BEFORE THE FEDERAL ELECTION COMMISSION

SENSITIVE

In the Matter of	)	
	)	
	)	MUR 4378
National Republican Senatorial Committee	)	
Stan Huckaby, as treasurer	)	

GENERAL COUNSEL'S REPORT

I. BACKGROUND

This matter was initiated by a complaint filed on behalf of U.S. Senator Max Baucus and Friends of Max Baucus '96'. On June 17, 1997, the Commission found reason to believe that the National Republican Senatorial Committee and Stan Huckaby, as treasurer, ("the NRSC"), violated 2 U.S.C. §§ 441a(f), 441b and 434(b) and 11 C.F.R. § 102.5(a) as a result of having made expenditures in excess of the limitations on party expenditures at 2 U.S.C. § 441a(d) in 1996 for media advertisements critical of Senator Baucus, of having reported these disbursements as "administrative/voter drive" expenditures and thus as allocable pursuant to 11 C.F.R. § 106.5 and § 104.10(b)(1), rather than as in-kind contributions, and of having made thirty-five percent of the expenditures from non-federal account(s).

On November 16, 1998, counsel for the NRSC were provided with a General Counsel's Brief which was also distributed to the Commission and which is incorporated herein by reference. On January 15, 1999, following receipt of an extension of time to respond, counsel for the NRSC submitted a Reply Brief. The following is a discussion of the issues addressed in this matter in light of the Reply Brief, plus recommendations for Commission action.

II. ANALYSIS

A. 2 U.S.C. § 441a(d) Limitations

For purposes of determining whether the 1996 NRSC expenditures here at issue were subject to the limitations of 2 U.S.C. § 441a(d), the General Counsel's Brief applied the two-fold standard of "electioneering message" and coordination with a candidate. The Response Brief disputes the application of each of these elements.

1. Content of Communications

Counsel for the NRSC argue in their Response Brief that the limitations of 2 U.S.C. § 441a(d) apply only to expenditures for communications which contain "express advocacy." (Reply Brief, page 19) Counsel begin their discussion of caselaw with the decision of the U.S. Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976), arguing in broad terms that the Court "held that the First Amendment requires limitations on expenditures 'relative to a clearly identified candidate' to be construed as reaching only 'communications containing express words of advocacy of election or defeat' . . . . See [Buckley v. Valeo], at 39-59."

In fact, this language formed part of the Buckley Court's discussion of the expenditure limitations imposed at former 18 U.S.C. § 608(e)(1), a provision which the Court did find unconstitutional, but which it also found to have encompassed expenditures made independently of a candidate. 424 U.S. at 45-47. The Court upheld as constitutional the limitations on "contributions" imposed by Congress, regardless of the content of any communications involved. 424 U.S. at 26, 35. The Court stated further: "[C]ontrolled or coordinated expenditures are treated as contributions rather than expenditures under the [Federal Election Campaign] Act." 424 U.S. at 46.

Counsel also cite FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) ("MCFL"); FEC v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45 (2d Cir. 1980) (en banc) ("CLITRIM"); and FEC v. Christian Action Network, Inc., 110 F.2d 1049 (4th Cir. 1997) ("Christian Action Network") in support of their argument that express advocacy is required to trigger Section 441a(d) limitations. (Reply Brief, page 20.) None of these cases, however, concerned the activities of a political party committee and thus did not involve the application of 2 U.S.C. § 441a(d). MCFL and Christian Action Network addressed the relationship of the prohibitions of 2 U.S.C. § 441b to activities of incorporated, non-profit organizations, while CLITRIM addressed communications uncoordinated with a candidate which had been undertaken by an unincorporated, non-party organization.

Counsel argue further that, in light of the Supreme Court's decision in Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604, (1996), ("Colorado Republicans I"), the reliance by this Office upon the Tenth Circuit's "now-vacated opinion" in FEC v. Colorado Republican Federal Campaign Committee, 59 F.3d 1015 (10th Cir. 1995), is misplaced as support for an "electioneering message" standard for Section 441a(d) expenditures. (Reply Brief, page 21). As is noted in the General Counsel's Brief, however, the Supreme Court in Colorado Republicans I did not address the content issue as regards Section 441a(d) expenditures. Although the Supreme Court did "vacate" the Tenth Circuit's decision, it did so on the basis that the expenditures at issue were in fact independent. The

Court did not "overrule" the Tenth Circuit's legal reasoning concerning the standard for addressing the content of Section 441a(d) expenditures.[1]

Counsel also question the citations to Advisory Opinion 1983-12 and Advisory Opinion 1983-43 in the General Counsel's Brief, arguing that these opinions have been "overruled or superseded" and that their use by this Office was not "candid." (Reply Brief, pages 21-22.) With regard to AO 1983-12, counsel term the political committee involved there to have been an "independent political action committee" and then, citing three Supreme Court decisions, state that the Court has included "independent political committees" among the entities protected by the First Amendment from regulation of "speech . . . that does not meet the express advocacy standard."

Only one of the decisions cited by counsel, namely Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981), involved a political committee as opposed to a corporation, and that decision addressed a committee making expenditures in support of ballot initiatives, not of candidates. None of the cases cited would overrule the Commission's distinction between independent and coordinated expenditures.

Counsels' arguments regarding AO 1983-12 ignore the fact that the Commission in that opinion distinguished between situations in which the requester, the National Conservative Political Action Committee ("NCPAC"), would be coordinating a planned television broadcast with a particular incumbent of the U.S. Senate who had provided footage

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[1] On June 26, 1996, the Supreme Court, as part of its decision in Colorado Republicans I, remanded the case to the Tenth Circuit Court of Appeals for further legal and factual development on the issue of the constitutionality of limitations on party expenditures coordinated with candidates. The Tenth Circuit in turn remanded the case to the U.S. District Court for Colorado. On February 18, 1999, the District Court found

for the broadcast, or otherwise consulting with that incumbent, and situations in which there would be no such "coordination, consultation or contact." The Commission found that in the former situation the expenditures for a broadcast would be considered in-kind contributions to the individual, while in the latter they would not.

Advisory Opinion 1983-43 was cited in a footnote in the General Counsel's Brief solely for the proposition that discussion of legislative issues and election-related messages are not mutually exclusive. Otherwise, dealing as it did with an incorporated membership organization, this opinion is not directly relevant to the present matter, whether or not it has been "overruled."

Counsel faults the Office of the General Counsel for not addressing Advisory Opinion 1995-25. (Reply Brief, page 22). That opinion involved political party expenditures for advertisements which were assertedly going to address a national political party's legislative proposals. The requester, the Republican National Committee, stated in its request for the advisory opinion that the communications being planned would contain neither express advocacy nor an electioneering message. Relying upon this assertion, the Commission focused in AO 1995-25 upon the issue of whether the RNC's expenditures would still be allocable between federal and non-federal accounts, and determined that they would, "unless the ads would qualify as coordinated expenditures on behalf of any general election candidates of the Party under 2 U.S.C. § 441a(d)." (Emphasis added.) The Commission cited the Supreme Court's statement in Buckley v. Valeo that "[e]xpenditures. . . of 'political

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2 U.S.C. § 441a(d) unconstitutional. On March 24, 1999, the Commission voted to appeal this decision to the Tenth Circuit.

committees' . . . can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign-related." 424 U.S. at 79.

In the present matter, the NRSC recognized that at the least it was required to allocate the costs of the anti-Baucus advertisements between its federal and non-federal accounts, and it did so. However, it is the position of this Office that the expenditures at issue were made for advertisements which contained an "electioneering message" and which were coordinated with a candidate (see further discussion below), thereby placing the NRSC's expenditures within the exception cited by the Commission in AO 1995-25 and thus outside the parameters of that opinion.

With regard to the actual contents of the NRSC's communications here at issue, counsel argue that none "contained words of express advocacy" and that none urged "viewers to take any action with respect to any election whatsoever." They state that there was no reference to the general election, and that "the fact that Baucus was unopposed in the June 4 [1996] primary precludes a finding that the advertisements – the vast majority of which were in April or May - involved 'electioneering'." (Reply Brief, page 23.)

Taking these arguments in reverse order, the fact that Senator Baucus was unopposed in the June primary shifts the effect of the advertisements to the general election. The expenditure limitations at 2 U.S.C. § 441a(d) apply only to general elections for Federal office in any event; however, the Commission has found that the time frame for coordinated party expenditures is not restricted to the post-nomination campaign period. See Advisory Opinion 1984-15 and Advisory Opinion 1985-14. In the present matter the advertisements aired both before and after the June 4, 1996 primary election in Montana.

Counsel are correct that the advertisements at issue did not contain words of express advocacy. Given, however, the position of this Office, in the General Counsel's Brief and below, that the expenditures were coordinated with the Rehberg campaign, "express advocacy" is not the appropriate standard to be applied in this matter. Counsel are also correct that the NRSC advertisements did not include the words "Democrat" or "Republican" in their texts, although the disclaimers cited the "National Republican Senatorial Committee" as the source of payment. The advertisements did, however, clearly identify U.S. Senator Max Baucus, who was at the time a candidate for re-election; did refer to his position as an incumbent member of the U.S. Senate and to his record as such; and did contain negative statements about his alleged positions on specific issues. The NRSC had publicly signaled its intent, months earlier, to target during the 1996 elections "liberals" in Congress who had voted for tax increases, and Senator Baucus was included in the announced list of planned targets. Although the issues addressed in the advertisements at issue, particularly term limits and a balanced budget, were scheduled to come before the Senate during or just after the running of the advertisements, the advertisements were placed only with stations serving Montana, not with others serving broader, issue-related constituencies. The advertisements did not specify specific Senate legislation, either by bill number or timing; and, in most instances, did not provide Senator Baucus' Senate telephone number or address. Thus, the advertisements were primarily aimed at reducing support for Senator Baucus' reelection rather than at encouraging contacts with him about his votes on pending legislation. They therefore contained electioneering messages, and met the content standard for coordinated party expenditures and thus for the application of Section 441a(d) limitations.

2. Coordination

Counsel argue that evidence that the NRSC's advertisements were produced and placed without the Rehberg campaign's prior input or knowledge "precludes any finding of coordination." (Reply Brief, page 4). Later, counsel assert that the use of the words "actual coordination" on page 10 of the General Counsel's Brief indicates agreement that something more than an "opportunity" for coordination is required. (Reply Brief, page 10). Counsel also argue that there would need to be evidence of a flow of information from the Rehberg committee to the NRSC about the needs of the campaign in order for coordination to be found. (Reply Brief, pages 14-15).

This Office does not agree that an "opportunity" for coordination is insufficient evidence of coordination. The phrase "actual coordination" as used in this Office's Brief was employed in the context of a discussion of the Supreme Court's decision in Colorado Republicans I that coordination between a party committee and a candidate committee could not be presumed; but, rather, that there had to be evidence of coordination. 518 U.S. at 619-623. Thus, the distinction being drawn was between presumed coordination and evidence of coordination, not between opportunities for coordination and "actual" coordination.

More importantly for purposes of the present matter, the Supreme Court in Colorado Republicans I, in support of its finding that the advertising campaign at issue in that case had been undertaken independently of a candidate, stated that the campaign had not been developed "pursuant to any general or particular understanding with a candidate." 518 U.S. at 614. (Emphasis added.) Based upon this judicial language, it is the position of this Office that specific input by the Rehberg campaign into the NRSC advertising campaign in Montana with regard to content, timing or placement was not required in order to trigger the Section

441a(d) limitations. Rather, it is sufficient for a finding of coordination that the Rehberg committee knew as early as mid-October, 1995, and thus prior to the media campaign, that the NRSC was planning a 1996 advertising campaign targeting Senator Baucus among others; that Ladonna Lee and JoAnne Barnhart, as representatives of the Rehberg campaign and of the NRSC respectively, had specifically discussed in late October - early November, 1995 an advertising campaign which would address Mr. Baucus' voting record and upcoming votes in the Senate; that the Rehberg campaign later encouraged, even urged, such a campaign, prior to its start in mid-April, 1996, through inquiries directed at the NRSC; that the Rehberg campaign tried, albeit indirectly, to change the tone of the advertising campaign in Montana once it started; and that the Rehberg campaign maintained contacts with the NRSC throughout the campaign, in spite of opposition to the latter's advertising program in Montana.[2]

3. Adjustment of Statutory Violation

Counsel argue that the General Counsel's Brief is "procedurally defective" because it concludes that the making of coordinated expenditures in excess of the Section 441a(d) limitations results in a violation of 2 U.S.C. § 441a(h) rather than of 2 U.S.C. 441a(f), the provision addressed in the Commission's reason to believe determination. (Reply Brief, page 26). It is counsels' position that the lack of a reason to believe determination regarding a

[2] Counsel argue that "an actual exchange of information" is required and cite Branstool v. FEC, No. 92-0284 (WBB) at 10, fn. 5 (D.D.C. April 4, 1995) as support for this position. (Reply Brief, pages 13-14). The cited footnote consists of a lengthy quotation from the Statement of Reasons issued by Commissioner Thomas Josefiak during the administrative phase of that case. Commissioner Josefiak used the phrase "brief, isolated and insubstantial contact" to describe a particular communication between representatives of the two respondents. In the present matter that phrase would be inadequate to describe the contacts between the NRSC and the Rehberg campaign, in particular the discussion between Ms. Lee and Ms. Barnhart cited above.

violation of 2 U.S.C. § 441a(h) denied the NRSC "an opportunity to marshall evidence in its defense prior to a reason-to-believe vote . . . ," and would violate the Administrative Procedures Act and the Due Process clause of the U.S. Constitution. (Reply Brief, page 27).

Counsels' position is erroneous. A reason to believe determination by the Commission serves only as a threshold for commencing an investigation into alleged or apparent violations of the Act. See 2 U.S.C. § 437g(a)(2); 11 C.F.R. § 111.10(a). Once commenced, the investigation and Commission determinations based thereon are not limited to only those issues, statutory provisions and/or violations specifically referenced in the threshold reason to believe findings, but, rather, may encompass all relevant information, and take into consideration any intervening judicial decisions. See, e.g., United States v. Powell, 379 U.S. 48 (1964); United States v. Morton Salt Co., 338 U.S. 632 (1950). Consequently, it would be inconsistent with the scope of the Commission's authority and responsibilities, as well as redundant, to require additional threshold findings for violations of other provisions of the Act arising from the same facts as those which formed the basis for the initial reason to believe determinations.

Further, the Act itself nowhere requires the Commission to make a reason to believe determination with regard to a violation of a specific statutory provision prior to making a probable cause finding regarding a violation of that provision. 2 U.S.C. § 437g(a)(3) requires only that the General Counsel "notify the respondent of any recommendation to the Commission by the general counsel to proceed to vote on probable cause." Similarly, the Commission's regulations require that, upon completion of the investigation, the General Counsel put forth in a brief the factual and legal basis for the probable cause recommendations, notify respondents of the recommendations, and provide respondents with

a copy of the brief. See 11 C.F.R. § 111.16(a) and (b). Thus, what is essential is that respondents be provided with opportunities to respond to all allegations at some point during the administrative proceedings. See, FEC v. NRA of America, 533 F.Supp. 1331 (D.D.C. 1983). See also Department of Education of State of California v. Bennett, 864 F. 2d 656, 659 (9th Cir. 1988) ("notice will be adequate for due process purposes 'if the party proceeded against understood the issue and was afforded full opportunity' to respond (quoting Lara v. Secretary of Interior, 820 F.2d 1535, 1539 (9th Cir 1986)").

Earlier in their brief, Counsel argue that the Commission cannot "[u]nilaterally . . '[l]egislate' a convergence of Sections 441a(d) and 441a(h)." (Reply Brief, page 15.) Counsel state that the result of such an approach is to make the two provisions duplicative of one another, and thus "contrary to settled statutory construction." (Id., page 18). Counsel also argue that this Office's recommendation involves "a new and different construction of the statute. Such a change is more appropriate for a rulemaking, if at all, than for an enforcement proceeding." (Id.).

In the present matter the Commission initially found reason to believe that the NRSC violated 2 U.S.C. § 441a(f) by exceeding the expenditure limitations established at 2 U.S.C. § 441a(d). This determination was consistent with prior Commission practice regarding the consequences of exceeding the Section 441a(d) limitations. Such practice had been in turn the product of the Commission's regulatory presumption of coordination between party committees and their candidate; of the frequent lack of evidence of actual coordination with a candidate; of the resulting decision to treat party expenditures in these circumstances as only "expenditures," rather than as "in-kind contributions" reportable by a candidate; and of the determination that, under these circumstances, the appropriate violation on the part of the

party committee would be of 2 U.S.C. § 441a(f) which states, inter alia, that " [n]o . . . political committee shall knowingly . . . make any expenditure in violation of the provisions of [Section 441a]." (Emphasis added.)

This agency practice has been called into question as a result of the Supreme Court's decision in Colorado Republicans I rejecting presumptions of coordination between party committees and their candidates, and requiring instead evidence of coordination. It follows from this requirement that, when and if evidence of coordination is present, the party expenditure at issue would become an in-kind contribution to the candidate and his or her committee by virtue of the involvement of the candidate and/or the candidate's authorized committee with the expenditure. Such contributions would then be subject to the limitations on contributions at 2 U.S.C. § 441a, including the special limitation on Senate campaign committee contributions at 2 U.S.C. § 441a(h). In this way, the standards for applying the limitations on coordinated party expenditures at 2 U.S.C. § 441a(d) and the limitations on in-kind contributions by a party committee at 2 U.S.C. § 441a(a) have indeed converged as both now involve coordination with a candidate. Thus, in the present matter the Office of the General Counsel is recommending that the Commission find the more statutorily appropriate finding with regard to the NRSC to be one of a violation of the limitations on contributions at 2 U.S.C. § 441a(h). Contrary to counsels' argument, this change does not constitute a "new and different construction of the statute." It is, rather, the logical outcome of the Supreme Court's decision in Colorado Republicans I, and represents simply the substitution of one statutory violation for another, i.e. of Section 441a(h) for Section 441a(f). The factual and

legal basis for the violation remains the same - namely, that there have been coordinated party expenditures in excess of the limitations imposed by 2 U.S.C. § 441a(d).[3]

Finally, counsel argue that the Commission may not retroactively apply a new interpretation of the statute in an enforcement proceeding. (Reply Brief, page 27). In support of this position, counsel cite Health Insurance Association of America v. Shalala, 23 F.3d 412, 423 (D.C. Cir. 1994), in which the court ruled, inter alia, that the Government could not recover conditional Medicare payments based upon interpretative rules not in existence at the time the payments were made. The court distinguished between direct actions for recovery in court, which were required by the statute in question, and "internal administrative adjudications," noting that "agency interpretations announced in adjudications typically are retroactive, and, subject to some limits, are permissibly so." 23 F.3d at 424.

Because the Commission's proceedings do not constitute "adjudications," it is possible that a court would find in certain situations that Commission regulations may not be applied retroactively. However, in the present matter the recommendation being disputed by counsel involves not the retroactive application of a regulation, but rather a recommendation that the Commission find probable cause to believe there has been a violation of one statutory sub-section rather than of another statutory sub-section within 2 U.S.C. § 441a, when under either approach the violation would be the result of the NRSC's having exceeded the same statutory contribution limitation, namely that established by 2 U.S.C. § 441a(d). The recommendation by this Office that the Commission find probable cause to believe that the

[3] If the respondent were an party committee other than a Senate campaign committee, the appropriate violation would be one of 2 U.S.C. § 441a(a).

NRSC violated § 441a(h), rather than of U.S.C. § 441a(f), does not address a violation which would not exist but for a new interpretation of the statute.[4]

B. Reporting Violations

The Commission also found reason to believe that the NRSC violated 2 U.S.C. § 434(b) when it reported the NRSC payments at issue as allocable expenses, not as in-kind contributions. Counsel in their Reply Brief state in a footnote on page 26 that "[b]ecause the disbursements at issue were not 'expenditures,' they did not place the NRSC in violation of 2 U.S.C. § 441a(d). . . . Thus, the NRSC did not violate 2 U.S.C. § 434(b) . . . ."

In light of the evidence discussed above in support of the recommendation that the Commission find probable cause to believe the NRSC violated 2 U.S.C. § 441a(h), this Office also recommends that the Commission find probable cause to believe that the NRSC and Stan Huckaby, as treasurer, violated 2 U.S.C. § 434(b) by misreporting the disbursements at issue as allocable expenditures rather than as in-kind contributions.

C. Use of Non-Federal Funds

Finally, the Commission found reason to believe that the NRSC violated 2 U.S.C. § 441b and § 441a(f) and 11 C.F.R. § 102.5 by using funds from non-federal accounts to make coordinated party expenditures. In a footnote, counsel argues that the NRSC could not have violated 2 U.S.C. § 441b because it is not itself a national bank, corporate or labor

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[4] In response to counsels' argument that the NRSC expenditures at issue cannot be deemed contributions because "the Rehberg committee has not been accused of accepting any improper contributions," it should be noted that the application of 2 U.S.C. § 441a(h) rather than of 2 U.S.C. § 441a(f) does provide a basis for recommending that the Commission pursue the Rehberg committee as the recipient of in-kind contributions from a party committee. However, at this stage in the present proceedings, this Office is not making such a recommendation.

organization. (Reply Brief, fn. 9, page 26). This argument ignores the portion of Section 441b which prohibits any political committee from receiving corporate or labor organization contributions to be used in connection with federal elections. The Reply Brief does not discuss violations of 2 U.S.C. § 441(a)(f) and 11 C.F.R. § 102.5 arising from the use of non-federal accounts.

D. Conclusions

Based upon the evidence and legal arguments set out in the General Counsel's Brief and above, this Office recommends that the Commission find probable cause to believe that the National Republican Senatorial Committee and Stan Huckaby, as treasurer, violated 2 U.S.C. § 441a(h), 441a(f), 441b and 434(b) and 11 C.F.R. § 102.5.

III. DISCUSSION OF CONCILIATION AND CIVIL PENALTY

IV. RECOMMENDATIONS

1. Find probable cause to believe that the National Republican Senatorial Committee and Stan Huckaby, as treasurer, violated 2 U.S.C. §§ 441a(h) by making excessive in-kind contributions to Montanans for Rehberg in 1996.

2. Find probable cause to believe that the National Republican Senatorial Committee and Stan Huckaby, as treasurer, violated 2 U.S.C. § 434(b) by misreporting expenditures for media advertisements aired in connection with the 1996 U.S. Senate election in Montana.

3. Find probable cause to believe that the National Republican Senatorial Committee and Stan Huckaby, as treasurer, violated 2 U.S.C. §§ 441a(f) and 441b and 11 C.F.R. § 102.5 by making expenditures in connection with the 1996 U.S. Senate election in Montana from its non-federal accounts.

4. Approve the attached proposed conciliation agreement.

5. Approve the appropriate letter.

6/5/99
Date

Lawrence M. Noble
General Counsel

Attachment
Proposed Conciliation Agreement

Staff Assigned: Anne A. Weissenborn

FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Lawrence M. Noble
General Counsel

FROM Marjorie W. Emmons/Lisa R. Davis
Commission Secretary

DATE: May 11, 1999

SUBJECT: MUR 4378 - General Counsel's Report
dated May 5, 1999.

The above-captioned document was circulated to the Commission on **Thursday, May 6, 1999.**

Objection(s) have been received from the Commissioner(s) as indicated by the name(s) checked below:

Commissioner Elliott	XXX
Commissioner Mason	XXX
Commissioner McDonald	_
Commissioner Sandstrom	_
Commissioner Thomas	_
Commissioner Wold	_

This matter will be placed on the meeting agenda for

Tuesday, May 18, 1999.

Please notify us who will represent your Division before the Commission on this matter.