



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission
Staff Director
General Counsel

FROM: Mary W. Dove/Veneshe Ferebee-Vines *VAV*
Acting Secretary of the Commission

DATE: March 13, 2000

SUBJECT: Statement of Reasons for MUR 4250

Attached is a copy of the Statement of Reasons for MUR 4250
signed by Commissioner Lee Ann Elliott.

This was received in the Commission Secretary's Office on Friday,
March 10, 2000 at 5:04 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 Pointevint, as treasurer) **MUR 4250**
 Haley R. Barbour)
 National Policy Forum)
 and John Bolton, President)

STATEMENT OF REASONS

COMMISSIONER LEE ANN ELLIOTT

I am writing to state my reasons¹ for voting on June 17, 1997 not to approve the recommendation of the General Counsel that the Commission find reason to believe that some of the respondents in this matter, namely the Republican National Committee ("RNC") and its treasurer, Alex Pointevint, violated 2 U.S.C. § 434(a)(1) by failing to report activities allegedly conducted through the National Policy Forum ("NPF"); 2 U.S.C. § 441a(d) and 441b(a) for making disbursements for the allegedly Federal share of the NPF activities from entirely non-Federal funds; and 11 CFR §§ 102.5(a)(1) and 106.5(g)(1) by failing to properly allocate disbursements for activities allegedly conducted through NPF into Federal and non-Federal share and by making these disbursements from the non-Federal account. Because the NPF is an independent non-profit issue research and education organization (similar to the Democratic Leadership Council ("DLC")) that does not appear to engage in any federal election related activity - and is legally separate and distinct from the RNC - I conclude that as a matter of law the RNC is not responsible for the allocation and reporting of NPF's research, education and publication activity.

I.

The NPF, "A Republican Center for the Exchange of Ideas," is a non-profit corporation organized under the laws of the District of Columbia "to operate exclusively for social welfare purposes within the meaning of Section 501(c)(4) of the Internal

¹ This Statement of Reasons concerns only my June 17, 1997 vote. Please see also the Statement of Reasons of Chairman Darryl R. Wold and Commissioners Lee Ann Elliott and David Mason filed on February 11, 2000 for further information on MUR 4250

Revenue Code of 1986." *NPF Articles of Incorporation* (attached to *DNC Complaint* at Exhibit 1). The NPF emphasized from day one that, "This organization will be separate from the Republican National Committee...it is not a party operation." NPF Press Release, June 21, 1993 (Attachment 2 to *General Counsel's Memorandum to the Commission* (May 8, 1997)). The NPF's mission states, "The National Policy Forum is a broad-based, inclusive organization designed to go out to the grassroots to listen to Americans about issues on their minds and to conduct a search for 'ideas that work.'" *Listening to America*, a 1994 NPF summary report (Attachment 6 to *General Counsel's Memorandum to the Commission* at 2 (May 8, 1997)). The NPF Board of Directors and Officers included a variety of individuals ranging from U.S. Senators to local mayors to RNC Chairman Haley Barbour. To be involved in forming NPF's public policy positions "one did not have to be a Republican to participate...many Democrats and Independents did participate." *Id.* at 2 and 6. In addition, because the NPF was a non-profit corporation whose articles of incorporation confine its activities to those which a § 501(c)(4) organization is permitted to perform, it would not have been permitted to participate in activities whose purpose was to influence federal elections.² Furthermore, extensive investigation of NPF by the Office of General Counsel uncovered no evidence of election influencing activities by the NPF.

The accusations against the RNC outlined in the Democratic National Committee's ("DNC") complaint of August 23, 1995 and the General Counsel's memorandum of May 8, 1997 all hinge on the assumption that the NPF was "an arm or project" of the RNC. If, however, the NPF was 1) a legally separate organization from the RNC, and 2) not a political committee, but instead a non-profit corporation engaged solely in issue discussion and research, then the NPF was indeed not "an arm or project of" the RNC and the FEC's political committee "affiliation" regulations at 11 C.F.R. § 100.5(g) can not be applied to any loose ties NPF may have had with the RNC. The RNC, therefore, would have had no legal obligations regarding NPF activity. I firmly believe that was the case.

The General Counsel's brief disregarded NPF's legally independent status from the RNC and attempted to use the affiliation factors of 11 C.F.R. § 100.5(g) to bootstrap NPF's constitutionally protected public policy discussions into "a part of the RNC." *General Counsel's Memorandum to the Commission* at 8 (May 8, 1997) [hereinafter *GC Memo.*]. The text of the regulation is clear, however, that the affiliation factors of 11 C.F.R. § 100.5(g) only apply to "political committees," hence the title of § 100.5 (where the affiliation factors are found) is "*Political committee.*" The way the General Counsel attempts to get around this inconvenient (to his ultimate conclusion), yet likely constitutionally necessary,³ limitation on the scope of the regulation is by rewording it in

² I note that, subsequent to my vote in this matter, in the advisory opinion context the Commission has found it significant that because a corporation was organized to comply with tax exempt status under 26 U.S.C. 501(c)(3), it could not legally participate or intervene in any political campaign on behalf of or in opposition to any candidate. See AO 1999-25.

³ The NPF correctly notes in its response of September 29, 1995 that "[t]o provide that these [social welfare and charitable] organizations might be treated as political committees, or as 'arms' of political committees,

his brief. Rather than quoting the text of the regulation, which consistently refers to the term of art "committees," the General Counsel instead refers to "entities," *GC Memo.* at 8, n. 5, or he avoids the regulation altogether and asserts that the question is really "whether the NPF is *part of* the RNC." *GC Memo.* at 8 (emphasis added).

The clear textual inapplicability of 11 C.F.R. § 100.5(g) to the NPF is entirely sufficient reason to reject the General Counsel's reason to believe recommendation. The General Counsel's additional arguments do not change this conclusion and do not support any other legal basis for the alleged violations.

In his attempt to support the novel theory that although the NPF is a separate legal entity from the RNC, for the Commission's enforcement purposes it should be treated as "part of" the RNC, the General Counsel looks primarily to three factors: a) The NPF's activities; b) NPF's financing; and c) NPF's staff. I shall address these issues *ad seriatim*.

a) NPF's Activities

The General Counsel outlined in his brief the wide variety of activities that the NPF engaged in, including: conducting issue forums; producing an issue document entitled "Listening to America"; hosting approximately a dozen conferences focusing on various policy issues (from which some of the information was used in a book by NPF Chairman Haley Barbour entitled "Agenda for America: A Republican Direction for the Future"); conducting a public opinion survey on health care policy issues; and producing a television show entitled "Listening to America: A Neighborhood Meeting." *GC Memo.* at 14-20. The emphasis by the General Counsel regarding these activities seems to be either that the policy issues discussed dealt with "Republican" ideas or issues⁴, or that the

is to enter the perilous constitutional waters that *Buckley v. Valeo* and its progeny have been set up to avoid:"

On its face, the statute might seem to include as political committees...issue-oriented groups... In *Buckley*, however, the Supreme Court explicitly recognized the potentially vague and overbroad character of the 'political committee' definition in the context of [the Act's] disclosure requirements...

The *Buckley* court felt that a more expansive definition of 'political committee' would have been constitutionally dangerous, since once any group of Americans is found to be a 'political committee' it must then submit to an elaborate panoply of FEC regulations requiring the filing of dozens of forms, the disclosing of various activities, and the limiting of the group's freedom of political action to make expenditures or contributions.

FEC v. Machinist Non-Partisan Political League, 655 F.2d 380, 391-2 (D.C. Cir 1981), quoted in *FEC v. GOPAC, Inc.*, 871 F. Supp. 1466, 1469 (D.D.C. 1994).

⁴ See *GC Memo.* at 11 (quoting Haley Barbour and adding emphasis to "our" in "The NPF will be a very participatory program, giving Republicans and others...a voice in the national debates between the Clinton Administration...and our belief in lower taxes, less spending..."); *Id* at 13 (asserting that because the NPF promoted the "Republican message," it functioned as a "party auxiliary" working for "future electoral gain" and could not be an "independent issue-oriented entity."); *Id* at 13-14 ("promoting the Republican message" means that "the NPF is an auxiliary of the RNC" responsible for formulating and articulating the party's

results of the NPF projects were helpful to the RNC⁵ (or RNC projects were helpful to the NPF⁶). The implication is that the RNC gained an "electoral benefit" because the NPF promoted "the Republican perspective." *GC Memo.* at 11. In fact, the General Counsel went so far as to imply that promoting ideas that appeal to Republicans is the same as promoting Republican candidates.⁷ Based upon this already legally flawed logic,⁸ the General Counsel then leaps to the end conclusion regarding the NPF's activities that because 1) the NPF promoted ideas that Republicans (and others) supported, and 2) promoting Republican ideas may help Republican candidates that support those same ideas get elected, and 3) the RNC works to elect Republican candidates, then 4) the NPF must be part of the RNC. This "logic" is, of course, without legal basis.⁹

b) NPF's Financing

The NPF conducted fundraising drives¹⁰ seeking contribution commitments from wealthy individuals, corporations and membership associations, along with negotiating

message for use in all facets of the RNC's activities."); *Id* at 16 (the results of NPF policy forums were published in a report entitled "Listening to America" that advanced "the 'Republican' ideals" of deficit reduction, etc.); *Id* at 17 (the NPF hosted conferences focusing on various policy issues which "promoted the Republican perspective"); *Id* at 19 ("there is evidence that the [NPF's] "Listening to America" project served to formulate and disseminate a Republican message geared to the electorate.")

⁵ "The information gathered through the various [NPF] 'policy counsels' and the resulting policy conclusions were apparently used by the RNC's 1996 platform committee in drafting and adopting the 1996 Republican Platform." *GC Memo* at 18.

⁶ The RNC mailed an issue research survey to over 800,000 individuals and generated more than 134,000 responses. The information from the survey was provided to "more than 150,000 recipients including, but not limited to, the media, Congressmen, governors, state and local officials and party leaders," and the NPF. The General Counsel somehow concluded that, despite the survey being distributed to over 150,000 recipients, the "principal purpose for the RNC conducting the survey was to provide a framework from which the NPF could begin its activities." See discussion in *GC Memo* at 14-15.

⁷ The General Counsel summarized the NPF's goal of wanting the Republican party to be "a party that is centered on ideas and gives people something to be in favor of, something to vote for" as an "electioneering goal of promoting Republican ideals and candidates." *GC Memo.* at 12.

⁸ An independent group supporting "Republican" issues is not the same as that group supporting Republican candidates. Issue advocacy (yes, even if Republicans support those same issues) that does not expressly advocate the election or defeat of a candidate for political office is constitutionally protected. See e.g. *Buckley v. Valeo*, 424 U.S. 1 (1976). In addition, even if the General Counsel's "electioneering" theories were constitutionally permissible, and the NPF's support for Republican ideas meant it was therefore involved in supporting Republican candidates, that still would not make the NPF a part of the RNC. There are numerous groups that are totally independent of the RNC that support Republican candidates.

⁹ Similar to the General Counsel's flawed analysis here, the DNC's original complaint alleged in the alternative that if the NPF was not a "part of" the RNC, then a NPF's activity promoting ideas that appeal to Republicans was an in-kind corporate contribution to the RNC. *Democratic National Committee Complaint* at 8-9 (Aug. 23, 1995). Absent express advocacy, promoting conservative and "Republican" ideas is, of course, constitutionally protected issue advocacy and certainly not an "in-kind contribution" to the RNC. I therefore support the General Counsel's conclusion that the DNC's "alternative allegations regarding the NPF need not be explored." *GC Memo* at 9, n. 2.

¹⁰ The General Counsel asserts that because some solicitations by the NPF may have been conducted using major donor lists obtained from the RNC, consequently the RNC violated 2 U.S.C. §§ 441a(f) and 441b(a) "by accepting both excessive and prohibited contributions which were used to pay the Federal share of allocable activity." *GC Memo* at 21-22. This conclusion, however, begs the legal question and assumes

loans from the RNC. *GC Memo* at 21. NPF funds were deposited into NPF accounts and disbursed from NPF accounts, none of which the RNC had access to. *RNC Response* at 3. The loans from the RNC were made at market rates and all financial transactions involving the RNC were conducted on an arms-length basis. *NPF Response* at 7 (Sep. 29, 1995). Although the RNC made a total (through the end of 1996) of \$4,192,792 in loans to the NPF, by the end of 1996 the NPF had already repaid \$1,909,975 of that amount. *GC Memo* at 20-21. Because there is no evidence or indication that these loans were not made at market rates, or that the NPF did not intend to repay the loans, there is therefore nothing about the loan transactions that would legally indicate the NPF was anything other than a separate corporate entity from the RNC. Further evidence of the RNC and NPF's independent financial nature is that when the NPF wanted the television program it produced, entitled "Listening to America: A Neighborhood Town Meeting," to be televised, the NPF had to pay the RNC's cable network GOP-TV to show it. *GC Memo* at 20.

c) NPF's Staff

From 1993 through 1996, Haley Barbour served as both Chairman of the RNC and Chairman of the NPF. The General Counsel uses the affiliation factors at 11 C.F.R. § 100.5(g)(4)(ii) to imply that because Mr. Barbour held positions in both organizations, the RNC therefore "controlled" the NPF. *GC Memo* at 22, 30-31. Although common staff and leadership are factors that the Regulations point to in order to determine whether two political committees are affiliated, as discussed above, the NPF is not a political committee and the affiliation factors are therefore not applicable. In reality, it is common for elected officials and leaders of organizations and corporations to concurrently serve in leadership positions at separate non-profit 501(c)(3) and 501(c)(4) entities. There is no legal basis to suggest that because an individual serves in a leadership role in two independent organizations, those organizations would then be treated as the same legal entity. Similarly, the fact that a few individuals have had career progressions that included jobs at both the NPF and later the RNC (or other separate entities such as the National Republican Senatorial Committee ("NRSC")), or vice versa, does not legally make the NPF part of, or controlled by, the RNC or the NRSC.

Finally, the General Counsel simply glosses over the fact the RNC is governed by the rules established by its members every four years, and could not have formed the NPF as a subsidiary because the RNC's governing rules do not allow for the formation of non-profit 501(c)(4) organizations. *RNC Response* at 3. Even if the RNC's governing members could hypothetically ignore or circumvent the RNC's own rules and vote to establish this type of organization as "part" of the RNC, in this factual situation they did not! *Id.*

II.

that the NPF is a "part of" the RNC. Because they are in fact separate legal entities, and different organizations frequently swap, borrow, rent and sell donor lists, there is no legal reason why contributions to the NPF would be imputed as (perhaps prohibited) contributions to the RNC.

Perhaps it was because, as the General Counsel correctly noted, "there is limited precedent on the issue of political committees' dominance over an ostensibly independent organizations [sic]," that the General Counsel then attempted to push a square peg into a round hole by analogizing the RNC's relationship to NPF with the situation in MUR 1503, the sole (and hotly contested) instance where the Commission has found that a multi-candidate committee's substantial involvement in the creation, management and financing of a corporation could render the two entities indistinguishable. *GC Memo.* at 28. In fact, however, the distinctions between the instant MUR and MUR 1503 are instructive of why they legally must be treated differently.

At issue in MUR 1503 was, among other things, the relationship between the National Congressional Club ("NCC"), a multi-candidate committee, and the for-profit corporation (Jefferson Marketing, Inc. or "JMI") that NCC formed to conduct media and direct-mail election services for NCC. *GC Memo* at 28. After a lengthy investigation, the Commission found probable cause against the NCC and JMI, based upon the theory that JMI and NCC operated effectively as one entity. *GC Report Re: Conciliation* in MUR 1503 at 3 (Jan. 29, 1995). The factors relied upon for that determination included: 1) NCC "accounted for nearly 90% of JMI's business" and NCC provided interest free loans to JMI. *GC Memo* at 29; 2) "At all relevant times NCC had *de facto* control of all shares of JMI stock and consequently had direct control over the formation of JMI's board of directors." *GC Memo* at 28-29; 3) Approximately 32 of JMI's total 53 employees were previously employed by NCC. *GC Memo* at 29; 4) NCC was directly involved in JMI's affairs, "such as the approval of JMI purchase orders by an NCC officer and NCC involvement in settling a debt owed to JMI." *GC Memo* at 29.

The most important distinguishing factor between the situation in MUR 1503 and MUR 4250 is that in MUR 1503, NCC formed JMI as a subsidiary corporation to carry out its essential (and traditional) election related activities, such as conducting media and direct-mail campaigns expressly advocating candidates. As the General Counsel explained, in MUR 1503 the relationship whereby the political committee dominated the ostensibly separate for-profit corporation [engaging in activities intended to influence federal elections] defeated important statutory purposes by circumventing the "reporting requirements, the prohibition on corporate contributions to political committees and contribution limitations - all integral to the statutory scheme of the FECA." *GC Memo.* at 7 (citing General Counsel's Brief in MUR 1503 at 22 (August 17, 1984)). In contrast, because the NPF, as a non-profit issue organization, engaged solely in constitutionally protected issue-oriented activities that did not expressly advocate the election or defeat of any candidates for federal office, the NPF's activities did not fall within the jurisdiction of the FECA, and therefore any alleged ties to the RNC could not have circumvented the statutory purposes of the FECA.

In addition, the contrast between the MUR 1503 fact pattern, which showed that JMI was engaged in the express advocacy of federal candidates and was directly controlled by NCC, and the alleged relationship between the NPF and RNC, is stark: 1)

While NCC provided interest free loans to JMI, meaning they essentially co-mingled funds, the loan transactions between the RNC and NPF were arms-length transactions made at market rates; 2) While the NCC "had *de facto* control" of all JMI stock, the RNC had no such direct or "*de facto*" control over the NPF; 3) While 32 - of 53 total - of JMI's employees were previously employed by NCC (and therefore were allegedly loyal to, and possibly took their orders from, NCC), in MUR 4250 the General Counsel does not cite any employees who moved from the RNC to the NPF.¹¹ The General Counsel attempts to analogize the very different situation that a few NPF employees apparently also did separate paid work for the RNC during 1993 and 1994. *GC Memo* at 23-24. The key here, however, is that the cited employees were paid independently by each of the organizations for their separate work for each organization; and 4) While the NCC was directly involved in JMI's daily affairs, there is no evidence that the RNC was involved in day-to-day activities such as approving NPF purchase orders. Contrary to the General Counsel's assertions, the fact that an individual (Haley Barbour) from the RNC also held an individual position at the NPF does not mean that the RNC (a huge political committee with over 100 individual employees) as an entity runs or controls the NPF.

Rather than a tenuous forced comparison to MUR 1503, the more accurate Commission precedent is the comparison between the NPF and the Democratic Leadership Council. In a mirror image of the NPF, the DLC is a non-profit 501(c)(4) corporation formed to promote centrist Democratic ideas. Governor Bill Clinton served as Chairman of the DLC, which "gave him a national platform," and when he ran for President in 1992, he "adopted the council's program as his own."¹² Until recently, the Democratic National Committee's General Chairman was Roy Romer, who at the same time served as Vice-Chairman of the DLC. The current Chairman of the DNC, Joe Andrew, was founder of the DLC Indiana Chapter.¹³ The DLC publishes *Blueprint*, a quarterly journal designed to elucidate Democratic "beliefs, policy prescriptions, and political approaches for the next election."¹⁴ The DLC's 1998 annual conference was "the first showcase of Democratic presidential hopefuls for 2000."¹⁵ In 1992, Al From, the President of the DLC, served on the DNC's Democratic Platform Drafting Committee.¹⁶ In addition, Holly Page, Vice President of the DLC, previously worked at the DNC as Director of the DNC National Finance Council.¹⁷ Despite the remarkable similarities (including leadership, staffing, showcasing of candidates, and goals of promoting ideas that their national party supports) between the relationships of the DLC

¹¹ In NCC's case, the large number of NCC employees that then moved (or were sent) to work for JMI were an indication that NCC was controlling JMI by placing NCC people there. In contrast, the General Counsel's notation of a few employees that worked for the NPF then moved on to work for the RNC does not lead to the same inference (it has not been suggested that the NPF was attempting to control the RNC).

¹² William Schneider, *No Modesty, Please, We're the DLC*, National Journal, December 12, 1998.

¹³ See Kenneth S. Baer, *Life After Clinton: The Future of the Democratic Party and the New Democrats within It*, <http://dlcppi.org/texts/politics.baer.htm> (2000) (on-line article adapted from *Reinventing Democrats: The Politics of Liberalism from Reagan to Clinton*, University Press of Kansas (2000)).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Democratic Leadership Council web site, "Who We Are," <http://www.dlcppi.org/aboutdlc98.htm> (2000).

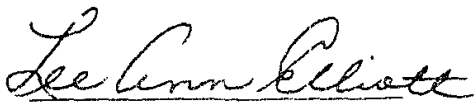
¹⁷ *Id.*

and the DNC, and the NPF and the RNC, no one has never suggested that the Commission find reason to believe that the DLC is "part of" the DNC. The practice of both parties appears to indicate a common understanding of the law, and in this MUR the Commission was correct in rejecting the recommendation of the General Counsel and refusing to find reason to believe that the NPF is "part of" the RNC.

III.

Finally, two Commissioners have made the unfortunate assertion that this Statement of Reasons is not timely, and therefore "would appear to justify a default finding" in a private action under 2 U.S.C. § 437g(a)(8). *Statement of Reasons by Commissioners Thomas and McDonald* at 23, n. 19 (January 28, 2000). To clarify, the guideline found in 11 C.F.R. §5.4(a)(4) for making opinions available to the public no later than "30 days from the date on which a respondent is notified that the Commission has voted to take no further action" is simply an internal rule of the Commission. Although it arguably may have been more convenient for the original complainant when deciding whether to bring a private action under 2 U.S.C. § 437g(a)(8) had this opinion been made public by December 18, 1999 (the end of the 30-day period), I am confident that this opinion, coupled with my joint opinion (with Commissioners Wold and Mason) regarding other aspects of this MUR filed on February 11, 2000, is fully compliant with the legal requirement that statements of reasons be released to facilitate judicial review. *See Common Cause v. FEC*, 842 F.2d 436 (D.C. Cir 1988); *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131 (D.C. Cir. 1987). As for the misleading and somewhat bizarre¹⁸ suggestion that not meeting the Commission's internal 30-day guideline could justify a default finding by a court, the Court of Appeals for the D.C. Circuit was clear in *Democratic Congressional Campaign Comm.* that when a statement of reasons is not available to the district court, they must "remand the case to the FEC with instructions to the Commissioners to explain coherently the path they are taking." 831 F.2d at 1133. This opinion should provide that guidance.

Dated: March 10, 2000


LEE ANN ELLIOTT *kte*
Commissioner

¹⁸ Commissioners Thomas and McDonald cited the controlling authority on this matter, *Common Cause v. FEC*, 842 F.2d 436 (D.C. Cir 1988) and *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131 (D.C. Cir. 1987) in their Statement of Reasons, so one suspects they must have been aware that in the absence of a statement of reasons the remedy for a district court is not a default (as they assert) but instead a remand to the Commission for an opinion.