BEFORE THE FEDERAL ELECTION COMMISSION

APR 17 3 56 PM '98

DNC Services Corporation/ Democratic National Committee and Carol Pensky, as Treasurer	)	**MURs 4544 and 4407**

RESPONSE TO FACTUAL AND LEGAL ANALYSIS

In the summer of 1995, it became increasingly apparent that the President, a Democrat, and the U.S. Congress, controlled by the Republicans, were headed for a showdown on the Fiscal Year 1996 federal budget, with respect to treatment of the Medicare and Medicaid programs, funding for student aid, environmental protection, crime control and other issues. On August 9, 1995, the Republican National Committee presented to the Federal Election Commission, for its consideration in connection with a requested advisory opinion, the texts of three proposed advertisements. One of the proposed advertisements read, in pertinent part:

> Medicare, you see, is going bankrupt in seven years. That's right, bankrupt. . . Republicans think Medicare is too young to die. We won't let Medicare go bankrupt. . . That's why Republicans are saving Medicare. . . .
> President Clinton knows Medicare is dying, but he has done nothing to save it. . . If Clinton lets Medicare go bankrupt, you can keep your existing coverage--but only for seven years. If Clinton lets Medicare go bankrupt, you can keep your own doctor--but only for seven years. If Clinton lets Medicare go bankrupt, you can still get sick--but only for seven years. If Clinton lets Medicare go bankrupt, Medicare won't be there when you need it. Medicare will be gone.

On August 24, 1995, the Commission ruled that this advertisement, along with the two others, were generic Republican Party communications that "focus on national legislative policy and promote the Republican Party." Advisory Opinion 1995-25, CCH Fed. Elec. Camp. Fin. Guide ¶ 6162 at p. 12,109 (1995). The Commission acknowledged that the advertisements' "stated purpose--to gain popular support for the Republican position on given legislative measures and to influence the public's positive view of Republicans and their agenda--encompasses the related goal of electing Republican candidates to Federal office." Id. Nevertheless, the Commission found that such "[a]dvocacy of the party's legislative agenda is one

aspect of building or promoting support for the party that will carry forward to its future election campaigns." Id. Therefore, the Commission concluded, these advertisements were generic party communications, classifiable as administrative expenses or generic voter drive costs, not in-kind contributions to or expenditures or behalf of a specific candidate; and that the costs of the advertisements were allocable as generic voter drive costs between the RNC's federal and non-federal accounts. Id.

The Federal Election Campaign Act of 1971 as amended (the "Act") provides that, "Any advisory opinion rendered by the Commission. . . may be relied upon by . . . any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered." 2 U.S.C. §437f(c)(1)(B). Beginning in August 1995, the DNC, relying specifically on Advisory Opinion 1995-25, ran television advertisements contrasting the position of the Republicans in Congress and their leadership, on the issue of Medicare, with that of President Clinton and the Democrats. The first such advertisement, for example, read in its entirety:

> Medicare. Lifeline for our elderly. There is a way to protect Medicare benefits and balance the budget. President Clinton. Cut government waste. Reduce excess spending. Slow medical inflation. The Republicans disagree. They want to cut Medicare $270 billion. Charging elderly $600 more a year for medical care. $1,700 more for home care. Protect Medicare benefits or cut them? A decision that touches us all.

The DNC subsequently ran a number of similar advertisements contrasting the Republican and Democratic positions on budget and related issues before the Congress. Democratic state party committees also ran a number of these same advertisements, and other similar advertisements, with funding from the DNC.

Now, nearly two and a half years after issuing its advisory opinion, and after the DNC and RNC, and their state parties, expended millions of dollars in 1995 and 1996 on television advertising absolutely identical in content to that which was the subject of that advisory opinion, the Commission has concluded that there is reason to believe that this very same DNC/state party advertising was unlawful. Relying on a fundamentally flawed analysis completely at odds with all of its prior rulings on this subject, and on scraps of second and third hand information from

various journalistic accounts of the campaign, the Commission has found reason to believe that (1) the costs of the advertising constituted an in-kind contribution to the Clinton/Gore campaign and (2) the DNC improperly reported transfers of funds to its state committees, which transfers should have been reported as direct disbursements to the media firms that created and placed the advertising.

Neither finding has any support whatsoever in the law or the facts. The advertisements did not contain any electioneering message, and the costs of the advertising were therefore properly treated as costs for generic voter drive activity. Further, the Commission has already ruled, in another MUR, that transfers made by the DNC to state parties in identical circumstances were properly made and reported. Accordingly, the Commission should take no further action in this matter and should close the file.

I THE DNC AND STATE PARTY ADVERTISEMENTS WERE COMMUNICATIONS PROMOTING SUPPORT FOR THE PARTY, THE COSTS OF WHICH WERE PROPERLY TREATED AS COSTS OF GENERIC VOTER DRIVE ACTIVITY

The DNC's disbursements to two media firms for the issue advocacy advertising campaign in 1995 and 1996 were properly treated as national party administrative and/or generic voter drive expenses, which are not subject to limitation and which, under 11 C.F.R. § 106.5(b)(2), are subject to allocation between the DNC's federal and non-federal accounts. The same is true of the disbursements made by Democratic state party committees for this advertising. Instead, the Factual and Legal Analysis ("FLA") concludes that these disbursements should have been treated as in-kind contributions to Clinton/Gore '96 Primary Committee, Inc., in violation of 2 U.S.C. § 441(a)(2)(A), and/or excessive expenditures in connection with the general election campaign of President Clinton and Vice President Gore, in violation of 2 U.S.C. § 441a(d)(2). FLA at 26-27. Based on this finding, the Commission also found reason to believe that the DNC violated the prohibition on using non-federal money for such contributions to and/or expenditures on behalf of a federal candidate, 2 U.S.C. § 441b(a). Id. at 28.

The Commission's well-established rule is that the costs of a party communication are not treated as an in-kind contribution to or expenditure on behalf of a specific federal candidate unless

the communication clearly identifies that candidate and contains an "electioneering message" on his or her behalf. The DNC and state party advertising did not contain such an "electioneering message." Therefore, the costs of the advertising did not constitute an in-kind contribution to or expenditure on behalf of the Clinton/Gore primary or general committees ("Clinton/Gore").

A. Party Coordination With a Candidate Is Irrelevant

The FLA puts great emphasis on various scraps of evidence suggested that the DNC/state party issue advertising campaign "was the result of cooperation between the DNC and the President and his campaign organizations." FLA at 19. The FLA suggests that such cooperation, transform the costs of the advertising into an in-kind contribution to Clinton/Gore. At one point, the FLA suggest that such cooperation is to be considered in combination with the "content, timing and broadcast areas of the advertisements," id. at 16. At another point, the FLA suggests that party cooperation with a candidate in itself, with respect to a party communication, transforms the costs of the advertising into an in-kind contribution: "[T]hese matters involve expenditures for advertisements which appear to have been made with the cooperation of, or in consultation with, the candidate or his campaign staff, and which therefore appear to have been contributions regardless of whether advertisements contained an electioneering message or included reference to a clearly identified candidate." FLA at 23-24 (emphasis added).

That is not, and never has been, the law with respect to party communications. To the contrary, the law is that a party's coordination or cooperation with a candidate with respect to a party communication is utterly irrelevant in determining whether the costs of that communication should be treated as an in-kind contribution to the candidate.

It is the position of the DNC that a political party communication should be treated as an expenditure for a specific candidate--and thus as an in-kind contribution to or expenditure on behalf of the candidate--only when that communication expressly advocates the election or defeat of a clearly identified candidate. The reasons why "express advocacy" should be the standard are set forth in detail in the DNC's Response to the Complaint in MUR 4407, dated August 16, 1996, and will not be repeated here.

If "express advocacy" is the proper standard, it is clear that the Commission can take into

account only the content and timing of the party communication. Under the Commission's own regulation, 11 C.F.R. § 100.22(b), "express advocacy" is to be determined based solely on the wording of the communication, "with limited reference to external events, such as the proximity to the election." Further, it has been held that any reference to matters external to the wording of the communication cannot be considered in determining whether a communication "expressly advocates" the election or defeat of a specific candidate. E.g., Federal Election Commission v. Christian Action Network, No. 95-2600 (4th Cir. Aug. 2, 1996); Faucher v. Federal Election Commission, 928 F.2d 468 (1st Cir. 1991), cert. denied, 502 U.S. 87 (1991); Maine Right to Life Committee v. Federal Election Commission, 98 F.3d 1 (1st Cir. 1996), cert. denied, No. 96-1818 (Oct. 6, 1997).

We recognize that the Commission has not shared the view that the "express advocacy" standard governs party communications. See, e.g., FLA at 16-17 n. 14. Even under the Commission's own well-established view of the law, however, a party communication is attributable to a particular candidate, rather than treated as a generic voter drive expense, only if the communication refers to a "clearly identified candidate" and contains an "electioneering message." FLA at 12-13; FEC Advisory Opinion 1995-25; Advisory Opinion 1985-14; Advisory Opinion 1984-15. Manifestly, in determining whether a party communication contains an "electioneering message," the Commission is not entitled to consider factors beyond the content and timing of the communication. In Advisory Opinions 1984-15 and 1985-14, the Commission considered nothing beyond the pure wording and timing of the proposed advertisements. Similarly, in Advisory Opinion 1995-25, the Commission considered specific proposed advertisements submitted by the Republican National Committee. The Commission ruled, solely on the basis of this content analysis, that the costs of these advertisements should be treated as an administrative or generic voter drive expense under 11 C.F.R. § 106.5(b). The issue of coordination was nowhere mentioned in the Advisory Opinion.

The reason that coordination is irrelevant is that the Commission's rules and rulings presume that party communications are coordinated with the party's candidates. The "electioneering message" standard was precisely designed to be used to determine when a party communication that is coordinated with a candidate should be attributed to that candidate, and

therefore should be treated as an in-kind contribution to or expenditure on behalf of that candidate. This was explained very clearly by the Commission in its brief to the Supreme Court in the case of Colorado Republican Campaign Committee v. FEC, 116 S. Ct. 2309 (1996):

> First a party expenditure is coordinated [for purposes of section 441a(d)] only if it is attributable to a particular candidate (as distinct from "generic" appeals for support for the party's candidates as a group). That determination is made on a case-by-case basis and depends upon whether the communication "(1) depict[s] a clearly identified candidate and (2) convey[s] an electioneering message." Advisory Opinion 1985-14 at 11, 185; . . . If the expenditure is attributable to a particular candidate, it is then conclusively deemed to be coordinated with that candidate, based on the categorical determination that "[p]arty committees are considered incapable of making independent expenditures in connection with the campaigns of their party's candidates." Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 28-29 n. 1. See 11 C.F.R. § 110.7(b)(4)("party committees shall not make independent expenditures in connection with the general election campaign of candidates for Federal office"); FEC Advisory Opinion 1988-22, . . . (with respect to the campaign expenditures of political party committees, "coordination with candidates is presumed and 'independence' precluded"). . . .
>
> The FEC's determination that political parties are "incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates," DSCC, 454 U.S. at 28-29 n. 1, is entitled to substantial deference. That determination rests in part on the empirical judgment that party officials will of course consult with the party's candidates before funding communications intended to influence the outcome of a federal election.
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> Brief for Respondent, Colorado Republican, at 23-24, 27 (emphasis added).

In its decision in Colorado Republican, the Court held that section 441a(d) cannot constitutionally be applied to limit party committee expenditures on behalf of congressional candidates if those expenditures are in fact independent. 116 S. Ct. at 2317. Thus the Court struck down the Commission's presumption that party committees cannot make independent expenditures. Id. at 2318-2319. The Court specifically did not address, however, the questions of (1) whether section 441a(d) can constitutionally be applied to limit party expenditures which are in fact coordinated with candidates, or (2) if so, what is the proper test for determining when party expenditures count towards the section 441a(d) limits: "[W]e need not consider the Party's

further claim that the statute's 'in connection with' language, and the FEC's interpretation of that language, are unconstitutionally vague." Id. at 2317, see also id. at 2319-2320.

The Factual and Legal Analysis in the instant MURs suggests, at 11-12, that the Colorado Republican decision was somehow intended to narrow the rights of political parties, by allowing the Commission to treat every in-fact coordinated party communication as an in-kind contribution regardless of content. That suggestion is absolutely absurd, given that the Court specifically declined to address the standard for determining when coordinated party expenditures are attributable to a particular candidate and therefore trigger the Act's contribution and expenditure limits:

> [T]he opinions of the lower courts, and the parties' briefs in this case, did not squarely isolate, and address, party expenditures that in fact are coordinated. . . This issue is complex. . . .[P]arty coordinated expenditures do share some of the constitutionally relevant features of independent expenditures. But many such expenditures are also virtually indistinguishable from simple contributions. . . . Thus, a holding on in-fact coordinated party expenditures necessarily implicates a broader range of issues than may first appear, including the constitutionality of party contribution limits. . . .
>
> While [the parties' litigation] strategies do not deprive the parties of a right to adjudicate the counterclaim, they do provide a reason for this Court to defer consideration of the broader issues until the lower courts have reconsidered the question in light of our current opinion.

116 S. Ct. at 2320 (emphasis in original and added).

Thus, the current law, at least as interpreted by the Commission, remains that party expenditures which are in fact coordinated with a candidate are subject to limitation only if they contain an "electioneering" message. The contrary proposition in the Factual and Legal Analysis is not only contrary to the law, as represented by the Commission itself to the U.S. Supreme Court, but would produce absurd results. If mere coordination, without more, results in an "in-kind" contribution, then, for example, the fact that a candidate suggested that a party committee undertake a generic voter registration drive--in which no candidate is even mentioned--would make the costs of that registration drive an in-kind contribution to the candidate. That is not and never has been the Commission's view, let alone a constitutionally sustainable legal position.

For these reasons, in determining whether the disbursements for issue advertising were administrative/generic voter drive expenses or were, instead, attributable to a specific candidate (President Clinton), the only relevant factors are the content (and possibly other objective factors such as timing or geographic placement) of the advertising. The presence or absence of any coordination between the DNC and the President and/or his campaign is utterly irrelevant.

B. The DNC and State Party Advertising Contained No Electioneering Message

The FLA contends that, in addition to or apart from coordination, the "content, timing and broadcast areas of the advertisements appear calculated to bolster the President's bid for re-election." FLA at 16. The FLA goes on to conclude that, because the advertisements "address the policies of the major party candidates in a manner which appears calculated to encourage the viewer to vote for one candidate over the other," "the advertisements at issue meet both the 'clearly identified candidate' and 'electioneering message' tests." Id. at 24. In fact, it is clear that the advertising did not contain any "electioneering message" based on the content, timing or placement of this advertising.

1. The Language of the Advertisements Included No Electioneering Message

Although the Commission has defined "electioneering message" primarily by way of example in advisory opinions and enforcement matters, in each instance where the issue has been confronted, the Commission has premised its rulings on the language of the advertisement. If a clearly identified candidate is referenced or depicted, the Commission has then looked for explicit references to an upcoming election, identification of an individual in his or her capacity as a candidate for election to federal office, an exhortation to vote for a specific candidate or party, or some other explicit electoral message.

None of the relevant FEC advisory opinions or enforcement matters have found an electioneering message in an advertisement in which there was no reference to an election, no reference to a person's candidacy and no reference to taking action to remove or elect someone to office. In fact, the FEC advisory opinions regarding issue advertising have analyzed advertising indistinguishable from the DNC/state party issue advertising run in 1995 and 1996, and in those instances, have specifically concluded that the advertising did not contain an electioneering

message. For example, in FEC Advisory Opinion 1984-15, CCH Fed. Elec. Camp. Fin. Guide ¶ 5766 (1984), the Commission considered two television advertisements proposed by the Democratic Congressional Campaign Committee. One advertisement criticized "the President and his Republican supporters in Congress" for their farm policy, and referred to a joke by President Reagan to the effect that the farm crisis should be solved by "keeping the grain and exporting the farmers." The ad concluded with the line, "Let your Republican congressman know that you don't think this is funny." The second advertisement criticized the "President and his Republican allies in Congress" for their economic policies. The ad concluded with the line, "Let your Republican Congressman know that their irresponsible management of the nation's economy must end--before it's too late." The Commission concluded that, as long as the advertisements did not say "Vote Democratic," they would not be considered to contain an "electioneering" message, and their costs would not be subject to section 441a(d). Fed. Elec. Camp. Fin. Guide ¶ 5819 at 11,186.

Similarly, in Advisory Opinion 1995-25, discussed above, the Commission ruled that proposed RNC advertisements were generic party communications, including an advertisement that contrasted the Republicans' position on Medicare with that of President Clinton and criticized President Clinton, by name, no less than six times in the course of the advertisement.

In sharp contrast to those advertisements found to lack an electioneering message are a limited number of cases where the Commission has required attribution of party communication expenditures to a specific candidate. Generally, the Commission has required such attribution only for party communications which (1) contain an exhortation to vote for a specific party, e.g., Advisory Opinion 1984-15 (contrasting candidate statements with candidate record, coupled with exhortation to "Vote Republican"); or (2) refer to an individual's status as a candidate, e.g., Advisory Opinion 1985-14, CCH Fed. Elec. Camp. Fin. Guide ¶ 5819 (mailer stating "wave of the future could be an oil spill if Congressman X has his way," along with a list of campaign contributions to Congressman X from the oil industry).

In this case, as noted above, the issue advertising run by the DNC and state Democratic parties was actually modeled on the proposed RNC advertising specifically considered in Advisory Opinion 1995-25. Indeed, none of the DNC/state party issue advertisements contained an electioneering message. No advertisement contained any reference to an upcoming election,

no advertisement identified or referred to any individual as a candidate for office and no advertisement contained an exhortation to vote or any other explicit electoral message.

The FLA offers absolutely no evidence to the contrary. In fact, the FLA expressly concedes that the content of the DNC/state party advertising was about promoting the position of the Democratic Party on issues before the Congress and contrasting that position unfavorably with that of the Republicans and their leadership:

> The advertisements provided by the DNC have a similar tone and style to each other. In general, they discuss President Clinton's position on diverse subjects such as Medicare, the budget, education, health care taxes and immigration and contrast his views with those of the Republicans in Congress, particularly Senator Dole, who eventually became the Republican presidential nominee, and House Speaker Gingrich.

FLA at 18. The FLA goes on to suggest that some of the advertisements were "essentially negative attacks on Senator Dole and Speaker Gingrich" because they criticized these congressional leaders for their position on Medicare, citing one advertisement that read: "The Republicans in Congress. They never believed in Medicare." Id. The FLA further notes that some of the advertisements "characterize Republicans as opponents to President Clinton's policies," (FLA at 19, emphasis added), while others "specifically imply that Senator Dole and Speaker Gingrich are obstacles to passage of President Clinton's policies in Congress." Id. (emphasis added). Other advertisements, the FLA points out, "focused on the budget battle between the President and Congress, contrasting the President's budget plan with Republican plans to cut education, environmental protection and health care." Id.

All of these characterizations of the advertisements by the FLA are perfectly consistent with the fundamental nature of these advertisements as promoting the Democratic position on pending legislative issues with the Republican position, praising the former and criticizing the latter--exactly the nature of the advertisements considered in Advisory Opinion 1995-25. Nowhere does the FLA identify, in any DNC or state party advertisement, any words which referred to an upcoming election; identified or referred to any individual as a candidate for office; or exhorted viewers to vote or in any other way constituted any explicit electoral message.

For these reasons, based on their content, the DNC and state party issue advertisements

did not contain any electioneering message and, therefore, the costs of the advertising were not attributable as an in-kind contribution to any particular candidate under the Commission's rulings.

2. The Timing and Placement of the Advertising Are Consistent With Its Purpose Of Influencing Public Opinion on Legislative Issues and Do Not Indicate Any Electioneering Message or Purpose

The FLA suggests that the "timing" and "geographic focus" of the DNC and state party issue advertising were "calculated to further President Clinton's re-election efforts." FLA at 15. With respect to timing, however, the DNC and state party advertising was simply not run in proximity to the election. In fact, no DNC or state party issue advertisement appeared after the nomination of Robert Dole to be the Republican nominee for President at the 1996 Republican National Convention. Thus, no DNC or state party issue advertisement was run during the general election campaign for President, period. During the primary season, no DNC or state party issue advertisement ran in any primary state within 30 days before the primary election in that state.

The FLA provides no factual support for its assertion that the timing of the advertising was "calculated to further" the President's re-election. In fact, the only reference to timing in the FLA are citations from books suggesting that the advertising was run early--not in proximity to the election. FLA at 21. In addition, the FLA cites a book by Richard S. (Dick) Morris, Behind the Oval Office (1997), as stating that the advertising was put on "more or less continually until election day in '96", FLA at 17, citing Morris, supra, and that the "intent was to keep the advertisements on the air until election day." FLA at 17. In fact, however, the DNC and state party issue advertising did not run until election day; to the contrary, it was discontinued entirely at the very outset of the general election period. Thus, the timing of the DNC and state party advertising in no way suggests the existence of an "electioneering" message or purpose.

With respect to the geographic markets in which the issue advertising was run, the FLA again offers no evidence, other than a single quotation from the Morris book to the effect that the issue advertising "was concentrated in the key swing states. . . ." FLA at 17, citing Morris, supra. In fact, the DNC and state party legislative issue advertising was run in 33 states--65% of all the states in the country. And, whatever he might have implied in his book, Morris made clear under

oath, in his deposition before the U.S. House of Representatives Committee on Government Reform and Oversight, that the advertising was targeted to affect the votes, in Congress, of Republican Senators and Members of Congress who were on the fence about key pending legislative proposals, and to hold the votes of conservative Democrats, all specifically with a view toward winning the budget battle. He stated that the advertising was targeted:

> at States where moderate Republican Senators, moderate Republican Congressmen, and Republican freshmen and conservative Democrat boll weevils or yellow dogs or whatever they call them, blue dogs, lived, and targeted the media in those States deliberately to try to hold the conservative Democrats so that we could block a veto override, and to bombard the moderate Republicans so that we could break their discipline.
>
> Q. Did these also happen to be target swing states?
>
> A. Some were and some were not, many were not. For example, we advertised in Rhode Island, which is a Democratic State. We advertised in Vermont, which is too small a state to fuss with as a target. We advertised in New Mexico, which was at that point not a target State. We advertised in South Dakota, which we had no prayer of carrying. We advertised in Texas, which we never felt we could carry. . . .

Deposition of Richard S. Morris, before the Committee on Government Reform and Oversight, U.S. House of Representatives, August 21, 1997, page 54, line 12--page 55 line 3 (hereinafter "Morris Deposition")(emphasis added). Later in his deposition, Morris again emphasized, "the point I was trying to make, that these buys were primarily targeted at Republican and conservative Democratic Senators or Congressmen," id. at 133, lines 15-18, and provided a further state-by-state explanation of which Senators and Members of Congress were being targeted, by the advertising, to influence their positions in the Congress on the issues involved in the budget fight. Id. at 133-136.

Thus, to the extent that timing and geographic placement of the advertising are to be taken into account, these factors clearly indicate that the purpose of the advertising was to influence public opinion on legislative issues before the Congress, and that the advertising did not constitute or contain any "electioneering".

3. The FLA's Reliance on Subjective Intent is Completely Misplaced

The FLA places great reliance on its intention that the DNC and state party advertising

was "calculated to bolster the President's bid for re-election," FLA at 16, based on various scraps of evidence about the subjective intent of the consultants who created and placed the advertising. The FLA cites a passage from the book by Richard S. (Dick) Morris, Behind the Oval Office (1997) claiming that the advertising was the "key to Clinton's victory," FLA at 17 citing Morris, supra, and that the "intent was to keep the advertisements on the air until election day, in order to secure the President's nomination and re-election." FLA at 17. The FLA also cites a book by Bob Woodward, The Choice (1997), as establishing that "Clinton's re-election strategists decided. . . to use the DNC's money to further his re-election." Id. at 20. [1]

The FLA's reliance on passages from these books is completely misplaced, for two reasons. First, the subjective intent of the persons creating the advertisements is absolutely irrelevant. Second, even if it were relevant, the selective quotations used by the FLA have no credibility and, in the case of Mr. Morris, are rebutted by other portions of his own book and by his own sworn testimony.

a. Subjective Intent Is Irrelevant

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[1] The FLA also cites a well-publicized statement by the President at a May 1996 event for DNC donors, at which the President stated that the DNC advertising "has been central to the position I now enjoy in the polls." FLA at 22. It is not surprising that the issue advertising contributed to the President's legislative success in having the Congress ultimately adopt most of his proposals--since the very purpose of the advertising was to bolster public support for those legislative priorities, just as in Advisory Opinion 1995-25. And it is equally unsurprising that achieving legislative success helps a President's standing with the public. It is preposterous to conclude from these facts that the "purpose" of the advertising was to help the President's re-election, for purpose of analyzing the existence of an electioneering message as defined in FEC rulings.

The subjective intent of Mr. Morris and/or the other consultants hired by the DNC to create the advertising is simply beside the point. The Commission cannot take into account any factors other than the objective ones of content, timing and placement of the advertisements.

That the Commission is not permitted to consider factors beyond content, timing and placement was made explicit in the Commission's defense of the "electioneering message" standard against a claim of unconstitutional vagueness in the case of Colorado Republican Campaign Committee v. FEC, 116 S. Ct. 2309 (1996). There, the petitioners argued that the "electioneering message" standard is unconstitutionally vague because, among other things, it "invites intrusive and unjustified government investigation of a political party's conduct and motive" and thus "boils down to a classic 'totality of the circumstances' test in which the answer can never be known in advance." Brief for Petitioners at 39-40.

The Commission replied that the "statutory provisions. . . as construed by the Commission's advisory opinions, provide fully adequate warning as to the nature of the prohibited conduct" because "[p]eople of 'common intelligence,' . . . would have no difficulty understanding that an advertisement explicitly linking an attack on the record of an opposing candidate with his ongoing Senate campaign contained an 'electioneering message.'" Brief for the Respondent at 44 (citations omitted). The Commission explicitly relied on the lower court's finding, as to the advertisements at issue in that case, that "'any reasonable reader'" of the advertisement "'would leave the reader (or listener) with the impression that the Republican Party sought to 'diminish' public support for'" the candidate. Id. at 19 (citations omitted, emphasis added). Clearly, if it is possible to apply the "electioneering message" standard solely by reading or listening to or watching the party communication--as the Commission itself has told the U.S. Supreme Court--then it cannot be permissible for the Commission to consider, in applying that standard, any factors other than the content of the communication, and possibly its timing and placement. In particular, it cannot be permissible for the Commission to consider the subjective intent of those creating the advertisement, such consideration being a sure route to having the "electioneering" test declared unconstitutionally void for vagueness.

b. The FLA Offers No Credible Evidence With Respect to Subjective Intent

Even if subjective intent were somehow relevant--and it is not--the FLA offers no credible evidence to suggest that the "real" motivation for the advertising was to promote the President's re-election. First, the Woodward book cannot be considered credible evidence of anyone's intent, since Woodward was not involved in any way in the DNC's operations, or those of Clinton/Gore, and does not identify any of the sources for any of the propositions in the book that are cited by the FLA.

Second, the FLA's quotations from the Morris book are highly selective and misleading. While Morris at various points in his book indeed credits the advertising campaign post hoc with being a significant factor in the President's electoral victory, he clearly and specifically identifies the purpose of the advertising as being to win public support for the President's position on legislative issues pending before the Congress. Indeed, Morris identifies the roots of the issue advertising idea as being similar advertising Morris he created for Mr. Clinton when he was Governor of Arkansas:

> [W]e advertised throughout the governor's tenure, not to promote his re-election but to publicize his views on important legislative issues.

Behind the Oval Office at 140 (emphasis added). With respect to the 1995-96 effort, Morris says, similarly:

> The key was to advertise on legislative issues only, not to promote Clinton's candidacy. By focusing on these issues, Clinton could pass his program and build a vast base of support. I wanted to use such advertising to advance the President's legislative program at the expense of the Republicans, hoping to build national support as we had built local support in Arkansas.

Id (emphasis added). Morris emphasizes:

> I wanted to do what we had done in Arkansas: hammer home the difference between the Democratic and the Republican legislative and budget proposals. I knew that once voters learned the specifics about the massive cuts in the Republican budget and saw that Clinton wanted to balance the budget too, but sensibly, they would reject the Republican plan."

Id. at 141 (emphasis added).

Third, Morris' testimony under oath, before the U.S. House Committee on Government Reform and Oversight, clearly confirms that the purpose of the advertising was to influence public opinion on the budget and related legislative issues pending before the Congress. Morris testified that, in explaining the purpose of the advertising to the President, he said:

> [A]ll I want to do in these ads is win the budget fight. I am not particularly concerned at this point about reelection. The issue now is winning the budget fight.

Morris Deposition at 52, lines 6-9. Morris went on to explain that he had to convince some of the President's staff that the DNC should run such advertising to influence public opinion on these legislative issues:

> Panetta and Stephanopoulos gradually came around to the view that we should be doing the advertising, because they felt that it was the only way to win the budget fight, and I told them that I felt it was crucial that the President veto the Republican budget, and that the veto not be overridden, and that he be willing to accept a government shutdown and survive a government shutdown. . . .
>
> But during this entire process, it was an issue advocacy effort in just the same way as if we had advertised for health care reform in 1994 or for the stimulus package in 1993. Did it help the President get re-elected? Yeah, anything a President does helps the President get re-elected. Was it expressly designed for the President to get reelected and the substantive battle merely invented as a ruse? Absolutely not. . . . We couldn't even reach the issue of re-election given the President's popularity numbers until we won this [budget] fight.

Id. at 55 line 22 --56 line 3, lines 17-25, 56 lines 1-2. And as noted above, Morris explained in detail that the DNC and state party issue advertising was targeted, as to geographic markets, to influence Senators and Members thought to represent potential swing votes on the budget issues. Id. at 54-55, 133-136.

Thus, the FLA's reliance on selective quotations from Morris' book is simply misplaced. Morris himself has confirmed, both in the book and under oath, that the real purpose of the advertising was to influence the outcome of the budget fight and other legislative issues.

As the Commission recognized in Advisory Opinion 1995-25, such legislative issue advertising is intended "to gain popular support for the [the party's] position on given legislative measures and to influence the public's positive view of [the party] and their agenda. The Commission reasoned that such "[a]dvocacy of the party's legislative agenda is one aspect of

building or promoting support for the party that will carry forward to its future election campaigns." In the case of the DNC and state party issue advertising, not only the purpose but the effect of the advertising was to do precisely what A.O. 95-25 explains: gain popular support for the Democrats' position on the budget and thereby influence the public's positive view of the Democratic Party and our agenda. The advertising was intended to, and did influence, the perception of and prospects for the Democratic Party as a whole, up and down the ticket. Indeed, during the period the DNC and state parties ran the issue advertising, from August 1995 through early August 1996, public identification with the Democratic Party increased nearly 10 points. Of the 22 new seats the Democrats picked up in the U.S. House, 100% were in states where the DNC and/or state parties ran the issue advertising. Five of seven governorships won by the Democrats in 1996 were in states where the DNC and state parties ran issue advertising; three of four State Senate chambers where control was shifted from the Republicans to the Democrats were in such states; and five of six State House chambers where control shifted from the Republicans to the Democrats were in those states.

Thus, even if the "purpose" or "intent" of the advertising were somehow relevant--and it is not--it is clear that the purpose and intent of the DNC and state party advertising was to influence the legislative battle over the budget and other issues in Congress and thereby improve public perception of the Democrats generally--not to "electioneer" for President Clinton's re-election.

In summary, the content, timing and placement of the advertising all confirm the lack of any "electioneering" message. The subjective purpose of the advertising is irrelevant, but even if it could be taken into account, that purpose was clear: to influence the legislative battle in Congress. For these reasons, the DNC and state parties properly treated the costs of the advertising as costs of generic voter drive activity under the Commission's rules.

II. THE DNC'S TRANSFERS OF FUNDS TO STATE PARTIES WERE ENTIRELY LAWFUL

The FLA contends that the disbursements by state parties to the media firms that placed

the advertising were really DNC disbursements, because the DNC transferred federal and non-federal funds to the state parties which in turn used those funds to run the advertising. FLA at 25-26. The FLA suggests that based on the "timing" and "purpose" of these transfers, the disbursements by state party committees were "DNC funds, not state committee funds, and that the DNC used the state committee accounts to take advantage of state allocation ratios. . . ." Id. at 25. From this leap of logic, the FLA concludes there is reason to believe that "the DNC improperly reported the transfers to the state committees, which may have been payments to [the media firms] that were funneled through the state committees to disguise their origin," in violation of 2 U.S.C. §434(b)(4). Id. at 28.

This precise contention was considered and rejected by the Commission in MUR 4215. There, in 1994, the DNC had transferred federal funds to the federal accounts of several state parties and non-federal funds to the non-federal accounts of those parties--just as in this case. The state parties used those funds, in turn, to run generic advertising promoting the Democratic Party's message in the 1994 general election. The Office of General Counsel recommended that the Commission find probable cause to believe that the DNC violated the Act and the Commission's regulations because, OGC alleged, the DNC had made the transfers to the state parties with the intention that the funds be used for the advertising, and with the purpose of taking advantage of the state parties' allocation ratios.

On February 24, 1998, by a vote of 5-0, the Commission rejected the General Counsel's recommendation and found no probable cause to believe that the DNC violated the Act or Commission's regulations. In a Statement of Reasons dated March 26, 1998, and signed by all five Commissioners, the Commission explained that "there is no. . . Commission regulation which addresses, much less specifically restricts, the transfer of national party funds for a state party's generic voter activity or questions the purpose or intent of these transfers." Statement of Reasons at 2. The Commission noted that the state party committees gained control over the transferred funds; that the Act and Commission regulations explicitly state that there are not limits on the amounts a national party can transfer to a state party committee; and that:

> The regulations do not address instances, such as those at issue in this enforcement matter, in which the national party committee transfers federal and non-federal

> funds to state party committees directly from the national party committee's federal and non-federal accounts, and the state party committees later make expenditures to vendors for generic voter drive activity pursuant to their own allocation ratios.

Id. at 4.

The Commission's unanimous holding in MUR 4215 is clearly controlling in this case, where the material facts are absolutely identical. The Commission's regulations do not transform national party transfers to state parties into direct disbursements of some sort based on the purpose or intent of the transfers. The DNC properly reported all of its transfers to the state party committees. The state parties in turn properly reported all of their disbursements to the media firms. Manifestly there is no violation of the Act's reporting violations.

CONCLUSION

For the reasons set forth above, the DNC's disbursements for issue advocacy advertising in 1995 and 1996 were perfectly lawful and did not violate, in any respect, the Act or the Commission's regulations. Accordingly, the Commission should take no further action in this matter and should close the file.

Respectfully submitted,

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Dated: April 14, 1998