FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel

DATE: August 20, 1997

SUBJECT: MUR 4305-General Counsel's Brief

The attached is submitted as an Agenda document for the Commission Meeting of _____

Open Session _____ Closed Session _____

CIRCULATIONS		DISTRIBUTION	
SENSITIVE	☒		
NON-SENSITIVE	☐	COMPLIANCE	☒
72 Hour TALLY VOTE	☐	Open/Closed Letters	☐
		MUR	☐
24 Hour TALLY VOTE	☐	DSP	☐
24 Hour NO OBJECTION	☐	STATUS SHEETS	☐
		Enforcement	☐
INFORMATION	☒	Litigation	☐
		PFESP	☐
		RATING SHEETS	☐
		AUDIT MATTERS	☐
		LITIGATION	☐
		ADVISORY OPINIONS	☐
		REGULATIONS	☐
		OTHER	☐

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 4305
Malcolm S. "Steve" Forbes, Jr.	)	
Forbes, Inc.	)	
Forbes Magazine[1]	)	
Forbes for President, Inc. and	)	
William A. Dal Col, as treasurer[2]	)	

GENERAL COUNSEL'S BRIEF

I. STATEMENT OF THE CASE

This matter was generated by a complaint filed by Charles J. Givens. On December 3, 1996, the Federal Election Commission ("Commission") found reason to believe Malcolm S. "Steve" Forbes, Jr., Forbes Magazine ("*Forbes*") and Forbes, Inc., and Forbes for President, Inc. and Joseph A. Cannon, as treasurer ("Forbes Committee" or "Committee") (collectively, "Respondents"), each violated 2 U.S.C. § 441b(a). The Commission's findings were based on in-kind corporate contributions made by Forbes, Inc., and accepted by the Committee, in the form of regularly-featured columns written by Mr. Forbes and published in *Forbes*. The Commission also found that the Forbes Committee violated 2 U.S.C. § 434(b)(2)(A) by failing to report the contributions. The Office of the General Counsel has conducted an investigation pursuant to 2 U.S.C. § 437g(a)(2).

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[1] Forbes Magazine is a division of Forbes, Inc. and not a separate corporate entity. Accordingly, any further findings involving the magazine will be confined to Forbes, Inc.

[2] William A. Dal Col replaced Joseph A. Cannon as treasurer on January 13, 1997. An amended Statement of Organization reflecting this change was received by the Commission on January 16, 1997.

II. FACTUAL AND LEGAL ANALYSIS

A. Applicable Law

The Federal Election Campaign Act of 1971, as amended (the "Act"), prohibits corporations from making contributions or expenditures from their general treasury funds in connection with any election of any candidate for Federal office. 2 U.S.C. § 441b(a). Section 441b(a) also makes it unlawful for any candidate, political committee, or other person knowingly to accept or receive a contribution prohibited by section 441b(a). This provision also forbids any officer or director of any corporation from consenting to any such contribution or expenditure by the corporation.

The Act broadly defines a contribution or expenditure by a corporation to include "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value" made to any candidate, campaign committee, or political party or organization, in connection with any Federal election. 2 U.S.C. § 441b(b)(2). The term "anything of value" includes all in-kind contributions, such as goods and services offered free of charge or at less than the usual and normal charge. 11 C.F.R. § 100.7(a)(1)(iii)(A). Expenditures made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B).

The terms "contribution" and "expenditure" as used in the Act do not include any news story, commentary, or editorial distributed through the facilities of any newspaper or other periodical publication, unless such facilities are owned or controlled by the

candidate. 2 U.S.C. § 431(9)(B)(i); *see also* 11 C.F.R. §§ 100.7(b)(2) and 100.8(b)(2). Even if the publication is owned or controlled by the candidate, the cost for a news story is not a contribution so long as the news story represents a bona fide news account communicated in a publication of general circulation and which is part of a general pattern of campaign-related news accounts which give reasonably equal coverage to all opposing candidates in the circulation area. 11 C.F.R. § 100.7(b)(2)(i)-(ii).

The Act and the Commission's regulations distinguish a "news story" from a "commentary" or an "editorial." The Act covers "news stor[ies], commentar[ies], or editorial[s]," so the "press exemption" will protect all such material where the candidate lacks ownership or control of the media entity, obviating the need for further inquiry. The provision in the regulations that applies where ownership or control exists, however, is specifically limited to "news stor[ies]." The Commission has explained that "[u]nlike news [stories], commentaries and editorials are intended to reflect the subjective views of the publisher or broadcaster. In the context of a political campaign, commentaries and editorials tend to be partisan in nature and to be disseminated for the purpose of influencing the outcome of an election." Informational Letter 1976-29, CCH ¶ 6907. Accordingly, commentaries or editorials contained in candidate-owned or -controlled publications are *not* protected by the press exemption. The candidate will be presumed to have received a contribution in-kind to influence his or her election when the candidate's "newspaper or radio station disseminates commentaries or editorials favorable to [the candidate] or unfavorable to [the candidate's] opponent." *Id.*

In addition to "favorable" or "unfavorable" commentaries or editorials appearing in a candidate-owned or -controlled press entity, the Commission has held that the financing of a communication to the general public that discusses or mentions a candidate in an election-related context and is coordinated with the candidate or his or her campaign is "for the purpose of influencing a federal election." Advisory Opinion 1988-22, CCH ¶ 5932. *See also* AO 1983-12, CCH ¶ 5718. The Commission has explained that if "[s]tatements, comments or references regarding clearly identified candidates appear in [a publication] and are made with the cooperation, consultation or prior consent of, or at the request or suggestion of, the candidates or their agents, regardless of whether such references contain 'express advocacy'[3] or solicitations for contributions, then the payment for allocable costs incurred in making the communications will constitute . . . in-kind contributions to the identified candidates." AO 1988-22. Even in circumstances where the candidate was not clearly identified as such in a publication controlled and financed by that candidate, the Commission nevertheless held that any edition would be deemed to be "campaign-related" and thus for the purpose of influencing the candidate's

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[3] Under former regulation 11 C.F.R. § 109.1(b)(2), "expressly advocating" meant any communication that by its terms advocated the election or defeat of a candidate, including but not limited to the name of the candidate, or expressions such as "vote for," "elect," "support," "cast your ballot for" and "Smith for Congress," or "vote against," "defeat," or "reject." The U.S. Supreme Court has determined that when a communication urges voters to vote for candidates who hold a certain position and identifies specific candidates who hold that position, such a message "is marginally less direct than 'Vote for Smith'" but "goes beyond issue discussion to express electoral advocacy." *FEC v. Massachusetts Citizens for Life ("MCFL")*, 479 U.S. 238, 249 (1986). Moreover, speech is express advocacy under the Act if, "when read as a whole, and with limited reference to external events," it is "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987). New regulations in effect October 5, 1995 expanded the prior regulatory definition to incorporate the holdings of *MCFL* and *Furgatch*. 11 C.F.R. § 100.22. *But see Maine Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8 (D. Me. 1996), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996) (invalidating new 11 C.F.R. § 100.22(b)), *petition for cert. filed*, 65 U.S.L.W. 3783 (U.S. May 14, 1997) (No. 96-1818).

election if, *inter alia*, reference is made "to [the candidate's] views on public policy issues, or those of [the candidate's] opponent, or [to any] issues raised in the campaign." AO 1990-5, CCH ¶ 5982. All contributions to federal candidates, including contributions in-kind, must be reported by the candidates' authorized committees in accordance with 2 U.S.C. § 434.

B. Facts

Forbes, Inc. is a privately-held New York corporation primarily engaged in the business of magazine publishing. It lists nine divisions, among them the Forbes Division and Forbes Newspapers. The Forbes Division publishes *Forbes*, a biweekly magazine focusing on finance and investment founded in 1917, with a current circulation of at least 765,000. Forbes Newspapers was acquired by Forbes, Inc. in 1985 and publishes 14 weekly newspapers with a total circulation of approximately 56,000. In February 1990, Malcolm S. "Steve" Forbes, Jr. became the majority stockholder of Forbes, Inc., owning 51% of the company's capital stock. The remaining 49% is owned equally by the four other Forbes siblings. Mr. Forbes is President and Chief Executive Officer of Forbes, Inc., and is Editor-in-Chief of *Forbes*. For several years, Mr. Forbes has written a column that is featured in every issue of *Forbes*, entitled "Fact and Comment," with the byline "By Steve Forbes, Editor-in-Chief." It is usually two pages in length, subdivided into four to eight separate topic sections, and carried in the front part of the magazine. Since 1989, excerpts from "Fact and Comment" have appeared regularly in *The Hills-Bedminster Press*, a weekly newspaper published by Forbes Newspapers. This

publication is distributed only in New Jersey and had a circulation of 6,216 as of December 31, 1996.

Mr. Forbes filed a Statement of Candidacy as a candidate for the Republican nomination for the U.S. Presidency on September 22, 1995, and formally announced his candidacy on the same day. On November 2, 1995, Mr. Forbes took a leave of absence from Forbes, Inc. to concentrate on his presidential campaign, but he continued to write his column in *Forbes*. The masthead of *Forbes* subsequently listed Timothy C. Forbes as "Acting Chief Executive Officer," although Malcolm S. Forbes, Jr. was still listed as "President and Editor-in-Chief." Mr. Forbes withdrew from the Republican primary race on March 14, 1996 and the following month he officially resumed his duties as CEO at Forbes, Inc. He was not listed as a candidate on the ballot in four states that held their primary elections after March 14, including New Jersey.

During the period in which Mr. Forbes actively campaigned for the Republican presidential nomination, themes that he promoted in a campaign context were given similar treatment in his columns. For example, in Mr. Forbes's presidential announcement on September 22, 1995, he discussed at length the benefits of a "flat tax." Then, in the "Fact and Comment" column appearing in the October 16, 1995 issue of *Forbes*, he wrote: "The way to get the economy growing as it should is to enact the flat tax. That won't happen until the next election." One week later, Mr. Forbes wrote in "Fact and Comment":

> The answer is to junk the current code and enact the flat tax. The resulting simplicity would enormously increase compliance, would remove the major sources of political corruption in Washington, would set off an economic boom because people could keep more of each dollar they earned, and would eliminate barriers to job-creating investments.

Forbes, October 23, 1995, p. 23. Mr. Forbes also promoted his positions on other campaign issues in his columns, such as returning to the gold standard (*Forbes*, 11/20/95 at p. 24; *The Hills-Bedminster Press*, 11-15-95), abortion (*Forbes*, 12/18/95 at p. 23; *The Hills-Bedminster Press*, 12-20-95), Bosnia (*Forbes*, 10/23/95 at p. 23, 11/6/95 at p. 23, 1/1/96 at p. 25; *The Hills-Bedminster Press*, 11/1/95, 1/3/96), federal term limits (*Forbes*, 9/25/95 at p. 23) and capital gains taxes (*Forbes*, 9/25/95 at p. 24; *The Hills-Bedminster Press*, 9/27/95).

According to Forbes, Inc., Mr. Forbes "exercises total control over his column" and "[n]o individual or group of individuals from [the Forbes Committee] was involved in any fashion with the creation or dissemination or [sic] any 'Fact and Comment' column, including suggestions as to the column topics, research of the topics chosen, or assistance in developing, writing, or publishing any of the columns." William Dal Col, the Committee's campaign manager and current treasurer, states in an affidavit that "neither Mr. Forbes nor any representative of Forbes magazine, ever referenced or suggested to me that the subject of any type of campaign communication to the general public should involve any specific subject because it was also the subject of a 'Fact and Comment' column in Forbes magazine." He adds that "at no time was I requested, nor did I ever attempt, to coordinate any themes or subject matter of the campaign with Forbes magazine based on any subject contained in any portion of the magazine, including 'Fact and Comment.'"

C. Analysis

The material facts in this matter are not in dispute. The central issue is whether a corporation controlled by a Federal candidate that publishes a widely circulated magazine of which the candidate is the editor-in-chief may donate space for the candidate to express his opinions on campaign issues in a regularly-featured commentary section of the magazine.

As an initial matter, the press exemption is not available to Mr. Forbes or Forbes, Inc. because the corporation is "owned or controlled" by Mr. Forbes by virtue of his 51% ownership of the outstanding voting shares of capital stock. Accordingly, the exemption would then extend only to the costs of bona fide "news stories," as distinguished from "commentaries" or "editorials." *See* 11 C.F.R. §§ 100.7(b)(2) and 100.8(b)(2). Forbes, Inc. admits that the "Fact and Comment" columns appearing in *Forbes* "provid[e] Mr. Forbes a forum to voice concern on a broad spectrum of domestic and international issues." Each column contains Mr. Forbes's personal views on all subjects addressed in that column.[4] Accordingly, the columns constitute "commentaries," and as such would not be covered by the press exemption because the publications in which they appeared are candidate-controlled.[5]

[4] The only exceptions are restaurant reviews contained in the column, which appear to be written by other *Forbes* employees.

[5] Respondents argue that the "press exemption" at 2 U.S.C. § 431(9)(B)(i) is irrelevant to the Commission's discussion "because the communications at issue do not measure up to a contribution and expenditure . . . ." However, it is because Forbes, Inc. is *not* covered by the press exemption that the Commission must decide whether the expenditures for the communication falls within the Act's prohibitions.

As previously noted, the Commission in AO 1988-22 determined that costs associated with publishing material pertaining to clearly identified candidates may constitute in-kind contributions when there is evidence of coordination with the campaign, regardless of whether the material contains express advocacy. Although the fact of his candidacy is not discernible solely from the columns that appear in *Forbes*, at least one issue of *The Hills-Bedminster Press* carrying an excerpt of "Fact and Comment" makes clear reference to Mr. Forbes's campaign. The first page of the September 27, 1995 edition of the newspaper contains a large photograph of Mr. Forbes announcing his candidacy followed by the headline "Forbes is running for president: GOP candidate presents 'A New Conservative Vision.'"[6] In his column on the fourth page of the same edition, Mr. Forbes comments on the "destructive[ness]" of the "high capital gains tax," which he had proposed to "zero out" in his candidacy announcement. While the column itself does not refer to Mr. Forbes's candidacy, a quick glance at *The Hills-Bedminster Press*'s front page headline and photograph will make it clear to the reader that the author of the column (which also contains a small picture of Mr. Forbes) is also a presidential candidate.[7]

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[6] The headline story itself is a "bona fide news account" and thus would be protected under the press exemption. *See* 11 C.F.R. §§ 100.7(b)(2)(i)-(ii), 100.8(b)(2)(i)-(ii).

[7] Respondents note that Mr. Forbes was "not seeking election" in New Jersey, where *The Hills-Bedminster Press* is distributed. Although he was not listed on the New Jersey ballot for the Republican presidential nomination, Mr. Forbes became a presidential candidate under the Act no later than September 22, 1995, based on receipts and expenditures by the Committee. *See* 2 U.S.C. § 431(2). *See also* 21 U.S.C. §§ 9002 and 9032(2). In the states where Mr. Forbes was not on the ballot, including New Jersey, the primary elections were held after March 14, 1996, the date he dropped out of the race. Accordingly, Mr. Forbes's reasons for "not seeking election" in those states appear to be related to his withdrawal from the race. The activity at issue in this matter occurred prior to March 14, 1996, while Mr. Forbes was still a candidate.

More applicable to Forbes, Inc.'s primary publication, *Forbes*, is AO 1990-5, where the Commission faced what it called the "difficult task of reconciling [the requestor's] status as a candidate for Federal office" with her desire to comment on issues of the day in a newsletter operation she financed and which was entirely under her editorial control. The newsletter contained no express advocacy and, like *Forbes*, it did not clearly identify the owner/editor as a candidate.[8] Nevertheless, the Commission held that "campaign-related" editions of the newsletter would include, *inter alia*, those editions containing references to the candidate's views on public policy issues or to issues raised in the campaign. The Commission determined that, unless the candidate's committee assumed the costs for publishing the "campaign-related" editions of the newsletter, these expenditures would constitute prohibited corporate contributions by her publishing company.

Mr. Forbes repeatedly offered his opinions on campaign issues in his columns during his candidacy. As previously mentioned, Mr. Forbes discussed, both on the campaign trail and in "Fact and Comment," his positions on taxes, term limits, a gold standard, abortion, and U.S. involvement in Bosnia.[9] Respondents argue that, unlike the candidate in AO 1990-5, Mr. Forbes has been writing his column for several years, and the columns were not inspired by his candidacy since they discussed issues that had been

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[8] Although Mr. Forbes's name and picture appear prominently at the top of each "Fact and Comment" column in *Forbes*, no explicit references to his candidacy are found in the magazine.

[9] Respondents contend that the "Fact and Comment" column "fails to show common themes with the Forbes Campaign," but they contradict themselves by admitting that the "promotion of the flat tax issue was one of Mr. Forbes's primary issues during the presidential campaign" and that his column contained references to the flat tax.

featured in *Forbes* in the years prior to his run for office. While Mr. Forbes's commentaries may have served non-campaign purposes in previous years, publication of his campaign themes after becoming a presidential candidate had the effect of advancing his candidacy, as the Commission suggested would be the case with the continued publication of the newsletter in AO 1990-5.[10] Mr. Forbes not only had complete control over the substance of his commentaries; he also controlled their dissemination. The fact that Mr. Forbes was permitted to temporarily withdraw from his management duties at Forbes, Inc. while still being provided with column space in *Forbes* and *The Hills-Bedminster Press* to air his political views is further evidence of an inappropriate benefit to his campaign by his corporation. Based on the foregoing, Mr. Forbes's use of column space in Forbes, Inc. publications to espouse his campaign positions constitutes "campaign-related" activity.[11]

According to Respondents, when determining whether Forbes, Inc. violated 2 U.S.C. § 441b(a) by making a contribution or expenditure "in connection with" a

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[10] Respondents also point out that, unlike the newsletter in AO 1990-5, *Forbes* was not sent out primarily to those supporters Mr. Forbes encountered during the campaign, and there is no evidence that he increased the circulation because of his candidacy. Although true, it should be noted that Mr. Forbes was a first-time candidate unlike the then-former candidate in AO 1990-5, and "Fact and Comment" comprises only two pages of a subscription-based financial publication of more than 100 pages, making it unlikely that the magazine's circulation would or could have been increased significantly because of his candidacy. More to the point is that *Forbes* already had a wide circulation when Mr. Forbes announced his candidacy and offered him an immediate and convenient means of disseminating his campaign themes to a national audience.

[11] Respondents cite several Advisory Opinions wherein the Commission permitted the particular activity or communication at issue (AOs 1996-11, 1994-15, 1992-37, 1977-54, 1977-42), but each of those opinions is more factually remote from this matter than AO 1990-5. Perhaps the most crucial difference is that, where a media entity was involved, the candidate did not exercise ownership or control over the entity.

Federal election, the only applicable legal standard of review is express advocacy.[12] They cite several court decisions to support this assertion, beginning with the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *FEC v. Massachusetts Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238 (1986). However, neither the Supreme Court nor any other court has ever applied the express advocacy requirement to contributions.

In *Buckley*, the Court observed that "controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act." 424 U.S. at 46. The Court understood "contribution" to "include not only contributions made directly or indirectly to a candidate, political party, or campaign committee . . . but also *all* expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate," and found that "[s]o defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or campaign." *Id.* at 78 (emphasis added). It was only when the Court construed the statutory provisions as they applied to *independent* expenditures that it found the express advocacy test necessary to avoid vagueness. *Id.* at 78-79 (emphasis added). Later, in *MCFL*, the Court again specified that the express advocacy construction

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[12] Respondents appear to be mainly concerned with how to determine which subjects discussed in the column are "campaign-related." They argue that "[a]bsent the clear delineation called for by the express advocacy standard, such judgments become arbitrary." They further contend that AO 1990-5's "campaign-related" standard is constitutionally overbroad, causing a "chilling" effect on the magazine's First Amendment rights. The standard enunciated by the Commission in AO 1990-5 avoids arbitrariness by offering guidance to others in similar positions of authority at media entities, such as Mr. Forbes, who continue to disseminate their views in their publications or broadcasts after becoming candidates. It strikes "a reasonable balance between FECA enforcement interests in keeping funding of candidate advocacy and promotion within the prohibition and limitations of the FECA and constitutionally protected free speech interests in issue or public policy advocacy." AO 1990-5, Concurring Opinion of Commissioner Josefiak.

was necessary for the "provision that directly regulates *independent* spending." 479 U.S. at 249 (emphasis added).

In addition to arguing for the standard of express advocacy, Respondents assert that the Commission acknowledges a jurisdictional concern by virtue of its 1997 Legislative Recommendations which include a request for statutory authority to deem candidate-coordinated issue advocacy to be an in-kind contribution: "The fact that the Commission deems it necessary for Congress to enact an amendment to the Act to authorize the FEC to deal with the type of legal issues presented in this MUR, leads to the undisputable conclusion that the Commission does not presently have jurisdiction under the Act to determine if such coordinated issue advocacy is in violation of the Act."

Section 438(a)(9) of the Act mandates the Commission to annually transmit to the President and Congress "any recommendations for any legislative or other action the Commission considers appropriate." The pertinent recommendation asks "that Congress consider when 'issue advocacy' advertising by corporations, labor organizations, political parties, and other organizations is an in-kind contribution because it is coordinated with a candidate or a candidate's campaign." 1997 FEC Legislative Recommendations. The Commission observes that in "a series of cases, the Supreme Court has viewed public communications coordinated with campaigns as in-kind contributions. As contributions, *such communications were subject to the Act's limitations and prohibitions*, but were not subject to the same level of First Amendment protection as expenditures." *Id.* After citing the cases, the Commission recommends that "[i]n accordance with these rulings, Congress should stipulate when coordination of an issue advocacy advertisement with a

candidate or campaign would be considered an in-kind contribution." *Id.* Far from constituting an "admission by the Commission that they do not have jurisdiction under the Act" in matters involving coordinated issue advocacy as urged by Respondents, the recommendation simply encourages Congress to clarify existing law in light of relevant Supreme Court decisions.[13]

Respondents speculate that "the basis for [the Commission's] 'coordination' theory apparently lies at 11 C.F.R. § 114 regulations" in reaching their erroneous conclusion that the concept of coordination does not apply to issue advocacy but only to those activities referenced at 11 C.F.R. §§ 114.3 and 114.4.[14] These regulations merely implement certain statutory and constitutionally mandated exceptions to the general prohibition against corporate and union expenditures in connection with Federal elections, and do not comprise a "closed universe" of election-related activity that can be "tainted by . . . coordination with the candidate," as suggested by Respondents. In fact, "coordination" does not adequately describe the circumstances of this matter, where the candidate exerted such dominance over all phases of the activity, "exercis[ing] total control over his column," as admitted by Forbes, Inc. By virtue of Mr. Forbes's positions of authority as CEO of Forbes, Inc. and Editor-in-Chief of *Forbes*, he had final approval

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[13] It is well settled that courts will not rely on an agency's legislative recommendation to draw the inference that an agency admits it is acting on an erroneous statutory construction. Wong Yang Sung v. McGrath, 339 U.S. 33, 47 (1950) ("Public policy requires that agencies feel free to ask [Congress for] legislation which will terminate or avoid adverse contentions and litigations."). See also American Trucking Assns., Inc. v. Atchison, Topeka & Santa Fe Railway Co., 387 U.S. 397, 417 (1967); Warner-Lambert Co. v. FTC, 562 F.2d 749, 758 n. 39 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978).

[14] 11 C.F.R. §§ 114.3 and 114.4 deal with corporate and labor communications to and beyond their restricted classes. These regulations became effective on March 13, 1996, just before Mr. Forbes dropped out of the race.

over all aspects of his column's inclusion in *Forbes*, including the subject matter, length, location within the magazine, and format details such as the placement of his name and picture at the top of the column. Accordingly, the costs of publishing "Fact and Comment" should be analyzed as contributions to the candidate because, at the very least, they were expenditures made by Forbes, Inc. "in concert, with, or at the request or suggestion of, a candidate . . . ." *See* 2 U.S.C. § 441a(a)(7)(B)(i). Respondents have stated that the Committee was not involved "in any fashion with the creation or dissemination" of the columns. While the involvement of campaign staff in the creation or dissemination of a communication may constitute further evidence of a campaign-related purpose (*see, e.g.*, AOs 1988-22, 1983-12), such a connection is not needed to transform corporate expenditures into in-kind contributions where, as in the matter at hand, the candidate both created the communication and approved its dissemination in his positions of authority at the corporate media entity.

Finally, the Commission made a similar determination in an enforcement matter where a respondent media entity was not afforded the protection of the press exemption. In Matter Under Review 2268 (Epperson, *et al.*), the candidate owned the media entity in question and therefore could not avail himself of the exemption. He had purchased a radio station and, after becoming a candidate, had used its facilities to broadcast editorials in which he discussed his positions on such topics as tax reform and U.S. foreign policy. Even though his editorials apparently did not refer to his or his opponents' candidacies,[15]

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[15] The conciliation agreements noted that "[e]ach editorial twice identified [the respondent] as the broadcaster," but the broadcasts did not refer to the respondent *as a candidate*.

and did not contain express advocacy or solicitations for contributions, a majority of the Commission still found reason to believe that the company that owned the radio station and the candidate's principal campaign committee respectively made and received corporate contributions in-kind with regard to the broadcast of the editorials. The respondents signed conciliation agreements containing admissions of the violation, with language describing the campaign-related editorials as a "thing of value" donated by the radio station to the committee. Similarly, "campaign-related" commentaries carried in *Forbes* are a "thing of value" to the Forbes Committee, as they provided a powerful, convenient vehicle for disseminating Mr. Forbes's campaign positions to several hundred thousand potential voters. In view of the candidate's direct involvement in the creation and dissemination of the commentaries, the column space provided by Forbes, Inc. to Mr. Forbes constituted an in-kind contribution to the Forbes Committee.

Based on a review of all "campaign-related" passages in "Fact and Comment" columns appearing in Forbes, Inc. publications during Mr. Forbes's candidacy, it appears that Forbes, Inc. made, and the Committee accepted, not less than $94,900 in prohibited in-kind contributions. This is a conservative figure based on the rates that a general advertiser would pay for the same space occupied by these passages in *Forbes* and *The Bedminster-Hills Press*. The Committee has not disclosed any such contributions in its reports filed with the Commission.

Accordingly, this Office is prepared to recommend that the Commission find probable cause to believe that Forbes, Inc. made in-kind corporate contributions to the Forbes Committee in violation of 2 U.S.C. § 441b(a), and that the Committee violated

2 U.S.C. §§ 441b(a) and 434(b)(2)(A) by knowingly accepting them and by failing to report them. Because Mr. Forbes was personally involved in creating and disseminating the commentaries that constituted the contributions, this Office is also prepared to recommend that the Commission find probable cause to believe that Mr. Forbes, personally and as an officer of Forbes, Inc., violated 2 U.S.C. § 441b(a) by knowingly accepting and by consenting to the contributions, respectively.

III. RECOMMENDATIONS

1. Find probable cause to believe that Forbes, Inc. violated 2 U.S.C. § 441b(a).

2. Find probable cause to believe that Forbes for President, Inc. and William A. Dal Col, as treasurer, violated 2 U.S.C. §§ 441b(a) and 434(b)(2)(A).

3. Find probable cause to believe that Malcolm S. "Steve" Forbes, Jr. violated 2 U.S.C. § 441b(a).

8/20/97
Date

Lawrence M. Noble
General Counsel