FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL

FROM: Mary W. Dove
Acting Secretary of the Commission

DATE: January 31, 2000

SUBJECT: Statement of Reasons for MUR 4250

Attached is a copy of the Statement of Reasons for MUR 4250 signed by Commissioner Scott E. Thomas and Commissioner Danny L. McDonald.

This was received in the Commission Secretary's Office on Friday, January 28, 2000, at 5:21 p.m.

cc: Vincent J. Convery, Jr.
Press Office
Public Information
Public Records

Attachments

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

In the Matter of	)	
	)	
Republican National Committee and	)	
Alec Poitevint, as treasurer	)	**MUR 4250**
Haley R. Barbour	)	
National Policy Forum	)	
and John Bolton, President	)	

STATEMENT OF REASONS

COMMISSIONER SCOTT E. THOMAS
COMMISSIONER DANNY LEE MCDONALD

In MUR 4250, the Federal Election Commission considered whether the Republican National Committee ("the RNC") could avoid public disclosure, the Commission's soft money regulations designed to prevent the use of federally impermissible funds, as well as the foreign national prohibitions simply by setting up a shell organization which it asserted was separate from the national party. This so-called "separate" organization, the National Policy Forum, was chaired by the RNC Chairman, staffed by RNC staff, and financed by RNC money. Obviously, to sanction such a charade would give rise to a serious loophole in the Federal Election Campaign Act ("FECA" or "the Act"). Certain members of the Commission, however, concluded that the NPF was not affiliated with the Republican National Committee, was not subject to the Act's disclosure provisions, and could be used by the RNC to launder foreign money for use in the election process.

We believe the RNC should not be able to do indirectly what it plainly can't do directly. The RNC must follow the requirements of the Commission's soft money regulations and the statute's disclosure provisions. It should not be allowed to escape those requirements through the artifice of a shell organization. The RNC must also follow the statutory prohibitions and not accept foreign national money. It should not be allowed to circumvent that prohibition by laundering, and then accepting, foreign national money through an entity it set up, financed, and controlled. Accordingly, we voted to support the General Counsel's legal recommendations to pursue this important matter.

Laws are effective only when they are enforced. The Commission's regulations limit the use and require the reporting of soft money. In addition, the Act broadly prohibits the use of foreign national money in *any* U.S. elections. By not enforcing the law against the Republican National Committee, despite strong and compelling evidence, certain members of the Commission have shown that they have little interest in enforcing the Commission's soft money regulations and the prohibitions on the use of foreign national money in our country's elections.

I.

The Federal Election Campaign Act ("the Act") requires that contributions accepted and spent to influence any federal election are subject to certain limitations and prohibitions. 2 U.S.C. §§441a, 441b, 441c, 441e, 441f and 441g. Because national party committees frequently make disbursements which impact on both federal and non-federal elections, however, Commission regulations permit national party committees to allocate these costs between federal and non-federal accounts. 11 C.F.R. §106.5. The Explanation and Justification to these rules recognize that although the national party committees' primary focus is on presidential and on other Federal candidates and elections, the national party committees also do engage in party building activities that benefit non-federal candidates, as well. 55 *Fed. Reg.* 26058, 26063 (June 26, 1990).

To ensure that federal election activity is paid for *only* with federally permissible money, the Commission's regulations provide that national party committee disbursements may be made in one of two ways: (1) entirely from funds raised subject to the prohibitions and limitations of the Act; or (2) if the party committees have established separate Federal and non-federal accounts pursuant to 11 C.F.R. §102.5, they may allocate certain disbursements between these accounts according to various formulas found in section 106.5. *See* 11 C.F.R. §106.5(a).[1] In addition, to assure compliance with these rules, national party committees are required to file periodic reports disclosing all receipts received, and all disbursements made, by both their Federal and non-federal accounts. 2 U.S.C. §434(a)(1); 11 C.F.R. §§104.8(a) and (e), and 104.9(a) and (c).

On August 23, 1995, the Democratic National Committee filed a complaint against the Republican National Committee ("the RNC") and the National Policy Forum ("the NPF") for violations of the Act and Commission regulations. Specifically, the complaint alleged that "[t]he National Policy Forum is a project of the RNC which the RNC has disguised as a separate non-profit corporation in order to evade the fundamental

[1] If separate accounts are used, national party committees must pay for shared federal and non-federal activity either by establishing an allocation account into which federal and non-federal funds are paid according to the proper ratio, or by paying all expenses out of the federal account and having the non-federal account reimburse its share of the costs. 11 C.F.R. §106.5(g)(1). Section 106.5(b)(2) sets out the allocation formulas for national party committees to use in allocating disbursements made for costs such as administrative expenses and generic voter drives. For a non-presidential cycle like 1993-94, the federal account of a national party committee like the Republican National Committee had to pay at least 60% of the latter costs. 11 C.F.R. §106.5(b)(2)(ii).

requirements of the federal law that national parties publicly disclose their contributions and disbursements and pay a certain minimum portion of their expenses with contributions allowable under the law." Complaint at 1. The complaint further alleged that:

> [NPF] was set up by the RNC and is entirely maintained, financed and controlled by the RNC. NPF's activities are indistinguishable from those normally conducted by the RNC itself: development and promotion, through mass communications and meetings, of the Party's official message; providing benefits to RNC donors; and showcasing Republican candidates for Federal and other offices. *All of these activities would clearly be covered by the Act and Commission regulations if conducted by the RNC itself.*

Id. (emphasis added). The complaint concluded that the RNC had failed to disclose the NPF's contributions and expenditures in violation of 2 U.S.C. §434 and 11 C.F.R. §§104.8(e) and 104.9. The complaint also charged that the RNC had failed to allocate the NPF's disbursements between federal and non-federal accounts and that, as a result, hundreds of thousands of impermissible dollars had found their way into the federal election process in violation of 2 U.S.C. §§441a(f) and 441b and 11 C.F.R. §102.5, 106.5(a) and (b), 110.9(a) and 114.2.[2]

The Office of General Counsel prepared a report for Commission consideration that contained a factual and legal analysis of the allegations presented in the complaint as well as responses from the RNC and the NPF. The Office of General Counsel's review focused primarily upon the complaint's allegation that the NPF was nothing more than a "project" of the RNC. The General Counsel's Report concluded that "there is evidence that the NPF was not in fact a separate entity from the RNC, but rather a subordinate instrument of the RNC, financed and controlled by the RNC primarily to conduct allocable party building activities." April 28, 1997 General Counsel's Report at 31.

Based upon this preliminary factual finding, the General Counsel's Report recommended that the Commission find reason to believe that the RNC violated 11 C.F.R. §§102.5(a)(1) and 106.5(g)(1) by failing to allocate expenses for activities carried out through NPF between its Federal and non-federal accounts and by making these disbursements from the non-federal account. The General Counsel's Report also recommended that the Commission find reason to believe the RNC violated 2 U.S.C. §§441a and 441b by making disbursements for the federal share of the NPF activities from entirely non-federal funds containing excessive and prohibited contributions. Finally, the Report recommended that that the Commission find reason to believe that the RNC violated 2 U.S.C. §434(a)(1) by failing to report the RNC activity conducted

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[2] The record would show NPF actually spent millions of dollars and that its use of RNC soft money resulted in over a million dollars worth of soft money being used for expenses that instead should have been paid for with federally permissible funds. The scale of the violation was enormous.

through the NPF. The General Counsel's Report also recommended an investigation of the matter through interrogatories and requests for production of documents.

On June 17, 1997, the Commission considered the General Counsel's Report. Despite the plain and obvious evidence at this preliminary stage that the RNC had established, financed, maintained and controlled the NPF, only Commissioners McDonald, McGarry and Thomas voted to find reason to believe there were violations of the Act and the Commission's Regulations and authorize an investigation. Commissioner Elliott voted against these findings. Commissioner Aikens recused herself from consideration of the matter, and there was one vacancy on the Commission. Because the General Counsel's recommendations failed to receive the four affirmative votes necessary to proceed, *see* 2 U.S.C. §437g(a)(2), this aspect of the matter was closed.

Meanwhile, on May 13, 1997, the DNC filed an amended complaint alleging that the Republican National Committee also used "the National Policy Forum as a means to hide foreign contributions to the RNC." May 13, 1997 Amended Complaint at 2. Reviewing these allegations, the General Counsel's Office recommended that the Commission find reason to believe that the RNC violated the foreign national prohibitions found at 2 U.S.C. §441e. On June 17, 1997, the same date referred to in the previous paragraph, the Commission voted to find reason to believe the RNC violated section 441e and authorized an investigation. On June 2, 1998, the Commission voted to find reason to believe Haley Barbour violated 2 U.S.C. §441e.

The General Counsel's investigation revealed that in 1993, the RNC's chairman, Haley Barbour, established the NPF as a supposedly independent, issue-oriented organization. From its inception, though, the RNC was the primary financial backer of the NPF. Over the course of the 1994 election cycle, the RNC provided the NPF with nearly $2.4 million, mostly in the form of loans. By the summer of the 1994 election year, the NPF owed approximately $2.1 million to the RNC, but there was little prospect of repayment. These loans to the NPF were approved by Mr. Barbour in his role as RNC Chairman. Because these funds were now badly needed by the RNC for the 1994 elections, the RNC arranged the security necessary for the NPF to get a bank loan and, in turn, to repay at least a portion of the outstanding balance. The investigation indicated that the RNC knowingly obtained security for the loan from a foreign national—Young Brothers Development Company, Ltd.—Hong Kong ("YBD—Hong Kong"). As part of the arrangement, the NPF earmarked and transferred approximately $1.6 million of the $2.1 million bank loan proceeds to the RNC's non-federal account in late October 1994—in time for use in the 1994 elections.

After conducting its investigation and a thorough review of the materials submitted by respondents, the Office of General Counsel prepared a report for Commission consideration analyzing the pertinent factual and legal issues. The Office of General Counsel recommended that the Commission find probable cause to believe the RNC solicited and accepted a $1.6 million contribution from a foreign national in knowing and willful violation of section 441e. The General Counsel further

recommended the Commission find probable cause to believe that Haley Barbour solicited and accepted, on behalf of the RNC, a $1.6 million contribution from a foreign national source, in knowing and willful violation of 2 U.S.C. §441e.

A vote regarding the General Counsel's recommendations failed to secure the four affirmative votes necessary to make even probable cause to believe determinations, let alone knowing and willful findings. 2 U.S.C. §437g(a)(4). Commissioners McDonald, Sandstrom and Thomas voted to find probable cause to believe the RNC and Mr. Barbour solicited and accepted a $1.6 million contribution from a foreign national.[3] Commissioners Elliott, Mason and Wold dissented and opposed the General Counsel's recommendations *in toto*. On November 30, 1999, the Commission voted to close the file.[4]

II.

With respect to the original complaint filed in this matter, there is no question that the activities engaged in by the NPF are exactly the sort of activities which a national party committee must allocate and report under the Act and Commission regulations. The RNC conceded this very point in its response to the complaint: "The RNC acknowledges that if it were to conduct activities similar to NPF, under FEC regulations found at 11 C.F.R. §106.5(a), as a national party committee it would be required to allocate those administrative expenses." RNC September 20, 1995 Response at 3.[5] The RNC argued, however, that the "NPF is separate and distinct from RNC," *id.* at 2, and that its activities are not subject to the RNC's allocation and reporting requirements.

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[3] At the time of the vote, Commissioner McDonald was not prepared to make a knowing and willful finding against the respondents.

[4] The Act does not contain its own internal statute of limitations. To date, the United States Court of Appeals for the District of Columbia Circuit has not ruled on the application of the statute of limitations at 28 U.S.C. §2462 to the Act. Other courts have ruled, however, that civil actions for the enforcement of any civil fine, penalty, or forfeiture under the Act are subject to the five year statute of limitations set forth at §2462. *See, e.g., FEC v. Williams*, 104 F.3d 237 (9th Cir. 1996), *cert. denied*, 522 U.S. 1015 (1997); *FEC v. Christian Coalition*, 965 F.Supp. 66, 70 (D.D.C. 1997); and *FEC v. National Republican Senatorial Committee*, 877 F.Supp. 15, 20-21 (D.D.C. 1995). It is our sense, however, that even if §2462 were found to be applicable, it would not preclude a disgorgement, equal to the amount of the loan proceeds, by respondents in this matter. *See, e.g., United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997)(section 2462 does not bar the government from seeking equitable relief); *FEC v. Christian Coalition, supra* at 71-72 (section 2462 does not bar FEC from seeking equitable relief for activity for which legal relief had been barred because it "has the authority to seek injunctive relief wholly separate and apart from its authority to seek a legal remedy" under 2 U.S.C. §437g(a)(6)). By voting not to proceed in MUR 4250, our colleagues blocked any Commission effort to even get the RNC to disgorge its ill-gotten gain of over $1.5 million.

[5] According to press reports, the Internal Revenue Service concluded that the National Policy Forum "was not entitled to [501(c)(4)] tax-exempt status because its activities were considered too partisan." *Washington Post*, May 13, 1997. The IRS ruled that the NPF was "a partisan, issues-oriented organization" that was "designed to promote the Republican Party." *Washington Post*, July 25, 1997 (quotes in the original).

Even at the preliminary reason to believe stage and with the necessarily limited record before us, we think the evidence is overwhelming that the NPF was *not* separate and distinct from the RNC. Indeed, it appears that the NPF was nothing but another operating account for the RNC from top to bottom. The NPF was an organization set up by the national party to do national party business. As such, the RNC should not be able to treat national party activities as non-allocable or exempt from public disclosure simply because they were run through the artifice of an allegedly separate organization.

The most obvious evidence that the NPF was an arm of the RNC is the overlap in leadership and staff between the NPF and the RNC. For example, from the creation of NPF in 1993 through the end of 1996 Haley Barbour served as both Chairman of the RNC *and* chairman of the NPF. As chairman of the NPF, Mr. Barbour exercised the ultimate decision making authority. According to the Bylaws, Mr. Barbour had sole discretion in appointing the NPF's Board of Directors who, in turn, were responsible for the appointment of other officers and the governance of the NPF. NPF Bylaws at Article IV, Section 2. With the authority of the leading NPF official resting in the hands of the RNC Chairman, it is clear that NPF was not an independent operation. Rather, it is apparent that its operations were directed and dictated by the Republican National Committee.

Not only did the same person simultaneously direct the operations of both the RNC and the NDF, but important NPF figures at the time of its inception were also RNC officials on the RNC payroll. For example, Michael A. Hess, one of NPF's incorporators, also served as RNC Chief Counsel at the time of NPF's incorporation. First General Counsel's Report at 23-24 (April 28, 1997). Similarly, the NPF's Articles of Incorporation list Donald Fierce as one of the three original directors. At this time Mr. Fierce was also a salaried employee of the RNC and in 1995 served as the Strategic Planning and Congressional Affairs Director at the RNC. *Id.* Additionally, there is evidence in the record of NPF officials leaving NPF for jobs at the RNC and the National Republican Senatorial Committee, as well as individuals receiving payments from the RNC while apparently working for the NPF, and an additional staffer who was apparently employed concurrently by the RNC and the NPF. *Id.* at 22-23.

Just as important as the role of RNC officials in creating and running the NPF, was the role of RNC money in fueling the NPF's operations. From its inception, the NPF was dependent upon the RNC for its finances. Two days after the formation of the NPF, the RNC loaned the NPF $100,000 in seed money from its non-federal account. *Id.* at Attachment 8, page 2. Nor did the money trail from the RNC to the NPF stop there. It appears that a substantial portion of the NPF's activities were financed by the RNC through soft dollar loans from its non-federal account. For example, from the NPF's inception in mid-1993 through August, 1994, the RNC made a total of approximately $2,345,000 in loans to the NPF. By September, 1994, the NPF had repaid only $200,000 of the loan amount. *Id.* Obviously, without RNC funding there would not have been an NPF. The predominant role played by the RNC as a source of funds for the NPF is yet another indication that the NPF was nothing more than a vehicle for RNC activities.

Any doubt the NPF was simply a subsidiary of the RNC is erased by statements made by the RNC itself--both by its leadership publicly and by the organization in its written materials. Shortly after formation of the NPF, Mr. Barbour as RNC Chairman distributed a June 10, 1993 memorandum to RNC major donors ("Team 100") introducing the NPF to these donors. In this memorandum, Mr. Barbour informs the Team 100 members that "[t]he RNC is *creating* the National Policy Forum as an issue development *subsidiary*." *See* First General Counsel's Report at Attachment 1, page 2 (April 28, 1997)(emphasis added). The fact that the Chairman of both the RNC and the NPF describes the NPF as a "subsidiary" of the RNC is persuasive evidence that, indeed, the NPF was a subsidiary of the RNC.[6]

Press accounts further detailed the control which Chairman Barbour exercised over the NPF. In particular, one report indicates that Michael Baroody, President of NPF, may have resigned his post partly as a result of his lack of authority and power to curtail "Mr. Barbour's 'fascination' with foreign sources of funding." *Time*, June 23, 1997 at 22.[7] In a memorandum to Mr. Barbour, Mr. Baroody complains that the NPF was "operated like a division" of the Republican National Committee. *Id.* Mr. Baroody cited examples of RNC intervention in NPF activities to emphasize his "concern that *separation between [the forum] and the RNC is fiction*." *Id.* (emphasis added).

The above material indicates that the RNC was intimately involved in the operations of the NPF. RNC officials incorporated and ran the NPF; RNC money funded NPF operations; according to RNC and NPF officials, the NPF was a "subsidiary" of the RNC and the NPF "was operated like a division" of the RNC; and finally, the financial transactions between the RNC and the NPF involving foreign money suggest that the NPF was run like an operating account of the RNC--not a separate and distinct organization. Because there is strong evidence that "the NPF was not in fact a separate entity from the RNC, but rather a subordinate instrument of the RNC, financed and controlled by the RNC," First General Counsel's Report at 31 (April 28, 1997), we agreed with the General Counsel's recommendations to find reason to believe that the RNC violated both the Act and Commission regulations.

Despite the overwhelming evidence to the contrary, Commissioner Elliott insists that the National Policy Forum is an independent organization, separate and distinct from the Republican National Committee. She asserts there is inadequate evidence to suggest the NPF may be an arm of the RNC under the statute's reason to believe standard. Moreover, she warns that if the Commission pursues the NPF, it must also pursue groups

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[6] The Barbour memorandum to RNC donors goes on to place the NPF on the RNC organizational chart alongside the RNC Platform Committee, all the while cautioning that the NPF would not actually "supersede" but only "supplement" the Platform Committee: "It is not the intention of NPF to rewrite or amend the 1992 Republican Platform, and NPF does not have the authority to do so. *NPF's work is only supplemental to the platform* and does not in any way supersede it." *Id.* (emphasis added).

[7] Even though the *Time* article was dated June 23, 1997, it was published before that date. In fact, the article was specifically quoted from and discussed at the June 17, 1997, Commission meeting at which Commissioner Elliott later voted against the General Counsel's reason to believe recommendations.

which she asserts are in identical circumstances as the NPF such as the Democratic Leadership Council (DLC). As best as we can tell, it was on this basis that she voted against the General Counsel's reason to believe recommendations and blocked any investigation into this matter.[8]

We disagree with Commissioner Elliott and believe that there certainly was more than enough evidence to meet the reason to believe standard. At the outset, the Commission has *unanimously* acknowledged that a "reason to believe" finding is a very low threshold:

> Under the present statute, the Commission is required to make a finding that there is "reason to believe a violation has occurred" before it may investigate. Only then may the Commission request specific information from a respondent to determine whether, in fact, a violation has occurred. The statutory phrase "reason to believe" is misleading and does a disservice to both the Commission and the respondent. It implies that the Commission has evaluated the evidence and concluded that the respondent has violated the Act. In fact, however, *a "reason to believe" finding simply means the Commission believes a violation may have occurred if the facts as described in the complaint are true. An investigation permits the Commission to evaluate the validity of the facts as alleged.*

1996 Federal Election Commission Annual Report at 57 (emphasis added). Given this low standard and the amount of evidence available (as highlighted above and detailed more fully in the General Counsel's Report), it is difficult to understand how one could not reach at least a reason to believe finding. Yet, there were not four votes at the Federal Election Commission to conduct even the most preliminary investigation into whether the NPF was separate and distinct from the RNC.

During the Commission's discussion of this matter, Commissioner Elliott also speculated that if the Commission pursued the NPF it would have to pursue the Democratic Leadership Council. First, of course, the DLC is not a listed respondent in this matter. Second, if the DLC were established, financed and controlled by the DNC as the NPF is by the RNC, we would also recommend finding reason to believe and investigating that matter. From what we generally know of the DLC, however, it does not appear to be analogous to the NPF. Unlike the NPF, the DLC was not set up and established by the Chairman of the DNC; nor were its officials all appointed by the Chairman of the DNC; nor did it receive millions of dollars in funding from the DNC;

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[8] It appears that Commissioner Elliott also may have been arguing that, even if NPF was a part of the RNC, it was somehow not covered by the Commission's allocation regulations. Yet, even the RNC concedes that if NPF was a part of the RNC, its activities would be covered by 11 C.F.R. §106.5(a).

We cannot know Commissioner Elliott's reasoning for sure, since to date she has not submitted a Statement of Reasons. *See* n. 19, *infra*. We base our understanding of her logic on the Commission meeting discussions.

nor did its officials state that it was a "subsidiary" of the DNC and that the separation between it and the national party was a mere "fiction."[9]

In light of the low threshold for a reason to believe finding and the irrelevance of the DLC to this matter, Commissioner Elliott's vote must be considered arbitrary and capricious. Even at this preliminary stage, the evidence is extensive that the NPF was a tool of the RNC. Mr. Barbour was the head of both organizations; he solicited officers of NPF; he caused the RNC to fund NPF; and, as we will show below, he was the force behind the whole transaction to route foreign money back to the RNC through NPF. Because the RNC controlled the NPF, the operations of the NPF were subject to the same statutory and regulatory requirements as the RNC.[10] Even, "[t]he RNC acknowledges that if it were to conduct activities similar to NPF, under FEC regulations found at 11 C.F.R. §106.5(a), as a national party committee it would be required to allocate those administrative expenses." RNC September 20, 1995 Response at 3. To conclude that the NPF was separate and distinct from the RNC in the face of this evidence, and that it was

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[9] Indeed, some have even observed that the birth of the DLC was anything but a welcome event to the national party. The DLC was described as "an organization of moderate to conservative Democratic officeholders, most of them from the South and the West, making a point of *setting themselves apart from the Democratic National Committee. . . the DLC was intended to be a counterweight. . .to the DNC. .* [DNC Chairman] Kirk was not happy about [the DLC]. '*The last thing the party needs is a separate entity,*' he said at one point." Germond and Witcover, *Whose Broad Stripes and Bright Stars* at 39-40 (1993)(emphasis added); *see also National Journal*, March 9, 1985 at 516 (the DLC was established "outside of the DNC")(emphasis added).

[10] This case is somewhat similar to MUR 4246 where the issue was whether certain national party committee activities, carried out through an in-house division of the national party, were allocable. In MUR 4246, ironically, the RNC filed a complaint with the Commission charging that the DNC had used non-federal funds deposited into a non-federal National Health Care account to exclusively sponsor DNC "National Health Care" programs. Originally, the DNC had established a separate corporation known as the "national Health Care Campaign"(NHCC) to undertake grassroots lobbying for President Clinton's health care reform. NHCC received a $100,000 loan from the DNC as "seed money" to help establish the organization. However, a barrage of negative newspaper articles criticized the organization for hiding its ties to the DNC and for operating as a "separate" organization not subject to public disclosure or receipts and disbursements. One week after launching the NHCC, the decision was made to operate the NHCC as a project of the DNC rather than a separate organization. Then DNC Chairman David Wilhelm was quoted as saying:

> The whole goal was to create a non-partisan or bipartisan umbrella organization, something we could kick off and then let go and emerge on its own. But this was being construed as a front group of sorts for the DNC So since we could not achieve the benefit we hoped from its being independent, it might as well be a part of the DNC.

Associated Press, June 6, 1993. Thus, the only difference between MUR 4246 and the present MUR is that the DNC activity was formally done in-house as part of the DNC. The DNC acknowledged NHCC for what it was and publicly disclosed its receipts and disbursements. In the only vote on the merits in MUR 4246, the Commission voted unanimously (Commissioner Elliott included) to find reason to believe the DNC violated the allocation rules. *See* Statement of Reasons of Commissioners McGarry and Thomas in MUR 4246 at 3 (June 12, 1997). Perhaps the lesson to be learned by the DNC is that it should have continued to run the NHCC as a "separate" organization, funded it with bogus loans, and used foreign money to pay off the loans as the RNC did with its counterpart, the NPF.

not even necessary to ask any questions in this important matter, simply defies logic and common sense.

III.

We also believe there was probable cause to believe the RNC solicited and accepted a $1.6 million contribution from a foreign national in violation of 2 U.S.C. §441e. Under the Act and Commission regulations, foreign nationals are prohibited from making contributions, directly *or through any person*, in connection with any election to any political office. 2 U.S.C. §441e; 11 C.F.R. §110.4(a). Unlike most of the other provisions of the Act, §441e applies to any election for any political office, including state and local offices as well as Federal offices. *See United States v. Kanchanalak*, 192 F.3d 1037 (D.C.Cir. 1999)(court concluded that §441e prohibits foreign contributions of soft money as well as hard money). In addition, it is unlawful for any person to solicit, accept, or receive any such contribution from a foreign national. 2 U.S.C. §441e(a); 11 C.F.R. §110.4(a)(1) and (2). For purposes of §441e, a contribution includes any loan, and a loan is defined to include a guarantee, endorsement and any other form of security. 2 U.S.C. §431(8)(A)(i); 11 C.F.R. §100.7(a)(1)(i). Moreover, the term "person" includes both individuals and committees such as a national party committee. 2 U.S.C. §431(11). We believe there is probable cause to believe the RNC and its Chairman, Haley Barbour, devised a plan to circumvent this law.

This is not a difficult case. The facts are relatively straightforward. As with the disclosure and soft money violation discussed above, the § 441e violations arise out of the RNC attempting to do indirectly what it couldn't do directly. The factual record in this matter plainly shows that the RNC used the NPF to launder and accept prohibited foreign national money. Because we view the NPF as a direct extension of the RNC, we view the NPF's acceptance of a foreign national loan guarantee as acceptance by the RNC itself in violation of §441e. Even if the NPF is viewed as "separate and distinct" from the RNC, however, the RNC and Chairman Barbour still violated §441e which prohibits the solicitation or acceptance of "any such contribution from a foreign national" either "directly *or through any other person*." 2 U.S.C. §441e (emphasis added).

A.

The Chairman of the Republican National Committee, Haley Barbour, established the National Policy Forum on May 24, 1993. From the beginning, Mr. Barbour presided as Chairman of both the RNC and the NPF. During this time, the RNC was the principal financial supporter of the NPF and its activities. From May 26, 1993 through August 12, 1994, the RNC made approximately $2,345,000 in loans to the NPF. During this period, the NPF repaid only $200,000 of the loan amount. Thus, at the end of summer, 1994, the NPF owed a $2,145,000 debt to the RNC.

With the November, 1994 congressional elections fast approaching, the RNC decided to seek repayment of the NPF debt in time to use for the elections. There was a problem, though. The NPF did not have the money to repay its outstanding debt to the RNC before the 1994 elections. In addition, the NPF did not have the credit worthiness to obtain on its own a commercial loan with which to repay its massive debt to the RNC.

The RNC needed this money from the NPF for the 1994 elections, however, and was not to be deterred. From approximately May to September of 1994, the RNC solicited a foreign national, a wealthy Hong Kong businessman named Ambrous Tung Young, to provide the collateral necessary for the NPF to obtain a commercial bank loan to repay its debt to the RNC. The express purpose of the loan transaction, and the solicited collateral, was to allow the RNC to regain the money it had previously loaned to the NPF so that these funds would be available to the RNC in time for the 1994 congressional elections. *See* the detailed analysis provided in General Counsel's Probable Cause Brief to the RNC ("Probable Cause Brief") at 9-20 (December 23, 1998). For example, in discussing the loan guarantee requested of him, Mr. Young wrote Chairman Barbour that, "we are willing to consider the support of $2.1 million *which is the amount you have expressed to me is urgently needed and directly related to the November election.*" General Counsel's Report at Attachment 3 (April 23, 1998)(Letter from Young to Chairman Barbour, September 9, 1994)(emphasis added).

In early September, 1994, Mr. Young agreed to provide $2,100,000 in collateral to guarantee a commercial loan to the NPF. This commitment put into motion a chain of financial events which culminated with $1,600,000 being deposited into RNC coffers before the 1994 elections. On October 11, 1994, YBD-Hong Kong wire transferred $2,100,000 to YBD-USA. On October 13, 1994, YBD-USA wire-transferred the $2,100,000 received from YBD-Hong Kong to Signet Bank Virginia. On October 13, 1994, Signet Bank Virginia completed a loan agreement with the NPF for a $2,100,000 loan, using the YBD-Hong Kong funds as collateral. The loan agreement explicitly earmarked $1,600,000 of the loan proceeds for repayment of the NPF's debt to the RNC.

On October 17, 1994, Signet Bank Virginia disbursed the loan proceeds to the NPF. On October 20, 1994, one day after the deadline for disclosing receipts in the RNC's 1994 12 Day Pre-General Election Report, the NPF transferred $1,600,000 of the loan proceeds to the RNC. Indeed, it appears that Steven S. Walker, the NPF's Comptroller at the time, wrote Signet Bank explaining that the RNC did not desire payment until October 20, 1994 and specifically asked that the deposit of the $1.6 million in repayment funds to the RNC be held until October 20. Probable Cause Brief at 23. On this date the RNC deposited these funds into the RNC state elections account.

It appears that this "urgently needed" and indirectly received money had a very real and direct impact on the 1994 elections:

> The $1.6 million accounted for 67 percent of the money transferred from the RNC's main soft-money account to state GOP committees

> between Oct. 20 and election day on Nov. 8, FEC records show. The state committees used that money to bolster Republican candidates in tight races throughout the country, according to interviews.
>
> "We would have been lost without it," said one Republican Party official in Iowa, where the party defeated a senior House Democrat.

Congressional Quarterly at 1354 (June 14, 1997).

Moreover, from the beginning it was clear that the RNC planned to use the money, secured by a foreign national loan guarantee, for the purpose of influencing elections. Indeed, in a deposition before the Senate Committee On Governmental Affairs, Fred Volcansek, a prominent Republican businessman and fundraising consultant for NPF, was asked if he "had any general understanding as to how they [the RNC] were going to use the money" received from the loan repayment. Deposition of Fred Volcansek at 84 (July 21, 1997). Mr. Volcansek answered:

> My general understanding of how they were going to use the money was in the '94 election process in which there were numerous races they [the RNC] thought they had an opportunity for and they needed the money back from the NPF that had been lent to the NPF.

Id. Mr. Volcansek further indicated that he flew to Hong Kong in order to explain to Mr. Young the NPF debt situation and the need for a loan guarantee to help the RNC secure funds for the 1994 elections:

> I explained to Mr. Young about the National Policy Forum. I talked to him about the concept of the structure of what was needed to be done and the fact that the NPF needed to repay a loan and that a guarantee that he might provide would facilitate the process of the NPF making a loan with a bank in Washington. And that *his guarantee would allow for that loan to be made and that then the National Policy Forum would be allowed to be in a position to repay the RNC and the RNC would be able to use that money in the '94 election cycle.*

Id. at 92 (emphasis added).

Similarly, former RNC Chairman Richard Richards testified before the Committee on Senate Governmental Affairs regarding Chairman Barbour's interest in securing a loan repayment from the NPF in order to influence the 1994 elections. In particular, Mr. Richards recalled a phone call he received from Chairman Barbour in or around August, 1994:

> Chairman Barbour spoke to me on the phone and told me that he felt like the Republican Party had an opportunity to gain control of the House of Representatives for the first time in decades, and public opinion surveys showed him that that was a realistic goal. Frankly, I never thought I would see the time in my lifetime that Republicans won the House majority. But he told me that was the case and said: We have a problem, we at the National Committee have loaned the forum $3 million, $3.3 million, some amount in excess of $3 million, of money that we can use in the campaign, but we have got a problem: *we need to be able to take it out of the forum for our purposes*, and we can't take it out unless we replace it with something because the forum has overhead and other expenses. *And I understand you represent a well-to-do Chinese fellow in Hong Kong who has previously been a beneficiary to the Republican Party. Would you be willing to talk to him about loaning us $3 million for that purpose?*

Committee on Senate Governmental Affairs, Vol. 10 at 69 (testimony of R. Richards)(emphasis added). Later, Mr. Richards was asked:

QUESTION: Can you tell me whether Mr. Barbour expressed to you any sense of importance that this loan guarantee take place sooner rather than later?

RICHARDS: It was an urgent thing.

QUESTION: Did he elaborate on why this was an urgent matter?

RICHARDS: *Yes, that he needed to withdraw monies, RNC monies from the Forum to be used in the campaign.* So, obviously, it had to take place before the election or have some assurance it was going to be available shortly thereafter.

QUESTION: . . . Did Mr. Barbour elaborate as to why it was particularly urgent at that time or in and around August of 1994 for this loan guarantee to go forward?

RICHARDS: Well, he said the *purpose was to assist in the election of 60 potential new congressmen,* and obviously, I assume that means you got 60 days or something like that to do it.

Id. at 106-107 (emphasis added).[11] After his initial conversation with Chairman Barbour, Mr. Richards "started talking directly with Fred Volcansek and other people

[11] As a friend, ally, and confidante of Chairman Barbour, Mr. Richards' testimony appears particularly informative and credible. In a letter to Ambrous Young, Chairman Barbour described Mr. Richards this

rather than directly with the chairman." *Id.* at 108. *See also* Sept. 17, 1996 letter from Mr. Richards to Haley Barbour ("Just prior to the elections of 1994, I was asked by Fred Volcansek to help facilitate a loan in excess of $2 million to assist you in replacing hard money at the Forum with soft money so that the hard dollars could be used to help pick up 60 targeted House seats.").[12]

B.

We believe the RNC and its Chairman, Haley Barbour, violated §441e by directly soliciting collateral, for the purpose of influencing an election, from an individual they knew to be a foreign national, Ambrous Tung Young. Under that provision, it is not only unlawful to *accept* a contribution from a foreign national, but it also unlawful to *solicit* a contribution from a foreign national. The evidence clearly shows that respondents were informed that Mr. Young was a foreign national and that the solicited collateral would be provided by a foreign national corporation, YBD-Hong Kong, through its domestic subsidiary YBD-USA. Finding that Mr. Barbour had "direct and extensive involvement in all aspects of the loan guarantee transaction, from procuring the guarantee to reaching settlement with the guarantor after default," General Counsel's Probable Cause Brief to Haley Barbour at 32 (December 21, 1998), the General Counsel's Office described "evidence show[ing] that Mr. Barbour was explicitly informed of the foreign source of the collateral on at least four separate occasions." *Id.* at 33. Indeed, Mr. Volcansek, who had been a fundraising consultant for the NPF, testified in a deposition that he had informed Chairman Barbour and other Republican officials about the foreign national/Hong Kong origin of the money for the loan guarantee before the loan was made.

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way: "Dick is a champ and a real ally. I know he is a trusted associate of yours, but I want you to know he is also *a highly respected party leader whose counsel I benefit from very often.*" General Counsel's Report at Attachment 4 (April 23, 1998)(Letter from Chairman Barbour to Young, September 19, 1994)(emphasis added).

[12] While the terms "hard money" and "soft money" usually refer to money permissibly used for *federal* elections versus money prohibited for use in *federal* elections, Mr. Richards' comments seem to refer to "hard money" as money that could be used for *federal or non-federal* elections and to "soft money" as funds that could not. Foreign funds would fall in the latter category. Apparently, Mr. Richards understood that the return of loaned funds to the RNC would assist federal races, perhaps because the use of non-federal account funds to pay for a share of party-building activity indirectly helps the federal races too. For example, transferring $150,000 in non-federal account funds to a state party with a 75% non-federal/25% federal allocation allowance might enable the state party to undertake $200,000 worth of generic get-out-the-vote activity on election day.

It is important to note that the Commission is not required to trace deposited foreign national funds to expenditures for a specific election, let alone a specific federal election, in order to find a violation of 2 U.S.C. §441e. The fact that foreign national funds were deposited by the RNC into the RNC state elections account is adequate to establish that the funds were "in connection with an election to any political office." 2 U.S.C. §441e. Indeed, the Commission has never required such a tracing of funds in order to establish a violation of §441e. *See, e.g.*, MUR 4398 (Commission found reason to believe that a foreign national contributor and recipient committees violated §441e without a showing of how the contributed funds were ultimately spent by the recipient committees); MUR 4884 (Commission found reason to believe that contributions by a foreign national and his corporation to a party committee's non-federal account violated §441e without a showing of how the contributed funds were ultimately spent).

At his deposition before the Senate Committee on Governmental Affairs, the following colloquy took place:

QUESTION: Prior to October 13, 1994, did you make Haley Barbour aware that Mr. Young would be transferring monies from Hong Kong that would be used to support the collateral used in the loan guarantee made to the National Policy Forum?

VOLCANSEK: *Yes, I did.*

QUESTION: Do you recall when you made Mr. Barbour aware?

VOLCANSEK: No, I do not.

QUESTION: Do you recall the context in which you made Mr. Barbour aware of that?

VOLCANSEK: I believe it was in a meeting that I was with Mr. Fierce and Mr. Barbour and Mr. Denning[13] discussing the issue.

QUESTION: Do you recall where that meeting took place?

VOLCANSEK: At the Republican National Committee Headquarters.

Deposition of Fred Volcansek at 108-109 (July 21, 1997)(emphasis added).

Additionally, it appears that Chairman Barbour and Mr. Young met for dinner to discuss the loan guarantee on August 27, 1994. At this dinner, Mr. Young directly informed Chairman Barbour that the requested collateral would be coming from YBD—Hong Kong when he requested further information from Chairman Barbour to present to the Hong Kong Board of Directors for its approval. In his deposition testimony, Mr. Young recalled the discussion at dinner this way:

> The discussion basically was Mr. Haley Barbour requested me to consider for the loan of three and a half million dollars and assured me of the safe return of the loan, but as a result of that I could not commit nor have the power to commit *but requested him to give us more information so that we can present it to YBD Hong Kong board of directors* for further consideration.

[13] Exercising his control of the NPF, Chairman Barbour "hand picked" Mr. Denning in January 1994 to be the NPF's Chief Operating Officer. Probable Cause Brief at 10. Upon being hired, "Mr. Denning informed Mr. Baroody [the NPF President] that he had been specifically asked by Mr. Barbour to explore foreign funding for the NPF." *Id.*

Senate Committee on Governmental Affairs, Deposition of Ambrous Young at 35 (June 24, 1997)(emphasis added).[14] Three weeks after this dinner, Chairman Barbour wrote Mr. Young thanking him for subsequently agreeing to the loan guarantee proposal. The letter was addressed to Mr. Young as "President, Managing Director of Young Brothers Development Co., Ltd." and listed "23rd Floor, Dah Sing Financial Center, 108 Gloucester Road, Hong Kong" as the mailing address. General Counsel's Report at Attachment 4 (April 23, 1998)(Letter from Chairman Barbour to Young, September 19, 1994).

Similarly, in his Senate testimony, Mr. Richards also recalled telling Chairman Barbour of the foreign national source of the loan guarantee:

QUESTION: Did you advise Mr. Barbour at this time in the course of describing the transaction where the ultimate source of the money would come from what would be posted as collateral with the bank?

RICHARDS: Well, *the only thing I told him is the money would be transferred from Young Brothers (Hong Kong) to Young Brothers (USA) for that purpose.*

QUESTION: This was after Mr. Young had agreed that he would support what was being asked of him, at least to the tune of $2.1 million; Correct?

RICHARDS: That's correct.

QUESTION: And *this is in 1994, prior to the consummation of all the paperwork it would take to carry out the loan arrangement?*

RICHARDS: *That is correct.*

Committee on Senate Governmental Affairs, Vol. 10 at 73 (testimony of R. Richards)(emphasis added). Based on the evidence discussed above, as well as the other evidence discussed more fully in the General Counsel's Probable Cause Brief, pages 9-20, and the General Counsel's September 8, 1999 Probable Cause Report, pages 4-11, it appears that Chairman Barbour was directly informed of the foreign national source of the collateral for the NPF loan repayment. Certainly, as Chairman of the Republican National Committee, Mr. Barbour knew, or should have known, that the solicitation and acceptance of foreign national funds was prohibited.

By accepting the proceeds of a loan it knew to be guaranteed with foreign national funds, the RNC violated 2 U.S.C. §441e. Under the Act, a contribution includes any

[14] Mr. Young was later asked why the amount requested was changed from $3.5 million to $2.1 million. Mr. Young simply replied, "That message is given to me. I don't recall from who, but they told me no longer the 3.5 but 2.1" *Id.* at 39.

"loan." 2 U.S.C. §431(8)(A)(i). Furthermore, the Commission's Regulations define the term loan to include "a guarantee, endorsement, and any other form of security." 11 C.F.R. §100.7(a)(1)(i). Because YBD-Hong Kong provided collateral for the full amount of the loan, the collateral constitutes a contribution for the full amount of the loan proceeds transferred to the RNC--$1,600,000.[15]

This is a very compelling case. Obviously, the RNC itself could not receive a bank loan guaranteed with foreign national money or directly receive money from a foreign national. To overcome this, the RNC developed a carefully thought out series of transactions designed to deposit additional money into its accounts. Structured through a loan repayment, the RNC used a shell organization it had established as the vehicle to route "urgently needed" foreign funds into the United States election process. We strongly believe this activity was prohibited by §441e, and that the important prohibitions found at §441e should not be so easily evaded.

Our colleagues disagree. Without challenging any of the factual analysis of the General Counsel, they argue that because the funds paid to the RNC were a loan repayment from NPF, the circumstances underlying that repayment are irrelevant.

This approach is willfully blind to the reality of what occurred in this case, and leaves an easy path for party committees (or candidates) to accept unlimited foreign funds in the form of relief on bad loans. It is apparent that in the heat of the 1994 election cycle, the prospect of getting repayment of the $2.1 million in outstanding loans to the NPF was remote at best. The RNC was the only reliable source of NPF funding, it seems, and NPF's repayment history shows it was not able or inclined to make good on its "loan" obligations.[16] Thus, the whole idea of tapping a foreign corporation's assets to fill the RNC's coffers was based on the idea of creating a series of transactions leading to a repayment of the RNC's loan that would not have occurred otherwise. The argument that this arrangement was nothing more than an innocent loan repayment by NPF misses the essential part of the case. Allowing a committee to resuscitate a dead loan and have a prohibited source make the loan repayment would legitimize clearly sham transactions.

This case is plainly different from the typical situation where an entity owing funds to a committee goes about raising funds in the ordinary course of business to make good on the debt. In such cases, the persons providing funds to the debtor don't even know what the debtor will do with the funds, and certainly don't primarily intend to help

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[15] Though the cited statutory and regulatory provisions are couched in terms of "influencing federal elections," the D.C. Circuit's decision in *United States v. Kanchanalak*, 192 F.3d 1037 (D.C.Cir. 1999), makes clear that the foreign national prohibition at §441e reaches influencing non-federal elections as well. The general provisions elsewhere in the Act and regulations, in essence, should be read to apply to §441e analysis whether dealing with federal or non-federal activity.

[16] Because NPF's activity escaped disclosure, it is not clear how much it was able to raise independently. Certainly, the fact that the NPF had to get further loans from the RNC after the 1994 elections, General Counsel's Probable Cause Brief at 23-24, and eventually defaulted on the bank loan to the tune of $1,584,398.22 in 1996, *id.* at 26, suggests that there was no basis for expecting repayment in 1994 when the transactions at issue arose.

the debtor's creditor. Nor is the original creditor in charge of arranging the raising of funds for the debtor and deciding whether the debtor will use the funds to make the repayment. By contrast, here the foreign national (YBD-Hong Kong) and the original creditor (RNC) knew of and controlled all the arrangements leading to the repayment of the dormant debt. This series of transactions was fully intended to route prohibited foreign funds back to the RNC, and the so-called loan repayment would not have occurred but for the conscious and active efforts of the RNC and the foreign national. Thus, even if some loan repayment arrangements might escape FEC interest, this one surely should not.

Perhaps nothing evidences the intent and causation elements better than the transaction that almost incurred instead. According to the record, it appears that Mr. Young initially wanted to make a *direct* contribution to the RNC but was instead asked to make a loan guarantee. After meeting with, and later receiving a letter from Chairman Barbour, Mr. Young wrote the Chairman from Hong Kong. Having described his interest in supporting the Republican Party, Mr. Young explained that he preferred to make a direct contribution to the Republican Party. "*If not possible*," Mr Young continued, he would be "willing to consider the support of $2.1 million [the total amount of the NPF debt to the RNC] which is the amount you have expressed to me that is urgently needed and directly related to the November election." First General Counsel's Report at Attachment 3 (April 23, 1998)(Letter from Young to Chairman Barbour, September 9, 1994). Eventually, Mr. Young was dissuaded from making a direct contribution and, instead, persuaded to support the Republican Party through the loan guarantee scheme as a means of funneling support to the RNC. By Mr. Young's own admission, he was trying to provide support he was told was "urgently needed" for the "November election."

Our colleagues might wish to argue the Commission's regulations state that a loan repayment is not a contribution and therefore, the payment to the RNC is expressly permissible. Indeed, the regulations at 11 C.F.R. §100.7(a)(1)(i)(E) state: "If a political committee makes a loan to any person, . . . [r]epayment of the principal amount of such loan to such political committee shall not be a contribution by the debtor to the lender committee." However, the crucial Commission policy on loan repayments specifies that "[s]uch repayment shall be made with funds which are subject to the prohibitions of 11 C.F.R. §110.4 and part 114." *Id.* This is a strict rule that requires the repaying entity to make sure it uses "clean" funds to make repayment. Thus, if anything, the Commission's regulations clarify that a loan repayment cannot be made using prohibited sources—precisely what happened in this case.[17]

[17] The cited regulation technically applies only to loans by a "political committee," which in the context of party committees that form federal and nonfederal accounts arguably means the federal account. Even if loan repayments to a party committee's nonfederal account technically are not covered by the regulation, certainly the regulation's logic should apply where loan repayments consist of funds prohibited for the nonfederal account. A nonfederal account that cannot accept foreign national funds, *see United States v. Kanchanalak, supra*, should not be able to loan funds not tainted by foreign national sources to a shell organization and then arrange to have foreign national funds put up to make the repayment.

There are a number of other faults with our colleagues' decision to dismiss this important matter on the assertion that this was a simple loan repayment by NPF. Most significantly, they ignore the plain language of the statute. Under §441e, foreign nationals are prohibited from making contributions "directly or *through any other person.*" 2 U.S.C. §441e (emphasis added). On its face, §441e is carefully designed to prohibit the very sort of "indirect" transaction or arrangement our colleagues have endorsed in this matter. By adding the "or through any other person" language, Congress indicated that the statute should be enforced in a common sense fashion so that it could not be easily circumvented by routing funds through intermediary sources. Faithful application of the statute means the RNC cannot receive money from a foreign national directly or "through any other person" such as NPF or any other shell organization.

Not only do Commissioners Elliott, Mason and Wold ignore the plain language of §441e, but they also disregard Commission precedent on this very point. The Commission has long emphasized that the use of a domestic subsidiary—in this case, YBD-USA—does not "cleanse" or launder the foreign source of funds. *See, e.g.*, Advisory Opinions 1989-20, 1985-3, and 1981-36 at Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5970, 5809, and 5632, respectively. For example, in Advisory Opinion 1989-20, the Commission was asked whether the political action committee of a domestic subsidiary of a foreign corporation could make political contributions. Finding that it could not, the Commission specifically held that:

> Section 441e . . . prohibits contributions by a foreign national through any other person. Because [the foreign national parent] is the predominant source of funds for [the domestic subsidiary], it would essentially be making contributions to the committee through[the domestic subsidiary]. Such contributions to a committee supporting state and local candidates would be contrary to the Act and regulations. In addition, *because the committee will accept most and perhaps all of its funds from such a source, it would be acting as a vehicle through which funds were sent to state and local candidates.* Contributions by the committee to such candidates would, therefore, be prohibited.

Advisory Opinion 1989-20 (emphasis added). Consistent with Commission precedent, we believe YBD-USA and the National Policy Forum could not act as a vehicle through which foreign funds could be indirectly routed and accepted by the RNC.

Moreover, by ignoring the circumstances under which a person has received funds for making a contribution, our colleagues adopt an approach which is contrary to longstanding Commission enforcement precedent. With respect to 2 U.S.C. §441f (prohibits the making of contributions "in the name of another person") cases, for example, the Commission routinely examines the circumstances and the source from which a contributor has received funds. Thus, the Commission has found an employer who gives a "bonus" to an employee so that an employee can make a contribution to a political committee is in violation of §441f. *See* MUR 4884 (Commission found corporation and its officers in violation of §441f by providing employee bonuses and other forms of salary compensation with the intent of reimbursing employee contributions); MUR 2893 (Commission found corporation in violation of §441f by providing false expense reimbursements to its employees as a means for reimbursing employee political contributions). In these cases, the Commission did not excuse a reimbursed contribution because the payment of the bonus and the making of the contribution could be seen as separate and legitimate transactions—the argument our colleagues now seem to be making in the instant matter. Commissioners cannot make up the rules as they go along to suit themselves. Just as the Commission pursued the above cases, it should have pursued MUR 4250.

Similarly, in other contexts, the Commission has argued that the circumstances under which funds have been received may indicate an election influencing purpose even though, considered separately, the transactions may appear proper. In *Federal Election Commission v. California Democratic Party ("California Democrats")*, Civil Action No. CIV-S-97-891 GEB PAN (E.D. Cal. October 14, 1999), the Commission argued, and the court agreed, that the California Democratic Party violated the Commission's allocation regulations by making soft money payments to a state initiative drive with the intent of increasing the number of Democratic Party voters in the upcoming elections and, hence, increasing support of federal Democratic candidates. In *California Democrats*, the court agreed with the Commission that the source and circumstances under which funding was provided was legally significant. Under our colleagues' theory of MUR 4250, however, there would have been no violation in *California Democrats* since the making of payments to the state initiative drive and the spending of those funds by the initiative drive were arguably legal as separate and legitimate transactions. Yet, in *California Democrats*, our colleagues considered important the source of the funding for the state initiative drive, pieced together the transactions, and recognized what was indirectly attempted in that case. Because Commissioners Elliott, Mason and Wold were willing to

pursue the California Democratic Party, they likewise should have been willing to pursue the Republican National Committee and Haley Barbour. We can find no way to reconcile their different approaches to these two matters.[18]

Our colleagues simply resort to gymnastics when they attempt to get around the statutory language and Commission precedent by asserting that this case only involves the simple repayment of a legitimate loan. Mr. Young, YBD-Hong Kong, and YBD-USA were not repaying a loan. They did not owe any money to either the RNC or the NPF. In fact, the evidence shows that Mr. Young, YBD-Hong Kong, and YBD-USA had absolutely no financial interest in the initial loan made between the RNC and the NPF. Yet, it was their foreign national money which made the loan repayment and subsequent infusion of funds into the 1994 elections possible. This involvement arose only after they were solicited by the RNC and Chairman Barbour.

By sanctioning such an obvious ruse, the approach taken by Commissioners Elliott, Mason and Wold in this matter threatens to turn the §441e foreign national prohibitions into a nullity. *See FEC v. Furgatch*, 807 F.2d 857, 862 (9th Cir. 1987)(Courts "must be . . .careful to ensure that [the Act's] purposes are fully carried out, that they are not cleverly circumvented, or thwarted by a rigid construction of the terms of the Act."), *cert. denied*, 484 U.S. 850 (1987). In their view, if a contribution from a prohibited source goes through an otherwise viable source, it is effectively "laundered" or cleansed. Under their approach, could a candidate ask a foreign national company to give "bonuses" so that its American employees could make "urgently needed" contributions for the November election? Or, suppose a candidate made a large deposit on vendor services, but the vendor could not refund the deposit because of cash flow problems. Could the candidate solicit foreign nationals to give money to the vendor so the vendor could return the deposit to the candidate? By ignoring the words "or through any other

[18] Our colleagues may rely on two prior FEC enforcement cases for the proposition that the Commission will not examine the connections between several otherwise legitimate transactions to determine if a violation exists. In MURs 4000 and 4314, the Commission determined there was no reason to believe that donors being asked to retire debt of one committee were in fact making indirect excessive contributions to a different committee. First, of course, neither of those MURs involved 2 U.S.C. §441e and its explicit statutory prohibition against the use of "any other person" to funnel foreign funds into U.S. elections. Moreover, in neither of these cases were the donors made aware that their own donations would be used to route funds to the other committee. At most, in MUR 4000, the donors were advised that if they contributed toward one committee's debt retirement, the candidate seeking funds would make his own matching contribution to the other committee. (The General Counsel's Report of Sept. 8, 1999, at footnote 25 on page 19, misstated the MUR 4000 evidence when it indicated the donors were made aware the debt they were retiring was owed to the candidate and that the candidate would in turn use such funds to make contributions to the other committee.) Clearly, this is a far cry from the present case where the foreign national (YBD-Hong Kong)and the ultimate beneficiary (RNC) were fully apprised of the routing of the foreign national's own funds to the latter. In addition, the FEC more recently indicated it will look through related transactions to assure the Act is properly applied when in Advisory Opinion 1996-33, Fed. Elec. Camp. Fin. Guide (CCH) ¶6213, it ruled that a candidate could not escape the transfer ban at 11 C.F.R. §110.3(d) by routing funds through other persons in ways that otherwise look permissible.

person" in §441e, we fear that our colleagues are inviting these and other evasions of the §441e foreign national prohibitions.

The factual record demonstrates that the purpose of the transactions at issue was to fund the RNC's 1994 election efforts and that the loan repayment to the RNC would not have been made by NPF without the financial assistance of a foreign national who had no pre-existing obligation to either the RNC or the NPF. The purpose of §441e is to prevent United States officeholders and candidates from becoming beholden to foreign influence and interests through the solicitation and acceptance of foreign money. Whether an obligation to a foreign national arises out of a direct contribution or indirectly from a loan guarantee through a third party makes little difference. Under either method, an obligation has been incurred to a foreign national. In order to prevent such obligations from arising, effect must be given to the statutory language "or through any other person" found in §441e. Our colleagues' failure to do so in MUR 4250 was clearly contrary to law.

IV.

We recognize that judicial review of the Commission's dismissal of a complaint, where there have not been four votes to take action, has been deferential. But deference has its bounds. It is not a license for Commissioners to disregard massive violations of the statute in the face of overwhelming evidence.

In MUR 4250, the Republican National Committee established, financed and controlled the National Policy Forum. The RNC concedes that the NPF engaged in activities which, if done directly by the RNC, should have been publicly disclosed and subjected to the statute and the Commission's soft money regulations. In carrying out these activities, the NPF raised and spent millions of dollars--money that was never publicly disclosed or allocated, simply because the RNC claimed the NPF was a "separate and distinct" organization.

In addition, the RNC used this shell organization to flout the prohibitions of 2 U.S.C. §441e. Because of loan guarantees provided through foreign nationals and solicited by the RNC, the NPF was able to make otherwise unattainable loan repayments to the RNC. As a result, the RNC was able to add $1.6 million to its committee accounts in the month before the 1994 congressional elections. These transactions were carried out—and approved by three members of this Commission--despite the clear language of §441e which prohibits foreign national contributions which are made "directly or through any other person." 2 U.S.C. §441e.

The Federal Election Campaign Act means very little if it can be so easily evaded. A national party committee should not be able to get around public disclosure requirements and fund allocable activities entirely with soft money merely by setting up a

straw organization. A national party should not be able to evade the prohibitions on the use of foreign national money through such a charade and, thus, be able to do indirectly what it can't do directly. By approving such trickery, our colleagues' decisions in this matter are plainly contrary to both the plain language of the statute and the Commission's regulations.[19]

1/28/00
Date

Scott E. Thomas
Commissioner

1/28/00
Date

Danny Lee McDonald
Commissioner

[19] Along these lines, it is important to note that as of January 28, 2000, Commissioner Elliott had not filed a Statement of Reasons explaining her June 17, 1997 vote against the General Counsel's recommendation to find reason to believe regarding the original complaint. Likewise, as of January 28, 2000, Commissioners Elliott, Mason and Wold still had not filed a Statement of Reasons explaining their vote against the General Counsel's §441e recommendation. This delay has occurred even though the file in this matter was closed on November 30, 1999.

The D.C. Circuit has explicitly required that the "declining-to-go-ahead Commissioners" file Statements of Reasons explaining their votes. *Common Cause v. FEC*, 842 F.2d 436, 451 (D.C.Cir. 1988); *see also DCCC v. FEC*, 831 F.2d 1131 (D.C.Cir. 1987). Reflecting this judicial command, the Commission's regulations explicitly require that these Statements "will be made available no later than 30 days from the date on which a respondent is notified that the Commission has voted to take no further action and to close such an enforcement file." 11 C.F.R. §5.4(a)(4).

The failure of Commissioners Elliott, Mason and Wold to file their Statements of Reasons in a responsible manner places complainants in an untenable situation. In deciding whether to exercise their statutory rights under 2 U.S.C. §437g(a)(8), Complainants have no way of knowing the reasoning of the "declining-to-go-ahead Commissioners" and thus, whether their failure to proceed is contrary to law. Unfortunately, disregard of the Commission's regulations at §5.4(a)(4) is becoming commonplace. *See, e.g.*, MUR 4305 (Commissioners Sandstrom, Elliott, Mason and Wold voted not to proceed on December 8, 1998 but did not file a Statement of Reasons until over a half a year later, May 26, 1999); MUR 4689 (Commissioners Sandstrom, Elliott, Mason, and Wold voted not to proceed on August 24, 1999 and did not file a Statement of Reasons within 30 days); and MUR 4378 (Commissioners Elliott, Mason and Wold voted not to proceed (Commissioner Sandstrom abstained) on June 22, 1999, and never filed a Statement of Reasons explaining their inaction). By itself, our colleagues' failure to file a timely Statement of Reasons, despite a clear judicial and regulatory mandate to do so, would appear to justify a default finding that their inaction in MUR 4250 was contrary to law.