



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THIS IS THE BEGINNING OF MUR # 3886

DATE FILMED 6-9-97 CAMERA NO. 4

CAMERAMAN JMA

97043802425



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 26, 1994

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

THROUGH: JOHN C. SURINA
STAFF DIRECTOR

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

SUBJECT: WILDER FOR PRESIDENT COMMITTEE - REFERRAL MATTERS

On April 21, 1994 the Commission approved the final audit report (FAR) on Wilder for President Committee. The report was released to the public on May 11, 1994. In accordance with the Commission approved materiality thresholds, the attached findings from the audit report are being referred to your office:

- Apparent Excessive Contributions
- Apparent Prohibited Contributions
- Transactions Involving the Commonwealth of Virginia (Sections II.D.1. & 2.)

Please note that the Commission granted the Committee an additional 30 days to respond to Finding II.D. Transactions Involving the Commonwealth of Virginia (response date - June 10, 1994). Any adjustment to the amount due, based on our analysis of the Committee's response, will be made and forwarded to your office.

All workpapers and related documentation are available for review in the Audit Division. Should you have any questions, please contact Brian Dehoff or Tom Nurthen at 219-3720.

97043802426

Attachments:

- Finding II.A. (Apparent Excessive Contributions), FAR Pgs. 5-9
- Finding II.B. (Apparent Prohibited Contributions), FAR Pgs. 8-11
- Finding II.D. Sections 1. & 2. (Transactions Involving the Commonwealth of Virginia), FAR Pgs. 12-24
- Attachment 2 - Schedule of Apparent Excessive Contributions
- Attachment 3 - Schedule of Apparent Prohibited Contributions
- Attachment 4 - Audit Analysis of Committee's Use of Commonwealth's Plane, Pgs. 1-3

97043802427

97043802428

A. Apparent Excessive Contributions

Section 441a(a)(1)(A) of Title 2 of the United States Code states that no person shall make contributions to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed \$1,000.

Section 103.3(b)(3) of Title 11 of the Code of Federal Regulations states, in part, that contributions which on their face exceed the contribution limitations set forth in 11 CFR 110.1 and contributions which do not appear to be excessive on their face, but which exceed the contribution limit set forth in

11 CFR 110.1 when aggregated with other contributions from the same contributor may be either deposited into a campaign depository under 11 CFR 103.3(a) or returned to the contributor. If any such contribution is deposited, the treasurer may request reattribution of the contribution by the contributor in accordance with 11 CFR 110.1(k). If reattribution is not obtained, the treasurer shall, within sixty days of the treasurer's receipt of the contribution, refund the contribution to the contributor.

Section 110.1(k)(3) of Title 11 of the Code of Federal Regulations states, in part, that if a contribution to a candidate or political committee, either on its face or when aggregated with other contributions from the same contributor, exceeds the limitation on contributions set forth in 11 CFR 110.1(b), the treasurer of the recipient political committee 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 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.

Finally, Sections 110.1(l)(3) and (5) of Title 11 of the Code of Federal Regulations state, 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 as required by 11 CFR 110.1(k). If a political committee does not retain the written records concerning reattribution, 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 60 days in which to seek reattribution, redesignation or refund of excessive contributions (see 11 CFR 103.3(b)(1) and (2)). 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. Excessive contributions resolved by the committees outside these time periods will not be considered mitigated violations. The Committee received the letter June 8, 1992.

The Audit staff's review of contributions received from individuals identified \$5,200 in excessive contributions involving five contributors (see Attachment 2). As of August 11, 1992 (date of exit conference), the Audit staff determined that no refunds or reattributions were made regarding these excessive contributions.

97043802429

The Committee did not establish a separate account for handling possible excessive contributions; however, the amount of cash maintained on a monthly basis by the Committee in its bank account was greater than the cumulative total of the excessive contributions deposited (see 11 CFR §103.3(b)(4)).

At the exit conference the Audit staff presented the Committee with a schedule of the apparent excessive contributions. The Committee official acknowledged the receipt of the schedule and stated that Committee personnel would review the apparent errors and attempt to resolve the situation as deemed necessary.

In the interim audit report, the Audit staff recommended that the Committee either:

- ° demonstrate that the contributions discussed above are not excessive; or
- ° make a payment to the United States Treasury in the amount of \$5,200, representing the total dollar value of the unresolved excessive contributions.

In response to the interim audit report Counsel for the Committee states:

The Committee disputes the Audit Division's recommendation that it make payment to the United States Treasury for any excessive contribution.

Counsel further states that assuming arguendo that the Committee did accept excessive contributions, the Committee challenges the Commission's authority to require payment of unresolved excessive contributions to the United States Treasury. Contributions deemed excessive are not subject to the repayment provisions of the Presidential Primary Matching Fund regulations. In fact, in a letter to the Committee dated June 2, 1992, the Commission apparently recognizes that it is without the legal authority to require campaign committees to make such payments to the United States Treasury, noting that it will request that unresolved contributions be paid to the United States Treasury.

To the extent that the Committee may have inadvertently accepted excessive contributions, the Committee should be permitted to refund such contributions to

97043802430

the respective contributors, with the expressed understanding that any such refunds will be recognized as documented, qualified campaign expenses by the Commission.

Finally, the Committee requests that the Audit Division recommendation that the Committee pay to the United States Treasury \$5,200, representing the total dollar value of the unresolved excessive contributions be deleted.

The Committee has not complied with the above stated recommendation. Arguments submitted questioning the Commission's authority to require a payment are not persuasive; therefore, a payment (\$5,200) to the United States Treasury is warranted. Further, the Audit staff has recognized this recommended payment as a qualified campaign expense, and as such, included this amount on the NOCO statement (see Finding III.A.). Finally, should the Committee make refunds to these contributors, the amount will not be considered a qualified campaign expense.

Recommendation #1

The Audit Division recommends that the Commission determine that the Committee make a payment in the amount of \$5,200 to the United States Treasury.

B. Apparent Prohibited 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 that it is unlawful for any candidate, political committee or any other person to knowingly 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 CFR 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 the receipt of this letter, whichever is later. Prohibited contributions resolved by the committees outside these time periods will not be considered mitigated violations. The Committee received the letter June 8, 1992.

97043802431

The Audit staff reviewed contributions received from individuals on a sample basis. Our review identified three apparent prohibited contributions, involving three contributors, totaling \$1,500 (see Attachment 3). The sample projected that the total dollar value of unresolved prohibited contributions in the population was \$3,984. As of August 11, 1992 (date of exit conference), the Audit staff determined that no refunds were made regarding these prohibited contributions.

The Committee did not establish a separate account for handling possible prohibited contributions; however, the amount of ending cash on hand reported by the Committee on its monthly disclosure reports was greater than the cumulative total of the prohibited contributions deposited (see 11 CFR §103.3(b)(4)).

At the exit conference the Audit staff presented the Committee with a schedule of apparent prohibited contributions. The Committee acknowledged receipt of the schedule and stated that personnel would review the apparent errors and attempt to resolve the situation as deemed necessary.

In the interim audit report, the Audit staff recommended that the Committee either:

- demonstrate that the contributions discussed above are not prohibited; or
- make a payment to the United States Treasury in the amount of \$3,984, representing the projected dollar amount the unresolved prohibited contributions.

In response to the interim audit report Counsel for the Committee states:

The Committee disputes the Audit Division's recommendation that it make payment to the United States Treasury for any prohibited contribution.

Counsel further states that assuming arguendo that the Committee did accept prohibited contributions, the Committee challenges the Commission's authority to require payment of unresolved prohibited contributions to the United States Treasury. Contributions deemed prohibited are not subject to the repayment provisions of the Presidential Primary Matching Fund regulations. In fact, in a letter to the Committee dated June 2, 1992, the Commission apparently recognizes that it is without the legal authority to require campaign committees

97043802432

to make such payments to the United States Treasury, noting that it will request that unresolved prohibited contributions be paid to the United States Treasury.

To the extent that the Committee may have inadvertently accepted prohibited contributions, the Committee should be permitted to refund such contributions to the respective contributors, with the expressed understanding that any such refunds will be recognized as documented, qualified campaign expenses by the Committee. The Committee requests that the Audit Division recommend that the Committee pay to the United States Treasury \$3,984, representing the total dollar value of the unresolved prohibited contributions be deleted.

Finally, the Committee states,

"The Audit Division's preliminary finding identifies unresolved excessive contributions in the amount of \$5,200.00. The Interim Audit notes that the \$5,200.00 represent[s] the total dollar value of the unresolved excessive contributions. In order to reach this conclusion, the Audit Division obviously reviewed all the contributions received by the Committee. This examination should have enabled the Audit Division to make a preliminary determination regarding the total dollar value of any unresolved prohibited contributions as well. Instead, for some unexplained reason, the Audit Division identified several unresolved prohibited contributions and used a sampling method to project a dollar amount representing unresolved prohibited contributions. After having examined all the contributions, there is no rationale for the Audit Division utilizing a sampling method to project prohibited contributions instead of calculating the total dollar amount. It is the position of the Committee that if the Audit is to contain amounts representing unresolved prohibited contributions, the Audit Division, having already reviewed all the contributions, should be required to

97043802433

present a total dollar amount and not a projected amount."

It should be noted that the Audit staff did not review all contributions on a 100% basis. Two separate reviews were performed to determine the amount of excessive contributions (see Finding II.A.). Certain contributions were tested on a sample basis, while other contributions were tested on a 100% basis. Conversely, a sample review was performed to project the value of prohibited contributions received by the Committee. The Committee's position is incorrect.

The Committee has not complied with the above stated recommendation. Arguments submitted questioning the Commission's authority to require a payment are not persuasive; therefore, a payment (\$3,984) to the United States Treasury is warranted. Further, the Audit staff has recognized this recommended payment as a qualified campaign expense, and as such, included this payment on the NOCO statement (see Finding III.A.). Finally, should the Committee make refunds to these contributors, the amount will not be considered a qualified campaign expense.

Recommendation #2

The Audit Division recommends that the Commission determine that the Committee make a payment in the amount of \$3,984 to the United States Treasury.

97043802434

97043802435

D. Transactions Involving Commonwealth of Virginia

Introduction

During calendar years 1991 and 1992, the Committee was invoiced by the Office of the Governor, Commonwealth of Virginia (the Commonwealth) for goods/services provided, including the use of (1) an airplane and a helicopter^{5/}, (2) telephones, (3) credit card, and (4) labor and equipment/facilities. The Commonwealth billed approximately \$70,730 and received payment.

^{4/} The Committee submitted an amendment to its July monthly report which corrected a portion of the misstatement noted for disbursements.

^{5/} The use of the helicopter was provided by the Virginia Department of State Police.

1. Use of the Airplane and Helicopter

Section 9034.7(a) of Title 11 of the Code of Federal Regulations states that notwithstanding the provisions of 11 CFR part 106, expenditures for travel relating to the campaign of a candidate seeking nomination for election to the office of President by any individual, including a candidate, shall, pursuant to the provisions of 11 CFR 9034.7(b), be qualified campaign expenses and be reported by the candidate's authorized committee(s) as expenditures.

Section 9034.7(b)(1) through (5) of Title 11 of the Code of Federal Regulations states for a trip which is entirely campaign-related, the total cost of the trip shall be a qualified campaign expense and a reportable expenditure.

For a trip which includes campaign-related and non-campaign related stops, that portion of the cost of the trip allocable to campaign activity shall be a qualified campaign expense and a reportable expenditure. Such portion shall be determined by calculating what the trip would have cost from the point of origin of the trip to the first campaign-related stop and from that stop through each subsequent campaign-related stop, back to the point of origin. If any campaign activity, other than incidental contacts, is conducted at a stop, that stop shall be considered campaign related.

For each trip, an itinerary shall be prepared and such itinerary shall be made available for Commission inspection.

For trips by government conveyance or by charter, a list of all passengers on such trip, along with a designation of which passengers are and which are not campaign-related, shall be made available for Commission inspection.

If any individual, including a candidate, uses government conveyance or accommodations paid for by a government entity for campaign-related travel, the candidate's authorized committee shall pay the appropriate government entity an amount equal to the first class commercial air fare plus the cost of other services, in the case of travel to a city served by a regularly scheduled commercial service; or the commercial charter rate plus the cost of other services, in the case of travel to a city not served by a regularly scheduled commercial service.

Also, 11 C.F.R. §§100.7(a)(1)(iii)(A) and (B) define the term "anything of value" (referring to contribution) to include all in-kind contributions. Unless specifically exempted under 11 CFR 100.7(b), the provision of any goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services is a contribution. Examples of such goods or services include, but are not limited to: securities, facilities, equipment, supplies, personnel,

97043802436

advertising services, membership lists, and mailing lists. If goods or services are provided at less than the usual and normal charge, the amount of the in-kind contribution is the difference between the usual and normal charge for the goods or services at the time of the contribution and the amount charged the political committee. For purposes of 11 CFR 100.7(a)(1)(iii)(A), "usual and normal charge" for goods means the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution; and usual and normal charge for any services, other than those provided by an unpaid volunteer, means the hourly or piecework charge for the services at a commercially reasonable rate prevailing at the time the services were rendered.

The candidate, frequently accompanied by staff and media personnel, made campaign trips on the Commonwealth's airplane, a Cessna Model S550. The Committee was billed at a rate of \$625 per flight hour plus pilots' expenses, landing fees, etc. Virtually all flight destinations were cities served by regularly scheduled commercial service. Thus, in accordance with 11 C.F.R. §9034.7(b)(5), the Committee was required to reimburse the Commonwealth the first class commercial airfare plus the cost of other services.

As discussed at Section I.D., written requests and subpoenas were issued in an effort to obtain all records related to usage of the airplane and the helicopter. All records requested had not been received as of October 28, 1992.

The Committee did however provide (1) invoices which were annotated to include the identification of the passengers who apparently were on the airplane (in at least one instance, one passenger was not listed for a trip), (2) a typed flight itinerary (3) photocopies of billings issued by the Committee to the media, and (4) photocopies of reimbursement checks received. Records related to the computation of the amounts billed by the Commonwealth, the formal passenger manifest, and a complete accounting of all campaign related trips (in whole or in part) had not been provided by the Commonwealth.

As previously stated, on December 15, 1992, the Commission authorized the Office of General Counsel to file a civil suit against the Commonwealth for subpoena enforcement. Prior to filing, the Commonwealth was granted ten days to comply with the subpoena. The Audit staff received, from the Office of General Counsel, the Commonwealth's response on January 8, 1993. Included in the response were copies of flight log information for use of the Commonwealth's plane, despite repeated allegations that the documents responsive to the subpoena had been previously forwarded to the Audit staff as part of the presidential audit process and/or did not exist.

The Audit staff analyzed the information in hand in an effort to determine if the \$625 per hour charge equated to first class airfare. Based on our analysis of 54 trip legs (17

97043802437

complete trips), the Commonwealth "underbilled" the Committee by approximately \$25,847. Further, the Audit staff identified two campaign-related trips (November 20, 1991 and December 4, 1991) for which no flight logs were made available for review.

In the interim audit report, the Audit staff recommended that the Committee:

- provide flight log information generated by the Commonwealth for campaign-related trips on the two dates noted above;
- demonstrate that the Commonwealth did not underbill the Committee in the amount of \$25,847; or
- make a payment to the Commonwealth in the amount of \$25,847.

Further recommendations will be forthcoming.

In response to the interim audit report, Counsel for the Committee disputes the Audit Division's recommendation that it make a payment to the Commonwealth of Virginia for the amount determined to be underbilled.

Counsel states, in relevant part, that:

"the Committee used the Commonwealth of Virginia's plane for campaign-related travel on several occasions. As required by the Commonwealth, Wilder for President reimbursed the Commonwealth of Virginia at the rate of \$625.00 per hour of plane use plus pilot and miscellaneous expenses. Due to a conflict between federal and state methods for calculating reimbursements in connection with the use of Commonwealth aircraft, the Audit Division preliminarily concluded that the Committee must pay the Commonwealth of Virginia an additional \$25,847.04 for the use of the state plane. The Committee disputes the Audit Division's position that the Committee pay the Commonwealth of Virginia an additional \$25,847.04. The Audit Division's underlying analysis and calculations are flawed. Therefore, the alleged repayable amount of \$25,847.04 pursuant to federal regulations is erroneous for various reasons.

The Committee disputes the Audit Division's payment amount of \$25,847.04 based upon its use of the General Services Administration first-class airfare. The Audit Division used General Services Administration's first class

97043802438

airfare as the standard first class airfare to determine the cost per leg. The Regulations do not dictate that first class airfare be based on GSA's determination of first class airfare. The Regulations only require that payment be made to the appropriate government entity in the amount equal to the commercial first class airfare. In fact, there is no standard first class airfare. On any given day, different travel agencies and airlines might provide various first-class commercial airfares. Accordingly, there were most likely other first-class airfares lower than GSA's first class airfare for each particular flight. Therefore, because the first-class airfares that the Audit Division used were not determinative first-class airfares, the alleged repayable amount is highly questionable.

In addition, the Committee strongly objects to the Audit Division's inclusion of the costs of flights which contained no campaign-related passengers. The Audit Division erroneously included in its calculations the costs of flights which are not subject to payment by the Committee under the Regulations. The Audit Division included in its calculations flights which contained only the pilot and no campaign-related passengers..(sic) In these instances, the state plane was sent from Richmond to another city to pick-up Governor Wilder or returned from another city to Richmond without any campaign-related staff..(sic) However, such flight is not a reimbursable flight pursuant to the Regulations because the flight did not contain any campaign-related passengers. The Regulations at 11 C.F.R. 9034.7 clearly state that 'if any individual, including a candidate, uses government conveyance or accommodations paid for by a government entity..' then the candidate'(sic) committee must pay the appropriate government entity an amount equal to the first class commercial airfare plus the cost of other services.' The language 'any individual' clearly does not include the pilot or crew of a plane. In the instant cases, these were the only individuals present on the plane.

In analogous situations, the Audit Division does not require payment for flights like these. For example, when a committee uses

97043802439

corporate aircraft, a committee is not required to pay the corporation for the return flight to its origin if the plane is not carrying any campaign-related staff. Similarly, the Committee in the instant cases is not required under federal law to reimburse the government entity for flights which do not contain any individuals on campaign-related business. The Committee reimbursed the Commonwealth of Virginia for such flights pursuant to state policy. However, simply because the Committee makes an expenditure in connection with a state requirement does not permit the FEC to include such flights in its calculations when such flights clearly are not subject to the federal election law. The Audit Division would like to ignore the Committee's state reimbursement method in connection with campaign-related travel in all other instances. Yet in this instance it would like to adopt state policy when state policy requires reimbursement and federal election law requires none. The FEC cannot selectively apply different standards for its own benefit. Most importantly, regardless of state policy, the Regulations, as well as past Commission practice, prohibit the Commission from requiring payment for the costs of such flights. Accordingly, the following flights should not be included in the FEC's \$25,874.04 (sic) figure::(sic)

7/14/91	JFK to Richmond, VA**	\$384.00
7/21/91	Richmond, VA to JFK**	\$384.00
7/27/93(sic)	Richmond, VA to Washington, D.C.	\$325.00
10/19/91	Richmond, VA to San Antonio, TX	\$826.00
11/08/91	Richmond, VA to Washington, D.C.	\$325.00

** This leg of the flight was not campaign-related. Specifically, the July 14, 1991 New York/Richmond leg was not campaign-related. Neither the Governor, nor any other campaign-related staff returned on the plane to Richmond. Governor Wilder went on to his vacation. Similarly, the Richmond-JFK leg on July 21, 1991 was not campaign-related. The plane was sent to New York to pick-up the Governor. By including these two legs, the Audit Division is in direct contradiction to the Regulations and the Audit Division's practice, including non-campaign-related flights.

9704380244C

The Interim Audit Report also inaccurately stated that the Committee failed to provide certain flight information to the FEC. The Committee strongly disagrees with this statement. The Committee continually forwarded all records in its possession relating to use of the Commonwealth plane to the Commission. The Committee was unable to provide the Commission with documents which were not in its possession. The Committee never asserted that the Commonwealth did not possess information related to the use of the Commonwealth plane. The Committee stated only that the Committee did not possess such information and, therefore, was unable to forward that information to the FEC.

The Audit Division also requested copies of flight logs for November 20, 1991 and December 4, 1991. Flight logs for November 20, 1991 and December 4, 1991 were included in documents previously provided to the Audit Division." (Emphasis in original).

It should be noted that the airfare information, provided by General Services Administration, is selected by utilizing the date of the trip. The date is entered into its computer program^{6/} which selects and prints the available airfares for those carriers providing first class commercial service on the date of the trip. The Audit staff selected the lowest unrestricted and non-discounted first class airfare. Counsel's argument that the airfares selected are "not determinative first-class airfares" is, in the opinion of the Audit staff, not persuasive. The Committee did not submit any documentation in support of its argument. Counsel merely states, "there were most likely other first-class airfares lower than GSA's first class airfare for each particular flight."

It should be noted that when the regulation concerning the use of corporate aircraft was adopted in 1976, prior to the deregulation of the airline industry, there was little price variation between carriers for a given trip. Subsequently, in February 1983 a similar regulation concerning the candidate's use of government conveyance was adopted.

^{6/} Passenger Interline Pricing/Prorate System compiled by the Airline Tariff Publishing Company based at Dulles International Airport

The Committee is suggesting that a lower (discounted) first class airfare should be used rather than the lowest non-discounted and unrestricted first class airfare.^{7/} It is the opinion of the Audit staff that the Committee's position is not a reasonable interpretation of the intent of the regulation given that the service provided is not subject to the pre-established routes and schedules of commercial carriers.

In the interim audit report, the Audit staff charged an equivalent of one first-class airfare in instances where the Commonwealth's plane traveled, without passengers, to/from a campaign-related event. Counsel's argument that the Committee reimbursed the Commonwealth for the these flights pursuant to state policy and such expenditures do "not permit the FEC to include such flights in its calculations when such flights clearly are not subject to federal election law" is incorrect. In accordance with 11 C.F.R. 9034.7(a), any expenditures made for travel relating to the campaign of a candidate seeking nomination for election to the office of President, shall, pursuant to the provisions of 11 C.F.R. 9034.7(b), be qualified expenses and be reported by the candidate's authorized committee(s). Thus, the flights, corresponding reimbursements, and all supporting documentation are subject to federal election law and, accordingly, were reviewed by the Audit staff.

Nonetheless, the Audit staff has removed the five legs in question from its analysis for various reasons, which reduced the amount underbilled from \$25,847 (interim audit report) to \$25,414 (see Attachment 4).

The Audit staff determined that the July 14, 1991 and July 21, 1991 trips (Richmond to New York to Richmond) were not campaign-related. See discussion at Finding III.C.4..

The July 27, 1991 and November 8, 1991 legs (Richmond to Washington, D.C.) were flights by the Commonwealth's plane (empty) to provide the Governor with transportation back to Richmond or onto another campaign-related event. The Audit staff determined that the difference between the amount reimbursed by the Committee and the correct billable amount calculated by the Audit staff is minimal. Therefore, the legs and associated costs were removed from our analysis.

^{7/} The airfare information provided by General Services Administration Transportation Audit Division contains first class airfares with no accompanying provisions and/or conditions (code F). It also contains lower first class airfares for night travel (code FN), and other discounted and/or restricted service (code F9, F28, etc.).

97043802442

The Richmond to San Antonio leg on October 19, 1991 was also removed from our analysis. In this instance the Governor was in San Antonio, TX for a campaign-related event. The Commonwealth's plane traveled (empty) from Richmond to San Antonio to provide transportation for the Governor and other campaign-related individuals back to Richmond. However, according to Counsel, the state policy requires the Committee to reimburse the state for the initial leg (Richmond to San Antonio). The flight log provided by the Commonwealth indicates 4.1 flight hours recorded for this leg, therefore, the Committee should have reimbursed the Commonwealth for \$2,563 (4.1 hours x \$625 per hour). There was no evidence of a billing by the Commonwealth nor a reimbursement by the Committee.

As a result, the Committee must reimburse the Commonwealth \$2,563.

As stated above, the Audit staff's requests for documentation were routinely delayed throughout the audit process. See discussion at Section I.D. It should be noted that the Committee never asserted that the "official flight logs" were not in the possession of the Commonwealth. However, Counsel for the Committee did state that an "itinerary" and "manifest" did not exist.

Further, Counsel argues that the flight logs for November 20, 1991 and December 4, 1991 were included in documents previously provided to the Audit Division. The Commonwealth's submission of flight logs on January 8, 1993 did not include these flight logs. The flight logs were received by the Audit staff in the Committee's response dated December 13, 1993.

The Committee has not complied with the above stated recommendation. Therefore, it remains the opinion of the Audit staff that the Committee should be required to reimburse the Commonwealth of Virginia \$27,977 (\$25,414 + \$2,563).

Recommendation #3

The Audit Division recommends that the Commission determine that the Committee reimburse the Commonwealth of Virginia \$27,977.

2. Telephone and Credit Card Usage

The Committee paid the Treasurer of Virginia \$5,000 for use of the Governor's office phone lines, and \$4,853 for reimbursement of travel expenses charged on a credit card. The only information provided related to the phone reimbursement was an invoice from the Office of the Governor, dated December 31, 1991, with the following description "Use of Governor's Office phone lines by Wilder for President campaign." No photocopies of

97043802443

phone bills or other documents were made available to show when the calls were made, the charges for the calls and the itemization of campaign vs. non campaign-related calls.

A Committee representative stated that the Governor did not wish to make available the telephone numbers called.

On November 20, 1992, the Audit Division received, from the Office of General Counsel, the Committee's supplemental response to the subpoenas. The response included a typed worksheet that recaps categories of cost (i.e., Monthly Recurring Charges, Scats, Toll Calls, Other Charges, and Message Units/Extended Area). The amounts contained on the worksheets are supported by copies of monthly "Commonwealth of Virginia - Interagency Transfer Invoice for Telephone Service", which detail the same categories of cost that appear on the worksheets.

The Committee uses the average cost of scats, toll calls, other charges, and message units/extended area for a 4 month period (August 28, 1991 through December 28, 1991) it considers the "campaign period" and compares it to the average cost of similar charges for a 6 month period (January 28, 1991 through July 27, 1991) which precedes the "campaign period". The Committee then takes the average increase of each category, multiples it by 4, and arrives at the cost the Committee should reimburse the Commonwealth, for use of phones.

The calculation is deficient for a number of reasons:

- billing information for the period July 28, 1991 through August 27, 1991 is missing, and not used in the Committee's analysis.
- billing information for the period December 29, 1991 through January 27, 1992 is missing, and not used in the Committee's analysis.
- the Committee considers the "campaign period" to be August 28, 1991 to December 28, 1991. However, the Candidate's exploratory committee registered in March 1991 and the campaign ended in January 1992 (the Candidate's DOI is 1/8/92). Further, an apparent one time charge ("other charges" September 1991 at \$2,535) could be a direct charge to the Committee because it appears to be for some increased level of activity, possibly additional telephone lines.
- the Committee did not include in its analysis any charge or average charge for the cost of the "Monthly Recurring Charges", which under its analysis would increase the amount due the Commonwealth of Virginia by approximately \$1,200.

97043802444

- the Committee did not include in its analysis any charge or average charge for Federal, State, or local taxes normally associated with monthly telephone cost.

The Committee submitted additional documentation on December 21, 1992. Specifically, the Committee submitted typed worksheets and copies of monthly "Commonwealth of Virginia - Interagency Transfer Invoice for Telephone Service", that support its worksheets, for the period April 1990 through February 1992. However, the Committee has revised its previous calculation (of \$5,104) and determined that the amount owed the Commonwealth for use of its telephones was \$3,345. The Committee calculated the average cost of scats, toll calls, other charges, and message units/extended area for the four month period and compared it the average cost of similar charges for the preceding 17 months and the subsequent 3 months following the "campaign period". It is the opinion of the Audit staff that the revised calculation is even less representative of the actual cost of campaign related telephone usage than its previous calculation. As a result, the Audit staff will not consider the revised calculation in the discussion that follows. Further, the Committee has also stated that telephone bills itemizing long distance calls were not (and at this stage cannot be) annotated as to whether a particular call was campaign related or official business of the Governor.

Absent the itemized phone bills, the Audit staff has analyzed the charges noted on the interagency transfer invoices for an 11 month period beginning March 1991 through January 1992, versus the same charges for the preceding 11 months (April 1990 through February 1991). According to the documentation made available, the cost of the Governor's office telephones for the 11 month period from April 1990 through February 1991 totaled \$49,373. The cost of telephones for the 11 month period during which the Candidate's campaign was active totaled \$57,244, an increase of \$7,871.

The difference between the amount calculated by the Audit staff (\$7,871) and the amount initially calculated by the Committee (\$5,104) is as follows:

- the Audit staff compared all costs noted on the interagency transfer invoices, where as the Committee did not include the "Monthly Recurring Charges".
- the Audit staff considered the relevant period to be March 1991 through January 1992, the Committee considered the "campaign period" to be September 1991 through December 1991.
- the Audit staff compared costs incurred during the 11 month active campaign period to costs incurred during the preceding 11 months. The Committee compared costs

97043802445

incurred during a 4 month period to costs incurred during a 6 month period which precedes, but not sequentially, its four month "campaign period".

It is our opinion that, based on the documentation made available, the Audit staff's calculation reasonably reflects the amount of campaign-related usage of the Commonwealth's telephones. However, the interagency transfer invoices do not include the cost of Surcharges on equipment, Federal excise taxes, and local taxes, which are normally associated with telephone bills and, if incurred, should be prorated between the Committee and the Governor's office.

On January 15, 1992, the Committee reimbursed the Treasurer of Virginia \$4,853 for its use of the Governor's credit card, a "Visa Business Card". In support of the payment the Committee submitted a schedule of 8 charges totaling \$2,693, a page from the December 1991 (closing date) billing statement, and receipts for 7 of the charges totaling \$2,321. Documentation for credit card charges totaling \$2,532 (\$4,853 - 2,321) has not been made available.

As a result, the undocumented portion, \$2,532, of the above payment is considered a non-qualified campaign expense (see Finding III.C.3.).

In the interim audit report, the Audit staff recommended that the Committee:

- with respect to the use of telephones, make a payment to the Commonwealth of \$2,871 (\$7,871 - 5,000) plus an amount that represents the increase in surcharges on equipment, federal excise taxes, and local taxes for the periods noted above; documentation to show the additional costs and the Committee's calculations are to be provided to the Audit staff; and
- with respect to the use of the credit card, provide documentation to support the \$2,532 in apparent credit card charges.

The Committee did not address these matters in its response to the interim audit report. It remains the opinion of the Audit staff that the Committee should be required to reimburse the Commonwealth of Virginia \$2,871 for use of telephones and provide documentation which identifies the costs of surcharges on equipment, Federal excise taxes, local taxes, and any other costs for the period April 1990 through January 1992; the undocumented credit card payment of \$2,532 represents a non-qualified campaign expense (see Finding III.C.3. for disposition).

97043802446

EPSTEIN BECKER & GREEN, P.C.

ATTORNEYS AT LAW

1227 25TH STREET, N.W.

WASHINGTON, D.C. 20037-1156†

(202) 861-0800

TELECOPIER: (202) 296-2532

DIRECT LINE

250 PARK AVENUE
NEW YORK, NEW YORK 10177-0077†
(212) 381-4500

1875 CENTURY PARK EAST
LOS ANGELES, CALIFORNIA 90067-2501
(310) 556-6361

SIX LANDMARK SQUARE
STAMFORD, CONNECTICUT 06901-2704†
(203) 348-3737

ONE RIVERFRONT PLAZA
NEWARK, NEW JERSEY 07102-8401†
(201) 642-1900

78 STATE STREET
BOSTON, MASSACHUSETTS 02108
(617) 342-4000

2 EMBARCADERO
SAN FRANCISCO, CALIFORNIA 94111-5004
(415) 398-3500

12750 MERIT DRIVE
DALLAS, TEXAS 75251-1209†
(214) 490-3143

115 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301-1830
(904) 681-0886

2400 SOUTH DIXIE HIGHWAY, SUITE 100
MIAMI, FLORIDA 33133
(305) 856-1100

510 KING STREET, SUITE 301
ALEXANDRIA, VIRGINIA 22314-3127†
(703) 664-1204

LEGAL & CONFIDENTIAL

November 7, 1994

P.C. NEW YORK, WASHINGTON, D.C., NEW JERSEY,
CONNECTICUT, VIRGINIA AND TEXAS ONLY

**VIA FACSIMILE &
HAND-DELIVERED**

James S. Portnoy, Esquire
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Room 657
Washington, DC 20463

MUR 3986

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
NOV 8 10 40 AM '94

RE: WILDER FOR PRESIDENT COMMITTEE

Dear Mr. Portnoy:

This is to acknowledge receipt by our office on last Monday, October 31, 1994 of the transcript of my October 5, 1994 oral presentation before the Commission on behalf of the Wilder for President Committee ("the Committee").

Based on my initial review of the transcript, I believe that several clarifications and/or revisions in connection with same may need to be filed with your office.

Unfortunately, the Committee representatives with whom I need to discuss these matters are pre-occupied with activities involving tomorrow's election and thus are not currently available.

However, I should be able to talk with them at the end of the week, and therefore file my clarifications and revisions by Monday, November 14, 1994.

I trust this will be acceptable. Please call me at (202) 861-1877 if you have any questions.

Sincerely,


Leslie J. Kerman

97043802447

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

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

Apr 26 12 13 PM '95

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR 3986

STAFF MEMBERS: James S. Portnoy
Jane J. Whang

SOURCE: INTERNALLY GENERATED

RESPONDENTS: Wilder for President Committee
and Mark R. Warner, as Treasurer
Thomas J. Berenguer
Commonwealth of Virginia

RELEVANT STATUTES/
REGULATIONS: 2 U.S.C. § 441a(a)(1)(A)
2 U.S.C. § 441b(a)
2 U.S.C. § 441a(f)
11 C.F.R. § 100.7(a)(1)
11 C.F.R. § 100.10
11 C.F.R. § 100.11
11 C.F.R. § 103.3(b)
11 C.F.R. § 9034.7(b)(5)

INTERNAL REPORTS CHECKED: Audit Documents

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTER

This matter was generated by an audit of the Wilder for President Committee ("the Committee") for the period from January 1991 through April 1992 undertaken pursuant to 26 U.S.C. § 9038(a).^{1/} The audit included an examination of the Committee's contributions, disbursements and qualified

^{1/} The Committee registered with the Commission on March 27, 1991 as the Wilder for President Exploratory Committee. On September 27, 1991, the Committee filed an amended Statement of Organization changing its name to the Wilder for President Committee.

97043802448

campaign expenditures.^{2/} As part of the audit, the Commission used dollar unit sampling of the Committee's contributions to project the dollar value of prohibited and excessive contributions made to the Committee.^{3/}

On May 6, 1994, the Commission approved the Final Audit Report on the Committee. The Report found that the Committee received \$5,200 in apparently excessive contributions and \$3,984 in apparently prohibited contributions and recommended that the Committee disgorge those contributions to the United States Treasury ("Treasury"). The Report also found that the Committee underpaid the Commonwealth of Virginia \$27,977 for the use of state-owned airplanes and \$2,871 for the use of state-owned telephones, and recommended that the Committee pay those amounts to the Commonwealth. The Committee submitted its response to the Final Audit Report on July 25, 1994.^{4/} To date, however, the Committee has not made the recommended payments to the Treasury or the Commonwealth.

^{2/} The Audit Division's referral materials are attached as Attachment 1.

^{3/} The Commission approved the use of sampling on May 5, 1992. By letter dated June 2, 1992 (which the Committee received on June 8, 1992), the Commission notified the Committee that sampling would be used to review contributions. The letter also notified the Committee that the Commission would not recognize "any 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." Thus, unlawful contributions resolved outside this time period do not mitigate the violation.

^{4/} On June 9, 1994, the Commission granted the Committee an extension of 45 days, until July 25, 1994, to respond to the Final Audit Report and the initial repayment determination.

97043802449

II. FACTUAL AND LEGAL ANALYSIS

A. Excessive & Prohibited Contributions

1. Background

The Federal Election Campaign Act (the "Act") provides that no person shall make contributions to any candidate and his or her authorized political committees which, in the aggregate, exceed \$1,000. 2 U.S.C. § 441a(a)(1)(A). The Act further provides that no political committee or officer or employee of a political committee shall knowingly accept a contribution in violation of the foregoing contribution limitation. 2 U.S.C. § 441a(f). Commission regulations state that apparently excessive contributions may be deposited into a campaign depository, but must be either refunded or reattributed within sixty days of the treasurer's receipt of the contribution. 11 C.F.R. § 110.1.

The Act also prohibits any corporation or labor organization to make a contribution or expenditure in connection with any election to federal office. 2 U.S.C. § 441b(a). It is further unlawful for any candidate, political committee, or other person to knowingly accept or receive any contribution prohibited by this section. Id.

2. Discussion

In its review of contributions accepted by the Committee, the Audit Division identified \$5,200 in apparently

97043802450

excessive contributions from five contributors.^{5/} The Audit staff also identified apparently prohibited contributions with a projected dollar value of \$3,984.^{6/} No refunds of the apparently excessive or prohibited contributions were made as of August 11, 1992, the date of the exit conference.

The Commission requested in both the Interim Audit Report and the Final Audit Report that the Committee either demonstrate that the foregoing contributions were not illegal or make payments to the Treasury. The Committee neither provided the requested documentation nor made the requested payments to the Treasury. Rather, the Committee incorrectly asserted that the auditors reviewed 100% of the Committee's contributions and thus should not have projected that the Committee accepted prohibited contributions other than those actually identified. The Committee also challenged the

^{5/} The Audit staff determined that the Committee accepted excessive contributions from: (1) Thomas J. Berenguer (\$3,000); (2) Mary Freeman Cheek (\$100); (3) Reginald C. Jackson, MD (\$1,000); (4) H.B. Mack (\$1,000); and (5) Lawrence D. Wilder, Jr. (\$100). To identify these contributions, the Audit staff reviewed all contributions over \$1,000 as well as a sample (318) of the remaining contributions. No excessive contributions were discovered in the sample of contributions of \$1,000 or less. As such, no projected excessive contributions were included in the Final Audit Report; the entire amount of excessive contributions included in the Report were actual contributions identified by the Audit staff.

^{6/} The Audit Division derived this figure based upon a sample review comprising 566 contributions, in which three apparent prohibited contributions totaling \$1,500 were identified. The entities that made the apparent prohibited contributions are: (1) Asprey (\$250); (2) J. Kopf, CMA Enterprises LTD (\$1,000); and (3) Lindley T. Smith, MD, PC (\$250). In view of the amounts involved, we are not making any recommendations with respect to the foregoing contributors.

97043802451

Commission's recommendation that unresolved contributions be paid to the Treasury.^{7/}

The Committee's arguments are not persuasive. First, the Committee misapprehended the Audit staff's review with respect to prohibited contributions. The Audit staff did not examine contributions on a 100% basis. Rather, the Audit staff examined a sample of 566 contributions, identified three prohibited contributions totaling \$1,500, and projected that the total dollar value of prohibited contributions would equal \$3,984. See note 6, supra. Thus, the Committee's challenge to the projection concerning prohibited contributions rests upon a faulty premise.

Second, the Committee's objection to disgorgement has no bearing on the Commission's determination whether there is reason to believe that the Committee violated the Act. Disgorgement is simply a remedy for violations of the Act.

^{7/} The Committee did not challenge the accuracy of the sampling or dispute the Commission's determination that it accepted \$5,200 in excessive contributions.

97043802452

In light of the foregoing, this Office recommends that the Commission find reason to believe that the Committee violated 2 U.S.C. § 441a(f) by accepting \$5,200 in excessive contributions. We further recommend that the Commission find reason to believe that the Committee violated 2 U.S.C. § 441b(a) by accepting \$3,984 in prohibited contributions.

We make no recommendations regarding four of the five individuals who made apparently excessive contributions -- Mary Freeman Cheek (\$100), Reginald C. Jackson, MD (\$1,000), H.B. Mack (\$1,000), and Lawrence D. Wilder, Jr. (\$100)

However, the fifth contributor, Thomas J. Berenguer, made apparently excessive contributions totaling \$3,000. These contributions warrant further action with respect to Mr. Berenguer as well as the Committee. Id. Accordingly, we recommend that the Commission find reason to believe that Thomas J. Berenguer violated 2 U.S.C. § 441a(a)(1)(A).

B. Transactions Involving Commonwealth of Virginia

As noted previously, the Act provides that a person may not contribute in excess of \$1,000 to a candidate and his or her authorized committee, and that a candidate and his or her authorized committee may not accept such a contribution. 2 U.S.C. §§ 441a(a)(1)(a) and 441a(f). The Act defines contributions to include a "gift, subscription, loan . . . or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C.

97043802453

§ 431(B)(A)(1); see also 11 C.F.R. § 100.7(a)(1). "Anything of value" includes "all in-kind contributions," as well as the provision of goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services. 11 C.F.R. §§ 100.7(a)(1)(iii)(A) and (B).

In addition, Commission regulations provide that if an individual, including a candidate, uses a government conveyance for campaign-related travel, the candidate's authorized committee must reimburse the appropriate government entity. 11 C.F.R. § 9034.7(b)(5). For travel to a city served by regularly scheduled commercial service, the amount reimbursed shall equal the first class commercial air fare plus the cost of other services. Id.

Governor Wilder and his campaign staff made some 50 campaign-related trips on planes owned by the Commonwealth of Virginia. The Committee concedes that it did not pay the Commonwealth the rate required by 11 C.F.R. § 9034.7(b)(5). Instead, the Committee reimbursed the Commonwealth at a rate of \$625 per hour of plane usage plus certain expenses. This represents the rate at which the Commonwealth billed the Committee. The Committee thus contends that it is in full compliance with Commonwealth law -- which it also contends should determine the proper reimbursement rate. However, federal law supersedes state law in the event of a conflict. Weber v. Heaney, 995 F.2d 872 (8th Cir. 1993)(FECA and Commission regulations supersede Minnesota Congressional

97043802454

Campaign Act); see also 2 U.S.C. § 453; see generally Article VI, U.S. Const. Thus, in MUR 1686, the Commission rejected a similar claim, requiring the Governor of North Carolina to calculate reimbursement rates pursuant to Commission regulations for the use of state conveyances during his Senate campaign. See also AO 1984-48 (explaining proper reimbursement calculation method for North Carolina's Governor's use of state-owned airplane and helicopter).

In light of the foregoing, the Committee was required to reimburse the Commonwealth at the rate prescribed in the Commission's regulations. See 11 C.F.R. § 9034.7(b)(5). Upon review of the Committee's records, the Audit staff determined that the reimbursement rate used by the Committee resulted in an underpayment to the Commonwealth totaling \$25,414. See Attachment 1 at 19.

Also with respect to use of the Commonwealth's plane, the Audit staff determined that the Committee failed to pay the Commonwealth for a positioning flight from Richmond, Virginia to San Antonio, Texas to pick up Governor Wilder from a political trip.^{9/} Attachment 1 at 20. The Commission requires a committee to pay the equivalent of one first class airfare for a positioning flight. The Audit staff has advised this Office that the applicable first class airfare

^{9/} It appears that no payment was made because the Commonwealth never sent the Committee an invoice for the flight. Attachment 1 at 18.

97043802455

from Richmond to San Antonio is \$826.^{10/} Therefore, it appears that the Committee underpaid the Commonwealth a total of \$26,240 for use of government conveyances, in violation of 11 C.F.R. § 9034.7(b)(5).

In addition, the Committee underpaid the Commonwealth for the campaign-related use of state telephones. The Committee reimbursed the Commonwealth for telephone use from August 28, 1991 to December 28, 1991; however, Mr. Wilder's exploratory committee registered in March 1991 and his campaign lasted into January 1992. Also, the Committee did not reimburse the Commonwealth for taxes and other surcharges incurred on the Committee's behalf. In sum, the Audit staff calculated that the Committee underpaid the Commonwealth \$2,871 for the use of state telephones.

Thus, the Committee apparently underpaid the Commonwealth a total of \$29,111 for use of government conveyances (\$26,240) and telephones (\$2,871). The underpayment for use of government conveyances contravenes Commission regulations, 11 C.F.R. § 9034.7(b)(5), and constitutes a contribution to the Committee. See 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.7(a)(1). The regulations do not directly address the Committee's underpayment for use of the Commonwealth's telephones. Even so, the underpayments for the use of the Commonwealth's telephones similarly

^{10/} Under the Commonwealth's regulations, the Committee should have paid the Commonwealth \$2,563 for this flight (4.1 hours x \$625 per hour). See Attachment i at 20. The amount due under Commission regulations, \$826, by contrast, is \$1,737 less.

97043002456

constitute in-kind contributions from the Commonwealth to the Committee. See 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.7(a)(1). Because the Act imposes a \$1,000 contribution limit, the underpayments constitute apparent excessive contributions from the Commonwealth to the Committee in the amount of \$28,111.^{11/}

In light of the foregoing, the Office of General Counsel recommends that the Commission find reason to believe that the Committee accepted excessive contributions from the Commonwealth of Virginia in violation of 2 U.S.C. § 441a(f). In addition, the Office of General Counsel recommends that the Commission find reason to believe that the Commonwealth of Virginia made excessive contributions to the Committee in violation of 2 U.S.C. § 441a(a)(1)(A). We believe, however, that the Commission can best achieve its remedial goals in this matter by directing enforcement efforts against the Committee rather than the Commonwealth. Therefore, we recommend that the Commission exercise its prosecutorial

^{11/} See MUR 1686 (Commission found reason to believe that the State of North Carolina made excessive contributions to Governor Jim Hunt's Senate campaign in the form of inadequately reimbursed use of state conveyances and that the Hunt campaign accepted excessive contributions. But, see MUR 2074 (Commission rejected this Office's recommendation to find reason to believe that Charles Schumer's congressional campaign accepted excessive contributions from the State of New York in the form of salaries of state employees who performed services for the Committee.)

97043802457

discretion to take no further action against the Commonwealth and to close the file with respect to the Commonwealth.^{12/}

III. CONCILIATION AND CIVIL PENALTIES

IV. RECOMMENDATIONS

1. Find reason to believe that the Wilder for President Committee and Mark R. Warner, as treasurer, violated 2 U.S.C. §§ 441a(f) and 441b(a).
2. Find reason to believe that Thomas J. Berenguer violated 2 U.S.C. § 441a(a)(1)(A).
3. Find reason to believe that the Commonwealth of Virginia violated 2 U.S.C. § 441a(a)(1)(A), but take no further action and close the file with respect to this respondent.

^{12/} This recommendation is consistent with the ultimate disposition in MUR 1686. After the Hunt Committee reimbursed the State of North Carolina for its underpayments and signed a conciliation agreement with the Commission, the Commission took no further action against the State.

97043802458

4. Enter into conciliation with the Wilder for President Committee and Mark R. Warner, as treasurer, prior to a finding of probable cause to believe.

5. Enter into conciliation with Thomas J. Berenquer prior to a finding of probable cause to believe.

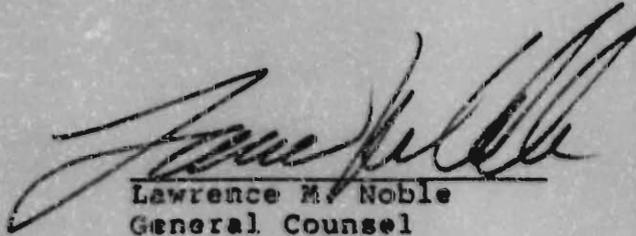
6. Approve the attached Factual and Legal Analyses.

7. Approve the attached Conciliation Agreements.

8. Approve the appropriate letters.

Date

4/26/95



Lawrence M. Noble
General Counsel

ATTACHMENTS

1. Referral Materials
2. Factual & Legal Analyses
3. Conciliation Agreements

97043802459

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Wilder for President Committee) MUR 3986
and Mark R. Warner, as Treasurer;)
Thomas J. Berenguer;)
Commonwealth of Virginia.)

CERTIFICATION

I, Marjorie W. Emons, Secretary of the Federal Election Commission, do hereby certify that on May 1, 1995, the Commission decided by a vote of 5-0 to take the following actions in MUR 3986:

1. Find reason to believe that the Wilder for President Committee and Mark R. Warner, as treasurer, violated 2 U.S.C. §§ 441a(f) and 441b(a).
2. Find reason to believe that Thomas J. Berenguer violated 2 U.S.C. § 441a(a)(1)(A).
3. Find reason to believe that the Commonwealth of Virginia violated 2 U.S.C. § 441a(a)(1)(A), but take no further action and close the file with respect to this respondent.
4. Enter into conciliation with the Wilder for President Committee and Mark R. Warner, as treasurer, prior to a finding of probable cause to believe.

(continued)

9704380246C

5. Enter into conciliation with Thomas J. Berenguer prior to a finding of probable cause to believe.
6. Approve the Factual and Legal Analyses, as recommended in the General Counsel's Report dated April 26, 1995.
7. Approve the Conciliation Agreements, as recommended in the General Counsel's Report dated April 26, 1995.
8. Approve the appropriate letters, as recommended in the General Counsel's Report dated April 26, 1995.

Commissioners Aikens, Elliott, McGarry, Potter, and Thomas voted affirmatively for the decision; Commissioner McDonald did not cast a vote.

Attest:

5-2-95
Date

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

Received in the Secretariat: Wed., April 26, 1995 12:18 p.m.
Circulated to the Commission: Wed., April 26, 1995 4:00 p.m.
Deadline for vote: Mon., May 01, 1995 4:00 p.m.

lrd

97043802461



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 4, 1995

Leslie J. Kerman
Epstein, Becker & Green, P.C.
Attorneys at Law
1227 25th Street, N.W.
Washington, D.C. 20037-1156

RE: MUR 3986
Wilder for President
Committee

Dear Ms. Kerman:

On May 1, 1995, the Federal Election Commission found that there is reason to believe your clients, the Wilder for President Committee ("Committee") and Mark R. Warner, as treasurer, violated 2 U.S.C. §§ 441a(f) and 441b(a), provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of 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.

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.

97043802462

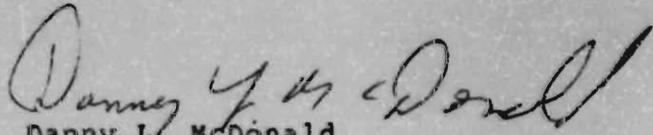
Letter to Leslie J. Kerman
Page 2

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

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

For your information, we have attached a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact James S. Portnoy, the attorney assigned to this matter, at (202) 219-3690.

Sincerely,


Danny L. McDonald
Chairman

Enclosures
Factual and Legal Analysis
Procedures
Conciliation Agreement

97043802463

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

MUR 3986

RESPONDENT: Wilder for President Committee
and Mark R. Warner, as Treasurer

I. GENERATION OF MATTER

97043802464

This matter was initiated by the Federal Election Commission ("the Commission") pursuant to information ascertained in the normal course of carrying out its supervisory responsibility. In particular, this matter was generated by an audit of the Wilder for President Committee ("the Committee") for the period from January 1991 through April 1992 undertaken pursuant to 26 U.S.C. § 9038.1(a).1/ The audit included an examination of the Committee's contributions, disbursements and qualified campaign expenditures. As part of the audit, the Commission used dollar unit sampling of the Committee's contributions to project the dollar value of prohibited and excessive contributions made to the Committee.2/

1/ The Committee registered with the Commission on March 27, 1991 as the Wilder for President Exploratory Committee. On September 27, 1991, the Committee filed an amended Statement of Organization changing its name to the Wilder for President Committee.

2/ The Commission approved the use of sampling on May 5, 1992. By letter dated June 2, 1992 (which the Committee received on June 8, 1992), the Commission notified the Committee that sampling would be used to review contributions. The letter also notified the Committee that the Commission would not recognize "any 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." Thus, unlawful contributions resolved outside this time period do not

On May 6, 1994, the Commission approved the Final Audit Report on the Committee. The Report found that the Committee received \$5,200 in apparently excessive contributions and \$3,984 in apparently prohibited contributions and recommended that the Committee disgorge those contributions to the United States Treasury ("Treasury"). The Report also found that the Committee underpaid the Commonwealth of Virginia \$27,977 for the use of state-owned airplanes and \$2,871 for the use of state-owned telephones, and recommended that the Committee pay those amounts to the Commonwealth. The Committee submitted its response to the Final Audit Report on July 25, 1994.^{3/} To date, however, the Committee has not made the recommended payments to the Treasury or the Commonwealth.

II. FACTUAL AND LEGAL ANALYSIS

A. Excessive & Prohibited Contributions

The Federal Election Campaign Act (the "Act") provides that no person shall make contributions to any candidate and his or her authorized political committees which, in the aggregate, exceed \$1,000. 2 U.S.C. § 441a(a)(1)(A). The Act further provides that no political committee or officer or employee of a political committee shall knowingly accept a contribution in violation of the foregoing contribution limitation. 2 U.S.C. § 441a(f). Commission regulations

(Footnote 2 continued from previous page)
mitigate the violation.

^{3/} On June 9, 1994, the Commission granted the Committee an extension of 45 days, until July 25, 1994, to respond to the Final Audit Report and the initial repayment determination.

97043802465

state that apparently excessive contributions may be deposited into a campaign depository, but must be either refunded or reattributed within sixty days of the treasurer's receipt of the contribution. 11 C.F.R. § 110.1.

The Act also prohibits any corporation or labor organization to make a contribution or expenditure in connection with any election to federal office. 2 U.S.C. § 441b(a). It is further unlawful for any candidate, political committee, or other person to knowingly accept or receive any contribution prohibited by this section. Id.

Upon review of contributions accepted by the Committee, the Audit Division identified \$5,200 in apparently excessive contributions from five contributors.^{4/} The Audit staff also identified apparently prohibited contributions with a projected dollar value of \$3,984.^{5/} No refunds of the

^{4/} The Audit staff discovered that the Committee accepted \$5,200 in apparently excessive contributions from the following five contributors: (1) Thomas J. Berenguer (\$3,000); (2) Mary Freeman Cheek (\$100); (3) Reginald C. Jackson, MD (\$1,000); (4) H.B. Mack (\$1,000); and (5) Lawrence D. Wilder, Jr. (\$100). To identify these contributions, the Audit staff reviewed all contributions over \$1,000 as well as a sample (318) of the remaining contributions. No excessive contributions were discovered in the sample of contributions of \$1,000 or less. As such, no projected excessive contributions were included in the Final Audit Report; the entire amount of excessive contributions included in the Report were actual contributions identified by the Audit staff.

^{5/} The Audit Division derived this figure based upon a sample review comprising 566 contributions, in which three apparent prohibited contributions totaling \$1,500 were identified. The entities that made the apparent prohibited contributions are: (1) Asprey (\$250); (2) J. Kopf, CMA Enterprises LTD (\$1,000); and (3) Lindley T. Smith, MD, PC (\$250).

97043802466

apparently excessive or prohibited contributions were made as of August 11, 1992, the date of the exit conference.

The Commission requested in both the Interim Audit Report and the Final Audit Report that the Committee either demonstrate that the foregoing contributions were not illegal or make payment to the Treasury in the above amounts. However, the Committee neither provided the requested documentation nor made the requested payment to the Treasury. Rather, the Committee incorrectly asserted that the auditors reviewed 100% of the Committee's contributions and thus should not have projected that the Committee accepted prohibited contributions other than those actually identified. The Committee also challenged the Commission's recommendation that unresolved contributions be paid to the Treasury.

Neither of the Committee's arguments is persuasive. First, the Committee misapprehended the Audit staff's review with respect to prohibited contributions. The Audit staff did not examine contributions on a 100% basis. Rather, the Audit staff examined a sample of 566 contributions, identified three prohibited contributions totaling \$1,500, and projected that the total dollar value of prohibited contributions would equal \$3,984. See note 5, supra. Thus, the Committee's challenge to the Audit staff's projection concerning prohibited contributions rests upon a faulty premise.

97043802467

Second, the Committee's objection to disgorgement has no bearing on the Commission's determination whether there is reason to believe that the Committee violated the Act.

Disgorgement is simply a remedy for violations of the Act.^{6/}

In light of the foregoing, there is reason to believe that the Committee violated 2 U.S.C. § 441a(f) by accepting \$5,200 in excessive contributions. There also is reason to believe that the Committee violated 2 U.S.C. § 441b(a) by accepting \$3,984 in prohibited contributions.

B. Transactions Involving Commonwealth of Virginia

The Act provides that a person may not contribute in excess of \$1,000 to a candidate and his or her authorized committee, and that a candidate and his or her authorized committee may not accept such a contribution. 2 U.S.C. §§ 441a(a)(1)(a) and 441a(f). The Act defines contributions to include a "gift, subscription, loan . . . or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i); see also 11 C.F.R. § 100.7(a)(1). "Anything of value" includes "all in-kind contributions," as well as the provision of goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services. 11 C.F.R. §§ 100.7(a)(1)(iii)(A) and (B).

^{6/} Notwithstanding the Committee's objections, the Commission has authority to seek disgorgement to the Treasury to "depriv[e] wrongdoers of the gains of their wrongful conduct." SEC. v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1307 (2d Cir. 1971); see also SEC. v. First Financial Corp., 890 F.2d 1215, 1231 (D.C. Cir. 1989); SEC. v. Bilzerian, 814 F. Supp. 116, 120 (D.D.C. 1993).

97043802468

In addition, Commission regulations provide that if an individual, including a candidate, uses a government conveyance for campaign-related travel, the candidate's authorized committee must reimburse the appropriate government entity. 11 C.F.R. § 9034.7(b)(5). For travel to a city served by regularly scheduled commercial service, the amount reimbursed shall equal the first class commercial air fare plus the cost of other services. Id.

Governor Wilder and his campaign staff made some 50 campaign-related trips on planes owned by the Commonwealth of Virginia. The Committee concedes that it did not pay the Commonwealth the rate required by 11 C.F.R. § 9034.7(b)(5). Instead, the Committee reimbursed the Commonwealth at a rate of \$625 per hour of plane usage plus certain expenses. This represents the rate at which the Commonwealth billed the Committee. The Committee thus contends that it is in full compliance with Commonwealth law -- which it also contends should determine the proper reimbursement rate.^{7/} However, federal law supersedes state law in the event of a conflict. Weber v. Heaney, 995 F.2d 872 (8th Cir. 1993) (FECA and Commission regulations supersede Minnesota Congressional Campaign Act); see also 2 U.S.C. § 453; see generally

^{7/} In MUR 1686, the Commission rejected a similar claim, requiring the Governor of North Carolina to calculate reimbursement rates pursuant to Commission regulations for use of state conveyances during his campaign for the U.S. Senate. See also AO 1984-48 (explaining proper reimbursement calculation method for North Carolina's Governor's use of state-owned airplane and helicopter).

97043802469

Article VI, U.S. Const. As such, the Committee was required to reimburse the Commonwealth at the rate prescribed in the Commission's regulations. See 11 C.F.R. § 9034.7(b)(5). Upon review of the Committee's records, the Audit staff determined that the reimbursement rate used by the Committee resulted in an underpayment to the Commonwealth totaling \$25,414.

Also with respect to use of the Commonwealth's plane, the Audit staff determined that the Committee failed to pay the Commonwealth at all for a positioning flight from Richmond, Virginia to San Antonio, Texas to pick up Governor Wilder from a political trip.^{8/} The Commission requires committees to pay the equivalent of one first class airfare for positioning flights. The applicable first class airfare from Richmond to San Antonio is \$826.^{9/} Therefore, it appears that the Committee underpaid the Commonwealth a total of \$26,240 for use of government conveyances, in violation of 11 C.F.R. § 9034.7(b)(5).

The Committee also apparently underpaid the Commonwealth for the campaign-related use of state telephones. For example, the Committee reimbursed the Commonwealth for telephone use only from August 28, 1991 to December 28, 1991,

^{8/} It appears that no payment was made because the Commonwealth never sent the Committee an invoice for the flight.

^{9/} Under the Commonwealth's regulations, the Committee should have paid the Commonwealth \$2,563 for this flight (4.1 hours x \$625 per hour). The amount due under Commission regulations, \$826, by contrast, is \$1,737 less.

97043802470

whereas Mr. Wilder's exploratory committee registered in March 1991 and the campaign lasted into January 1992. The Audit staff also included taxes and other surcharges in the base amount from which the Committee's liability was determined. In total, the Audit staff calculated that the Committee underpaid the Commonwealth \$2,871 for the use of state telephones.

Thus, the Committee apparently underpaid the Commonwealth a total of \$29,111 for use of government conveyances (\$26,240) and telephones (\$2,871). The underpayment for the use of government conveyances contravenes Commission regulations, 11 C.F.R. § 9034.7(b)(5), and constitutes a contribution to the Committee. See 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.7(a)(1). The regulations do not directly address the Committee's underpayment for use of the Commonwealth's telephones. Even so, the underpayment for the use of the Commonwealth's telephones similarly constitutes an in-kind contribution from the Commonwealth to the Committee. See 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.7(a)(1). Because the Act imposes a \$1,000 contribution limit, the underpayments appear to constitute excessive contributions from the Commonwealth to the Committee in the amount of \$28,111. See NUR 1586 (Commission found reason to believe that the State of North Carolina made excessive contributions to Governor Jim Hunt's Senate campaign in the form of inadequately reimbursed use of

97043802471

state conveyances and that the Hunt campaign accepted excessive contributions.)

Therefore, there is reason to believe that the Committee accepted excessive contributions from the Commonwealth of Virginia in violation of 2 U.S.C. 5 441a(f).

97043802472



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 4, 1995

Thomas J. Berenguer
646 S. Atlantic Avenue
Virginia Beach, VA 23451

RE: MUR 3986
Thomas J. Berenguer

Dear Mr. Berenguer:

On May 1, 1995, the Federal Election Commission found that there is reason to believe you violated 2 U.S.C. § 441a(a)(1)(A), a provision of the Federal Election Campaign Act of 1971, as amended ("the Act"). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of 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.

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.

97043802473

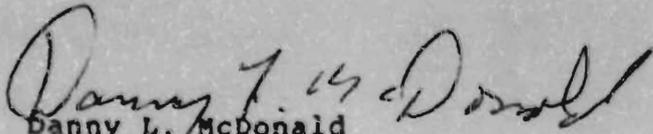
Letter to Thomas J. Berenguer
Page 2

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

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

For your information, we have attached a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Jack MacDonald, the staff member assigned to this matter, at (202) 219-3690.

Sincerely,


Danny L. McDonald
Chairman

Enclosures

Factual and Legal Analysis
Procedures
Designation of Counsel Form
Conciliation Agreement

97043802474

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

MUR 3986

RESPONDENT: Thomas J. Berenguer

This matter was initiated by the Federal Election Commission ("the Commission") pursuant to information ascertained in the normal course of carrying out its supervisory responsibility. In particular, this matter was generated by an audit of the Wilder for President Committee ("the Committee") for the period from January 1991 through April 1992 undertaken pursuant to 26 U.S.C. § 9038(a). The audit included an examination of the Committee's contributions.

The Federal Election Campaign Act of 1971, as amended ("the Act"), provides that no person shall make contributions to any candidate and his authorized political committees which, in the aggregate, exceed \$1,000. 2 U.S.C. § 441a(a)(1)(A). Committee records show that on April 15, 1991, Thomas J. Berenguer contributed \$4,000 to the Committee, in the form of four checks, each in the amount of \$1,000. Under the Act, Mr. Berenguer lawfully could contribute no more than \$1,000 to the Committee. Therefore, there is reason to believe that Mr. Berenguer made a \$3,000 excessive contribution to the Committee, in violation of 2 U.S.C. § 441a(a)(1)(A).

97043802475



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

May 4, 1995

James S. Gilmore, III
Attorney General of Virginia
101 North 8th Street, 5th Floor
Richmond, VA 23219

RE: MUR 3986
Commonwealth of Virginia

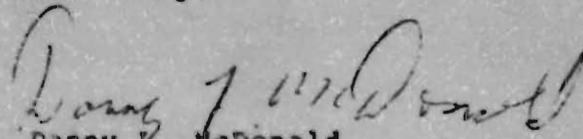
Dear Attorney General Gilmore:

On May 1, 1995, the Federal Election Commission found reason to believe that the Commonwealth of Virginia ("the Commonwealth") violated 2 U.S.C. § 441a(a)(1)(A), a provision of the Federal Election Campaign Act of 1971, as amended ("the Act."). However, after considering the circumstances of this matter, the Commission also determined to take no further action and closed its file as it pertains to the Commonwealth. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

The file will be made public within 30 days after this matter has been closed with respect to all other respondents involved. You are advised that the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) still apply with respect to all respondents still involved in this matter.

If you have any questions, please contact James S. Portnoy, the attorney assigned to this matter, at (202) 219-3690.

Sincerely,


Danny B. McDonald
Chairman

Enclosure
Factual and Legal Analysis

97043802476

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

MUR 3986

RESPONDENT: Commonwealth of Virginia

I. GENERATION OF MATTER

This matter was initiated by the Federal Election Commission ("the Commission") pursuant to information ascertained in the normal course of carrying out its supervisory responsibility. In particular, this matter was generated by an audit of the Wilder for President Committee ("the Committee") for the period from January 1991 through April 1992 undertaken pursuant to 26 U.S.C. § 9038.1(a).

II. FACTUAL AND LEGAL ANALYSIS

The Federal Election Campaign Act (the "Act") provides that no person shall make contributions to any candidate and his or her authorized political committees which, in the aggregate, exceed \$1,000. 2 U.S.C. § 441a(a)(1)(A). The Act defines contributions to include a "gift, subscription, loan . . . or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i); see also 11 C.F.R. § 100.7(a)(1). "Anything of value" includes "all in-kind contributions," as well as the provision of goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services. 11 C.F.R. §§ 100.7(a)(1)(iii)(A) and (B).

97043802477

In addition, Commission regulations provide that if an individual, including a candidate, uses a government conveyance for campaign-related travel, the candidate's authorized committee must reimburse the appropriate government entity. 11 C.F.R. § 9034.7(b)(5). For travel to a city served by regularly scheduled commercial service, the amount reimbursed shall equal the first class commercial air fare plus the cost of other services. Id.

Governor Wilder and his campaign staff made some 50 campaign-related trips on planes owned by the Commonwealth of Virginia. The Committee concedes that it did not pay the Commonwealth the rate required by 11 C.F.R. § 9034.7(b)(5). Instead, the Committee reimbursed the Commonwealth at a rate of \$625 per hour of plane usage plus certain expenses. According to the Committee, this represents the rate at which the Commonwealth billed the Committee and thus is in full compliance with Commonwealth law. However, federal law supersedes state law in the event of a conflict. Weber v. Heaney, 995 F.2d 872 (8th Cir. 1993)(The Act and Commission regulations supersede Minnesota Congressional Campaign Act); see also 2 U.S.C. § 453; see generally Article VI, U.S. Const. As such, the Committee was required to reimburse the Commonwealth at the rate prescribed in the Commission's

97043802478

regulations.^{1/} See 11 C.F.R. § 9034.7(b)(5). Upon review of the Committee's records, the Audit staff determined that the reimbursement rate used by the Committee resulted in an underpayment to the Commonwealth totaling \$25,414.

Also with respect to use of the Commonwealth's plane, the Audit staff determined that the Committee failed to pay the Commonwealth at all for a positioning flight from Richmond, Virginia to San Antonio, Texas to pick up Governor Wilder from a political trip.^{2/} The Commission requires committees to pay the equivalent of one first class airfare for positioning flights. The applicable first class airfare from Richmond to San Antonio is \$826.^{3/} Therefore, it appears that the Committee underpaid the Commonwealth a total of \$26,240 for use of government conveyances, in violation of 11 C.F.R. § 9034.7(b)(5).

The Committee also apparently underpaid the Commonwealth for the campaign-related use of state telephones. For example, the Committee reimbursed the Commonwealth for telephone use only from August 28, 1991 to December 28, 1991,

^{1/} In MUR 1696, the Commission required the Governor of North Carolina to calculate reimbursement rates pursuant to Commission regulations for use of state conveyances during his campaign for the U.S. Senate. See also AO 1984-48 (explaining proper reimbursement calculation method for North Carolina's Governor's use of state-owned airplane and helicopter).

^{2/} It appears that no payment was made because the Commonwealth never sent the Committee an invoice for the flight.

^{3/} Under the Commonwealth's regulations, the Committee should have paid the Commonwealth \$2,563 for this flight (4.1 hours x \$625 per hour). The amount due under Commission regulations, \$826, by contrast, is \$1,737 less.

97043802479

whereas Mr. Wilder's exploratory committee registered in March 1991 and the campaign lasted into January 1992. The Audit staff also included taxes and other surcharges in the base amount from which the Committee's liability was determined. In total, the Audit staff calculated that the Committee underpaid the Commonwealth \$2,871 for the use of state telephones.

Thus, the Committee apparently underpaid the Commonwealth a total of \$29,111 for use of government conveyances (\$26,240) and telephones (\$2,871). The underpayment with respect to the use of government conveyances contravenes Commission regulations, 11 C.F.R. § 9034.7(b)(5), and constitutes a contribution to the Committee. See 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.7(a)(1). The regulations do not directly address the Committee's underpayment for use of the Commonwealth's telephones. Even so, the underpayment for the use of the Commonwealth's telephones similarly constitutes an in-kind contribution from the Commonwealth to the Committee. See 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.7(a)(1). Because the Act imposes a \$1,000 contribution limit, the underpayments appear to constitute excessive contributions from the Commonwealth to the Committee in the amount of \$28,111. See MUR 1686 (Commission found reason to believe that the State of North Carolina made excessive contributions to Governor Jim Hunt's Senate campaign in the form of inadequately reimbursed use of state conveyances.)

9704380248C

In light of the foregoing, there is reason to believe that the Commonwealth of Virginia made excessive contributions to the Committee in violation of 2 U.S.C. § 441a(a)(1)(A).

97043802481



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 26, 1995

Thomas J. Berenguer
646 S. Atlantic Avenue
Virginia Beach, VA 23451

RE: MUR 3986
Thomas J. Berenguer

Dear Mr. Berenguer:

On May 4, 1995, you were notified that the Federal Election Commission determined to enter into negotiations directed toward reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. On that same date you were sent a conciliation agreement offered by the Commission in settlement of this matter.

Please note that conciliation negotiations entered into prior to a finding of probable cause to believe are limited to a maximum of 30 days. To date, you have not responded to the proposed agreement. The 30 day period for negotiations will soon expire. Unless we receive a response from you within five days, this Office will consider these negotiations terminated and will proceed to the next stage of the enforcement process.

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

Sincerely,

Jack MacDonald
Paralegal Specialist

97043802482



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

May 30, 1995

Leslie J. Kerman
Epstein, Becker & Green, P.C.
Attorneys at Law
1227 25th Street, N.W.
Washington, D.C. 20037-1156

RE: MUR 3986
Wilder for President
Committee

Dear Ms. Kerman:

On May 4, 1995, you were notified that the Federal Election Commission determined to enter into negotiations directed toward reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. On that same date you were sent a conciliation agreement offered by the Commission in settlement of this matter.

Please note that conciliation negotiations entered into prior to a finding of probable cause to believe are limited to a maximum of 30 days. To date, you have not responded to the proposed agreement. The 30 day period for negotiations will soon expire. Unless we receive a response from you within five days, this Office will consider these negotiations terminated and will proceed to the next stage of the enforcement process.

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

Sincerely,

James S. Portnoy
Attorney

97043802483



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

June 5, 1995

BY TELECOPIER AND FIRST CLASS MAIL

Thomas J. Berenguer
1546 Blanford Circle
Norfolk, VA 23505

RE: MUR 3986
Thomas J. Berenguer

Dear Dr. Berenguer:

In accordance with my telephone conversation on June 5, 1995 with your wife Mary, enclosed are copies of the Federal Election Commission's original correspondence to you dated May 4 and May 26, 1995. If you have any questions, please contact me at (202) 219-3690.

Sincerely,

Jack MacDonald
Paralegal Specialist

Enclosures

97043802484

STATEMENT OF DESIGNATION OF COUNSEL

MUR _____

NAME OF COUNSEL: Carl A. Fannon, ESQ.

ADDRESS: C/O Wolcott, Rivers, Et Al

1100 One Columbus Center

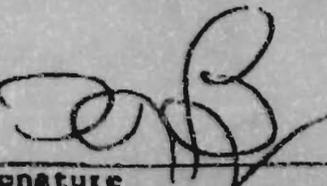
Virginia Beach, Va. 23462

TELEPHONE: (804) 497-6633

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.

June 12, 1995

Date



Signature

RESPONDENT'S NAME: Thomas J. Berenguer, M.D.

ADDRESS: 6160 Kempsville Circle

Suite 201A

Norfolk, Va. 23502

HOME PHONE: (804) 489-8332

BUSINESS PHONE: (804) 466-7100

97043802485



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

FAXED
6-28-95

June 28, 1995

VIA FACSIMILE AND MAIL

Carl A. Eason, Esq.
Wolcott, Rivers, Et Al.
1100 One Columbus Center
Virginia Beach, VA 23462

RE: MUR 3986
Thomas J. Berenguer

Dear Mr. Eason:

On June 13, 1995 and June 21, 1995, you and I spoke by telephone concerning the above referenced matter. On those dates, you stated that you planned to respond to the Commission's reason to believe finding against your client; however, as of this date, the Commission has not received your response. In light of the amount of time that has already expired since Dr. Berenguer was first notified of this matter, you should submit any response you wish the Commission to consider in this matter no later than July 5, 1995. Accordingly, I look forward to your response by July 5, 1995. Correspondence can be sent to the Federal Election Commission, Office of General Counsel, 999 E Street, N.W., Washington, D.C. 20463.

If you have any further questions, please contact me at (202) 219-3690. I can be reached by fax at (202) 219-1043.

Sincerely,

Jack MacDonald
Paralegal Specialist

97043802486

WOLCOTT, RIVERS, WHEARY, BASNIGHT & KELLY, P.C.

ATTORNEYS AND COUNSELORS AT LAW
1100 ONE COLUMBUS CENTER
VIRGINIA BEACH, VIRGINIA 23462-6722

WILSON L. RIVERS
WILLIAM A. WHEARY, III
W. BRANTLEY BASNIGHT, III
MONROE KELLY, III
CARL A. EASON
JOSEPH R. MAYES
SAMUEL W. MEEKINS, JR.
EDWARD W. WOLCOTT, JR.
BARRY DORANS
RICHARD E. BIEMILLER
RICHARD E. SLANEY
CHESHIRE L'ANSON EVELEIGH
M. POWELL PETERS

HARRY K. WOLCOTT
(1888-1932)
EDWARD W. WOLCOTT
(1871-1932)
JAMES M. WOLCOTT
(1894-1976)
EDWARD W. WOLCOTT
(RETIRED)

TELEPHONE: (804) 497-6633
TELECOPIER: (304) 497-7267

June 29, 1995

VIA TELECOPIER

ALSO ADMITTED IN
NORTH CAROLINA

Mr. Jack MacDonald
Paralegal Specialist
Federal Election Commission
Washington, D.C. 20463

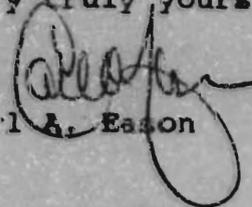
Re: MUR 3986
Thomas J. Berenguer

Dear Mr. MacDonald:

Please find enclosed an affidavit pursuant to the previous discussions with Thomas J. Berenguer and you.

Thank you for your attention to this matter.

Very truly yours,


Carl A. Eason

CAE:dmo
enclosure
cc: Thomas J. Berenguer

97043802487

JUN 30 1995

JUN 30 1995

FEDERAL
COMMISSION
MAIL ROOM
JUN 30 10 24 AM '95

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF THE CLERK
JUL 33 9 48 AM '95

AFFIDAVIT

I, THOMAS J. BERENGUER, after duly being sworn states as follows:

1. I am a resident of Virginia and a licensed medical practitioner.

2. I consider it an appropriate duty and responsibility to remain informed on political issues and to participate in the political process.

3. As such, I actively participate in the political process and encourage my wife's and children's participation in same.

4. For many years I have been cognizant of the federal limitation of contributions to candidates which should not exceed \$1,000.00 per person.

5. Incident to the Wilder campaign and the solicitation for contributions, it was agreed I would contribute \$1,000.00, my wife, Mary J. Berenguer, would contribute \$1,000.00 and my two children would do likewise.

6. My daughter has previously been involved in the political process serving as a page in Richmond, Virginia.

7. My entire family was extremely active in the Wilder campaign and resolved that each should give a \$1,000.00 gift.

8. I submitted four independent checks, each in the amount of \$1,000.00 referencing the specific individual making the contribution in the memo section on the check.

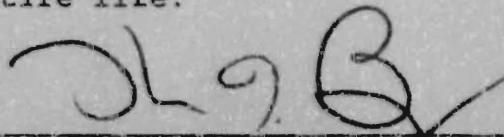
97043802488

9. There was no misunderstanding between each of us and the Wilder campaign committee as to who was making the contribution as evidenced by their independent reporting in the four individual intended names.

10. By specifically earmarking four independent checks, I in no wise intended to exceed the \$1,000.00 per individual contribution of which I was cognizant. Had I intended to do so, I would have merely written one check in the amount of \$4,000.00.

11. A refund has not been requested nor received from the Wilder campaign committee, it being the intention of all parties that four independent contributions had been made.

12. I have never run afoul or violated any campaign contribution rule in my entire life.

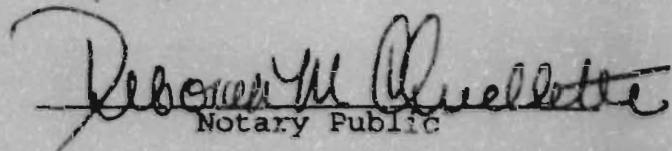


THOMAS J. BERENGUER

COMMONWEALTH OF VIRGINIA
CITY OF Virginia Beach, to-wit:

28th The foregoing Affidavit was acknowledged before me this day of June, 1995 by Thomas J. Berenguer.

My commission expires: 10/31/95.



Notary Public

I WAS COMMISSIONED DEBORAH M. STOKES

97043802489

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

BEFORE THE FEDERAL ELECTION COMMISSION

AUG 11 3 44 PM '95

In the Matter of
Thomas J. Berenguer

)
) RUR 3986
)
)

SENSITIVE

GENERAL COUNSEL'S REPORT

I. BACKGROUND

On May 1, 1995, the Federal Election Commission ("the Commission") found reason to believe that Thomas J. Berenguer violated 2 U.S.C. § 441a(a)(1)(A), by making excessive contributions to the Wilder for President Committee ("the Committee"). At that time, the Commission also authorized this Office to enter into negotiations with Dr. Berenguer directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe.

Dr. Berenguer made four contributions totaling \$4,000, which exceeded his individual contribution limitation by \$3,000.

9704380249C

II. ANALYSIS

In the course of a Commission audit of the Committee, it was discovered that Dr. Berenguer made four contributions on or about April 15, 1991, in the form of four checks, each in the amount of \$1,000. The checks in question are signed by Dr. Berenguer and all have an individual's name written on the memo line of the check. Each check is dated April 12, 1991, and the names that appear on the memo lines are as follows: Thomas J. Berenguer; Mary J. Berenguer; Bryan Berenguer; and Jessica Berenguer. See Attachment 2.1/

97043802491
On June 29, 1995, Dr. Berenguer submitted an affidavit stating his version of the facts surrounding the four contributions in question. See Attachment 3. The affidavit outlines the Berenguer family's involvement in contributing money to the Committee. Dr. Berenguer states that it was clearly understood among the four family members that each of them would make a \$1,000 contribution to Governor Wilder's Presidential committee, and that each of his checks represents a contribution from different members of his family. Dr. Berenguer also states that there was no intent on his part to circumvent the laws governing contribution limits on individuals. However, as evidenced by the checks, the contributions ultimately came from one source, Thomas J. Berenguer, and not four different sources as required by law.

1/ Mary J. Berenguer is the respondent's wife, and Bryan and Jessica Berenguer are his children.

In this case, it appears that there may have been intent for each family member to make a \$1,000 contribution; however, the respondent erred by making contributions in this fashion.

Therefore, we recommend that the Commission accept the proposed conciliation agreement and payment from Thomas J. Berenguer, and close the file with respect to this respondent.

III. RECOMMENDATIONS

1. Accept the attached conciliation agreement with respondent Thomas J. Berenguer.
2. Close the file with respect to respondent Thomas J. Berenguer.
3. Approve the appropriate letter.

Date

8/10/95

Lawrence M. Noble
General Counsel

97043302492

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Thomas J. Berenguer.) MUR 3986
)

CERTIFICATION

I, Marjorie W. Emmons, Secretary of the Federal Election Commission, do hereby certify that on August 17, 1995, the Commission decided by a vote of 6-0 to take the following actions in MUR 3986:

1. Accept the conciliation agreement with respondent Thomas J. Berenguer, as recommended in the General Counsel's Report dated August 10, 1995.
2. Close the file with respect to respondent Thomas J. Berenguer.
3. Approve the appropriate letter, as recommended in the General Counsel's Report dated August 10, 1995.

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

Attest:

8-17-95
Date

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

Received in the Secretariat:	Fri.,	Aug. 11, 1995	3:44 p.m.
Circulated to the Commission:	Mon.,	Aug. 14, 1995	11:00 a.m.
Deadline for vote:	Thurs.,	Aug. 17, 1995	4:00 p.m.

lrd

97043802493



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

August 21, 1995

Mr. Carl A. Eason
Wolcott, Rivers, Wheary, Basnight & Kelly
1100 One Columbus Center
Virginia Beach, Virginia 23462-6722

RE: MUR 3986

Dear Mr. Eason:

On August 17, 1995, the Federal Election Commission accepted the signed conciliation agreement and civil penalty submitted on your client's behalf in settlement of a violation of 2 U.S.C. § 441a(a)(1)(A), a provision of the Federal Election Campaign Act of 1971, as amended ("the Act"). Accordingly, the file has been closed in this matter as it pertains to Thomas J. Berenguer.

This matter will become public within 30 days after it has been closed with respect to all other respondents involved. 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.

You are advised that the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) still apply with respect to all respondents still involved in this matter. The Commission will notify you when the entire file has been closed.

Enclosed you will find a copy of the fully executed conciliation agreement for your files. If you have any questions, please contact John McDonald at (202) 219-3690.

Sincerely,

Kenneth E. Kellner
Assistant General Counsel

Enclosure
Conciliation Agreement

97043802494

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
 Thomas J. Berenguer) MUR 3986
)

RECEIVED
 FEDERAL ELECTION
 COMMISSION
 OFFICE OF GENERAL
 COUNSEL
 JUN 14 10 05 AM '95

CONCILIATION AGREEMENT

This matter was initiated by the Federal Election Commission ("Commission"), pursuant to information ascertained in the normal course of carrying out its supervisory responsibilities. The Commission found reason to believe that Thomas J. Berenguer ("Respondent") violated 2 U.S.C. § 441a(a)(1)(A).

NOW THEREFORE, the Commission and the Respondent, having participated in informal methods of conciliation, prior to a finding of probable cause to believe, do hereby agree as follows:

I. The Commission has jurisdiction over the Respondent and the subject matter of this proceeding, and this agreement has the effect of an agreement entered into pursuant to 2 U.S.C.

§ 437g(a)(4)(A)(i).

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

III. Respondent enters voluntarily into this agreement with the Commission.

97043802495

IV. The pertinent facts in this matter are as follows:

1. Respondent is an individual who resides in Virginia Beach, Virginia.

2. L. Douglas Wilder was a candidate for the nomination of the Democratic Party for the office of President of the United States for the election held in November 1992.

The Wilder for President Committee ("the Committee") is the authorized committee of Mr. Wilder.

3. Pursuant to 2 U.S.C. § 441a(a)(1)(A), it is unlawful for a person to make contributions to any candidate and his authorized political committees with respect to any election for federal office which, in the aggregate, exceed \$1,000.

4. On or about April 15, 1991, Respondent contributed \$4,000 to the Committee. The contribution took the form of four checks, each in the amount of \$1,000.

V. Respondent violated 2 U.S.C. § 441a(a)(1)(A) by making excessive contributions totaling \$3,000.

VI. Respondent will pay a civil penalty to the Federal Election Commission in the amount of \$1,100, pursuant to 2 U.S.C. § 437g(a)(5)(A).

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.

97043802496

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 requirements contained in this agreement and to so notify the Commission.

XI. 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
Lawrence M. Noble
General Counsel

8/18/95
Date

FOR THE RESPONDENT:

Thomas J. Berenger
for *Thomas J. Berenger*
(name)
(position)

7-6-95
Date

97043802497



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 22, 1995

Leslie J. Kerman
Epstein, Becker & Green, P.C.
1227 25th Street, N.W.
Washington, D.C. 20037-1156

RE: MUR 3986
Wilder for President Committee

Dear Ms. Kerman:

As we discussed, I write to confirm that I will be leaving the Commission on September 22, 1995. Henceforth, Jane Whang will be representing the Commission in the above-referenced matter. She may be reached at (202) 219-3690.

Sincerely,


James E. Portnoy
Attorney

97043802498



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

SEP 27 12 11 PM '96

SENSITIVE

September 27, 1995

Ms. Leslie J. Kerman, Esq.
Epstein, Becker and Green, P.C.
1227 25th Street, N.W.
Washington, D.C. 20037-1156

Re: MUR 3986
Wilder for President Committee

Dear Ms. Kerman:

Based on information ascertained in the normal course of carrying out its supervisory responsibilities, on May 1, 1995, the Federal Election Commission found reason to believe that the Wilder for President Committee ("the Committee") violated 2 U.S.C. §§ 441a(f) and 441b(a), and instituted an investigation in this matter.

After considering all of the evidence available to the Commission, the Office of General Counsel is prepared to recommend that the Commission find probable cause to believe that the above-stated violations have occurred.

The Commission may or may not approved 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 the brief should also be forwarded to the Office of 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.

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 General Counsel ordinarily will not give extensions beyond 20 days.

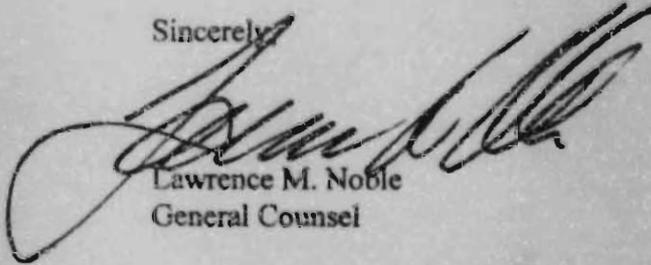
97043802499

Letter to Leslie J. Kerman
MEUR 3986
Witness for President Committee
Page 2

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

Sincerely,



Lawrence M. Noble
General Counsel

Enclosure
Brief

9704380250C

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
 Wilder for President Committee) MUR 3986
 and Mark R. Warner, as Treasurer)
)

GENERAL COUNSEL'S BRIEF

I. STATEMENT OF THE CASE

On May 1, 1995, the Commission found reason to believe that the Wilder for President Committee and Mark R. Warner, as treasurer, ("the Committee") violated 2 U.S.C. § 441a(f) by accepting excessive contributions totaling \$33,311. The Committee received \$5,200 in apparent excessive contributions from individuals. The Committee also received an excessive contribution from the Commonwealth of Virginia totaling \$28,111 for the use of state-owned airplanes and telephones. On the same date, the Commission found reason to believe that the Committee violated 2 U.S.C. § 441b(a) by accepting prohibited contributions totaling \$3,984.

Because the Committee received contributions which exceeded the \$1,000 contribution limitation of 2 U.S.C. § 441a(a)(1)(A), there is probable cause to believe that the Committee violated 2 U.S.C. § 441a(f). Moreover, because the Committee received contributions that it was prohibited from accepting, there is probable cause to believe that the Committee violated 2 U.S.C. § 441a(f).

97043802501

II. ANALYSIS

A. The Law

The Federal Election Campaign Act of 1971, as amended (the "Act") prohibits contributions from persons to candidates or their authorized political committees, with respect to any election for federal office which, in the aggregate, exceed \$1,000. 2 U.S.C. § 441a(a)(1)(A). The Act further provides that no political committee or officer or employee of a political committee shall knowingly accept a contribution in violation of the foregoing contribution limitation. 2 U.S.C. § 441a(f). The Act also prohibits any corporation or labor organization from making a contribution or expenditure in connection with any election to federal office. 2 U.S.C. § 441b(a). Further, it is unlawful for any candidate, political committee, or other person to knowingly accept or receive any contribution prohibited by this section. *Id.* The Act defines contributions to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i); *see also*, 11 C.F.R. § 100.7(a)(1). "Anything of value" includes "all in-kind contributions," as well as the provision of goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services. 11 C.F.R. §§ 100.7(a)(1)(iii)(A) and (B).

A presidential candidate, or any individual traveling on behalf of a presidential candidate, may use a government airplane for campaign-related travel. 11 C.F.R. § 9034.7(b)(5). However, if an individual, including a candidate, uses a government conveyance for campaign-related travel, the candidate's authorized committee must reimburse the appropriate government entity. *Id.* For travel to a city served by regularly scheduled commercial service, the amount reimbursed

97043802502

shall equal the first class commercial air fare plus the cost of other services. *Id.* The purpose of this reimbursement is to prevent the free use of government airplanes for campaign related travel. See *Explanation and Justification for 11 C.F.R. 9004.7*, 45 Fed. Reg. 43377 (June 27, 1980). The free use of government airplanes would be a subsidization to a presidential candidate's campaign.

B. Excessive and Prohibited Contributions

The Commission examined the Committee's contributions, disbursements and qualified campaign expenses during the course of its mandatory audit. 26 U.S.C. § 9038(a). A 100% review of the Committee's contributions in excess of \$1,000 revealed that the Committee received \$5,200 in excessive contributions from the following five individuals: (1) Thomas J. Berenguer (\$3,000); (2) Mary Freeman Cheek (\$100); (3) Reginald C. Jackson, MD (\$1,000); (4) H.B. Mack (\$1,000); and (5) Lawrence D. Wilder, Jr. (\$100).¹ Because the Committee did not resolve the excessive contributions in accordance with 11 C.F.R. § 103.3, the Commission recommended that the Committee disgorge the excessive contributions to the United States Treasury. The Committee did not submit a separate response to the Commission's reason to believe findings nor has it disgorged these contributions to the United States Treasury. Because the Commission determined during the audit process that the Committee accepted \$5,200 in contributions that were greater than the \$1,000 contribution limit for individuals set forth at 2 U.S.C. § 441a(a)(1)(A), there is probable cause to believe that the Committee violated 2 U.S.C. § 441a(f) by accepting these excessive contributions.

¹ The Commission also conducted a dollar-unit sample of contributions less than \$1,000 to determine whether the Committee accepted any excessive contributions. The dollar-unit sample consisted of 338 contributions and revealed no excessive contributions.

97043802503

The Commission also conducted a dollar-unit sample review of 566 contributions to determine whether the Committee accepted prohibited contributions. The review resulted in the identification of \$1,500 in apparent prohibited contributions from the following entities: (1) Asprey (\$250); (2) J. Kopf, CMA Enterprises LTD (\$1,000); and (3) Lindley T. Smith, MD, PC (\$250). Based on this review, the Commission projected that the Committee received \$3,984 in prohibited contributions. Because the Committee did not resolve the prohibited contributions in accordance with 11 C.F.R. § 103.3, the Commission recommended that the Committee disgorge the prohibited contributions to the United States Treasury. In response to this recommendation, the Committee claimed that the auditors reviewed 100% of the Committee's contributions and that only those prohibited contributions actually identified by the auditors (totaling \$1,500, as detailed above) should be characterized as prohibited contributions. Therefore, the Committee argues, the actual amount of prohibited contributions is \$1,500.

The Committee is wrong, however, in stating that the Audit Division examined 100% of prohibited contributions. The Audit Division examined a sample of 566 contributions, from which it identified three prohibited contributions totaling \$1,500. Based on this sample, the Audit Division concluded that the projected dollar value of prohibited contributions equaled \$3,984. Thus, the Committee's challenge to the projected amount of prohibited contributions is faulty and lacks merit. Therefore, there is probable cause to believe that the Committee violated 2 U.S.C. § 441b(a) by accepting \$3,984 in prohibited contributions.

C. Transactions Involving the Commonwealth of Virginia

Governor Wilder and his campaign staff made approximately 50 campaign-related trips on planes owned by the Commonwealth of Virginia ("Commonwealth"). The Committee

97043802504

reimbursed the Commonwealth at a rate of \$625 per hour of plane usage for these campaign-related trips plus certain expenses. However, this rate was less than the rate set forth at 11 C.F.R. § 9034.7(b)(5). Therefore, the Commission found that the Committee underpaid the Commonwealth \$25,414 (the difference between the rate set forth at 11 C.F.R. § 9034.7(b)(5) and the amount actually paid).

The Committee also failed to reimburse the Commonwealth for a positioning flight from Richmond, Virginia to San Antonio, Texas to retrieve Governor Wilder from a political trip.² As a result, the Commission found that the Committee failed to reimburse the Commonwealth \$826 for this flight, the equivalent first class airfare from Richmond to San Antonio. 11 C.F.R. § 9034.7(b)(5). Taken together, the Commission found that the Committee underpaid the Commonwealth a total of \$26,240 (\$25,414 + \$826) for the use of government conveyances.

The Committee also underpaid the Commonwealth for campaign-related use of state telephones. The Committee reimbursed the Commonwealth for telephone use from August 28, 1991 to December 28, 1991, the timeframe the Committee considers the "campaign period." However, Governor Wilder's exploratory committee registered with the Commission in March 1991 and his campaign continued into January 1992. Therefore, the Audit Division concluded that the relevant campaign period was from March 1991 to January 1992. As a result, the Audit Division concluded that the Committee failed to reimburse the Commonwealth for telephone usage, taxes and other surcharges that were incurred on the Committee's behalf from March 1991

² The Committee apparently did not reimburse the Commonwealth for this flight because the Commonwealth never sent the Committee an invoice for this flight. However, the Committee was obligated to reimburse the Commonwealth for this flight because the Commonwealth was retrieving Governor Wilder from a campaign-related event. See generally, *Explanation and Justification for the 1996 regulations on public financing and presidential campaigns* (11 C.F.R. §§ 9004.7 and 9034.7), 60 Fed. Reg. 31860, 31869 (June 16, 1995) (incorporates Commission's previous practice regarding positioning flights).

97043802505

to August 28, 1991 and from December 28, 1991 to January 1992. Based on this conclusion, the Commission found that the Committee underpaid the Commonwealth \$2,871 for the use of state telephones. The Commission determined that the Committee must reimburse the Commonwealth for the use of these government conveyances and telephones. See Final Audit Report of Wilder for President Committee (approved May 6, 1994). To date, the Committee has made no reimbursement to the Commonwealth.

The Committee argues that it did not underpay the Commonwealth when it reimbursed it at a rate of \$625 per hour for the use of the Commonwealth's airplanes. During the audit process, the Committee contended this amount was determined by the Commonwealth in compliance with state law.

The applicable reimbursement rate is governed by federal law, rather than state law. Article VI, U.S. Const.; 2 U.S.C. § 453; *Weber v. Heaney*, 995 F.2d 872 (8th Cir. 1993) (FECA and Commission regulations supersede Minnesota Congressional Campaign Act); and Advisory Opinion 1984-48 (explaining proper reimbursement calculation method for North Carolina's Governor's use of state-owned airplane and helicopter). Therefore, federal law prevails, and the Committee was required to reimburse the Commonwealth at the rate prescribed in the Commission's regulations. See 11 C.F.R. § 9034.7(b)(5). In any event, the Committee failed to identify any statutory, regulatory or policy basis for its conclusion that the Commonwealth was properly reimbursed at a rate of \$625 per hour of plane usage.

Moreover, the Committee failed to pay the Commonwealth for a positioning flight from Richmond, Virginia to San Antonio, Texas to retrieve Governor Wilder from a political trip. The Commission requires a committee to pay the equivalent of one first class airfare for a positioning

97043802506

7

flight. 11 C.F.R. § 9034.7(b)(5). The applicable first class airfare from Richmond to San Antonio is \$826. Therefore, the Committee underpaid the Commonwealth a total of \$26,240 for use of government conveyances.

97043602507

Finally, the Committee underpaid the Commonwealth for the campaign-related use of state telephones. The Committee reimbursed the Commonwealth for telephone use from August 28, 1991 to December 28, 1991. However, the Committee used the Commonwealth's telephones during other periods. Although Governor Wilder's exploratory committee registered in March 1991 and his campaign lasted into January 1992, the Committee did not reimburse the Commonwealth for telephone usage for all of the months that Governor Wilder was either contemplating or actually seeking the Democratic Party nomination for President, i.e., from March 1991 to August 28, 1991 and from December 28, 1991 to January 1992. The Committee also failed to reimburse the Commonwealth for taxes and other surcharges connected with the phone usage incurred on the Committee's behalf. Therefore, the Committee underpaid the Commonwealth \$2,871 for the use of state telephones.

Taken together, the Committee underpaid the Commonwealth a total of \$29,111 for use of government conveyances and telephones (\$25,414 + \$826 + \$2,871). The underpayment for use of government conveyances constitutes a contribution to the Committee. 11 C.F.R. § 9034.7(b)(5); see also, 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.7(a)(1) and *Explanation and Justification for 11 C.F.R. 9004.7*, 45 Fed. Reg. 43377 (June 27, 1980). The underpayments for the use of the Commonwealth's telephones similarly constitute in-kind contributions from the Commonwealth to the Committee. See 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.7(a)(1) ("anything of value"). Because the Act imposes a \$1,000 contribution limit, the

underpayments constitute excessive contributions from the Commonwealth to the Committee in the amount of \$28,111 (\$29,111 - \$1,000).

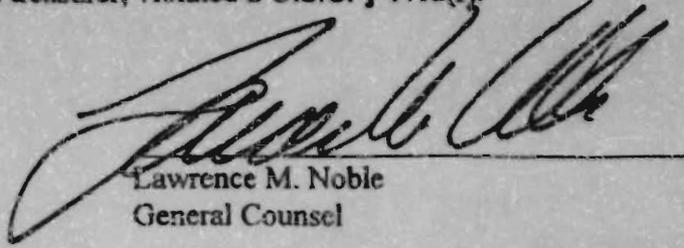
Therefore, there is **probable** cause to believe that the Committee accepted excessive contributions from the Commonwealth of Virginia in violation of 2 U.S.C. § 441a(f).

III. GENERAL COUNSEL'S RECOMMENDATIONS

1. Find **probable** cause to believe that the Wilder for President Committee and Mark R. Warner, as treasurer, violated 2 U.S.C. § 441b(a); and
2. Find **probable** cause to believe that the Wilder for President Committee and Mark R. Warner, as treasurer, violated 2 U.S.C. § 441a(f).

Date

9/27/96


Lawrence M. Noble
General Counsel

97043802508

EPSTEIN BECHER & GREEN, P.C.

ATTORNEYS AT LAW

1887 28TH STREET, N.W.

WASHINGTON, D.C. 20037-1188T

(202) 881-2600

TELECOPIER: (202) 398-2582

DIRECT LINE

250 PARK AVENUE
NEW YORK, NEW YORK 10177-0077T
(212) 351-1500

1875 CENTURY PARK EAST
LOS ANGELES, CALIFORNIA 90067-2501
(310) 350-2561

SIX LANDMARK SQUARE
STAMFORD, CONNECTICUT 06901-2704T
(203) 348-3737

ONE RIVERFRONT PLAZA
NEWARK, NEW JERSEY 07102-8401T
(201) 842-1900

75 STATE STREET
BOSTON, MASSACHUSETTS 02108
(617) 342-4080

2 EMBARCADERO
SAN FRANCISCO, CALIFORNIA 94111-8524
(415) 398-3800

12750 MERIT DRIVE
DALLAS, TEXAS 75261-1208T
(214) 490-3143

118 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301-1830
(904) 687-0596

2400 SOUTH DIXIE HIGHWAY, SUITE 100
MIAMI, FLORIDA 33133
(305) 856-1100

510 KING STREET, SUITE 301
ALEXANDRIA, VIRGINIA 22314-3133T
(703) 684-1204

October 1, 1996

*P.C. NEW YORK, WASHINGTON, D.C., NEW JERSEY,
CONNECTICUT, VIRGINIA AND TEXAS ONLY

HAND-DELIVERED

Andre G. Pineda, Esquire
Office of the General Counsel
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Room 657
Washington, D.C. 20463

**RE: M.U.R. 3986: RESPONDENT WILDER FOR PRESIDENT COMMITTEE
AND MARK R. WARNER, AS TREASURER**

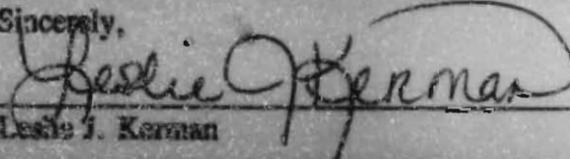
Dear Mr. Pineda:

On September 30, 1996, we received the General Counsel's Brief in the above-referenced action. Our clients' response to the General Counsel's brief is due to be filed with your office by the close-of-business on Tuesday, October 15, 1996.

We respectfully request a twenty-day extension of time, until Monday, November 4, 1996, in which to file a response brief on behalf of our clients. This extension-of-time is necessary for us to be able to submit a complete and thorough response to the allegations set forth in the General Counsel's Brief -- allegations which involve activities that occurred primarily in 1991.

Thank you for your assistance. If you have any questions, please do not hesitate to contact me at (202) 861-1877.

Sincerely,


Leslie J. Kerman

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

10 36 AM '96

97043802509



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

October 8, 1996

Ms. Leslie J. Kerman, Esq.
Epstein Becker & Green, P.C.
1227 25th Street, N.W.
Washington, D.C. 20037-1156

Re: MUR 3986
Wilder for President

Dear Ms. Kerman:

This is in response to your letter dated October 1, 1996, which was received by the Office of the General Counsel on the same date, requesting a twenty-day extension of time to respond to the General Counsel's Brief. 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 November 4, 1996.

If you have any questions, please do not hesitate to contact me at (202) 219-3690.

Sincerely,

A handwritten signature in black ink, appearing to read "Andre G. Pineda".

Andre G. Pineda
Attorney

Celebrating the Commission's 20th Anniversary

YESTERDAY, TODAY AND TOMORROW
DEDICATED TO KEEPING THE PUBLIC INFORMED

9704380251C

EPSTEIN BECKER & GREEN, P.C.

ATTORNEYS AT LAW

1227 28TH STREET, N.W.

WASHINGTON, D.C. 20037-11589

(202) 581-0900

TELECOPIER: (202) 296-2882

DIRECT LINE

250 PARK AVENUE
NEW YORK, NEW YORK 10177-0077
(212) 351-4500

1875 CENTURY PARK EAST
LOS ANGELES, CALIFORNIA 90067-2501
(310) 556-5651

SIX LANDMARK SQUARE
STANFORD, CONNECTICUT 06901-27041
(203) 348-3737

ONE RIVERFRONT PLAZA
NEWARK, NEW JERSEY 07102-84011
(201) 842-1900

75 STATE STREET
BOSTON, MASSACHUSETTS 02109
(617) 343-4000

2 EMBARCADERO
SAN FRANCISCO, CALIFORNIA 94111-5684
(415) 394-3500

12750 MERIT DRIVE
DALLAS, TEXAS 75281-12089
(214) 490-3143

118 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301-1850
(904) 881-0598

2400 SOUTH DIXIE HIGHWAY, SUITE 100
MIAMI, FLORIDA 33133
(305) 858-1100

510 KING STREET, SUITE 301
ALEXANDRIA, VIRGINIA 22314-31821
(703) 884-1204

November 4, 1996

F.P.C. NEW YORK, WASHINGTON, D.C., NEW JERSEY,
CONNECTICUT, VIRGINIA AND TEXAS ONLY

HAND-DELIVERED

The Honorable Lee Ann Elliott
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Room 905
Washington, D.C. 20463

RE: M.U.R. 3986; WILDER FOR PRESIDENT COMMITTEE

Dear Chairman Elliott:

This letter is submitted to the Federal Election Commission ("the Commission" or "FEC"), pursuant to 2 U.S.C. § 437g(a)(3), in response to the recommendation of the Commission's Office of the General Counsel that the Commission find probable cause to believe the Wilder for President Committee (the "Committee"), and Mark R. Warner, as treasurer, violated 2 U.S.C. §§ 441a(f) & 441b(a) in connection with various transactions which occurred primarily in 1991 -- over five years ago.

In sum, the recommendation should be denied due to the errors of the Audit Division in calculating the Committee's alleged underpayment for the use of aircraft and telephones owned by the Commonwealth of Virginia and due to the statute of limitation imposed by 28 U.S.C. § 2462 on pursuing penalties involving state allegations such as in the instant matter.

I. USE OF COMMONWEALTH AIRCRAFT

The General Counsel's analysis is wrong in asserting that the Committee underpaid the Commonwealth of Virginia for its use of Commonwealth aircraft for campaign purposes. The Committee paid the invoices submitted by the Commonwealth in full. Pursuant to state policy, the Commonwealth invoiced the Committee for campaign use at the Commonwealth's normal and ordinary rate of \$625.00 per hour of plane use, plus pilot and miscellaneous expenses. It is undisputed that the

Nov 4 5 21 PM '96

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

97043802511

Committee paid these invoices.

The General Counsel states that the reimbursement paid by the Committee was \$25,414 less than that required by the Commission's regulations. This alleged underpayment figure is based on an analysis prepared by the Audit Division ("Attachment A"). In addition, the General Counsel alleges that the Committee failed to make a required reimbursement of \$826 in connection with a "positioning" flight between Richmond, Virginia and San Antonio, Texas.

The Audit Division's analysis of the Committee's use of the Commonwealth's planes and resulting payments, and the General Counsel's analysis regarding "positioning" flights, are faulty in a number of regards.

A. AUDIT DIVISION'S ANALYSIS

The methodology used by the Audit Division in its "Analysis of Committee's Use of Commonwealth Plane" is inconsistent and impossible to decipher at this late date. For example, in several instances, the Audit Division simply ignores the Commonwealth's invoice with respect to a trip -- and, without citing any evidence, considers the entire trip campaign-related and thus subject to repayment. See 11/1/91 Commonwealth Invoice and 1/2/92 Commonwealth Invoice. In addition, the Audit Division randomly uses the Commonwealth's invoices and other Commonwealth-prepared schedules in connection with certain calculations, and then defers to the plane's flight log in other instances. See 12/4/91 Richmond-Concord flight analysis and 11/21/91 Richmond-Detroit-Richmond analysis. Further, at page 3, lines 123-124 of its Analysis, the Audit Division states that "[I]t must be noted that in many instances there are discrepancies between the number of passengers per the flight log and per the itinerary/invoices." Yet, it never explains on what basis it resolves these discrepancies.

In short, the Audit Division's Analysis does not provide a reliable basis for determining that the Committee underpaid for the use of the Commonwealth's planes.

B. Positioning Flights

Contrary to law and regulations applicable at the time, the General Counsel's analysis maintains that the Committee was required to reimburse the Commonwealth for a "positioning flight" required to relocate the Commonwealth's jet to San Antonio, Texas to pick up the Governor after a campaign event.

In support of this position, the General Counsel relies on a 1996 modification to the Commission's regulations requiring the payment of one first class airfare for positioning flights.¹ The

¹ This 1996 revision to the Commission's regulations, since it affects the substantive rights and obligations of the Committee, cannot be applied retroactively to the Committee's 1991 activity. See Bowen v. Georgetown University Hospital, 488 U.S. 204, 208-209 (1988); Motion

97043802512

brief asserts that this modification "incorporates Commission's previous practice regarding positioning flights," but does not provide substantiation or legal authority for this conclusion. In fact, the General Counsel can point to no evidence that requiring this payment for "positioning flights" represents the Commission's "previous practice" because that evidence does not exist.

The General Counsel's unsubstantiated assertion cannot change the fact that during the events in question, from August 1991 to January 1992, the Commission had given no indication about how to address the cost of positioning flights for state-owned aircraft. The Committee clearly cannot be held to a legal standard of which it did not, and could not, have any knowledge.

II. USE OF COMMONWEALTH TELEPHONES

Likewise, the General Counsel's office alleges that the Committee underpaid the Commonwealth for its use of state telephones. The General Counsel's office acknowledges that "[t]he Committee reimbursed the Commonwealth for telephone use from August 28, 1991 to December 28, 1991." Notwithstanding the extensive documentation and accounting the Committee provided the General Counsel's office with regard to this period, that office unilaterally adopted the dates of Governor Wilder's registration of an exploratory committee and withdrawal from the race as the period for which reimbursement is required.

The Committee gave the General Counsel substantial proof of its good faith analysis that the Committee's campaign-related use of state telephones was limited to the four-month period indicated by the Committee. In its brief, the General Counsel's office adopted a longer time period for reimbursement, but did not provide evidence or substantiation of any kind to disprove the analysis supplied by the Committee. Given the absence of facts to rebut the Committee's position, the General Counsel's office apparently adopted this longer period as a matter of law, even though no authority is cited for the Audit Division's decision to ignore the evidence in the record and arbitrarily calculate the Committee's telephone expenses.

III. STATUTE OF LIMITATIONS

Finally, the Commission is time-barred from pursuing allegations of Committee violations dating back more than five years due to the statute of limitations imposed by 28 U.S.C. § 2462. Here, such stale allegations represent by far the bulk of the alleged misconduct. The Supreme Court has clearly acknowledged that the policy behind statutes of limitations is to lay to rest "claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944).

Here, these notions are not just academic concerns, but are nearly perfect reflections of the reality of this situation. Governor Wilder has been a private citizen for almost three years, the people

97043802513

The Hon. Lee Ann Elliott
November 4, 1996
Page 4

who staffed the campaign have dispersed literally throughout the world, the facts at issue cannot be analyzed in context due to the passage of five years, and even the actual physical condition of paper evidence such as flight logs and cancelled checks has degraded. In short, this is precisely the type of case that, according to the Supreme Court, statutes of limitations are designed to end.

Moreover, the statute of limitations operates to bar the action and not just the relief, and therefore the Commission is precluded from pursuing any disgorgement claim as well. As Judge Jackson of the D.C. District Court stated in applying this time bar to equitable as well as legal relief:

The FEC argues that even if § 2462 bars its civil penalty claims, it is nevertheless entitled to its declaratory judgment and an injunction. The Court disagrees."

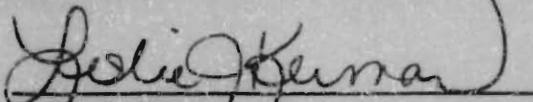
The Supreme Court has stated that when legal and equitable relief are available concurrently, "equity will withhold its relief . . . where the applicable statute of limitations would bar the concurrent legal remedy.

FEC v. National Right to Work Committee, 916 F. Supp. 10, 14 (D.D.C. 1996), quoting Cope v. Anderson, 331 U.S. 461, 464 (1947).

IV. CONCLUSION

For the foregoing reasons, and given the restrictions of the applicable statute of limitations, the General Counsel's recommendation should be denied and the matter should be formally terminated.

Sincerely,



Leslie J. Kernan

Joseph M. Birkenstock

Counsel for the Wilder for President Committee,
and Mark R. Warner, as treasurer

97043802514

ATTACHMENT A (PG. 1/3)

FAR

BPD.VMS 123
Attachment 4
Page 1 of 3

WELDER FOR FREIGHTER COMMITTEE
ANALYSIS OF COMMITTEE'S USE OF COMMERCIAL PLANE
(Reimbursements to Commonwealth of Virginia
compared to first class airfare for trip)

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)	(17)	(18)	(19)
Date of Trip	Depart/Arrive	# of Passengers (8)				Total	Flight hours	Leg cost (c. 8 X \$625/hr net (P5))	Other Expenses	Trig/Leg Total (9)+(10)	Invoice Total	Index Fee (X/1.5)	Cost of 1st Class (7%)	Cost of Charter	No. of Staff Press. & Other	Total 1st Class Cost per Leg (14)(X16)	Total 1st Class Cost (Sum of Leg totals)	Net WA under-billed (18)-(12)
1 02-May-91	1. Richmond VA to New Orleans LA	2	2			4	2.9	\$1,812.50					\$674.00		2	\$1,348.00		
2 04-May-91	2. New Orleans LA to Richmond VA	2	3			5	2.1	\$1,312.50					\$674.00		2	\$1,348.00		
3	Pilot's expenses								\$136.88									
4	Catering for passengers								\$61.20	\$3,323.08	\$3,323.08	4					\$2,696.00	(\$627.00)
5																		
6 05-May-91	3. Richmond VA to Cleveland OH	2	2			4	1.3	\$812.50					\$340.00		2	\$680.00		
7	Pilot's expenses (one day)								\$93.75	\$906.25								
8 06-May-91	4. Cleveland OH to Oklahoma City OK (RWA)	3	3			6	3	\$1,875.00					\$606.00		3	\$1,998.00		
9	Pilot's expenses (one day)								\$93.75									
10	Catering for passengers								\$53.64	\$2,022.39								
11 07-May-91	5. Oklahoma City OK (RWA) to Richmond VA	3	4			7	2.6	\$1,625.00					\$793.00		3	\$2,379.00		
12	Pilot's expenses (one day)								\$93.75	\$1,719.75	\$1,647.30	5					\$5,057.00	\$409.61
13																		
14 16-Jun-91	6. Richmond VA to Gettysburg MD	2	2			4							\$304.00 (A)		2	\$708.00		
15	7. Gettysburg MD to Richmond VA	2	3			5	1.8	\$1,187.50		\$1,187.50	\$1,187.50	6	\$384.00 (A)		2	\$768.00	\$1,536.00	\$348.50
16																		
17 27-Jul-91	12. Washington D.C. to Richmond	1	0			1							\$325.00		1	\$325.00		
18	13. Richmond to Miami FL	2	2			4							\$540.00		2	\$1,080.00		
19	14. Miami FL to Orlando FL	1	2			3							\$312.00		1	\$312.00		
20 26-Jul-91	15. Orlando FL to Richmond *	1	3			4	3.6	\$2,250.00					\$501.00		1	\$501.00		
21	Parking/Landing Fees								\$19.00									
22	Pilots' expenses								\$411.77		\$2,680.77	8					\$3,514.00	(\$166.77)
23a 19-Oct-91	16. San Antonio TX to Richmond VA	2	2	2		6					\$750.00	10	\$626.00		3	\$2,478.00	\$2,478.00	\$1,728.00
24																		
25 25-Oct-91	17. Richmond VA to Chicago IL	2	1			3							\$625.00		2	\$1,250.00		
26	18. Chicago IL to Manhattan KS	2	1			3							\$552.00 (A)		2	\$1,104.00		
27	19. Manhattan Kansas to Topeka KS	2	1			3							\$329.00 (A)		2	\$658.00		
28	20. Topeka KS to St. Louis MO	2	1			3							\$609.00 (B)		2	\$1,218.00		
29 10-Oct-91	21. St. Louis MO to Richmond VA	2	1			3					\$704.46	11	\$602.00		2	\$1,204.00	\$5,116.00	\$4,471.56
30																		
31 01-Nov-91	22. Richmond VA to Manchester NH	2	2	1	0	5							\$411.00		4	\$1,644.00		
32	23. Manchester NH to Richmond VA	1	2	1	0	4	1.3	\$1,062.50					\$441.00		3	\$1,323.00		
33	Pilots overnight expenses								\$286.88		\$2,273.06	12					\$3,087.00	\$813.85
34																		
35 05-Nov-91	24. Richmond VA to Gettysburg MD	2	1			3							\$384.00 (A)		2	\$768.00		
36	25. Gettysburg MD to Washington DC	2	2			4							\$375.00 (A)		2	\$750.00		
37	26. Washington DC to Richmond VA	1	0			1					\$456.64	13	\$325.00		1	\$325.00	\$1,243.60	\$1,356.16
38																		
39 08-Nov-91	27. Washington DC to Knoxville TN	2	1			3							\$472.00		2	\$944.00		
40	28. Knoxville TN to Richmond VA	2	1		1	4	2.7	\$1,675.00					\$448.00		3	\$1,344.00		
41	Parking/Landing Fees								\$41.00		\$1,666.00	14					\$2,287.00	\$622.00
42																		

06-Apr-94

97043802515

FAR

BFD.VMS 123
Attachment 4
Page 2 of 3

WILDER FOR PRESIDENT COMMITTEE
ANALYSIS OF COMMITTEE'S USE OF COMMONWEALTH PLANE
(Reimbursement to Commonwealth of Virginia
compared to first class airfare for trip)

(1) Date of Trip	(2) Depart/Arrive	(3) (4) (5) (6) # of Passengers (8)				(7) Total	(9) # flight hours	(10) Lag cost (cl. 8 X \$625/hr) see (P5)	(11) Amount Billed to Committee			(12) Invoice Total	(13) Amdt See CR/1.5	(14) 1st Class fare per OSA (P6)	(15) Cost of Charter	(16) No. of Staff Press, & Other	(17) Total 1st Class Cost per lag (14)(16)	(18) Total 1st Class Cost (Sum of Lag totals)	(19) Amt Vh under- billed (18)-(12)	
		(P1) Press+Staff	(P2) GPU	(P3) Other	(P4) Other				(9) Lag cost	(10) Other Expense	(11) Trip/Lag Total (9)+(10)									
54 15-Nov-91	32.Richmond VA to Manchester NH	4	1			5														
55	33.Manchester NH to Essex MA	3	1			4														
56 16-Nov-91	34.Essex MA to Richmond VA	3	1			4				\$1,923.34	15	\$482.00 (A)			3	\$1,446.00	\$3,804.00	\$1,880.66		
57																				
58 17-Nov-91	35.Richmond VA to Detroit MI	2	1		1	4							\$404.00		3	\$1,212.00				
59	36.Detroit MI to Richmond VA	2	2		1	5	2.7	\$1,625.00		\$1,625.00	16	\$404.00		3	\$1,212.00	\$2,426.00	\$799.00			
60																				
61 20-Nov-91	37.Richmond VA to Boston MA*	3	2	1		6							\$482.00		5	\$2,410.00				
62	38.Boston MA to Richmond VA*	3	2	1		6	2.9	\$1,812.50					\$482.00		5	\$2,410.00				
63	Barking/Landing Fees								\$53.00	\$1,965.50	\$1,865.50	17					\$4,820.00	\$2,954.50		
64																				
65 21-Nov-91	39.Richmond VA to Norfolk VA	2	2		1	5							\$244.00		3	\$723.00				
66	40.Norfolk VA to Atlanta GA	2	1			3							\$520.00		2	\$1,038.00				
67 22-Nov-91	41.Atlanta GA to Milwaukee WI	2	1			3							\$562.00		2	\$1,104.00				
68	42.Milwaukee WI to Chicago IL	2	1			3							\$310.00		2	\$620.00				
69	43.Chicago IL to Chicago IL	2	2	1		5							\$487.00 (A)		4	\$1,948.00				
70	44.Chicago IL to Selma AL	2	3	1		6							\$627.00 (A)		5	\$3,135.00				
71	45.Selma AL to Richmond VA	2	2	1	1	7				\$4,654.00	18	\$599.00 (A)		6	\$3,594.00	\$12,122.00	\$8,067.91			
72																				
73 04-Dec-91	46.Richmond VA to Concord NH*	2	3	1		6							\$441.00 (A)		5	\$2,205.00				
74 05-Dec-91	49.Concord NH to Berlin NH***	0	0	0		0							\$325.00 (A)		0	\$0.00				
75	50.Berlin NH to Virginia Beach VA	2	2	1		5							\$477.00 (A)		6	\$1,938.00				
76	51.VA Beach to Washington DC	2	1	1		4							\$312.00 (A)		3	\$936.00				
76a	51a.Washington DC to Richmond	1	0			1				\$3,000.00			\$325.00		1	\$325.00	\$5,176.00			
77																				
78 19-Dec-91	52.Richmond VA to Concord NH	1	2	1		4							\$441.00 (A)		3	\$1,323.00				
79	53.Concord NH to Nashua NH***	0	0	0		0							\$189.00 (A)		0	\$0.00				
80	54.Nashua NH to Richmond VA	1	1	1		4				\$1,812.00	\$5,216.00	20	\$483.00 (A)		3	\$1,446.00	\$2,769.00	\$2,726.01		
81																				
82																				
83																				
84																				
85																				
86																				
87 FOOTNOTES:																				
88	05 (P1) Press - identified as press related per typed itinerary																			\$0.00
89																				
90	70 (P2) Staff - identified as campaign related per reimbursement letter																			
91																				
92	02 (P3) GPU is used to represent the number of Executive Protective staff accompanying Governor Wilder																			
93																				
94	04 (P4) Other - not identified as campaign related, no reason given for non campaign related																			

Total:

\$32,414.00

\$57,826.00 \$25,414.00

Total Underbilled:

\$25,414.00

FAR

BFD-VMS 123
Attachment 4
Page 3 of 3

MEMORANDUM FOR MEMBERS COMMITTEE
ANALYSIS OF GOVERNMENT'S USE OF COMMERCIAL FLIGHT
(Reimbursements to Commonwealth of Virginia
compared to first class airfare for trips)

(1) Date of Trip	(2) Depart/Arrive	(3) (4) (5) (6) # of Passengers (8)				(7) Total	(8) # Flight hours	(9) (10) (11) Amount Billed to Committee			(12) Reimburse Total	(13) Index Cost/1.0	(14) Cost of 1st Class fare per GSA (F6)	(15) Cost of Charter	(16) No. of Staff Press, & Other	(17) Total 1st Class Cost per leg (14)(16)	(18) Total 1st Class Cost (Sum of leg totals)	(19) Are we under- billed (18)-(12)	
		Press+Staff+ (F1)	EU+ (F2)	Other+ (F3)	Other+ (F4)			Leg cost (cl. & X \$625/hr) see (F5)	Other Expenses	Trip/Leg Total (9)+(10)									
95		(F5) Rate for chartering NEW. Omega Citation State Jet from Commonwealth of Virginia																	
97		(F6) Price information from General Services Administration - Transportation Audit Division (PIPS - Passenger Interline Pricing/Prorate System)																	
100		(A) Airfare based on a flight to the nearest city, en route, which is served by a direct commercial flight. For example, there was no commercial service to Teterboro, NJ in leg #6 & #7 thus, the GSA representative used airfare from Richmond to Newark.																	
104		(B) Airfare based on a flight between two locations, with an intermediate linking point. For example, there was no direct commercial flight from Topeka to St. Louis; thus, the GSA representative used airfare from Topeka to Kansas City to St. Louis																	
106		The flight log information provided from the Commonwealth did not provide any information regarding these flights; flight information was taken from the Committee's itinerary and accompanying invoices from the Commonwealth.																	
109		No cost was calculated for these flights, distance was immaterial.																	
112		(8) The total passengers used in each leg of the analysis corresponds to the total passengers listed on the Commonwealth's flight log for that leg. In order to identify which passengers were "staff", "EU", "press", and "other", the auditor used the invoices from the Commonwealth and itinerary provided by the Committee. IT MUST BE NOTED THAT IN MANY INSTANCES THERE ARE DISCREPANCIES BETWEEN THE NUMBER OF PASSENGERS FOR THE FLIGHT LOG AND PER THE ITINERARY/INVOICES.																	

BEFORE THE FEDERAL ELECTION COMMISSION

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

MAR 27 1 22 PM '97

In the Matter of)
)
Wilder for President Committee,)
and Mark R. Warner, as Treasurer)
)
)

SENSITIVE

MJR 3986

GENERAL COUNSEL'S REPORT

I. BACKGROUND

On May 1, 1995, the Commission found reason to believe that the Wilder for President Committee ("the Committee") and Mark R. Warner, as treasurer, violated 2 U.S.C. § 441a(f) by accepting excessive contributions totaling \$33,311 from individuals (\$5,200) and from the Commonwealth of Virginia for the use of state-owned airplanes and telephones (\$28,111).¹ On the same date, the Commission found reason to believe that the Committee violated 2 U.S.C. § 441b(a) by accepting prohibited contributions totaling \$3,984 from corporate entities. The excessive contributions from individuals were accepted between April 15, 1991 and February 12, 1992. The activity resulting in excessive contributions from the Commonwealth of Virginia occurred between March 1991 and January 1992. Prohibited contributions were received between January 1991 and February 1992.²

On the same date that the Commission found reason to believe, it also authorized the Office of General Counsel to conciliate with the Committee prior to a finding of

¹ This matter was generated by an audit of the Committee pursuant to 26 U.S.C. § 9038(a).

² The amount of the prohibited contributions was determined by a dollar unit sample covering the period approximately between January 1991 and February 1992.

97043802518

probable cause to believe.

97043802519

After reviewing the Committee's responses, this Office recommends that the Commission reject the Committee's offer and find probable cause to believe that the Committee, and its treasurer, Mark R. Warner, violated 2 U.S.C. §§ 441a(f) and 441b(a). However, this Office further recommends that the Commission take no further action and close the file.

II. SUMMARY OF COMMITTEE RESPONSE

The Committee challenges the Commission's finding that it underpaid the Commonwealth of Virginia for its use of Commonwealth aircraft for campaign purposes. Attachment 5 at 1. The Committee asserts that all invoices have been paid in full and the Committee paid the Commonwealth for the use of the planes at \$625 per hour of plane use, plus pilot and miscellaneous expenses, "pursuant to state policy" and at "the Commonwealth's normal and ordinary rate" for such plane usage. *Id.* The Committee also states that the Commission's conclusion that the Committee's reimbursement to the Commonwealth is \$25,414 less than required by the Commission's regulations is based on a faulty analysis by the Audit Division. *Id.* at 2. The Committee argues that the Audit Division's analysis "does not provide a reliable basis for determining that the Committee underpaid for the use of the Commonwealth's planes." *Id.*

9704380252C

The Committee also challenges the Commission's finding that it failed to make a reimbursement of \$826 to the Commonwealth for a "positioning flight" between Richmond, Virginia and San Antonio, Texas. *Id.* The Committee argues that the Commission's regulations requiring the payment of one first class airfare for positioning flights may not be retroactively applied pursuant to *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208-209 (1988) and *Motion Picture Ass'n of America, Inc. v. Oman*, 969 F.2d 1154, 1155-56 (D.C. Cir. 1992). *Id.* at 2-3. The Committee also asserts that there is no evidence that the Commission's "previous practice" was to require payment for positioning flights and that during the relevant time period, there was no Commission guidance "about how to address the cost of positioning flights for state-owned aircraft." *Id.* Thus, the Committee argues, it "clearly cannot be held to a legal standard of which it did not, and could not, have any knowledge." *Id.* at 3.

With respect to the Commission's finding that it underpaid the Commonwealth for the use of its telephones, the Committee argues that the Commission "unilaterally adopted the dates of Governor Wilder's registration of an exploratory committee and withdrawal from the race as the period for which reimbursement is required" and ignored "the extensive documentation and accounting the Committee provided [to] the General Counsel's office." *Id.* The Committee claims that it provided the Commission "substantial proof of its good faith analysis" that the Committee's use of Commonwealth phones for campaign-related purposes was limited to a four-month period. *Id.* Thus, the Committee argues, the Commission adopted a longer period "as a matter of law even

97043802521

though no authority is cited for the Audit Division's decision to ignore the evidence in the record and arbitrarily calculate the Committee's telephone expenses." *Id.*

Finally, the Committee contends that the Commission is time-barred from pursuing the allegations of Committee violations "dating back more than five years due to the statute of limitations imposed by 28 U.S.C. § 2462." *Id.* The Committee argues that *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944) supports not pursuing this matter further when the statute of limitations period has passed, and that the Commission is barred from seeking equitable relief, such as disgorgement, as well as legal relief. *Id.* at 4 (citing *FEC v. National Right to Work Committee*, 916 F. Supp. 10, 14 (D.D.C. 1996)).

III. ANALYSIS

A. Excessive Contributions from Individuals and Prohibited Contributions from Corporations

The Commission determined that the Committee received \$5,200 in excessive contributions from five individuals which it did not refund to the contributors in accordance with 11 C.F.R. § 103.3. The Committee has not challenged this determination; nor has it disgorged these contributions to the Treasury as recommended in the Final Audit Report. In addition, based on a dollar-unit sample of contributions conducted during the audit, the Commission determined that the Committee accepted prohibited contributions, the projected dollar amount of which was calculated to be \$3,984. The Committee also failed to resolve these contributions in accordance with 11 C.F.R. § 103.3 or to disgorge this amount to the Treasury as recommended in the Final Audit Report. Therefore, the Office of General Counsel recommends that the

97043802522

Commission find probable cause to believe that the Committee violated 2 U.S.C. §§ 441b(a) and 441a(f).

B. Contributions from the Commonwealth of Virginia

Contrary to the assertions of the Committee, the Committee underpaid the Commonwealth \$25,414 for its use of aircraft for campaign purposes. It is irrelevant whether the Committee paid the Commonwealth "pursuant to state policy" or at "the Commonwealth's normal and ordinary rate." Federal law, not state law, governs such reimbursement. Article VI, U.S. Const.; 2 U.S.C. § 453; *Weber v. Heaney*, 995 F.2d 872 (8th Cir. 1993) (FECA and Commission regulations supersede Minnesota Congressional Campaign Act); and Advisory Opinion 1984-48 (explaining proper reimbursement calculation method for North Carolina's Governor's use of state-owned airplane and helicopter). Therefore, the Committee was required to reimburse the Commonwealth at the rate prescribed in the Commission's regulations. See 11 C.F.R. § 9034.7(b)(5).

The Commission regulations for the 1992 election cycle required committees to reimburse governmental entities an amount equal to the first class commercial airfare. 11 C.F.R. § 9034.7(b)(5)(i). The Commission previously recognized in other audits from the 1992 presidential election cycle the difficulty that may be presented to committees in determining first class rates in the context of the reimbursement requirements of the regulations. See, e.g., Final Audit Report for Americans for Harkin, Inc. (approved March 15, 1994); Final Audit Report for Bush-Quayle '92 Primary Committee, Inc. (approved December 27, 1994); and Final Audit Report for Bush-Quayle '92 General Committee, Inc. (approved December 27, 1994). In those cases, however, the committees

97043802523

provided evidence, such as affidavits, to support their assertions that the amount they paid complied with the requirement to pay the first class commercial air fare. The Committee has not provided any evidence to demonstrate that it reimbursed the Commonwealth at a rate equal to the first class air fare. In fact, although the Committee claims that it reimbursed the Commonwealth a rate in accordance with Commonwealth policy, it has not provided any evidence of this policy, nor has it claimed that this Commonwealth policy was equal to a first class air fare. Furthermore, this Office also has been unable to obtain evidence of such a policy from the Commonwealth on an informal basis.

Moreover, the Commission properly analyzed the Committee's payments for its use of Commonwealth's aircraft and determined that the entire trip in question was "made in connection with [Governor Wilder's] campaign for nomination." 11 C.F.R. § 9032; Final Audit Report for the Wilder for President Committee (approved May 6, 1994). Based on invoices from the Commonwealth, examined in conjunction with other information obtained from the Committee, the Commission determined which trips in question were made in connection with Governor Wilder's campaign for nomination. Final Audit Report for the Wilder for President Committee (approved May 6, 1994); 11 C.F.R. §§ 9032.9, 9034.7 and 9038.1.

The Commission's reliance on Commonwealth invoices and schedules for certain calculations and flight log information to determine that particular flights were "made in connection with [Governor Wilder's] campaign for nomination" does not mean that its analysis was faulty, as the Committee contends. 11 C.F.R. § 9032.9; *see also*

97043802524

11 C.F.R. §§ 9034.7 and 9038.1. Rather, it demonstrates that the Commission examined the evidence provided by the Committee in its entirety and that some of the evidence related to these flights, when analyzed in conjunction with other evidence, was sufficient to demonstrate that these flights were "made in connection with [Governor Wilder's] campaign for nomination." 11 C.F.R. § 9032.9. Moreover, just as publicly financed committees have the burden of demonstrating that their disbursements are qualified campaign expenses, 11 C.F.R. § 9033.11(1), the Committee is responsible for explaining any discrepancies that may exist in its documentation.

Additionally, the Committee has failed to make a \$826 reimbursement to the Commonwealth for a "positioning flight" taken on October 19, 1991. Contrary to the assertions of the Committee, this Office did not apply a modification of Commission regulations. Rather, the conclusion that the Committee failed to reimburse the Commonwealth for a positioning flight is consistent with the Commission's past practice regarding its treatment of "positioning flights." See *Explanation and Justification for the 1996 regulations on public financing and presidential campaigns* (11 C.F.R. §§ 9004.7 and 9034.7), 60 Fed. Reg. 31860, 31869 (June 16, 1995) (incorporates Commission's previous practice regarding positioning flights).

Moreover, the Committee has not demonstrated that it did not underpay the Commonwealth \$2,871 for the use of state telephones. As previously discussed, simply because the Committee produced information related to the use of Commonwealth telephones does not mean that all questions regarding such information cease. Based on documentation examined during the audit that indicated the Committee used

97043802525

Commonwealth telephones between August 28, 1991 and December 28, 1991, the Commission concluded that campaign-related phone usage occurred during this period. However, questions remained concerning Committee's use of Commonwealth telephones between March 1991 and August 28, 1991 and from December 28, 1991 to January 1992. The Commission concluded that, based on all the evidence, including the occurrence of campaign activity after the exploratory committee registered with the Commission in March 1991, the relevant campaign-period was from March 1991 through January 1992 (the date the candidate withdrew from the race), not the much shorter time period claimed by the Committee. The Commission's regulations provide that payments made for "testing the waters" become qualified campaign expenses if the individual becomes a presidential candidate. 11 C.F.R. § 9034.4(a)(2). Thus, such disbursements, by definition, are made in connection with seeking the nomination. See 11 C.F.R. § 9032.9(a).

Consequently, the Committee underpaid the Commonwealth of Virginia a total of \$29,111 for use of government conveyances and telephones (\$25,414 + \$826 + \$2,871). The underpayment for use of government conveyances constitutes a contribution to the Committee. 11 C.F.R. § 9034.7(b)(5); see also, 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.7(a)(1) and *Explanation and Justification for 11 C.F.R. § 9004.7*, 45 Fed. Reg. 43377 (June 27, 1980). The underpayments for the use of the Commonwealth's telephones similarly constitute in-kind contributions from the Commonwealth to the Committee. See 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.7(a)(1) ("anything of value"). Because the Federal Election Campaign Act of 1971, as amended, imposes a \$1,000

97043802526

contribution limit, the underpayments constitute excessive contributions from the Commonwealth to the Committee in the amount of \$28,111 (\$29,111 - \$1,000). *Id.* Therefore, the Office of General Counsel recommends that the Commission find probable cause to believe that the Committee accepted excessive contributions totaling \$28,111 from the Commonwealth of Virginia in violation of 2 U.S.C. § 441a(f).

The activity involved in this matter occurred more than five years ago. *See supra*, p. 1. Thus, any litigation to recover a civil penalty may be time barred. 28 U.S.C. § 2462; *FEC v. Williams*, 104 F.3d 237 (9th Cir. 1996); *FEC v. National Republican Senatorial Committee*, 877 F. Supp. 15 (D.D.C. 1995). Furthermore, the amounts involved in the violations at issue are relatively small. Thus, this Office recommends that the Commission exercise its prosecutorial discretion and take no further action against the Committee, and its treasurer, Mark R. Warner, and close the file.⁶

IV. RECOMMENDATIONS

1. Reject the offer by the Wilder for President Committee and Mark R. Warner, as Treasurer;
2. Find probable cause to believe that the Wilder for President Committee and Mark R. Warner, as Treasurer, violated 2 U.S.C. § 441a(f), but take no further action;
3. Find probable cause to believe that the Wilder for President Committee and Mark R. Warner, as Treasurer, violated 2 U.S.C. § 441b(s), but take no further action;
4. Send the appropriate letters; and
5. Close the file.

⁶ This recommendation comports with the description and recommendation to keep this matter open approved by the Commission in a General Counsel's Report dated March 4, 1997, in the Matter of 28 U.S.C. § 2462 Statute of Limitations.

97043802527

Date

3/26/97

Lawrence M. Noble
General Counsel

97043802528

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Wilder for President Committee and) MUR 3986
Mark R. Warner, as Treasurer.)

CERTIFICATION

I, Marjorie W. Emmons, Secretary of the Federal Election Commission, do hereby certify that on April 1, 1997, the Commission decided by a vote of 5-0 to take the following actions in MUR 3986:

1. Reject the offer by the Wilder for President Committee and Mark R. Warner, as Treasurer.
2. Find probable cause to believe that the Wilder for President Committee and Mark R. Warner, as Treasurer, violated 2 U.S.C. § 441a(f), but take no further action.
3. Find probable cause to believe that the Wilder for President Committee and Mark R. Warner, as Treasurer, violated 2 U.S.C. § 441b(a), but take no further action.

(continued)

97043802529

4. Send the appropriate letters, as recommended in the General Counsel's Report dated March 26, 1997.

5. Close the file.

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

Attest:

4-2-97
Date

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

Received in the Secretariat: Thurs., Mar. 27, 1997 1:22 p.m.
Circulated to the Commission: Thurs., Mar. 27, 1997 4:00 p.m.
Deadline for vote: Tues., Apr. 01, 1997 4:00 p.m.

bjr

9704380253C



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

April 7, 1997

Ms. Leslie J. Kerman, Esq.
Epstein Becker & Green, P.C.
1227 25th Street, N.W.
Washington, D.C. 20037-1156

RE: MUR 3986
Wilder for President Committee, Inc.
Mark R. Warner, as Treasurer

Dear Ms. Kerman:

This is to advise you that on April 1, 1997, the Federal Election Commission rejected an offer from your client, the Wilder for President Committee, Inc. ("the Committee"), and Mark R. Warner, as Treasurer, dated November 13, 1996, and found probable cause to believe that the Committee violated 2 U.S.C. §§ 441a(f) and 441b(a), provisions of the Federal Election Campaign Act of 1971, as amended. These violations resulted from the Committee's acceptance of excessive contributions from individuals, prohibited contributions from corporations, and excessive contributions from the Commonwealth of Virginia. After considering the circumstances of this matter, however, the Commission also determined to take no further action against the Committee, and closed its file in this matter.

The confidentially 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.

97043802531

If you have any questions, please contact Andre G. Pineda, the attorney assigned to this matter, at (202) 219-3690.

Sincerely,

Lawrence M. Noble by *KAC*

Lawrence M. Noble
General Counsel

97043802532



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

April 7, 1997

Mr. Carl A. Eason, Esq.
Wolcott, Rivers, Wheary, Basnight & Kelly
1100 One Columbus Center
Virginia Beach, Virginia 23462-6722

RE: MUR 3986
Thomas J. Berenguer

Dear Mr. Eason:

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

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

Sincerely,


Andre G. Pineda
Attorney

cc: Thomas J. Berenguer

97043802533



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

April 7, 1997

James S. Gilmore, III, Esq.
Attorney General of Virginia
101 North 8th Street
5th Floor
Richmond, Virginia 23219

RE: MUR 3986
Commonwealth of Virginia

Dear Mr. Gilmore:

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

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Andre G. Pineda".

Andre G. Pineda
Attorney

97043802534



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THIS IS THE END OF MJR # 3986

DATE FILMED 5-9-87 CAMERA NO. 4

CAMERAMAN JML

97043802535