FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THIS IS THE BEGINNING OF MUR # 3959

DATE FILMED 11/22/91 CAMERA NO. 8

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BJ005724

April 22, 1994

MEMORANDUM

TO: Lawrence M. Noble
General Counsel

THROUGH: John C. Surina
Staff Director

FROM: Roberta J. Costa
Assistant Staff Director
Audit Division

SUBJECT: Americans for Harkin, Inc. - Matters Referable

On March 15, 1994, the Commission approved the final audit report on Americans for Harkin, Inc. The report was released to the public March 28, 1994. In accordance with the Commission's approved materiality thresholds, the attached findings from the audit report are being referred:

Apparent Corporate Contributions
Apparent Excessive Contributions - Contributions from Individuals

Should you have any questions, please contact Lorenzo David or Wanda Thomas at 219-3720.

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A. **Prohibited Contributions**

1. **Apparent Corporate Contributions**

Section 441b(a) of Title 2 of the United States Code states, in part, that it is unlawful for any national bank or any corporation organized by authority of any law of Congress to make a contribution or expenditure in connection with any election to any political office or for any corporation whatever, or labor organization, to make a contribution or expenditure in connection with any election to federal office and further states that it is unlawful for any candidate, political committee or any other person knowingly to accept or receive any contribution prohibited by this section.

The Commission notified the Committee by letter dated June 2, 1992, that a sampling technique would be used to identify the dollar amount of prohibited contributions received by the Committee. The letter states, in part, "Commission regulations provide 30 days in which to refund contributions which appear to be prohibited. (See 11 C.F.R. 103.3(b)(1) and (2)). The Commission will no longer recognize any untimely refunds made more than 60 days following a candidate's date of ineligibility or after the date of receipt of this letter, whichever is later. Contributions resolved by the committees outside these time periods are considered untimely and in violation of the Commission's regulations. The Committee received the letter June 6, 1992.

Our sample review of contributions identified a material dollar amount of prohibited contributions. The sample projected that the total dollar value of prohibited contributions

in the population was $7,123. As of the conclusion of audit fieldwork, the Committee had made no refunds relative to the aforementioned items. In addition, one prohibited contribution of $250 was identified in a 100% review of selected contributions.

The Committee did not establish a separate bank account for the deposit of potential prohibited contributions; however, the account balances maintained in the Committee's regular accounts were greater than the cumulative total of the prohibited contributions deposited. (See 11 C.F.R. §103.3(b)(4)).

All prohibited contributions identified during the reviews were verified by the appropriate Secretaries of State.

At the Exit Conference, the Committee was provided schedules and relevant check copies to support the prohibited contributions identified. Committee personnel had no comments with respect to the items noted above. Further, the Committee stated that they would respond to our findings after receipt of the interim audit report.

In the interim audit report, the Audit Staff recommended that the Committee demonstrate that the contributions discussed above are not prohibited or make a payment to the United Stated Treasury in the amount of $7,373.

In response to the interim report, Counsel for the Committee objected to the Commission's demand for payments of $7,373 for alleged apparent corporate contributions. The objection is based on arguments that the Commission has no authority in the audit process to require payments of prohibited or excessive contributions and that the auditors' method of sampling to project these payments is invalid.

Counsel states correctly that the Federal Election Campaign Act requires publicly funded presidential candidates/committees to make repayments to the United States Treasury under very specific circumstances (26 U.S.C. §9038 (b)(1) and (2)) and that the payments requested for prohibited and excessive contributions fit neither of the categories. Further, Counsel notes that the only other authority granted the Commission to require any payment of money is found in the civil penalty provisions at 2 U.S.C. §437(g).

However, the payments at issue are not repayments or civil penalties. These payments are in accordance with the policy adopted by the Commission for use in 1992 Title 26 audits.2/

This sampling technique is the same technique used by the Commission since 1980 to determine the value of matchable

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2/ The Commission approved this policy on May 5, 1992. Committees were informed by letter dated June 2, 1992.

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contributions contained in a submission made by a presidential primary candidate.3/

Counsel for the Committee contends that "the combination of sampling with selected 100% review of certain transactions is an invalid methodology that may result in overstated projections." Counsel states,

> "The auditors sampled a population (contributions received by the Committee) and on the basis of the number of prohibited or excessive contributions found in the sample, used a statistical estimate to project an amount based on the total population. In addition to the estimate based on the sample, the auditors conducted an additional selected 100% review of certain items either in the same population or in a discretely identified portion of the overall population, and included those items as additional prohibited and excessive amounts on top of the statistical estimate based on the population. This method clearly results in an overstated amount." [Emphasis not in original]

Counsel further states,

> "The audit division's logic would allow for an estimate by sample, followed by a 100% review of a certain segment of the population known to contain errors (such as all refunds). This would, of course, lead to an overestimate of prohibited contributions just as the auditors have done."

Contrary to the contention apparently being made by Counsel to the Committee, it should be noted that the Audit staff performed two separate and distinct reviews. Certain contributions were tested on a sample basis while other contributions were tested on a 100% basis. Contributions reviewed on a 100% basis were not included in the population from which the sample was selected. Rather, as explained below, the 100% review items were a separate group of contributions.

On June 30, 1992, the Committee's Assistant Treasurer was informed that contributor information for 20 deposits into the Committee's bank account was not entered into the Committee's receipts database. The Committee requested the

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3/ This technique was recommended by the firm of Ernst & Whinney (now Ernst & Young) in a 1979 report to the Commission entitled Report on Study of Selected Sampling Procedure.

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information from the bank. It was received on August 26, 1992, subsequent to the Audit staff's sample review of contributions contained on the receipts database.

No overstatement occurs when the amount resulting from the separate and distinct 100% review is added to the projected amount based on the sample. Counsel's arguments on methodology used are flawed at best.

Counsel also states that the final audit report should be revised to require the Committee to refund to the contributors the $750 [$500 in corporation contributions identified in the sample and $250 identified in the 100% review] in actual corporate contributions inadvertently accepted.

The Committee has not complied with the recommendation contained in the interim audit report. Arguments submitted questioning the Commission's authority to require a payment or the methodology employed by the Audit staff are not persuasive4/; therefore a payment ($7,373) to the United States Treasury is warranted. Further, the Audit staff has recognized this amount as a qualified campaign expense, and as such, included this amount on the NOCO statement (See Finding III. A.)

Recommendation #1

The Audit staff recommends that the Committee be required to make a payment to the United States Treasury in the amount of $7,373, representing the value of unresolved corporate contributions.

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4/ Please refer to attached legal analysis (pages 2-5), dated 1/19/94, for a discussion of selected court cases which support both the Commission's authority to require payment and the methodology employed.

B. Apparent Excessive Contributions

1. Contributions from Individuals

Section 441a(a)(1)(A) of Title 2 of the United States Code states that no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000.00.

Section 110.1(k) of Title 11 of the Code of Federal Regulations states, in part, that any contribution made by more than one person, except for a contribution made by a partnership, shall include the signature of each contributor on the check, money order, or other negotiable instrument or in a separate writing. A contribution made by more than one person that does not indicate the amount to be attributed to each contributor shall be attributed equally to each contributor. If a contribution to a candidate on its face or when aggregated with other contributions from the same contributor exceeds the limitations on contributions, the treasurer may ask the contributor whether the contribution was intended to be a joint contribution by more than one person. A contribution shall be considered to be reattributed to another contributor if the treasurer of the recipient political committee asks the contributor whether the contribution is intended to be a joint contribution by more than one person, and informs the contributor that he or she may request the return of the excessive portion of the contribution if it is not intended to be a joint contribution; and within sixty days from the date of the treasurer's receipt of the contribution, the contributors provide the treasurer with a written reattribution of the contribution, which is signed by each contributor, and which indicates the amount to be attributed to each contributor if equal attribution is not intended.

5/ When the regulations were adopted in 1976, prior to the deregulation of the airline industry, there was generally, little price variation between carriers for a given trip.

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Section 103.3(b)(3) of Title 11 of the Code of Federal Regulations states, in part, that contributions which exceed the contribution limitation may be deposited into a campaign depository. If any such contribution is deposited, the treasurer may request redesignation or reattribution of the contribution by the contributor in accordance with 11 C.F.R. §§110.1(b) and 110.1(k), as appropriate. If a redesignation or reattribution is not obtained, the treasurer shall, within 60 days of the treasurer's receipt of the contribution, refund the contribution to the contributor.

Section 110.1(1) of Title 11 of the Code of Federal Regulations states, in part, that if a political committee receives a written reattribution of a contribution to a different contributor, the treasurer shall retain the written reattribution signed by each contributor. If a political committee does not retain the written records concerning reattribution as required, the reattribution shall not be effective, and the original attribution shall control.

The Commission notified the Committee by letter dated June 2, 1992, that a sampling technique would be used to identify the dollar amount of excessive contributions received by the Committee. The letter states, in part, "Commission regulations provide 30 days in which to refund contributions which appear to be prohibited, and 60 days in which to seek reattribution, redesignation or refund of excessive contributions (11 C.F.R. 103.3.(b)(1) (2) and (3)). The Commission will no longer recognize any untimely refunds, redesignations or reattributions made more than 60 days following a candidate's date of ineligibility or after the date of receipt of this letter, whichever is later. Contributions resolved by the committees outside these time periods are considered untimely and in violation of the Commission's regulations. The Committee received the letter June 6, 1992.

Our sample review of contributions identified a material dollar amount of unresolved excessive contributions. The sample projected that the total dollar value of unresolved excessive contributions in the population was $5,460. To date the Committee has not provided the Audit staff information relative to any refunds of the items noted. In addition, twenty-two unresolved excessive contributions, totaling $16,600, were identified in a 100% review of selected contributions.

The Committee did not establish a separate bank account for making refunds; however, the account balances maintained in the bank accounts were greater than the cumulative total of the aforementioned excessive contributions. (See 11 C.F.R. §103.3(b)(4)).

At the Exit Conference the Committee was provided with a schedule of the apparent excessive contributions. The Committee had no comments with regard to the excessive

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contributions. Further, the Committee stated that they would respond to our findings after receipt of the interim audit report.

The interim audit report recommended that the Committee either provide evidence that the contributions in question are not excessive or make a payment to the United States Treasury in the amount of $22,060.

Counsel for the Committee raised the same objections to this recommendation as were raised in response to the recommendation in Finding II.A.1. above. Further, Counsel contends that $2,250 had already been refunded by the Committee prior to the June notification and should not be included in the payment amount to the Treasury.

However, the Audit staff notes that only $1,500 in refund checks written prior to the June notification letter are included in the excessive amount. Those checks had not cleared the Committee's bank as of November 1992 and are, therefore, considered unresolved.

The arguments submitted questioning the Commission's authority to require a payment or the methodology employed by the Audit staff are not persuasive; therefore a payment ($22,060) is warranted. The Audit staff has recognized this amount as a qualified campaign expense, and as such, included the amount on the NOCO statement (see Finding III.A.)

Recommendation #2

The Audit staff recommends that the Committee be required to make a payment to the United States Treasury in the amount of $22,060 representing the value of unresolved excessive contributions received from individuals.

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

FIRST GENERAL COUNSEL'S REPORT

MUR #3959
STAFF MEMBER: Peter G. Blumberg

SOURCE: INTERNALLY GENERATED

RESPONDENTS: Americans for Harkin, Inc.
Larry Hawkins, as treasurer
David E. Johnson

RELEVANT STATUTE/ REGULATIONS:
2 U.S.C. § 441a(a)(1)(A)
2 U.S.C. § 441a(f)
2 U.S.C. § 441b(a)
2 U.S.C. § 441b(b)(2)
11 C.F.R. § 103.3(b)(1)
11 C.F.R. § 103.3(b)(2)
11 C.F.R. § 103.3(b)(3)

INTERNAL REPORTS CHECKED: Audit Documents

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTER

Americans for Harkin, Inc. ("the Committee") registered with the Commission on September 23, 1991, as the principal campaign committee of Senator Tom Harkin, a candidate for the 1992 Democratic presidential nomination. The Commission determined the candidate eligible for matching funds on November 27, 1991 and determined that his eligibility ended on March 9, 1992. Pursuant to 26 U.S.C. § 9038(a), the Commission conducted an audit and examination of the Committee's contributions, disbursements, and qualified campaign expenses.

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As part of the audit, the Commission used sampling of the Committee's contributions to project the dollar value of prohibited and excessive contributions made to the Committee.

On March 15, 1994, the Commission approved the Final Audit Report on Americans for Harkin, Inc. which included findings that the Committee had received $7,373 in apparent prohibited contributions, and $22,060 in apparent excessive contributions. The report recommended that the Committee make a payment, representing the total amount of unresolved prohibited and excessive contributions, to the United States Treasury within thirty days of its receipt of the report.2/ The Committee paid this amount on May 25, 1994. This enforcement matter was generated from information obtained from the audit and examination process. See 11 C.F.R. § 9038.1(e)(2). The Audit Division's referral materials are attached. Attachments 1, 2.

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2/ For the 1992 presidential election cycle, the Commission required publicly financed presidential committees to make a payment in an amount representing the committees' unresolved excessive and prohibited contributions.

II. FACTUAL AND LEGAL ANALYSIS

A. Statutory and Regulatory Provisions

It is unlawful for any corporation to make a contribution or expenditure in connection with any federal election to any political office. 2 U.S.C. § 441b(a). It is also unlawful for any officer or director of a corporation to consent to any corporate expenditures which may be prohibited contributions to candidates or committees. Id. It is also unlawful for any candidate or political committee to accept or receive any contribution from a corporation. Id. The term "contribution" includes any direct or indirect payment, distribution, loan (other than from a bank, pursuant to applicable banking law and regulations, in the ordinary course of business), advance, deposit, or gift of money, or any services, or anything of value. 2 U.S.C. § 441b(b)(2).

Individuals are prohibited from making contributions to candidates, their authorized committees or agents with respect to any election for federal office which, in the aggregate, exceed $1,000. 2 U.S.C. § 441a(a)(1)(A). No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate in violation of any limitation imposed on contributions and expenditures. 2 U.S.C. § 441a(f).

Contributions made from prohibited sources shall be refunded to the contributors within 30 days of receipt or within 30 days of discovery of new evidence that was previously unavailable demonstrating that a contribution comes from a

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prohibited source. 11 C.F.R. § 103.3(b)(1)-(2). Contributions that exceed the limitations of 2 U.S.C. § 441a(a) shall be refunded within 60 days of receipt if not redesignated or reattributed. 11 C.F.R. § 103.3(b)(3).

B. Audit Findings

The Audit Division reviewed the Committee's contributions in two batches.

The auditors found that the Committee received apparent prohibited contributions in the amount of $7,373. A portion of the apparent prohibited contributions, totaling $7,123, was discovered through the use of sampling.4/ The remaining amount of $250 was discovered in a batch of contributions that was not part of the auditors' sample and was reviewed separately. The auditors verified that the identified contributions came from incorporated entities by consulting with the appropriate state authorities.

The auditors also found that the Committee received apparent excessive contributions in the amount of $22,060. Apparent excessive contributions totaling $5,460 were identified

4/ The auditors identified $500 in prohibited contributions in the sample and projected it to the total sampled population to reach its conclusion.

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through sampling. Apparent excessive contributions totaling $16,600 were discovered in a batch of contributions that was not part of the sample and was reviewed separately.

Based on the foregoing, this Office recommends that the Commission find reason to believe that the Committee and Larry Hawkins, the treasurer, accepted prohibited contributions in violation of 2 U.S.C. § 441b(a). We also recommend that the Commission find reason to believe that the Committee and Larry Hawkins, the treasurer accepted excessive contributions in violation of 2 U.S.C. § 441a(f).

However, this Office recommends that the Commission take no further action against the Committee and its treasurer in this matter. We note that, aside from the apparent violations relating to the excessive and prohibited contributions, the audit resulted in no other referrals for enforcement. Further, the Committee made a payment to the United States Treasury on May 25, 1994 representing the total amount of excessive and prohibited contributions. Attachment 3.5/ Therefore, we believe that taking no further action is appropriate in this matter.

Because most of the apparent prohibited contributions were discovered through sampling, many of the contributors were not identifiable. Similarly, many of the excessive contributors

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5/ We note that the Committee did not make the payment to the Treasury within thirty days after receipt of the Final Audit Report as recommended in the Final Audit Report. However, this matter would have been referred for compliance even if the Committee had made the payment in a timely manner. See Attachment 2 at 1.

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were not identifiable. Therefore, we will not pursue any of the unidentifiable contributors. However, one of the identified excessive contributors, David E. Johnson, made $3,000 in excessive contributions that were not resolved in a timely manner. See Attachment 2. Therefore, this Office recommends that the Commission find reason to believe that David E. Johnson violated 2 U.S.C. § 441a(1)(A). However, since this individual is the only person the audit identified as making a contribution in this range, and many of the other contributions cannot be pursued because of the unknown identity of the contributors, we recommend that the Commission take no further action against Mr. Johnson.

III. RECOMMENDATIONS

1. Find reason to believe that Americans for Harkin, Inc. and Larry Hawkins, as treasurer, violated 2 U.S.C. § 441a(f) and 2 U.S.C. § 441b(a), but take no further action;

2. Find reason to believe that David E. Johnson violated 2 U.S.C. § 441a(1)(A), but take no further action;

3. Approve the appropriate letters; and

4. Close the file.

9/28/94
Date

Lawrence M. Noble by KRC
Lawrence M. Noble
General Counsel

Attachments

1. Audit Referral.

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2. Memorandum to Lawrence M. Noble from Robert J. Costa, Re: Americans for Harkin, Inc. -- Matters Referable (August 4, 1994).
3. Memorandum to the Commission, Re: Payment of $35,316 Received from Americans for Harkin (June 2, 1994).

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Americans for Harkin, Inc. and Larry Hawkins, as treasurer; David E. Johnson.	)	MUR 3959

CERTIFICATION

I, Marjorie W. Emmons, Secretary of the Federal Election Commission, do hereby certify that on September 29, 1994, the Commission decided by a vote of 6-0 to take the following actions in MUR 3959:

1. Find reason to believe that Americans for Harkin, Inc. and Larry Hawkins, as treasurer, violated 2 U.S.C. § 441a(f) and 2 U.S.C. § 441b(a), but take no further action.

2. Find reason to believe that David E. Johnson violated 2 U.S.C. § 441a(1)(A), but take no further action.

3. Approve the appropriate letters, as recommended in the General Counsel's Errata dated September 23, 1994.

4. Close the file.

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

Attest:

9-29-94
Date

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

Received in the Secretariat:	Fri.,	Sept. 23, 1994	2:53 p.m.
Circulated to the Commission:	Mon.,	Sept. 26, 1994	11:00 a.m.
Deadline for vote:	Thurs.,	Sept. 29, 1994	4:00 p.m.

bjr

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 19, 1994

Larry Hawkins, Treasurer
Americans for Harkin, Inc.
818 Connecticut Ave., N.W.
Suite 1100
Washington, D.C. 20006

RE: MUR 3959

Dear Mr. Hawkins:

On September 29, 1994, the Federal Election Commission found reason to believe that Americans for Harkin, Inc. and you, as treasurer, violated 2 U.S.C. § 441a(f) and 2 U.S.C. § 441b(a), provisions of the Federal Election Campaign Act of 1971, as amended. However, after considering the circumstances of this matter, the Commission also determined to take no further action and closed its file. The First General Counsel's Report, which formed a basis for the Commission's finding, is attached for your information.

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 Peter G. Blumberg, the attorney assigned to this matter, at (202) 219-3690.

For the Commission,

Trevor Potter
Chairman

Enclosure
First General Counsel's Report

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 19, 1994

David E. Johnson
4520 Dexter Street, N.W.
Washington, D.C. 20007

RE: MUR 3959

Dear Mr. Johnson:

On September 29, 1994, the Federal Election Commission found reason to believe that you violated 2 U.S.C. § 441a(a)(1)(A), a provision of the Federal Election Campaign Act of 1971, as amended. However, after considering the circumstances of this matter, the Commission also determined to take no further action and closed its file. The First General Counsel's Report, which formed a basis for the Commission's finding, is attached for your information.

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 Peter G. Blumberg, the attorney assigned to this matter, at (202) 219-3690.

For the Commission,

Trevor Potter
Chairman

Enclosure
First General Counsel's Report

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THIS IS THE END OF MUR # 3959

DATE FILMED 11/28/91 CAMERA NO. 2

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