BEFORE THE FEDERAL ELECTION COMMISSION

Rhode Island Republican State Central Committee and	**)**	
Merrill C. Drew, as treasurer	**)**	**MUR 5369**
Lincoln Chafee for U.S. Senate and William R. Facente,	**)**	
as treasurer	**)**	

STATEMENT FOR THE RECORD
VICE CHAIRMAN BRADLEY A. SMITH AND
COMMISSIONERS MICHAEL E. TONER AND DAVID M. MASON

I. Introduction

This statement provides the basis for the Commission's 4-2 vote[1] to find no reason to believe that the Rhode Island Republican Party ("RIRP") and Merrill C. Drew, as treasurer, violated 2 U.S.C. §§ 441a(a)(2)(A) and 441a(f); no reason to believe that Lincoln Chafee for U.S. Senate and William R. Facente, as treasurer, violated 2 U.S.C. § 441a(f); and no reason to believe that the Rhode Island Republican Party[2] and Merrill C. Drew, as treasurer, violated 2 U.S.C. § 434(b). Accordingly, the Commission determined to close the file in this matter.

II. Background

On May 23, 2001, the Reports Analysis Division, as part of its regular review of reports filed by political committees during the 2000 election cycle,[3] sent the RIRP a routine

[1] Chair Ellen L. Weintraub, Vice Chairman Bradley A. Smith, and Commissioners Michael E. Toner and David M. Mason voted in favor of the motion, and Commissioners Danny L. McDonald and Scott E. Thomas voted against the motion.

[2] The committee is registered with the Federal Election Commission as the Rhode Island Republican State Central Committee.

[3] The activity in question occurred before enactment of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) The activity was governed by the Federal Election Campaign Act of 1971, as amended ("the Act"), and the regulations in effect at the time. Thus, all references to the Act and Commission regulations exclude changes required by BCRA. With respect to the activity at issue here, those changes are described in the Final Rules for the Bipartisan Campaign Reform Act of 2002; Coordinated and Independent Expenditures, 68 Fed. Reg. 404 (Jan. 3, 2003) (codified at 11 C.F.R. pts. 100, et al.). On May 2, 2003, a three-judge panel of the U.S. District Court for the District of Columbia held that a number of BCRA provisions are unconstitutional but later stayed its order and injunction that had enjoined the enforcement, execution, or other application of the provisions. The case will be argued before the U.S. Supreme Court on September 8, 2003. *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), *probable jurisdiction noted,* 123 S.Ct. 2268 (2003).

request for further information with respect to certain disbursements for media costs.[4] In response to a follow-up request, RIRP explained that the costs were for uncoordinated expenditures for a federal election. Under established policy, the matter was then referred to the Office of the General Counsel, and, after review, that Office presented its theory to the Commission that the RIRP had engaged in potentially-coordinated non-express advocacy communications because the party and the candidate used the same media strategist and two advertisements contained similar themes and language.

II. Facts and Analysis

The candidate's authorized committee and the RIRP disclosed payments to McAuliffe Message Media/Pilgrim Films (apparently part of the same entity) during the relevant time period.[5] The two advertisements cited for their similarity were "Tradition" and "Undaunted." "Tradition" was paid for by RIRP:

> For Lincoln Chafee, hard work, integrity, and caring for others aren't just political slogans – they're a tradition. Senator Lincoln Chafee puts those values to work every day. For a social security lock box that stops politicians from raiding the trust fund. Ending the marriage tax penalty on working couples. He voted against his own party for a real patients' bill of rights and a prescription drug benefit that gives seniors the drugs they need at a price they can afford. Tell Senator Chafee to keep up his independent fight for Rhode Island.

"Undaunted" was paid for by the Lincoln Chafee for U.S. Senate Committee:

> A man of reason and moderation, independent minded and forward looking, Senator Lincoln Chafee's character and leadership is working for Rhode Island. A sense of duty and exemplary executive experience, Chafee knows how to get things done. Undaunted in his efforts – protecting our environment, pushing for a patients' bill of rights, Medicare prescription drug coverage for all beneficiaries. A man of conviction, a leader. Senator Lincoln Chafee – a tradition of trust.

The Act provides that state political party committees may make coordinated expenditures, within certain limits. 2 U.S.C. § 441a(d). In addition, state party committees may make independent expenditures on behalf of federal candidates without limit. *Colorado Republican Federal Campaign Committee v. FEC,* 518 U.S. 604 (1996). The Commission's view of the relevant standards governing the subject advertisements has been amply described

[4] Attached are portions of the RIRP disclosure report in which the disbursements at issue appear, Attachment 1, and the RIRP's response to the Reports Analysis Division's inquiry, Attachment 2.

[5] See Lincoln Chafee for U.S. Senate, 2000 October Quarterly Report dated Oct. 12, 2000, Sched. B for Line 17 at 8-9; RIRP, 2000 October Quarterly Report dated Oct. 5, 2000, Sched. B. for Line 21b at 1-2.

in numerous statements.[6] It is precisely because of the notice, fairness and consistency concerns identified in these statements and the cumulative history of the Commission's treatment of similarly-situated respondents that the Commission voted to find no reason to believe that violations had occurred and to close the file in this matter.

As a result of the disposition of cases arising during past election cycles, parties and candidates operated under a de facto Commission policy of not treating non-express advocacy communications by political parties as coordinated expenditures.[7] In 1999, addressing matters from the 1996 election cycle, the Commission rejected by a 2-4 vote recommendations by its audit staff to treat non-express advocacy advertisements by national political parties featuring the party's presidential nominee (or opponent) as coordinated expenditures on behalf of the nominee despite substantial evidence of extensive cooperation between the party and the nominee in crafting and disseminating the communications.[8] The four Commissioners who voted to reject the recommendation explained that they did so because the "electioneering message"[9] test relied upon in the audits and accompanying legal analyses was impermissibly vague, overbroad and had not been properly promulgated by the Commission, thus leaving parties without notice as to what sort of communications (other than express advocacy) might be treated as coordinated contributions if made in cooperation with a campaign.

Subsequently, by a 3-3 vote with a substantially different alignment of Commissioners, the Commission refused to initiate enforcement proceedings with respect to these rejected audit findings. Those Commissioners declining to go forward again cited vagueness, overbreadth and, by that point, inconsistency with the Commission's own actions

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[6] Statement of Reasons in MURs 4568, et al. (Triad) of Commissioner Mason (Jan. 22, 2003); Statement of Reasons in MUR 4538 (Alabama Republican Party et al.) of Commissioners Mason and Smith (May 23, 2002); Supplemental Statement of Reasons in MUR 4994 (Clinton for Senate et al.) of Commissioner Smith (Jan. 17, 2002); Statement of Reasons in MUR 4994 (Hillary Rodham Clinton for U.S. Senate, et al.) of Commissioner Thomas (Dec. 19, 2001); Statement for the Record in MUR 4624 (The Coalition) of Commissioner Smith (Nov. 6, 2001); Statement of Reasons in MUR 4624 of Commissioners Thomas and McDonald (Sept. 7, 2001); Supplemental Statement of Reasons in MUR 4553, et al. (Dole/Clinton) of Commissioner Thomas (June 28, 2000); Statement of Reasons in MUR 4553, et al (Dole/Clinton) of Commissioner Thomas (May 25, 2000); Statement of Reasons in MUR 4378 (Rehberg) of Commissioners Wold, Elliott, and Mason (Oct. 28, 1999); Statement of Reasons in MUR 4378 (Rehberg) of Commissioners Thomas and McDonald (Aug. 10, 1999); Statement of Reasons in the Audits of Dole for President, Inc. (Primary), et al. of Commissioners Wold, Elliott, Mason, and Sandstrom (June 24, 1999).

[7] See Statement of Reasons in MUR 4994 (Hillary Rodham Clinton for U.S. Senate, et al.) of Commissioner Thomas (Dec. 19, 2001) ("at the time the activity in question was occurring, the parties and candidates could not have had a clear picture of whether their plans would be treated as a violation of the coordinated expenditure limits").

[8] Statement of Reasons of Commissioners Wold, Elliott, Mason, and Sandstrom in the Audits of "Dole for President Committee, Inc. (Primary), *et al.* of Commissioners Wold, Elliott, Mason and Sandstrom (June 24, 1999).

[9] This test is different from the electioneering communications definition subsequently adopted by Congress in BCRA.

in the audit.[10] Still later, in matters arising from the 1996 and 1998 election cycles, the Commission rejected a series of probable cause recommendations from its General Counsel alleging that various state political parties had made excessive coordinated contributions to the Senate nominees when the parties made non-express advocacy communications in cooperation with the nominees. In one case from the 1998 election cycle, the Commission found that a party had made excessive coordinated communications on behalf of a nominee but restricted these findings to the party's express advocacy communications.[11]

On August 2, 1999 the U.S. District Court for the District of Columbia found that the Commission's coordination regulation was unconstitutional.[12] Rather than seek review of the ruling the Commission repealed the subject rule and promulgated a new coordination regulation.[13] When it enacted BCRA, Congress repealed the post-*Christian Coalition* regulation and directed the Commission to promulgate yet another coordination regulation.[14] This series of events only further muddied the waters as to what sorts of communications by political parties might constitute coordinated expenditures.

By the 2000 election cycle, the Commission was rejecting even investigating allegations involving alleged coordination of non-express advocacy party communications. While Commissioners diverged in some degree on their rationales, all agreed that "at the time the activity in question was occurring, the parties and candidates could not have had a clear picture of whether their plans would be treated as a violation of the coordinated expenditure limits."[15] Having rejected a complaint involving party advertising in the 2000 election on this basis in December of 2001, it would have been wholly arbitrary and capricious for the Commission in June of 2003 to change course and proceed under a theory of law which it had consistently rejected over the four previous years.

As previously explained, "[t]he Commission's uncertain policy guidance and the absence of consistent enforcement policy have, separately or together, made it impossible for the Commission to cite political parties for coordinating non-express advocacy

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[10] MURs 4969, 4970, and 4713.

[11] MUR 4503 (South Dakota Democratic Party).

[12] *FEC v. Christian Coalition*, 52 F. Supp.2d 45, 89 (D.D.C. 1999)(referring to prior version of 11C.F.R. § 109.1(b)(4)).

[13] 65 Fed. Reg. 76138 (Dec. 6, 2000) (codified later at 11 C.F.R. § 100.23).

[14] Section 214(c) of BCRA provides, "The Federal Election Commission shall promulgate new regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees. The regulations shall not require agreement or formal collaboration to establish coordination…" The Commission promulgated the new regulations in Final Rules for the Bipartisan Campaign Reform Act of 2002; Coordinated and Independent Expenditures, 68 Fed. Reg. 404 (Jan. 3, 2003) (codified at 11 C.F.R. pts. 100, et al.).

[15] Statement of Reasons in MUR 4994 (Hillary Rodham Clinton for U.S. Senate, et al.) of Commissioner Thomas (Dec. 19, 2001).

communications with candidates."[16] If parties and candidates were not on notice of the Commission's interpretation of the relevant statutes and regulations, as a matter of "hornbook law in the administrative context"[17] the Commission has no basis to pursue Respondents in this matter.[18] The regulated community thus had no fair warning of Commission enforcement policy in such matters and traditional concepts of due process preclude the imposition of penalties.[19]

There is now an additional reason for the Commission to decline to dedicate resources for the pre-November 2002 coordinated expenditure allegations at issue here. As explained above, both the "content" (whether the relevant category of communications is restricted to or extends beyond express advocacy and how far beyond) and the "conduct" (*Christian Coalition*, BCRA) legs of the Commission's coordinated communications concept have been subject to disagreement and shifting interpretation. In BCRA, Congress specifically included certain non-express advocacy communications in the class of potentially-coordinated communications, and the Commission added additional content standards pursuant to a specific regulatory mandate from Congress.[20] Whatever the law should have been prior to November 2002, it has substantially changed now, and there would be no value whatsoever in pursuing a test case (or making a declaration through a reason-to-believe finding without further proceedings) as to whether particular communications may have violated the vague standards in effect prior to BCRA.

Furthermore, the information available to the Commission is not suggestive of coordination and therefore fails the reason-to-believe threshold. The text of "Tradition" and "Undaunted" contain immaterial similarities reasonably attributed to the common sense conclusion that most parties and candidates will be addressing a defined set of campaign issues in their advertising. The Commission has no legal basis to assign a legal consequence to these similarities without specific evidence of prior coordination with regard to the specific content, timing and placement of the advertisements. Although both committees itemized disbursements to the same media firm, this fact speaks weakly to the burden of proof the

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[16] Statement of Reasons in MUR 4538 (Alabama Republican Party) of Commissioners Mason and Smith (May 23, 2002) at 7.

[17] *General Elec. Co. v. EPA,* 53 F.3d 1324, 1329 (D.D.C. 1995)(citing *Rollins Environmental Services (NJ) Inc., v. U.S.,* 937 F.2d 649, 655 n.1 (D.C. Cir. 1991)(Edwards, J., dissenting in part and concurring in part)).

[18] Commissioner Smith has argued that prior to BCRA "coordinated spending by party committees does not become subject to the Act's limits on contributions unless it contains express advocacy." Supplemental Statement of Reasons in MUR 4994 (Hillary Rodham Clinton for U.S. Senate, et al.) of Commissioner Smith (Jan. 17, 2002) at 9. Commissioner Toner concurs with Commissioner Smith's conclusion of law on this issue. Because the RIRP's "Tradition" advertisement lacks express advocacy, for this additional reason Commissioners Smith and Toner voted to find no reason to believe.

[19] *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987)("Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule."); U.S. Const. amend. V.

[20] 2 U.S.C. § 441a(a)(7)(C); 11 C.F.R. § 109.21(c).

Commission has when it seeks to prove coordination. Given the history of the Commission's disposition of previous matters and this generalized and unfocused factual support, the Commission voted to find no reason to believe that violations occurred and closed the file in this matter.

August 15, 2003

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Bradley A. Smith
Vice Chairman

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David M. Mason
Commissioner

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Michael E. Toner
Commissioner