohibited.

GE points out that if section 761.20(c)(2) is applied as EPA interprets it, the regulations apparently would not authorize, on their face, *any* steps between the draining of the fluid and its incineration even though such steps are clearly necessary. Drained fluids, for example, must be stored and transported to the incinerator. According to GE, section 761.20(c)(2) provides explicit permission for these pre-disposal processes, while under EPA's view, such incidental processes would require permits. But the agency has never imposed such a broad permit requirement on this type of intermediate PCB "processing." To avoid this inconsistency, the agency argues that while storage, transportation, and other "processing steps that are truly incidental and necessary to the disposal methods prescribed by the regulations" do require authorization other than that in section 761.20(c)(2), authorization for such steps is nonetheless "implicit" in section 761.60's disposal regulations. Government Brief at 27. Although this reading is certainly permissible, the agency presents it for the first time in this appeal, and it represents a further stretching of the regulations, reinforcing our conclusion that GE did not have fair notice of the agency's interpretation. Indeed, the agency itself has recognized that its interpretation of section 761.20(c)(2) is not apparent. It has recently proposed new regulations that would make this implicit waiver for incidental pre-disposal processing explicit by "clarifying" section 761.20(c)(2). *See* Disposal of Polychlorinated Biphenyls, 59 Fed.Reg. 62788, 62802 (1994) (to be codified at 40 C.F.R. pt. 761) (proposed Dec. 6, 1994).

The location in which EPA has proposed to codify these new regulations adds to our concern about the clarity of the present ones. The new regulations apply to section 761.20(c)(2), and are intended, according to the agency, to "clarify[ ] how [§ 761.20(c)(2)] applies to the *disposal* of all PCBs." 59 Fed.Reg. at 62802 (emphasis added). To us, this seems to contradict EPA's assertion here that section 761.20(c)(2) does not apply

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to *disposal* of PCBs, but only to their use. If, as the agency asserts, section 761.20(c)(2) merely authorizes the "use" of pre-disposal activities, and that it is section 761.60 which "implicitly" permits incidental processing, then the agency should have added the recent language making that permission explicit to section 761.60, not to section 761.20(c)(2). By "clarifying" that section 761.20(c)(2) fully authorizes incidental pre-disposal activities, EPA lends support to GE's argument that, prior to the amendments, section 761.20(c)(2) fully authorized all pre-disposal processing "for purposes of disposal," and that the company could not therefore have been on notice of the agency's contrary interpretation.

Our concern about the regulations' lack of clarity is heightened by several additional factors. First, GE and EPA have had considerable difficulty even identifying which portion of section 761.60(a) applied to the disposal of the dirty solvent. Section 761.60(a) sets forth several different sets of disposal options depending on the type of contaminated material and its level of contamination. As the ALJ found, tests of the distillation process in this case showed that the dirty solvent contained PCBs well in excess of 50,000 ppm. The only portion of section 761.60(a) that applies to such highly concentrated PCB materials in section 761.60(a)(1), which directs, without exception, the incineration of the material. As the ALJ recognized, section 761.60(a)(3), which would [illegible] solvent with concentrations between 5[illegible]00 ppm, is not applicable in this case. *See ALJ Decision*, 1992 TSCA LEXIS 2, at *57. Yet, EPA's original complaint, the decision of the Appeals Board, and EPA's brief before this court all rely on section 761.60(a)(3) rather than (a)(1). *See* Complaint, EPA Docket No. TSCA-IV-89-0016 (May 12, 1989), in Joint Appendix (J.A.) at 14 (listing processes authorized by section 761.60(a)(3) as the only authorized means of disposal); *Appeal Decision*, 1993 TSCA LEXIS 265, at *25-26 & n. 16 (citing section 761.60(a)(3) as relevant); Government Brief at vi (labelling section 761.60(a)(3) as a section upon which its brief "principally relies"). GE did not discover this error until its reply brief. Such confusion does not inspire confidence in the clarity of the regulatory scheme.

Second, as both *Gates & Fox* and *Rollins* recognized, it is unlikely that regulations provide adequate notice when different divisions of the enforcing agency disagree about their meaning. Such is the case here. In 1984, one EPA regional office concluded that companies could distill PCB materials without seeking additional authorization from the EPA. *See* Letter from EPA Region IV to American Industrial Waste, Inc. (July 5, 1984), *in* J.A. at 99. Although GE never proved it, the company asserted in its initial replies to the agency that a second regional office had told it the same thing. *See* Letter from GE Counsel to EPA (July 9, 1987), *in* J.A. at 67. While we accept EPA's argument that the regional office interpretation was wrong, confusion at the regional level is yet more evidence that the agency's interpretation of its own regulation could not possibly have provided fair notice.

Finally, EPA's position regarding the basis for GE's liability has subtly shifted throughout this case. The agency initially premised GE's liability on the company's failure to seek a permit for the distillation process. The original discussions between GE and EPA, as well as the ALJ's decision, presumed that distillation could be conducted only with a permit issued under section 761.60(e), which provides for "alternative methods" of destroying PCBs. 40 C.F.R. § 761.60(e). It is not at all obvious, however, that section 761.60(e) provides authority to issue a permit for this distillation process: the alternate methods of disposal approved through section 761.60(e)'s process are explicitly authorized as alternatives only for fluids governed by sections 761.60(a)(2) and (3), neither of which apply here because they address the disposal of fluids with PCB concentrations much lower than the dirty solvent in this case. And, as the Environmental Appeals Board recognized, section 761.60(e) only allows permits for alternative methods of PCB "*destruction*," and distillation is not destruction, but separation. *Id.* (emphasis added); *see Appeal Decision*, 1993 TSCA LEXIS 265, at *38-39. Recognizing the uncertain regulatory source for the permit requirement, the Appeals Board was forced to reject the ALJ's analysis and to conclude that the permit provisions were irrelevant. *Id.* at *39-41. Thus, even the agency's own interpretive bodies were unable to discern clearly whether the initial basis for GE's liability—failing to get a permit for distillation—was required or even provided for in the regulations. EPA can hardly hold GE liable for adopting a reasonable alternative reading of the regulations that alleviated this confusion altogether.

Notwithstanding the lack of clarity in the regulations themselves, the agency argues that GE was nevertheless on notice of its interpretation. It begins by pointing to a policy statement on PCB "separation activities" issued in 1983, claiming that it provided a sufficiently clear statement of its belief that distillation required agency approval. We disagree. Although some language in that policy statement does appear to address activities like distillation, requiring further approval for "activities that can be construed to be part of, or an initiation of a disposal activity," the statement's primary focus is on preventing parties from using such processes to circumvent the disposal requirements. EPA, TSCA Compliance Program Policy No. 6-PCB-2 at 1 (August 16, 1983), *in* J.A. at 23. As the statement notes, "it is possible to physically separate PCBs from liquids ... without EPA approval as long as these liquids ... are treated (used, stored, disposed of, etc.) as if they still contain their original PCB concentration." *Id.* at 2, *in* J.A. at 25. A reasonable interpretation of this language is that a physical separation process that is neither intended to nor actually avoids the disposal requirements for PCBs is permissible "without EPA approval" as long as it is handled in a manner consistent with the PCB regulations. GE's distillation was such a process, since the solvent was at all times handled as if it contained high concentrations of PCBs. EPA's contrary understanding of the policy statement's language is not so obvious that we consider GE to have had fair notice of the agency's reading.

Nor are we persuaded by EPA's argument that GE had actual notice of the regulatory requirements before and during 1987's distillation processing. EPA relies on the fact that in 1986, GE sought and received a permit for an alternative transformer disposal process which included distillation. That permit, however, was for a process that was an alternative to the suggested methods of disposing of *entire* transformers under section 761.60(b)(1). While GE sought a permit for that alternative, its decision to do so does not mean that it knew EPA required a permit for distillation in itself. Nor did an April, 1987, letter from EPA regarding distillation at GE's Cleveland facility provide GE with notice that it was violating the regulation. *See* Letter from EPA to GE (April 15, 1987), *in* J.A. at 65-66. That letter merely said that distillation may require a permit. As we have already pointed out, whether permits are required for distillation—let alone authorized under the regulations—is somewhat uncertain, and the EPA has argued here that the permit requirements are irrelevant. Furthermore, the letter does not require GE to get a permit; as the ALJ found, EPA "did not finally inform GE a permit was required until October 1, 1987," after GE had stopped using the process. *ALJ Decision*, 1992 TSCA LEXIS 2, at *70. Equally important, the April letter only asked GE to provide additional information about its distillation process. It did not categorically bar all types of distillation, did not direct GE to halt distillation processing, and, by requesting additional information, apparently left open the possibility that some types of distillation are authorized by the regulations. GE's response to the letter—that it believed that the regulations and policy statement only prohibited using distillation to circumvent the means of disposal required by section 761.60—reinforces the company's argument that it did not understand EPA to mean that distillation was impermissible per se. *See* Letter from GE General Counsel to EPA (July 9, 1987), *in* J.A. at 66-67. Because all the fluids involved were ultimately incinerated, GE reasonably believed that it had complied with the regulations, and the letter did not clearly put the company on notice that the agency believed otherwise.

We thus conclude that EPA did not provide GE with fair warning of its interpretation of the regulations. Where, as here, the

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regulations and other policy statements are unclear, where the petitioner's interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not "on notice" of the agency's ultimate interpretation of the regulations, and may not be punished. EPA thus may not hold GE responsible in any way—either financially or in future enforcement proceedings—for the actions charged in this case. Although we conclude that EPA's interpretation of the regulations is permissible, we grant the petition for review, vacate the agency's finding of liability, and remand for further proceedings consistent with this opinion.

So ordered.

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COMMISSION
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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 24, 1995

SENSITIVE

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

RE: MUR 3708
National Republican Senatorial Committee and
Maureen Goodyear, as treasurer

Dear Mr. Baran:

As you know, based on a complaint filed with the Federal Election Commission on November 19, 1992, and in accordance with a decision and orders by the District Court of the District of Columbia in DSCC v. FEC, Civil Action No. 1321 (HHG) (D.D.C. November 14, 1994 and March 2, 1995), on March 25, 1995, the Commission found that there was reason to believe that your clients, the National Republican Senatorial Committee and its treasurer violated 2 U.S.C. § 44a(f).

On October 17, 1995, the Federal Election Commission reviewed your September 8, 1995 counterproposal and failed to accept it. Accordingly, this matter will proceed to the next stage of enforcement.

After considering all the evidence available to the Commission, and in light of the District Court's decision and orders, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that a violation has occurred.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

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If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

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

Sincerely,

Lawrence M. Noble
General Counsel

Enclosure
Brief

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
National Republican Senatorial Committee	)	MUR 3708
	)	
Maureen Goodyear, as treasurer[1]	)	

GENERAL COUNSEL'S BRIEF

I. STATEMENT OF THE CASE

On March 21, 1995, the Federal Election Commission found reason to believe that the National Republican Senatorial Committee ("NRSC") and its treasurer (collectively, "Respondents") violated 2 U.S.C. § 441a(f) by exceeding the coordinated party expenditure limit of 2 U.S.C. § 441a(d)(3) in connection with the 1992 general election for U.S. Senate in Georgia. The Commission made its reason-to-believe finding pursuant to a U.S. District Court decision and order which declared the Commission's original dismissal of this complaint-generated matter to be contrary to law and directed the Commission to reopen the matter and initiate appropriate enforcement proceedings against the NRSC. The procedural history of this matter, including the district court decision, is described below.

II. PROCEDURAL HISTORY

This matter was initially generated by an administrative complaint filed by the Democratic Senatorial Campaign Committee

1. The NRSC filed an amended statement of organization on October 10, 1995 showing Maureen Goodyear as its new treasurer. James L. Hagen was treasurer of the NRSC at the time of the events at issue in this matter.

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("DSCC") on November 19, 1992, designated as Matter Under Review ("MUR") 3708. The DSCC alleged that the NRSC violated the Federal Election Campaign Act (the "Act") by exceeding the coordinated party expenditure limit of 2 U.S.C. § 441a(d)(3) in support of Republican Senate candidate Paul Coverdell in connection with Georgia's November 3, 1992 general election and a runoff election held on November 24, 1992.[2] The DSCC's complaint was filed the same day the Commission considered an Advisory Opinion Request from the NRSC asking whether an additional Section 441a(d) limit was available for the November 24, 1992 runoff. At the time NRSC made its Advisory Opinion Request, it had already made $535,607 in coordinated party expenditures on behalf of Coverdell for the November 3 general election, the maximum amount available for a general election pursuant to 2 U.S.C. § 441a(d)(3). The Commission failed by a vote of 3-3 to approve the General Counsel's Final Draft Advisory Opinion which concluded that no additional Section 441a(d) limit was available for the November 24 runoff. See Commission certification dated November 19, 1992 for Advisory Opinion Request 1992-39 and First Draft of Advisory Opinion 1992-39 dated November 18, 1992.

In considering the DSSC's complaint on April 27, 1993, the Commission was again equally divided on whether to approve the General Counsel's recommendation to find reason to believe that

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2. In 1992, Georgia law required a candidate for any office to obtain a majority of the votes cast in order to win an election. Since no Senate candidate received a majority of the vote for the U.S. Senate seat in the November 3, 1992 general election, a runoff election was held November 24, 1992.

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the NRSC had violated the Act. Accordingly, the Commission unanimously decided to close the file in MUR 3708. The Commissioners filed Statements of Reason for their votes, and on June 25, 1993, the DSCC filed suit in district court challenging the Commission's dismissal of its administrative complaint.

The district court issued its decision on the merits in the DSCC's lawsuit on November 14, 1994. DSCC v. FEC, Civil Action No. 93-1321 (HHG) (D.D.C. November 14, 1994). In that decision, the district court held that the Commission's dismissal of the DSCC's administrative complaint in MUR 3708 was contrary to law, and in accordance with 2 U.S.C. § 437g(a)(8)(C), ordered the Commission to conform to its declaration within 30 days, to vacate its dismissal of MUR 3708 and to initiate appropriate enforcement proceedings against the NRSC.[3]

In compliance with the court's decision and order, the Commission unanimously voted on December 13, 1994, to vacate its dismissal of MUR 3708, to reopen the matter consistent with the court's order and to notify the NRSC of its actions, giving them an opportunity to respond. Concurrently with the reopening of MUR 3708, on December 16, 1994, the Commission filed a motion with the district court seeking clarification of the district court's order. The motion requested the court to clarify whether the Commission could comply with its order by certifying

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3. The NRSC, an amicus in the district court proceeding, filed an Emergency Motion to Stay the November 14 Order, a Motion for Leave to Intervene and a proposed Motion to Reconsider the November 14 Decision and Order and Dismiss. The court denied those motions on December 6, 1994 and gave the Commission until January 15, 1995 to conform to its November 14 order.

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that, after considering the court's opinion and the administrative complaint, it was still unable to find reason to believe that the NRSC violated the Act, thereby allowing the court to permit complainant DSCC to bring its own action against Respondents pursuant to 2 U.S.C. § 437g(a)(8)(C).

The district court denied the Commission's motion to clarify on March 2, 1995, viewing it as a request to amend its order. The court ruled that "[t]he requested order would be contrary to the intention of the Court in issuing its order granting summary judgment in favor of the DSCC" and concluded that since it resolved the issues in favor of DSCC "it would be contrary to its Opinion to now permit the Commission to not find that the Act was violated." Consequently, on March 21, 1995 the Commission found reason to believe that the NRSC and its treasurer violated 2 U.S.C. § 441a(f).

III. ANALYSIS

A. Law

Section 441a of the Federal Election Campaign Act of 1971, as amended ("the Act"), sets forth limits on contributions that can be made to candidates and their authorized political committees as well as expenditures that can be made by party committees in connection with certain elections. See generally, 2 U.S.C. § 441a. Specifically, the Act prohibits multicandidate political committees, including party committees, from making contributions to authorized committees "with respect to any election for Federal office," which in the aggregate, exceed $5,000. 2 U.S.C. § 441a(a)(2)(A). This limitation on

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contributions applies separately with respect to each election. 2 U.S.C. § 441a(a)(6). In addition to contributions, national and state political party committees may each make limited expenditures "in connection with the general election campaign" of a candidate for federal office who is affiliated with such party. 2 U.S.C § 441a(d)(3); 11 C.F.R. § 110.7(b). The expenditure limit for election to office of Senator is the greater of $20,000 or 2 cents multiplied by the voting age population of the state in which the candidate is running. 2 U.S.C. § 441a(d)(3)(A). Annual increases in the expenditure limit are based on a formula set forth at 2 U.S.C. § 441a(c). The 1992 limit for the United States Senate general election campaign in Georgia was $267,803.52. Political committees are prohibited from knowingly making expenditures in violation of the Act. 2 U.S.C. § 441a(f).

The Act defines "election" in pertinent part as "a general, special, primary or runoff election." 2 U.S.C. § 431(1)(A). Although the Act does not define "general election," Commission regulations define it as:

> . . . an election which meets either of the following conditions:
>
> (1) An election held in even numbered years on the Tuesday following the first Monday in November is a general election.
>
> (2) An election held to fill a vacancy in a Federal office (i.e., a special election) and which is intended to result in the final selection of a single individual to the office at stake is a general election.

11 C.F.R. § 100.2(b). A special election is one held to fill a vacancy in a Federal office and may be a primary, general or

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runoff election. 11 C.F.R. § 100.2(f).

A runoff election, in turn, is defined, in pertinent part, as:

> . . . (2) The election held after a general election and prescribed by applicable State law as the means for deciding which candidate should be certified as an officeholder elect, is a runoff election.

11 C.F.R. § 100.2(d)(2).

B. Analysis

The district court's November 14, 1994 decision constitutes the law of this case. In assessing whether the NRSC violated 2 U.S.C. § 441a(f), the court examined the Commission's definitions of "general election" and "runoff election" found at 11 C.F.R. § 100.2 and concluded that under the plain meaning of those regulations, the November 24, 1992 election could be considered only a runoff election and not a general election. Consequently, the court determined that no additional Section 441a(d)(3) limit was available. See Decision and Order dated November 14, 1994, in DSCC v. FEC, Civil Action No. 93-1321 (HHG) (D.D.C. November 14, 1994) at pages 5 and 7-8 (cited hereafter as "Decision at page __").

In reaching its conclusion, the district court reasoned that the November 24 election failed to qualify as a general election since it was neither an election held on the Tuesday following the first Monday in November as defined at 11 C.F.R. § 100.2(b)(1) nor was it held to fill a "vacancy" as required in 11 C.F.R. § 100.2(b)(2). Decision at 6. In the court's view, no vacancy was created by the failure to elect a Senator in the November 3 election because a vacancy occurs "when an office is

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no longer occupied or when it is occupied by a person who has not been authorized by the voters to fill the office, such as when the elected officeholder dies or resigns." Id. The court found that neither of those situations existed in Georgia in November 1992, noting that Wyche Fowler, the incumbent Senator, had an "additional two months at minimum in which to occupy the office." Id. Further, the court reasoned that even if the November 24 election could be viewed as an election to fill a vacancy, that election "fits far more snugly and directly" into the regulatory definition of "runoff election" since it was held after a general election and prescribed by state law as the means for deciding which candidate should be certified as officeholder elect. Decision at pages 6-7.

The court further determined that the regulatory scheme of 11 C.F.R. § 100.2 precluded the November 24 election from being considered both a general election and a runoff election. According to the court, Commission regulations expressly state when the election definitions overlap. As an example, the court cited to the definition of "special election" at 11 C.F.R. § 100.2(f) which states that a "special election may be a primary, general or runoff election." Decision at 7. The absence of any similar statement recognizing that a runoff election could also be a general election was viewed by the court as "strong evidence" that such a conclusion could not be reached. Id.

In light of the district court's determination that the November 24 election was a runoff election, no additional

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Section 441a(d)(3) limit was available. The NRSC's disclosure reports show that it spent $509,570 in support of Coverdell for the November 24 election in addition to spending $535,607 on his behalf for the November 3 election. Since the total Section 441a(d)(3) coordinated expenditure limit available for the 1992 general election in Georgia was $535,607,[4] the NRSC exceeded the limit by $509,570.

Therefore, based on the foregoing and in accordance with the district court's decision and orders, this Office recommends that the Commission find probable cause to believe that the National Republican Senatorial Committee and Maureen Goodyear, as treasurer, violated 2 U.S.C. § 441a(f) by making excessive coordinated party expenditures in connection with the 1992 U.S. Senate election in Georgia.

IV. GENERAL COUNSEL'S RECOMMENDATION

Find probable cause to believe that the National Republican Senatorial Committee and Maureen Goodyear, as treasurer, violated 2 U.S.C. § 441a(f).

10-24-95
Date

Lawrence M. Noble
General Counsel

4. This amount represents the combined Section 441a(d)(3) limit available to the Republican National Committee ("RNC") and the Republican Party of Georgia ("RPG"). Both the RNC and the RPG apparently designated the NRSC as their agent for the purpose of expending these funds.

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WILEY, REIN & FIELDING

1776 K STREET, N.W.
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JAN WITOLD BARAN
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FACSIMILE
(202) 429-7049

November 9, 1995

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
NOV 13 9 45 AM '95

Ms. Marjorie W. Emmons
Commission Secretary
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 3708 (National Republican Senatorial Committee and Maureen Goodyear, as Treasurer)

Dear Ms. Emmons:

Enclosed please find the original and ten copies of the Respondent's Brief in the above-captioned matter filed pursuant to 11 C.F.R. § 111.16(c).

Sincerely,

Jan Witold Baran

cc: Maureen Goodyear
Lawrence M. Noble (3 copies)

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter Of	)	
	)	
National Republican Senatorial Committee and Maureen Goodyear, as Treasurer	)	MUR 3708

RESPONDENT'S BRIEF

The undersigned counsel, on behalf of the National Republican Senatorial Committee and Maureen Goodyear, as Treasurer ("Respondents") hereby file this Respondent's Brief in response to the General Counsel's Brief of October 24, 1995[1]. The General Counsel's Brief recommends that the Commission find probable cause to believe that Respondents violated the Federal Election Campaign Act of 1971, as amended ("Act"). Respondents urge the Commission to reject this recommendation and to take no further action in this matter.

Respondents incorporate in this response each of its previous responses with respect to this matter. Nonetheless, Respondents wish to highlight several pertinent facts which relate to this case.

1) The NRSC requested an advisory opinion from the FEC regarding whether it would be permitted to make coordinated expenditures with respect to the November 24, 1992 election in Georgia. The Commission failed to issue an opinion. It was only subsequent to this action that the NRSC made any expenditures in connection with the November 24, 1992 election.

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[1] Maureen Goodyear was not the Treasurer of the NRSC at the time of the activity in question.

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2) Consistent with its failure to issue an advisory opinion the Commission also failed to make a reason to believe finding against the NRSC in recognition that it had failed to notify the NRSC that making these coordinated expenditures would constitute a violation of the law and as an exercise of its prosecutorial discretion. [2]

3) The Commission subsequently made a reason to believe finding against Respondents only after being ordered to do so by the district court in DSCC v. FEC, Civil Action No. 1321 (HHG) (D.D.C. November 14, 1994 and March 2, 1995). Based on the pleadings before the District Court it is Respondents' understanding that this reason to believe finding does not represent the position of a majority of the Commission.

4) The Commission failed to appeal the district court's ruling and effectively blocked the NRSC from appealing that ruling.

5) The NRSC has cooperated with the Commission in attempting to settle this case prior to probable cause

Furthermore, Respondents note that this has become a perfunctory matter. The General Counsel's Brief is basically a recitation of the Commission's Factual and Legal Analysis in this matter. There have been no new developments, quite simply because the Commission refused to appeal the district court's decision. Unfortunately for all parties involved,

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[2] Interestingly enough, Respondents note that the three Commissioners recently released a Statement of Reasons in an enforcement action explaining that in their view the Commission could not proceed in the enforcement action because the Commission had voted 3-3 on the same issue with respect to an Audit. See Statement of Reasons in MUR 4192. These Commissioners appear to be taking the opposite position with respect to this matter.

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the Commission gained nothing by failing to appeal this case, but rather is repeating history. Once before the Commission failed to appeal a district court's order and then sued the NRSC after conciliation failed. The Court of Appeals reversed the district court, finding that no deference was due the district court order, and examined the Commission's initial decision. See FEC v. NRSC, 966 F.2d 1471 (D.C. Cir. 1992). Thus, should this matter also proceed further, there will be no deference to the district court in the end. Rather the Commission's initial decision not to find reason to believe will be scrutinized.

Against this background, the sole basis of the General Counsel's recommendation is the district court's ruling in DSCC v. FEC. However, the district court ordered the FEC to vacate its dismissal and initiate appropriate enforcement proceedings. DSCC v. FEC Order at p.9. In seeking clarification of that order the district court addressed whether it was necessary for the FEC to find "reason to believe" the NRSC violated the Act and found that the Commission would be acting contrary to its opinion if it did not make a reason to believe finding. See DSCC v. FEC, March 3, 1995 Order. The district court did not, however, compel the FEC to make a probable cause to believe finding nor does the General Counsel's Brief suggest that the FEC is required

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to make such a finding. The fact is that the Commission is not so required.

In sum, by making under compulsion a reason to believe finding, the Commission has fully complied with the district court's order in DSCC v. FEC. A probable cause vote is not necessary. Rather, the Commission may now, and should now vote to take no further action with respect to this matter in the exercise of the Commission's prosecutorial discretion as is its common practice. Given the procedural history of this case, taking no further action is the only equitable resolution to this matter.

Sincerely,

Jan Witold Baran
Counsel for the National
Republican Senatorial Committee
and Maureen Goodyear, as
Treasurer

November 9, 1995

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
National Republican Senatorial Committee and Maureen Goodyear, as treasurer[1]	)	MUR 3708
	)	

GENERAL COUNSEL'S REPORT **SENSITIVE**

I. BACKGROUND

On October 17, 1995, the Commission considered and failed to accept Respondents' pre-probable cause counteroffer in this matter which provided for admission of a violation but no civil penalty. Accordingly, this Office sent Respondents a General Counsel's Brief notifying them of our intent to recommend that the Commission find probable cause to believe that they violated 2 U.S.C. § 441a(f) by exceeding the coordinated party expenditure limit in connection with the 1992 U.S. Senate election in Georgia. Respondents submitted a response to the General Counsel's Brief on November 9, 1995. Attachment 1.

II. ANALYSIS (The General Counsel's Brief dated October 24, 1995 is incorporated herein by reference.)

Respondents contend that the Commission has fully complied with the District Court's remand order in DSCC v. FEC[2] by making a reason to believe finding in this matter and should now exercise its prosecutorial discretion and take no further action. Attachment 1 at 4. In support of their position, Respondents assert that the District Court, "did not. . . compel the FEC to make a probable cause to believe finding". Attachment 1 at 3. Respondents also reiterate their earlier argument that the procedural history of this case warrants an exercise of prosecutorial discretion to take no further action. Attachment 1 at 1-3.

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[1] The NRSC filed an amended Statement of Organization naming Ms. Goodyear as its new treasurer on October 10, 1995.

[2] Civil Action No. 4321 (HHG) (D.D.C. November 14, 1994).

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The District Court's decision declaring the Commission's dismissal of this case to be contrary to law concluded that under the plain meaning of Commission regulations, the November 24, 1992 election in Georgia was a runoff and thus, the Commission "erred in not finding that the NRSC violated the Act" when it spent in excess of $535,608. See November 14, 1994 decision by Judge Harold Greene in DSCC v. FEC at 8. Given the Court's unequivocal conclusion, a failure to find probable cause to believe that a violation occurred could be construed as inconsistent with the District Court's decision. Respondents' assertion that the District Court did not compel a probable cause finding when it ruled on the Commission's Motion to Clarify is unpersuasive since the issue before the Court in that Motion concerned only the Commission's ability to not make a reason to believe finding. No question concerning probable cause was before the Court. If any conclusion about a probable cause finding can be extrapolated from the Court's March 3 order, we believe it is the exact opposite of the position taken by Respondents. The Court's statement that ". . .it would be contrary to its [November 1994] Opinion to now permit the Commission to not find that the Act was violated" suggests that a probable cause finding, like a reason to believe finding, is necessary. See March 3, 1995 Order at 2.

Although we believe a probable cause finding is necessitated by the District Court's orders and decision, the Court clearly left to the Commission the issue of what an appropriate remedy for the violation would be in light of the procedural history of this case.. See e.g., March 3, 1995 Order at 2 (". . . the fairness issue could be addressed by the Commission when it considered what penalty would be appropriate"). Thus, after making a probable cause finding,

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the Commission may attempt to resolve this matter through a conciliation agreement with a token or no civil penalty or by taking no further action.

Based on the District Court's decision and orders, therefore, we recommend that the Commission find probable cause to believe that the National Republican Senatorial Committee and Maureen Goodyear as treasurer violated 2 U.S.C. § 441a(f). Moreover, we continue to believe the best course is to attempt to settle this matter through a conciliation agreement.

III. RECOMMENDATIONS

1. Find probable cause to believe the National Republican Senatorial Committee and Maureen Goodyear, as treasurer, violated 2 U.S.C. § 441a(f).

2. Approve the attached conciliation agreement and the appropriate letter.

11/28/95
Date

Lawrence M. Noble
General Counsel

Attachments
1. Respondents' Reply to General Counsel's Brief
2. Probable Cause Conciliation Agreement

Staff Assigned: Dawn M. Odrowski

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 3708
National Republican Senatorial	)	
Committee and Maureen Goodyear, as	)	
treasurer	)	

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on December 5, 1995, do hereby certify that the Commission decided by a vote of 5-0 to take the following actions in MUR 3708:

1. Find probable cause to believe the National Republican Senatorial Committee and Maureen Goodyear, as treasurer, violated 2 U.S.C. § 441a(f).

2. Approve the conciliation agreement and the appropriate letter as recommended in the General Counsel's November 28, 1995 report.

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

Attest:

12-6-95
Date

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

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 8, 1995

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

RE: MUR 3708
National Republican Senatorial Committee and
Maureen Goodyear, as treasurer

Dear Mr. Witold:

On December 5, 1995, the Federal Election Commission found that there is probable cause to believe your clients, the National Republican Senatorial Committee and Maureen Goodyear, as treasurer, violated 2 U.S.C. § 441a(f), a provision of the Federal Election Campaign Act of 1971, as amended, in connection with the making of excessive coordinated party expenditures for the 1992 U.S. Senate election in Georgia.

The Commission has a duty to attempt to correct such violations for a period of 30 to 90 days by informal methods of conference, conciliation, and persuasion, and by entering into a conciliation agreement with a respondent. If we are unable to reach an agreement during that period, the Commission may institute a civil suit in United States District Court and seek payment of a civil penalty.

Enclosed is a conciliation agreement that the Commission has approved in settlement of this matter. If you agree with the provisions of the enclosed agreement, please sign and return it, along with the civil penalty, to the Commission within ten days. I will then recommend that the Commission accept the agreement. Please make the check for the civil penalty payable to the Federal Election Commission.

If you have any questions or suggestions for changes in the enclosed conciliation agreement, or if you wish to arrange a meeting in connection with a mutually satisfactory

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conciliation agreement, please contact Dawn M. Odrowski, the attorney assigned to this matter, at (202) 219-3400.

Sincerely,

Lawrence M. Noble
General Counsel

Enclosure
Conciliation Agreement

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WILEY, REIN & FIELDING

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

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

FEB 7 1 11 PM '96

JAN WITOLD BARAN
(202) 429-7330

February 7, 1996

FACSIMILE
(202) 429-7049

Dawn M. Odrowski, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 3708, National Republican
Senatorial Committee and
Maureen Goodyear, as treasurer

Dear Ms. Odrowski:

Enclosed please find a signed conciliation agreement in the above-captioned matter and in response to your letter of this same day.

Please be advised that Ms. Maureen Goodyear who is mentioned in the caption is no longer Treasurer of the National Republican Senatorial Committee. Of course, as noted in this agreement, Ms. Goodyear was not Treasurer at the time of the events subject to this matter.

I trust that this case is now resolved.

Sincerely,

Jan Witold Baran

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
National Republican Senatorial Committee and	)	MUR 3708
Maureen Goodyear, as treasurer	)	

GENERAL COUNSEL'S REPORT

I. DISCUSSION

On December 5, 1995, the Commission found probable cause to believe that the National Republican Senatorial Committee and Maureen Goodyear, as treasurer ("Respondents") violated 2 U.S.C. § 441a(f) by exceeding the coordinated expenditure limit in connection with the 1992 U.S. Senate election in Georgia and approved a probable cause conciliation agreement

Respondents have submitted the attached conciliation agreement signed by counsel. Attachment 1. Respondents propose to pay the full civil penalty. No civil penalty check has yet been received.

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Accordingly, we recommend that the Commission accept the attached conciliation agreement submitted by the NRSC and close the file.

II. RECOMMENDATIONS

1. Accept the conciliation agreement with the National Republican Senatorial Committee and Maureen Goodyear, as treasurer.

2. Approve the appropriate letters.

3. Close the file.

2/8/96
Date

Lawrence M. Noble
General Counsel

Attachment
Proposed Conciliation Agreement
Redlined Copy of Conciliation Agreement

Staff Assigned: Dawn M. Odrowski

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 3708
National Republican Senatorial Committee and Maureen Goodyear, as treasurer	)	

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on February 13, 1996, do hereby certify that the Commission decided by a vote of 4-0 to take the following actions in MUR 3708:

1. Accept the conciliation agreement with the National Republican Senatorial Committee and Maureen Goodyear, as treasurer.

2. Approve the appropriate letters as recommended in the General Counsel's February 8, 1996 report.

3. Close the file.

Commissioners Aikens, Elliott, McGarry, and Thomas voted affirmatively for the decision; Commissioner McDonald was not present.

Attest:

2/13/96
Date

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

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

February 13, 1996

VIA FACSIMILE AND CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

Robert F. Bauer, Esq
Perkins Coie
607 Fourteenth Street, N.W.
Washington, DC 20005-2011

RE: MUR 3708

Dear Mr. Bauer:

This is in reference to the November 19, 1992 complaint filed with the Federal Election Commission by your client, the Democratic Senatorial Campaign Committee, concerning the making of excessive coordinated party expenditures by the National Republican Senatorial Committee ("NRSC") in connection with the 1992 U.S. Senate election in Georgia. As you know, on November 14, 1994, the U.S. District Court for the District of Columbia remanded this matter, known as MUR 3708, to the Commission with directions that the Commission conform with the court's declaration that the Commission's April 27, 1993 dismissal of this matter was contrary to law, and ordering the Commission to vacate its dismissal and initiate appropriate enforcement proceedings against the NRSC.

Accordingly, on December 13, 1994, the Commission voted to vacate its dismissal and to reopen MUR 3708; on March 21, 1995, the Commission found reason to believe that the NRSC and its treasurer violated 2 U.S.C. § 441a(f), a provision of the Federal Election Campaign Act of 1971, as amended, and on December 5, 1995, the Commission found that there was probable cause to believe that the NRSC and Maureen Goodyear, as treasurer ("Respondents"), violated 2 U.S.C. § 441a(f). On February 13, 1996, the Commission accepted a signed conciliation

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agreement submitted by Respondents and closed the file, thereby concluding this matter. A copy of the agreement is enclosed for your information.

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

Sincerely,

Dawn M. Odrowski

Dawn M. Odrowski
Attorney

Enclosure
Conciliation Agreement

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

February 13, 1996

VIA FACSIMILE AND U.S. MAIL

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

RE: MUR 3708
National Republican Senatorial Committee and Maureen Goodyear, as treasurer

Dear Mr. Baran:

On February 13, 1996, the Federal Election Commission accepted the signed conciliation agreement submitted on your clients' behalf in settlement of a violation of 2 U.S.C. § 441a(f), a provision of the Federal Election Campaign Act of 1971, as amended. Accordingly, the file has been closed in this matter. As noted in Paragraph VI.1 of the agreement, please be advised that the civil penalty reflects the unique circumstances surrounding 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 receiving your additional materials, any permissible submissions will be added to the public record upon receipt.

Information derived in connection with any conciliation attempt will not become public without the written consent of the respondent and the Commission. See 2 U.S.C. § 437g(a)(4)(B). The enclosed conciliation agreement, however, will become a part of the public record.

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Enclosed you will find a copy of the fully executed conciliation agreement for your files. Please note that the civil penalty is due within 30 days of the conciliation agreement's effective date. If you have any questions, please contact me at (202) 219-3400.

Sincerely,

Dawn M. Odrowski

Dawn M. Odrowski
Attorney

Enclosure
Conciliation Agreement

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
National Republican Senatorial Committee and	)	MUR 3708
	)	
Maureen Goodyear, as treasurer	)	

CONCILIATION AGREEMENT

This matter was initiated by a signed, sworn and notarized complaint by the Democratic Senatorial Campaign Committee ("DSCC") on November 19, 1992. The complaint alleged that the National Republican Senatorial Committee ("NRSC") violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by exceeding the coordinated party expenditure limit of 2 U.S.C. § 441a(d) in its support of Paul Coverdell, the Republican Senate candidate, in connection with Georgia's November 3, 1992 general election and November 24, 1992 runoff election. The DSCC's complaint was filed on November 19, 1992, the same day the Commission considered an Advisory Opinion Request from the NRSC asking whether an additional Section 441a(d)(3) limit was available for the November 24 runoff election. The Commission failed by a vote of 3-3 to approve the General Counsel's Final Draft Advisory Opinion which concluded that no additional Section 441a(d) limit was available for the November 24 election.

In considering the DSSC's complaint on April 27, 1993, the Commission was equally divided on a vote of whether to approve the General Counsel's recommendation to find reason to believe that the NRSC violated 2 U.S.C. § 441a(f). Accordingly, the

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Commission unanimously decided to close the file in MUR 3708.

On June 25, 1993, the DSCC filed a civil action for relief in the United States District Court for the District of Columbia pursuant to 2 U.S.C. § 437g(a)(8).

On November 14, 1994, the United States District Court for the District of Columbia issued a decision and order declaring the Commission's dismissal of the DSCC's administrative complaint contrary to law and ordering the Commission to vacate its dismissal of MUR 3708, to initiate appropriate enforcement proceedings against the NRSC, and to conform to its declaration within 30 days. The district court order was not appealed by the Commission.

The Commission unanimously voted on December 13, 1994, to vacate the dismissal in MUR 3708, to reopen the matter consistent with the court's order and to notify the NRSC of its actions and give them an opportunity to respond. On December 16, 1994, the Commission also filed a Motion to Clarify with the district court requesting the court to clarify whether the Commission could comply with its order by certifying that, after considering the court's opinion and the administrative complaint, it was still unable to find reason to believe that the NRSC violated the Act, thereby allowing the court to permit complainant DSCC to bring its own action against the NRSC pursuant to 2 U.S.C. § 437g(a)(8)(C).

The district court issued an order denying the Motion to Clarify on March 3, 1995, ruling that "[t]he requested order would be contrary to the intention of the Court in issuing its

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order granting summary judgment in favor of the DSCC" and that "it would be contrary to its Opinion to now permit the Commission to not find that the Act was violated."

In accordance with the district court's decision and orders, the Commission found probable reason to believe that the NRSC and Maureen Goodyear, as treasurer ("Respondents"), violated 2 U.S.C. § 441a(f) by exceeding the coordinated party expenditure limit of 2 U.S.C. § 441a(d)(3) for the general election campaign of Senator Paul Coverdell by $509,570. The Commission did not find reason to believe that the Coverdell Senate Committee and Marvin Smith, as treasurer, violated the law.

NOW, THEREFORE, the Commission and Respondents, having duly entered into conciliation pursuant to 2 U.S.C. § 437g(a)(4)(A)(i), do hereby agree as follows:

I. The Commission has jurisdiction over the Respondents and the subject matter of this proceeding, and this agreement has the effect of an agreement entered pursuant to 2 U.S.C. § 437g(a)(4)(A)(i).

II. Respondents have had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondents enter voluntarily into this agreement with the Commission.

IV. The pertinent facts and legal conclusions embodied in the November 14, 1994 decision and order of the United States District Court for the District of Columbia are as follows:

1. The NRSC is a political committee within the meaning of

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2 U.S.C. § 434(4) and Maureen Goodyear is the treasurer of the NRSC. Ms. Goodyear was not the treasurer of the NRSC in 1992.

2. Paul Coverdell was the Republican candidate for U.S. Senate in the 1992 general election in Georgia.

3. Pursuant to 2 U.S.C. § 441a(d)(3), and as adjusted by the Consumer Price Index in accordance with 2 U.S.C. § 441a(c), national and state political party committees may each make a limited amount of expenditures in connection with the general election campaign of a candidate for U.S. Senate affiliated with such party. The 1992 limit for each party for the U.S. general election campaign in Georgia was $267,803.52. Both the Republican National Committee and the State Republican Party of Georgia authorized the NRSC to expend their share of the Section 441a(d)(3) limit. Thus, the total combined 1992 Section 441a(d)(3) limit for the general election campaign in Georgia was $535,607.

4. Candidates and political committees are prohibited from knowingly accepting contributions or making expenditures in violation of the Act. 2 U.S.C. § 441a(f). Additionally, no officer or employee of a political committee shall knowingly make any expenditure on behalf of a candidate in violation of any limitation imposed on contributions and expenditures under Section 441a. Id.

5. The Act defines "election," in pertinent part, as "a general, special, primary or run-off election." 2 U.S.C. § 431(1)(A).

6. Commission regulations define a "general election," as

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either (1) an election held in even numbered years on the Tuesday following the first Monday in November (11 C.F.R. § 100.2(b)(1)) or (2) an election held to fill a vacancy in a Federal office (i.e., a special election) and which is intended to result in the final selection of a single individual to the office at stake (11 C.F.R. § 100.2(b)(2)). A "special election" is one held to fill a vacancy in a Federal office and may be a primary, general or runoff election. 11 C.F.R. § 100.2(f).

7. Commission regulations define a "runoff election," in pertinent part, as an election held after a general election and prescribed by applicable State law as the means for deciding which candidate should be certified as an officeholder elect. 11 C.F.R. § 100.2(d)(2).

8. In 1992, Georgia law provided that a candidate could not be nominated for, or elected to, public office in any election unless the candidate received a majority of the votes cast for the nomination or office. Ga. Code Ann. § 21-2-501(a) (1987). If no candidate received a majority of votes cast, Georgia law required that a run-off election between the two top vote getters be held 21 days after the preceding election. Id. Georgia law has now been amended. Effective January 1, 1995, Georgia law states that [t]o be elected to public office in a general election, a candidate must receive a plurality of the votes cast in an election to fill such public office. Ga. Code Ann. § 21-2-501(b)(1994).

9. No candidate received a majority of the votes cast for the U.S. Senate seat in Georgia on November 3, 1992.

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Consequently, a runoff election was held on November 24, 1992, between Democratic incumbent Senator Wyche Fowler and Republican Paul Coverdell, the candidates receiving the two highest votes in the general election. Paul Coverdell won the runoff election with 51% of the vote.

10. The NRSC's disclosure reports show that it made coordinated expenditures totaling $535,607 on behalf of Coverdell for media services in connection with the November 3, 1992 election. The NRSC's disclosure reports reflect additional coordinated expenditures totaling $509,570 on behalf of Coverdell in connection with the November 24 runoff election.

11. The district court concluded that under the plain meaning of the Commission regulations at 11 C.F.R. § 100.2, the November 24, 1992 election was a runoff election and thus, no additional Section 441a(d)(3) limit was available. According to the court, the November 24 election failed to qualify as a general election since it was neither an election held on the Tuesday following the first Monday in November as defined at 11 C.F.R. § 100.2(b)(1) nor was it held to fill a "vacancy" as described in 11 C.F.R. § 100.2(b)(2). Rather, the court concluded that the November 24 election "fits more snugly and directly" into the definition of "runoff election" found at 11 C.F.R. § 100.2(d) since it was held after a general election and was prescribed by Georgia law as the means for deciding which candidate would be certified as officeholder elect.

12. In light of the court's decision, the NRSC exceeded the Section 441a(d)(3) expenditure limit by $509,570 in connection

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with the 1992 U.S. Senate campaign in Georgia.

V. Under the court's decision, Respondents violated 2 U.S.C. §§ 441a(f) by making coordinated expenditures in excess of the limit established at 2 U.S.C. § 441a(d)(3).

VI. 1. For the sole purpose of settling this matter without further litigation, Respondents will not contest the Commission's finding. Respondents will pay a civil penalty to the Federal Election Commission in the amount of Five Thousand Dollars ($5,000) pursuant to 2 U.S.C. § 437g(a)(5)(A). This civil penalty acknowledges the District Court's suggestion that the Commission take into account its failure to issue an advisory opinion in determining an appropriate remedy.

2. Respondents and Respondent NRSC's officers, agents, employees and their successors shall not make expenditures in excess of the coordinated expenditure limit set forth at 2 U.S.C. § 441a(d)(3), or any successor provision, in any future runoff election following a general election held in an even-numbered year on the Tuesday following the first Monday in November.

VII. The Commission, on request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

VIII. This agreement shall become effective as of the date that all parties hereto have executed same and the Commission has

approved the entire agreement.

IX. Respondent shall have no more than 30 days from the date this agreement becomes effective to comply with and implement the requirement contained in this agreement and to so notify the Commission.

X. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained in this written agreement shall be enforceable.

FOR THE COMMISSION:

Lawrence M. Noble
General Counsel

2/13/96
Date

FOR THE RESPONDENTS:

(Name) Jan Witold Baran, Esq.
(Position) WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006

As Counsel to
National Republican
Senatorial Committee

2/7/96
Date

9604372174

FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

THIS IS THE END OF MUR # 3708

DATE FILMED 3-6-96 CAMERA NO. 3

CAMERAMAN JMN

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Date: 9/8/98

✓ Microfilm

_____ Press

THE ATTACHED MATERIAL IS BEING ADDED TO CLOSED MUR 3708

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 4, 1998

TWO WAY MEMORANDUM

TO: OGC Docket

FROM: Rosa E. Swinton
Accounting Technician

SUBJECT: Account Determination for Funds Received

We recently received a check from **Steve E. or Patti F. Stockman,** check number **3708,** dated **August 29, 1998,** for the amount of , **$3,000.00.** A copy of the check and any correspondence is being forwarded. Please indicate below which a account the funds should be deposited and give the MUR/Case number and name associated with the deposit.

==========

TO: Rosa E. Swinton
Accounting Technician

FROM: OGC Docket

SUBJECT: Disposition of Funds Received

In reference to the above check in the amount of $3000.00, the MUR/Case number is 3847 and in the name of Steve E. Stockman. Place this deposit in the account indicated below:

✓ Budget Clearing Account (OGC), 95F3875.16

___ Civil Penalties Account, 95-1099.160

___ Other: _____

Kim Stevenson
Signature

9-4-98
Date

90043894983

WILLIAM J. OLSON, P.C.
ATTORNEYS AT LAW
8180 GREENSBORO DRIVE, SUITE 1070
McLEAN, VIRGINIA 22102-3823
TELEPHONE (703) 356-5070
FAX (703) 356-5085

WILLIAM J. OLSON
(D.C., VA)
JOHN S. MILES
(D.C., MD., VA., OF COUNSEL)
ALAN WOLL
(VA)
JOHN F. CALLENDER, JR.
(FL ONLY)
GILMAN & PANGIA
(OF COUNSEL)

1815 H STREET, N.W.
SUITE 800
WASHINGTON, D.C. 20006-3604
TELEPHONE (202) 223-9066
FAX (202) 331-8986

CONFIDENTIAL

August 31, 1998

Tracey L. Ligon, Esquire
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 3847

Dear Ms. Ligon:

Enclosed is an additional check (#3708) payable to the Commission in the amount of $3,000, pursuant to the Conciliation Agreement in the above-referenced MUR.

Please call if you should have any questions. With best regards.

Sincerely yours,

William J. Olson

WJO:mm
Enclosure

SEP 4 4 09 PM '98

RECEIVED
FEDERAL ELECTION
COMMISSION
ACCOUNTING OFFICE
SEP 3 10 11 AM '98

3708

STEVE E. OR PATTI F. STOCKMAN 1-92
P O BOX 57135
WEBSTER, TX 77598

35-8399/3130-1

29 Aug 1998

Pay to the Order of Federal Election Commission $ 3,000

Three thousand & NO/100 Dollars

JSC FEDERAL CREDIT UNION
P.O. BOX 58346
HOUSTON, TEXAS 77258

For Fine

[redacted]

HARLAND 1994

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