BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Missouri Democratic State Committee and	)	**MUR 4831**
Michael Kelley, as Treasurer	)	**MUR 5274**
	)	
Nixon Campaign Fund and	)	
John C. Lanham, as Treasurer	)	

STATEMENT OF REASONS
VICE CHAIRMAN BRADLEY A. SMITH AND
COMMISSIONER MICHAEL E. TONER

We supported finding probable cause to believe that the Nixon Campaign Fund violated 2 U.S.C. 441a(f) by accepting excessive contributions and 11 C.F.R. 110.6(c)(2) by failing to report receipt of earmarked contributions, and finding probable cause to believe that the Missouri Democratic State Committee ("MDSC") violated 2 U.S.C. 441a(a)(8) and 11 C.F.R. 102.8(a), 110.6(b)(2)(iii) and 110.6(c)(1) by receiving contributions earmarked for the Nixon campaign, failing to report those contributions as earmarked for that campaign, and failing to forward them to the campaign.[1] However, we could not agree with the General Counsel's recommendation that we apply our earmarking rules to most of the contributions identified by the Counsel.[2] We write separately to explain our reasons for rejecting the General Counsel's broad earmarking analysis.

The Act addresses earmarking in the section of the law containing contribution limits. Section 441a(a)(8) states that for the purposes of these limits:

> all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or

[1] Federal Election Commission, Minutes of an Executive Session, Sept. 8, 2003, at 6,7 (5-0) (Commissioners Mason, McDonald, Smith, Thomas, and Toner voted affirmatively, Commissioner Weintraub recused).
[2] *Id.* at 7,8 (5-0) (Commissioners Mason, McDonald, Smith, Thomas, and Toner voted affirmatively, Commissioner Weintraub recused) (approving conciliation agreements, but requiring that only "express earmarking" be found in violation).

> conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

Our regulations define "earmarked" as "a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee." 11 C.F.R. 110.6(b)(1). Accordingly, for a contribution to be "earmarked" there must be a designation, instruction or encumbrance by *the donor* (the "person" mentioned in 441a(a)(8)), that results in a contribution being made to the designee.

The General Counsel's earmarking analysis in MURs 4831 and 5274 is broader than the statute or our regulations allow. To be sure, several of the contributions at issue bore explicit indicia of earmarking by contributors, in the form of memo line annotations, letters accompanying the contributions, and checks for the Nixon Campaign Fund (but deposited by the MDSC). We concur that these contributions should be treated as earmarked by the donor.

Yet the General Counsel's Brief included as "earmarked contributions" receipts solicited by the Missouri Democratic State Committee, made payable to the party, to assist the party in its efforts on Nixon's behalf. The Brief argued that the absence of a disclaimer to cast the solicitation as anything other than a request for earmarked funds indicated that the funds raised by the solicitation were earmarked.[3] MDSC deposits with notations from party staff referring to "Nixon" were also part of the earmarked total.[4] The General Counsel presents as additional evidence of "indirect" earmarking the fact that MDSC used funds in coordinated expenditures on behalf of Nixon in amounts "corresponding" to the totals raised by Nixon.[5]

This approach would appear to sweep within the classification of "earmarked" contribution party fundraising that invokes candidates or urges support for their campaigns, when instead that activity should be (and is) regulated and disclosed as ordinary political party activity. The Supreme Court has observed:

> Donations are made to a party by contributors who favor a party's candidates in races that affect them; donors are (of course) permitted to express their views and preferences to party officials; and the party is permitted (as we have held it must be) to spend money in its own right.

FEC v. Colorado Rep. Fed. Campaign Comm., 533 U.S. 431, 462 (2001). Consequently, unless the donor specifically earmarks his gift, we do not impose the original donor's limit on party spending, even thought the donor believed that by giving to the party he could assist the party's nominees.

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[3] General Counsel's Brief, MURs 4851 & 5274 (Aug. 1, 2003) at 8.
[4] Brief at 10.
[5] Brief at 12.

The General Counsel's argument imputes a "designation, instruction or encumbrance" in cases where there was no evidence that any such designation, instruction or encumbrance was made by the donor. We believe this is an improper extension of our regulation, and of the Act. We agree that some contributions such as those accompanied by letters stating the funds were "to aid in [Nixon's] campaign" were earmarked. However, post hoc notations on deposit slips by party staff are not earmarking, nor is the mere fact that party funds were solicited to assist Nixon. Under the Act, a contribution subject to our earmarking rules must *in fact* be earmarked by the person making the contribution. The General Counsel's analysis includes contributions bearing no donor designations into the earmarking analysis, and for that reason we supported a conciliation agreement that addressed only those contributions that showed the donor intended to contribute the funds for the Nixon campaign.

December 1, 2003

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Bradley A. Smith
Vice Chairman

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Michael E. Toner
Commissioner