FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission
Staff Director
General Counsel

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

DATE: May 30, 2000

SUBJECT: Statement of Reasons for MURs
4553 and 4671, 4713, 4407 and 4544

Attached is a copy of the Statement of Reasons for MURs 4553 and 4671, 4713, 4407 and 4544 signed by Commissioner Scott E. Thomas.

This was received in the Commission Secretary's Office on Friday, May 26, 2000 at 3:44 p.m.

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

Attachments

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

In the Matter of

Dole for President, Inc. and Robert J. Dole, as treasurer; Dole/Kemp '96, Inc., and Robert J. Dole, as treasurer; Republican National Committee and Alec Poitevint, as treasurer; Senator Robert J. Dole	)	**MURs 4553 and 4671**
The Clinton/Gore '96 Primary Committee, Inc., and Joan Pollitt, as treasurer; The Democratic National Committee, and Carol Pensky, as treasurer; President William J. Clinton; and Harold M. Ickes, Esquire	)	**MUR 4713**
The Clinton/Gore '96 Primary Committee, Inc., and Joan Pollitt, as treasurer; The Democratic National Committee, and Carol Pensky, as treasurer; President William J. Clinton; Vice President Albert Gore, Jr.; and Clinton/Gore '96 General Committee, Inc., and Joan Pollitt, as treasurer	)	**MURs 4407 and 4544**

STATEMENT OF REASONS

COMMISSIONER SCOTT E. THOMAS

At issue in the above-captioned matters were a number of advertisements run by the Republican National Committee ("the RNC") and the Democratic National Committee ("the DNC") during the 1996 presidential election cycle. The Office of General Counsel recommended that the Commission find reason to believe the national party committees had coordinated these advertisements with their eventual presidential nominee and that, as a result, they had made excessive in-kind contributions to their presidential campaigns and impermissibly used "soft money" to do so. In the alternative, the Office of General Counsel recommended that the Commission find reason to believe that the national party committees had improperly relied on more favorable state party allocation ratios when funding these advertisements and thereby used too much "soft money."

In considering these matters, I disagreed with some of the General Counsel's recommendations. First, based primarily on the Commission's regulations, I voted against the General Counsel's recommendations which concluded that national party advertisements run in 1995 were "for the purpose of influencing" the 1996 presidential election. Based upon these same regulations, however, I supported the General Counsel's reason to believe recommendation that those advertisements run in 1996 were "for the purpose of influencing" the presidential election. Second, based on recent Commission precedent, I disagreed with the General Counsel's recommendation to find reason to believe that the national parties improperly transferred funds to state party committees. I believe my votes in these matters properly applied the Act, the Commission's regulations and Commission precedent while, at the same time, preserving the ability of political parties to exercise their First Amendment rights and comment on important issues of the day.

I.

In early 1996, the Republican Party began an advertising campaign known as the "Summer Media Program." The advertisements in that campaign criticized President Clinton and/or praised Senator Dole. The Republican Party spent over $18 million on this campaign. Beginning in August, 1995, the Democratic Party ran a similar advertising campaign but with advertisements which criticized Senator Dole and/or praised President Clinton. The Democratic Party spent over $44 million on its advertising campaign.

The advertisements run by the Republican Party and the Democratic Party in the 1996 election cycle generated a number of complaints. The first occurred on July 2, 1996, when Dole for President, Inc. ("Dole Committee") filed a complaint with the Commission against the DNC and the Clinton/Gore '96 Committee ("Primary Committee"). Asserting that "President Clinton personally directed and controlled from the White House several ad campaigns that were paid for by the DNC," complaint at 1-2, the complaint alleged that the Primary Committee had violated 2 U.S.C. § 441a(b) by effectively making expenditures in excess of the expenditure limitations for publicly funded candidates and 2 U.S.C. § 434 by failing to report these expenditures. In the alternative, the complaint alleged that the DNC had violated 2 U.S.C. § 441a(d) by exceeding the coordinated party expenditure limit for the 1996 election cycle and 2 U.S.C. § 434 by failing to report these coordinated expenditures. The Commission designated this matter MUR 4407.

On October 21, 1996, Dr. Rebecca Carley filed a complaint with the Commission against both the DNC and the RNC. Dr. Carley's complaint referenced statements made by the President of Common Cause in announcing a complaint filed by Common Cause with the Department of Justice. Asking for the appointment of an independent prosecutor, Common Cause had alleged:

> There are substantial grounds to believe that the Clinton/Gore '96 Primary Committee, Inc. (Clinton Committee), acting through the Democratic National Committee (DNC), and the Dole for President Primary Committee, Inc. (Dole Committee), acting through the Republican National Committee (RNC), have each engaged in an illegal scheme to circumvent federal campaign finance laws. Through these schemes, the Clinton Committee and the Dole Committee, and their agents, each committed knowing and willful violations of the federal election laws, involving tens of millions of dollars, during the 1996 presidential primary election.
>
> These matters warrant investigation to determine whether criminal violations of the federal campaign finance laws have occurred,

Common Cause letter to Attorney General Reno at 1 (October 9, 1996). Dr. Carley alleged that the DNC and the RNC each had committed "clear cut criminal violations of campaign contribution laws." Complaint at 1. The Commission designated the allegations involving the DNC and the Primary Committee as MUR 4544. The Commission designated the allegations involving the RNC and the Dole Committee as MUR 4671.

On October 30, 1996, the DNC filed a complaint with the Commission alleging that the RNC "designed, produced, distributed, and aired a television ad which conveyed an 'electioneering' message on behalf of Senator Robert Dole's campaign for President of the United States, paid for with funds that violate the limitations and prohibitions of the Federal Election Campaign Act." Complaint at 1. Referring to an RNC advertisement entitled "The Story", the complaint charged:

> [T]his ad constitutes *precisely* the type of candidate support encompassed under 2 U.S.C. §441a(d)(2). By failing to count the costs associated with this ad as § 441a(d) expenditures, the RNC has violated the spending limits imposed by § 441a(d)(2), and had failed to accurately report their expenditures under 2 U.S.C. §434(b)(4)(H)(iv).

Complaint at 1 (emphasis in the original). The Commission designated this matter MUR 4553.

Finally, on January 30, 1998, Dr. Lenora Fulani filed a complaint against the DNC, the Primary Committee, President Clinton, Mr. Harold Ickes, and others. Likewise relying upon the Common Cause complaint filed with the Department of Justice, the Fulani complaint alleged:

> [S]oon after the 1994 election, the respondents and their agents entered into a conspiracy ("the conspiracy") to prevent a challenge to respondent Clinton in the 1996 presidential primaries and caucuses,

especially a challenge from his left, by using their political control of the DNC to arrange for the expenditure of "soft money" in furtherance of this goal.

Complaint at 3. The Commission designated this matter MUR 4713.

On December 23, 1997 the Office of General Counsel submitted reports for Commission consideration which contained a factual and legal analysis of the allegations presented in MURs 4553 and 4671 involving the RNC and MURs 4407 and 4544 involving the DNC as well as responses to the complaints. On February 10, 1998, the Commission conducted votes on these matters. With respect to MURs 4553 and 4671, the Commission found reason to believe that the RNC made, and the Dole Committee received, an in-kind contribution from the RNC. Similarly, in MURs 4407 and 4544, the Commission found reason to believe the DNC made, and the Primary Committee received, an in-kind contribution from the DNC. The Commission also approved the General Counsel's recommendations to conduct an investigation into the activities of both the RNC and the DNC.[1]

On June 11, 1999, the Commission's Audit Division made a referral to the Office of General Counsel generated from an audit of the Dole Committee undertaken in accordance with 26 U.S.C. § 9038(a). This referral became MUR 4969. Similarly, on June 15, 1999, the Audit Division made a referral to the General Counsel's Office generated from an audit of the Clinton Committee undertaken in accordance with 26 U.S.C. § 9038(a). This matter became MUR 4970.

On January 11, 2000, the General Counsel sent General Counsel's Reports to the Commission regarding MUR 4969 (Dole) and MURs 4713 and 4970 (Clinton) to the Commission. Because the composition of the Commission had changed, the General Counsel made fresh "reason to believe" recommendations, rather than "probable cause to believe" recommendations based on the earlier unanimous findings. *Compare* 2 U.S.C. § 437g(a)(2) *with* (a)(3) and (a)(4)(A)(i). Given the similarities between the Dole and Clinton matters, the Commission considered and discussed these matters together at its meetings of January 27, February 1, February 2, February 3 and February 8, 2000. With respect to MUR 4969, the Commission split 3-3 on whether to find reason to believe that the RNC advertising program constituted an excessive in-kind contribution to the Dole campaign.[2] Commissioners Mason, Thomas and Wold supported reason to believe findings. Commissioners Elliott, McDonald and Sandstrom opposed such findings.

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[1] *It must be noted that these 1998 votes were unanimous.* Afterward, new commissioners were appointed and several votes at the agency confused the law and shattered any semblance of consistency. Thus, the jumbled mess occasioning this statement emerged. *See* Statement for the Record in Audits of Clinton/Gore and Dole/Kemp Campaigns by Commissioner Thomas (Dec. 23, 1998); Statement for the Record in Audits of 1996 Clinton/Gore and Dole/Kemp by Commissioners Thomas and McDonald (July 2, 1999); MUR 4378 *Statement of Reasons of Commissioners* Thomas and McDonald (August 10,1999).

[2] More specifically, the Commission split 3-3 on whether to find reason to believe the RNC violated 2 U.S.C. § 441a(a)(2)(A) for making excessive contributions; 2 U.S.C. §441b(a) and 11 C.F.R. § 102.5(b)

Similarly, the Commission split 3-3 on whether to find reason to believe that 1996 advertising by the DNC constituted an excessive in-kind contribution to the Clinton campaign. Commissioners Mason, Thomas and Wold supported such findings. Commissioners Elliott, McDonald and Sandstrom dissented.[3] With respect to *1995* advertising by the DNC, Commissioners Elliott, McDonald, Sandstrom and Thomas opposed finding reason to believe that the expenditures constituted an excessive in-kind contribution to the Clinton campaign. Commissioners Mason and Wold supported the finding.

The Commission also split on whether the national party committees improperly transferred national party funds to state party committees. In MUR 4969, Commissioners Mason and Wold voted to find reason to believe that the RNC violated 11 C.F.R. §106.5(a) and 2 U.S.C. § 434(b)(4) by transferring national party funds to state parties. Commissioners McDonald, Thomas and Sandstrom opposed such a finding. Commissioner Elliott was absent. Likewise, in MURs 4713 and 4970, Commissioners Mason and Wold supported a reason to believe finding that the DNC violated 11 C.F.R. §106.5(a) and 2 U.S.C. §434(b)(4). As they did in MUR 4969, Commissioners McDonald, Thomas and Sandstrom opposed that proposed finding. Once again, Commissioner Elliott was absent.

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for improperly using prohibited contributions; and 2 U.S.C. §434(b)(4) for improper reporting. With respect to the Dole Committee, the Commission split 3-3 on whether there was reason to believe the Dole Committee violated 2 U.S.C. § 441a(f) for knowingly accepting excessive contributions; 2 U.S.C. § 441b(a) for knowingly accepting prohibited contributions; 2 U.S.C. §§ 441a(b)(1)(A) and 441a(f), and 26 U.S.C. § 9035(a) for exceeding the overall expenditure limitation; and 2 U.S.C. §§ 434(b)(2)(C) and 434(b)(4), and 11 C.F.R. §§ 104.13(a)(1) and 104.13(a)(2) for improper reporting. The Commission also split 3-3 on whether Senator Dole violated 2 U.S.C. § 441a(f) for knowingly accepting excessive contributions; 2 U.S.C. § 441b(a) for knowingly accepting prohibited contributions; and 2 U.S.C. §§ 441a(b)(1)(A) and 441a(f), and 26 U.S.C. § 9035(a) for exceeding the overall expenditure limitation.

[3] With respect to the 1996 advertisements, the Commission split 3-3 on whether to find reason to believe the DNC violated 2 U.S.C. § 441a(a)(2)(A) for making excessive contributions; 2 U.S.C. §441b(a) and 11 C.F.R. § 102.5(b) for improperly using prohibited contributions; and 2 U.S.C. §434(b)(4) for improper reporting. With respect to the Primary Committee, the Commission split 3-3 on whether there was reason to believe the Committee violated 2 U.S.C. § 441a(f) for knowingly accepting excessive contributions; 2 U.S.C. § 441b(a) for knowingly accepting prohibited contributions; 2 U.S.C. §§ 441a(b)(1)(A) and 441a(f), and 26 U.S.C. § 9035(a) for exceeding the overall expenditure limitation; and 2 U.S.C. §§ 434(b)(2)(C) and 434(b)(4), and 11 C.F.R. §§ 104.13(a)(1) and 104.13(a)(2) for improper reporting. The Commission also split 3-3 on whether President Clinton violated 2 U.S.C. § 441a(f) for knowingly accepting excessive contributions; 2 U.S.C. § 441b(a) for knowingly accepting prohibited contributions; and 2 U.S.C. §§ 441a(b)(1)(A) and 441a(f), and 26 U.S.C. § 9035(a) for exceeding the overall expenditure limitation. With respect to 1995 advertisements, the reason to believe votes on the above statutory violations were 2-4 with Commissioners Mason and Wold supporting the findings and commissioners Elliott, McDonald, Thomas and Sandstrom opposed.

Later, on tally vote, the Commission also unanimously found no reason to believe that the Primary Committee, President Clinton and Harold M. Ickes violated any statute or regulation within the jurisdiction of the Federal Election Commission with respect to the other allegations, unrelated to the DNC advertising campaign, in MUR 4713.

II.

In deciding whether the advertisements at issue in these matters constituted in-kind contributions from the national party committees to the presidential committees, the Commission must apply a two-part test. First, the Commission must determine whether the national party committees "coordinated" the advertisements with the presidential committees. Second, the Commission must decide whether these advertisements were made "for the purpose of influencing" an election.[4]

With respect to the first test, I believe there is sufficient evidence to find that the national parties did coordinate their advertising with the presidential campaigns. With respect to the second test, the Commission's regulations at *11 C.F.R. § 110.8(e) create a* presumption that certain election year party activity is for the purpose of influencing a particular election. Accordingly, I voted to find reason to believe that the national party committees coordinated their advertising campaigns with the campaigns of their eventual presidential nominees and that those advertisements run during the 1996 presidential election year were "for the purpose of influencing the election." Under the Commission's regulations, however, the same kind of party activity undertaken during a non-election year is presumed to be for the purpose of "party building" and not for the purpose of supporting a specific candidate. Accordingly, I voted to find no reason to believe that party advertisements run during the non-election year were for the purpose of influencing an election.[5]

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[4] The tortured evolution of the Commission's analysis regarding party communications is laid out in the July 2, 1999 Statement for the Record issued by Commissioner McDonald and myself in connection with the public funding repayment votes relating to the audits of the Clinton and Dole campaigns and in the General Counsel's Reports in the matters at issue. Statement for the Record in Audits of 1996 Clinton/Gore and Dole/Kemp by Commissioners Thomas and McDonald (July 2, 1999); *see also* MUR 4969 General Counsel's Report at 9-12 (January 11, 2000); MURs 4713 and 4970 General Counsel's Report at 19-22 (January 11, 2000).

[5] The Office of General Counsel notes that its:

> specific *analysis and recommendations vary* somewhat between the First General Counsel's Report in MURs 4407 and 4544 and the First General Counsel's Report in AR#99-15 and MUR 4713. *This variance is the result* of both the generation *of additional information* during the investigation in MURs 4407 and 4544, and intervening development of the applicable laws.

MURs 4970, 4713 4407 and 4544 General Counsel's Report at 3 n. 3 (March 3, 2000)(emphasis added). Similarly, my votes changed from MURs 4407 and 4544 where I voted to find reason to believe that the entire DNC media advertisement campaign constituted an excessive in-kind contribution in order to allow the Office of General Counsel to conduct a thorough investigation of the matter. This "additional information" was incorporated into MURs 4713 and 4970 where I voted to find that the 1996 ads constituted an excessive in-kind contribution but that the 1995 expenditures were not for the purpose of influencing the election of a specific candidate. Significantly, none of the "additional information" presented in the General Counsel's Report convinced me to overturn the presumptions contained in 11 C.F.R. 110.8(e). *See* 11 C.F.R. § 110.8(e)(2)(iii) and discussion *infra* at 14-15.

A.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court upheld limits on contributions to federal candidates but ruled that a similar limitation on independent expenditures was unconstitutional. The Court recognized, however, that its ruling created many opportunities for evading the contribution limitations. If a would-be spender was able to pay for a television advertisement created or authorized by a candidate's campaign, for example, this would convert what was supposed to be an "independent" expenditure into nothing more than a disguised contribution. Indeed, the *Buckley* Court warned that contribution limitations would become meaningless if they could be evaded "by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities." 424 U.S. at 46.

In order to "*prevent attempts to circumvent the Act through* prearranged or *coordinated* expenditures amounting to disguised contributions," 424 U.S. at 47 (emphasis added), the *Buckley* Court treated "coordinated expenditures. . . as contributions rather than expenditures." 424 U.S. at 46. Thus, the *Buckley* Court drew a specific distinction between expenditure made "totally independently of the candidate and his campaign" and "coordinated expenditures" that could be constitutionally regulated. The Court defined "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." 424 U.S. at 78 (emphasis added).

The current language of the Act reflects the concerns of the *Buckley* Court that expenditures are not turned into disguised contributions through coordination with a candidate or his campaign.[6] The Act squarely states that an expenditure made "in

[6] The Act prohibits multi-candidate political committees from making contributions to any candidate and his or her authorized political committees with respect to any election for federal office which, in the aggregate, exceed $5,000. 2 U.S.C. § 441a(a)(2)(A). In addition, the national committee of a political party may make expenditures in connection with the general election of its Presidential candidate that do not exceed an amount equal to 2 cents multiplied by the voting age population of the United States. 2 U.S.C. § 441a(d)(2). These "coordinated party expenditures" are not subject to, and do not count toward the contribution limits of § 441a. The coordinated party expenditure limitation for the 1996 general election was $11,994,007.

Limits on party in-kind contributions or coordinated expenditures are essential. Only by putting a limit on the kind of party support that candidates would most like to receive—hard hitting TV ads attacking their opponent or friendly ads touting their own platform—can the opportunities for corruption or the appearance of corruption through contributions to the party be restrained. Wealthy donors who otherwise can contribute only $1,000 toward a presidential candidate's primary election, nonetheless can get a lot of 'credit' with a candidate for having contributed to the party, which in turn can provide such ad support. A PAC can contribute $15,000 per year to a national party committee (2 U.S.C. § 441a(a)(2)(B)), or $60,000 per presidential cycle, and an individual can contribute $20,000 per year (2 U.S.C. § 441a(a)(1)(B)), or $80,000 per presidential cycle. These are amounts large enough to command a candidate's attention. Thus, the only way to put some reasonable brake on the 'quid pro quo' problem is an overall in-kind limit on party support. That way, while in theory 200 'maxed out' PAC donors or 150 'maxed out' individual donors or some combination thereof might be able to claim credit for the full $12 million in party support of a presidential candidate, other donors could not. Stated another way, the limit on party support prevents an

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" and subject to the contribution limitations. 2 U.S.C. § 441a(a)(7)(B)(i). Moreover, section 431(17) of the Act defines "independent expenditure" as:

> [A]n expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made *without cooperation or consultation with* any candidate, or any authorized committee or agent of such candidate, *and which is not made in concert with, or at the request or suggestion of*, any candidate, or any authorized committee or agent of such candidate.

2 U.S.C. § 431(17)(emphasis added). Section 109.1(b)(4)(i) of the Commission's regulations "clarif[ies] this language"[7] and explains that an expenditure will not be considered independent if there is "*[a]ny arrangement, coordination, or direction* by the candidate or his or her agent prior to the publication, distribution, display or broadcast of the communication." 11 C.F.R. § 109.1(b)(4)(i)(emphasis added). The regulations further state that an expenditure is presumed not independent if:

> (A) Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate or by the candidate's agents, with a view toward having an expenditure made; or

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unlimited number of donors from laying claim to having given large contributions that correlate with party spending on behalf of the candidate. If the party committee can only spend a specified amount, the opportunities to effect presidential candidate support through the party are restrained, and the 'quid pro quo' opportunities are minimized.

The recent decision in the Tenth Circuit finding the party coordinated expenditure limits unconstitutional regarding House and Senate campaigns, *FEC v. Colorado Republican Federal Campaign Committee*, 2000 U.S. App. LEXIS 8952 (May 5, 2000), disregarded such analysis, mistakenly assuming that the 'conduit' provision at 2 U.S.C. § 441a(a)(8) solved all problems. That provision, however, only treats a contribution by a donor to a party committee as if it were a contribution to a particular candidate when the donor somehow 'earmarks' it for that purpose. Sophisticated donors easily avoid such 'earmarks,' yet find ways to make it known to candidates that they have given large sums to the party. Thus, the 'quid pro quo' problem remains, and the party coordinated expenditure limit is the only way to address it.

The Tenth Circuit also ignored information reported by the parties themselves that showed how donors can rout *unlimited* 'soft money' donations to the parties, and how that soft money can then be 'traded' for the 'hard money' used for the parties' coordinated expenditures. In theory, a single donor could give $12 million in soft money to the national party, the party could then trade that with various state parties for $12 million in hard money, and that donor could claim credit for having fully funded the party's entire $12 million in coordinated expenditure ads for the presidential campaign. The relative ease with which a very large soft money donor could facilitate huge outlays by the party for ads expressly urging the election of a particular presidential candidate, demonstrates even more clearly why the coordinated expenditure limit is needed.

[7] *FEC v. National Conservative Political Action Committee*, 647 F.Supp. 987, 990 (S.D.N.Y. 1986).

(B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent.

Id.

In my view, there was sufficient evidence to find reason to believe that the RNC advertisements were made in coordination with Senator Dole and the Dole Committee. In its report to the Commission on MUR 4969, the General Counsel's Office presented a considerable amount of evidence supporting this conclusion. MUR 4969 General Counsel's Report at 16-35 (January 11, 2000). Indeed, the Office of General Counsel found that the RNC and the Dole Committee "coordinated on the planning, fundraising, budgeting, targeting and content of the advertisements." *Id.* at 16. According to the General Counsel's Report:

> *[T]he record includes evidence of substantial communication between the RNC and the Dole campaign on every facet of the media campaign.* The evidence of coordination is such that it is difficult to distinguish between the activities of the RNC and the Primary Committee with respect to the creation and publication of the media advertisements at issue.

Id. at 31 (emphasis added). By effectively transferring the Dole media division to the RNC, the Dole campaign deliberately used RNC funds for Dole advertising spots at a time when funds were running low for the Dole campaign. The General Counsel's Report points out, for example, that the person selected to run the RNC media program, Don Sipple, had previously been the Dole Committee's "chief strategist and had control over its advertising message and strategy." *Id.* at 19. According to the General Counsel's Report:

> Sipple and the RNC recruited many Dole campaign veterans to help him in the new project, including Anthony Fabrizio, a pollster, Bob Ward, another pollster, Adam Stoll, Sipple's chief assistant and administrator, and Michael Murphy and Stuart Stevens, Dole media vendors. *Essentially, the entire Dole media division shifted to the RNC and continued its work of producing advertisements in support of Senator Dole's campaign.* They functioned so similarly that many vendors continued to invoice expenses and fill out forms with the understanding that they were working for Dole, and not the RNC.

Id. at 33 (emphasis added). The General Counsel's Report further reveals that:

> *Sipple continued to be employed by the Dole campaign even after he began working for the RNC.* Thus, Sipple had a dual role in crafting the message for the RNC and the Dole campaign at the same time. Along with the sharing of media advisors, the RNC also used footage in some of the advertisements that had appeared in earlier [Dole Committee] advertisements and that had been used for a film called "the American Hero" which was played at certain [Dole Committee] fundraisers.

Id. at 19-20 (emphasis added). This overlap was not limited to Mr. Sipple. For example, a May 24, 1996 memorandum from Dole Committee/ RNC pollster Bob Ward to dual Dole/RNC employee Tony Fabrizio not only demonstrates the overlap between the Dole campaign and the RNC, but also illustrates the substantive role played by these overlapping figures. The Ward memorandum indicates that the goals of the media program should be to "define Bob Dole, both personally and what he stand[s] for, and (2) reinforce the doubts people have about Bill Clinton." *Id.* at 26. The memorandum indicated that the way to accomplish these goals was to "put a straight negative up like 'Stripes' or 'Balanced Budget' that uses Clinton to whack himself, and simultaneously air a straight Dole issue-oriented positive, or the Dole story." *Id.*

The General Counsel's Report lays out a persuasive case that the Dole campaign used the RNC to run Dole campaign advertisements. Indeed, as Senator Dole candidly admitted:

> We had to spend a lot of money to win the nomination. . . *But we can, through the Republican National Committee. . . run television ads and other advertising.* It's called generic. It's not Bob Dole for President. In fact, there's an ad running now, hopefully in Orlando, a 60-second spot about the Bob Dole story: Who is Bob Dole? What's he all about.

Id. at 27, n.28 (emphasis added). Accordingly, I concluded that the RNC advertisements were coordinated with the Dole campaign.

Similarly, the Office of General Counsel presented a considerable amount of evidence indicating that the DNC advertisements were made in coordination with the Primary Committee. MURs 4713 and 4970 General Counsel's Report at 31-39. As was the case with the RNC and the Dole Committee, it appears that there was an overlap between staff used by the DNC and the Clinton campaign. According to the General Counsel's Report :

> It appears that the advertisements funded by the DNC and campaign advertisements funded by the Primary Committee were produced and placed for broadcast by the same team of media consultants (the "Media Team"), and that this Media Team in fact planned and implemented these nominally separate advertisements as a single,

integrated media campaign. It further appears that this *media campaign was planned at weekly creative meetings held at the White House*, and that an integrated budget for both sets of advertisements was planned and controlled by [the Deputy Chief of Staff to the President].

Id. at 31 (emphasis added). Likewise, just as the Dole campaign sought to use RNC funds to advance their campaign, it appears that the Clinton campaign sought to use DNC funds to advance its campaign. For example, in connection with the weekly meeting of February 22, 1996, Dick Morris wrote:

> Total Clinton Gore Money through May 28: $2.5 million. . . [u]nless Alexander is nominated and we cannot use DNC money to attack him. *. . . If Dole is nominated, we need no additional CG [Clinton-Gore] money for media before May 28 since we can attack him with DNC money.*

Id. at 39 (emphasis added). As was the case with the RNC and the Dole Committee, I believe there was sufficient evidence to find that the DNC advertising campaign was coordinated with the Primary Committee.

B.

Having found that the advertisements at issue were coordinated between the national party committees and their eventual presidential nominees, the question becomes whether these advertisements were made "for the purpose of influencing a federal election." If they were, they must be considered as a contribution by the party committees to their respective presidential nominees. On the other hand, if the advertisements were not for the purpose of influencing an election, they cannot be considered as contributions to the presidential campaigns.

Reliance on 11 C.F.R. § 110.8(e) is warranted by the Commission's unanimous decision in Advisory Opinion 1995-25. 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶6162. In that opinion, the RNC had asked whether proposed RNC disbursements for media advertisements focusing on national legislative activity, and promoting the Republican Party, should be considered as being made in connection with both federal and non-federal elections and, thus, allocated. The Commission concluded that such disbursements should be allocated.

In Advisory Opinion 1995-25, the Commission reasoned that where a national party committee seeks "to gain popular support for the [party's] position on given legislative measures, and to influence the public's positive view of [the party] and their agenda, [the activity] encompasses the related goal of electing [the party's] candidates to Federal office." Advisory Opinion 1995-25 at 12,109. The Commission found that, like other types of party building activity such as get-out-the-vote activity and voter registration drives, "[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.* In so finding, the Commission did not prohibit a political party from engaging in legislative advocacy that promotes the party; the Commission simply held that if it does so, expenditures for such activity must be paid for, in part, with federal funds.

The Commission's decision in Advisory Opinion 1995-25 specifically relies upon 11 C.F.R. § 110.8(e):

> *This result is also contemplated by the Commission's regulations at 11 CFR 110.8(e), which recognize that certain party-building activities under specific conditions can feature the appearance of the party's candidates at a "bona fide party event or appearance."* Advocacy 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. (emphasis added). This is significant because § 110.8(e) is directly applicable in determining whether a candidate appearance paid for by the party can be considered simply a party-building event or whether it should be considered "for the purpose of influencing" a specific candidate's election.

Section 110.8(e)(1) provides that:

> A political party may make reimbursement for the expenses of a candidate who is engaging in party-building activities, without the payment being considered a contribution to the candidate, and *without the unreimbursed expense being considered an expenditure counting against [presidential candidate expenditure limitations],* as long as—
>
> (i) The event is a bona fide party event or appearance; and
> (ii) No aspect of the solicitation for the event, the setting of the event, and the remarks or activities of the candidate in connection with the event were *for the purpose of influencing the candidate's nomination or election.*

11 C.F.R. § 110.8(e)(1)(emphasis added). In deciding whether an event or appearance is "for the purpose of influencing the candidate's nomination or election," the regulation states:

> An event or appearance meeting the requirements of paragraph (e)(1) of this section and occurring *prior to January 1* of the year of the election for which the individual is a candidate is *presumptively party-related.*

11 C.F.R. § 110.8(e)(2)(i)(emphasis added). Party expenditures after January 1, however, are presumptively for the purpose of influencing the candidate's election:

> Notwithstanding the requirements of paragraph (e)(1) of this section, an event or appearance occurring on or *after January 1* of the year of the election for which the individual is a candidate is *presumptively for the purpose of influencing the candidate's election*, and any contributions or expenditures are governed by the contribution and expenditure limitations of this part 110.

11 C.F.R. § 110.8(e)(2)(ii)(emphasis added). Although this regulation has its purest application in the context of party caucuses and fundraising gatherings, the Commission's reliance on this regulation in Advisory Opinion 1995-25 indicates the appropriateness of this rule in situations concerning party-paid ads.

Applying 11 C.F.R. § 110.8(e), I must presume that those advertisements run prior to January 1, 1996 were "party related" and not for the purpose of influencing the election of a specific candidate. 11 C.F.R. § 110.8(e)(2)(i). As a result, the costs of the advertisements should not be considered as excessive contributions. With respect to those advertisements run by the parties after January 1, 1996, however, I must presume that those advertisements were made "for the purpose of influencing the candidate's election." 11 C.F.R. § 110.8(e)(2)(ii). Accordingly, the costs of those advertisements should be viewed as contributions by the political parties to their respective presidential candidates.

Looking at the advertisements themselves, it is apparent that the result reached under § 110.8(e)(2) is appropriate. For example, the following advertisement entitled "Emma" was run by the Democratic Party from October 3, 1995 to October 17, 1995:

> Preserving Medicare for the next generation. The right choice.
> But what's the right way?
> Republicans say double premiums deductibles.
> No coverage if you're under sixty-seven.
> 270 billion in cuts, but less than half the money reaches the Medicare Trust Fund.
> That's wrong. We can secure Medicare without these new costs on the elderly.
> *That's the President's plan.* Cut waste. Control Costs.
> *Save Medicare.*
> Balance the *Budget*. The right choice for our families.

MUR 4713 General Counsel's Report at Attachment 5, 85 (January 11, 2000)(emphasis added). I can see no basis for concluding that this advertisement was run for the purpose of influencing the election of a specific candidate. The advertisement was run in the midst of the budget battle between the White House and Capital Hill over the budget for

fiscal year 1996 and ran over a year before the 1996 November election. It featured the Republican leadership on Capital Hill—Speaker Newt Gingrich and Senate Majority Leader Dole. Moreover, the text of the advertisement is connected to the legislative budget battle. Under § 110.8(e)(2)(i), this advertisement is properly viewed as party related lobbying activity.

Similarly, a review of the advertisements run after January 1, 1996, generally supports the conclusion reached by § 110.8(e)(2)(ii) that these advertisements "were for the purpose of influencing the candidate's election." A sampling of the Republican Party advertisements at issue here readily show that these ads were intended to influence the election and gather support for Senator Dole. For example, the RNC advertisement entitled "The Story" read as follows:

> DOLE: "We have a moral obligation to give our children an America with the opportunity and values of the nation we grew up in."
>
> ANNOUNCER: "Bob Dole grew up in Russell, Kansas. From his parents he learned the value of hard work, honesty and responsibility. So when his country called, he answered. He was seriously wounded in combat. Paralyzed, he underwent nine operations.
>
> DOLE: "I went around looking for a miracle that would make me whole again."
>
> ANNOUNCER: "The doctors said he'd never walk again. But after 39 months, he proved them wrong."
>
> ELIZABETH DOLE: "He persevered, he never gave up. He fought his way back from total paralysis."
>
> ANNOUNCER: "Like many Americans, his life experience and values serve as a strong moral compass. The principle of work to replace welfare. The principle of accountability to strengthen our criminal justice system. The principle of discipline to end wasteful Washington spending."
>
> DOLE: "It all comes down to values; what you believe in, what you sacrifice for, and what you stand for."

MUR 4969 General Counsel's Report at 38 (January 11, 2000). Obviously, this advertisement was run to gather support for Senator Dole's candidacy. This is particularly true since the advertisement, along with other advertisements run by the Republican Party, were "broadcast in states that were known as 'battleground states' where Senator Dole and President Clinton were competing for electoral votes and where

it was thought that the presidential race was close." *Id.* at 25. I cannot find that this advertisement was some sort of party-related legislative activity.

Similarly, the Democratic Party ran advertisements featuring President Clinton during 1996 which are undoubtedly for the purpose of influencing his election. For example, from July 24, 1996 through August 6, 1996, the Party ran an advertisement entitled "Economy." It reads as follows:

> Remember recession. Jobs lost. The Dole GOP bill tries to deny nearly 1,000,000 families unemployment benefits.
> Higher interest rates. 10,000,000 unemployed with a Dole amendment.
> Republicans try to block more job training.
> Today we make more autos than Japan. Record construction. Jobs.
> Mortgage rates down. 10,000,000 new jobs.
> More women owned companies than ever.
> The President's plan. Education. Job training.
> Economic growth for a better future.

MUR 4713 and MUR 4970 General Counsel's Report at Attachment 5, 79 (January 11, 2000). This ad ran well after the conclusion of the budget battle over 1996 fiscal year spending (President Clinton signed the final spending bill for fiscal year 1996 on April 26, 1996) and less than three months before the November election. Moreover, the text of the advertisement singles out Bob Dole (who by this time had resigned as a United States Senator and obviously was not part of the legislative process) and contrasts his record unfavorably with President Clinton. Given the timing and the content of the advertisement, there is little doubt that it was for the purpose of influencing the election.

Section 110.8(e) also states that:

> The presumptions in paragraphs (e)(2)(i) and (ii) of this section may be rebutted by a showing to the Commission that the appearance or event was, or was not, party-related, as the case may be.

11 C.F.R. § 110.8(e)(2)(iii). I do not believe that the presumptions in paragraphs (e)(2)(i) and (ii) should be rebutted in the above-captioned matters. I recognize there may be good arguments to conclude, for example, that the Democratic Party advertisements run in 1996, but prior to April 26, 1996, were party-related support of the President's legislative plan. For example, the advertisement entitled "Slash" reads as follows:

> America's children. Millions pushed toward poverty by higher taxes. Over a million get substandard health care. Education cut $30,000,000,000. Environmental protection gutted. Drastic *Republican budget cuts*. But *the President's plan* protects Medicare. Medicaid. Education. Environment. And even Republican leaders agree it *balances the budget* in seven years. Congress should not slash

> Medicare and Medicaid. *It should balance the budget* and do our duty to our children.

MUR 4713 and MUR 4970 General Counsel's Report at Attachment 5, 87 (January 11, 2000)(emphasis added). Similarly, it can be strongly argued that the advertisement entitled "Victims" is not for the purpose of influencing an election:

> Every Year in America 1,000,000 women are victims of domestic abuse.
> It is a violation of our nation's values.
> It's painful to see. It's time to confront it.
> The President's plan. Increase child support enforcement.
> Work not welfare to encourage stronger families.
> Improve and enforce domestic violence laws. 1,000,000 women.
> A test of our national character. A challenge we will meet.

Id. at 89. "Slash" ran from January 10, 1996 through January 24, 1996 and "Victims" ran from March 7, 1996 through March 27, 1996—both ads ran in the middle of the 1996 budget battles. The timing and the text of these advertisement certainly cast doubt on a conclusion that they were for the purpose of influencing the election of the President. The presumptions of paragraph (e)(2)(i) and (ii) are so strong, however, that I do not believe they should be rebutted in the above-captioned cases.

Section 110.8(e) recognizes the varying activities of a political party and provides a balanced, measured and easily understood test for characterizing specific party activity. On the one hand, it is indisputable that the primary goal of a political party is to win elections. The Act reflects this basic understanding when it defines "political party" solely in election-related terms:

> The term "political party" means an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization.

2 U.S.C. §431(16)(emphasis added). The courts have similarly noted that "[t]he party's ultimate goal. . . is to obtain control of the levers of government by winning elections. . ." *Nader v. Schaffer*, 417 F.Supp. 837, 844 (D. Conn. 1976), *aff'd mem.*, 429 U.S. 989 (1976). *See also Rosario v. Rockefeller*, 458 F.2d 649, 652 (2d Cir. 1972), *aff'd.*, 410 U.S. 752 (1973)(a political party is composed of "individuals drawn together to advance certain aims by nominating and electing candidates who will pursue those aims once in office."). Indeed, the standard dictionary definition of a "party" is that of "an organized group which tries to elect its candidates to office." Webster's New World Dictionary (1966).

On the other hand, the Commission has recognized that political parties engage in a number of activities which fall outside the FECA's jurisdiction. For example, through

the years, the Commission has allowed political parties to pay for a number of activities exclusively out of non-federal funds. These included costs paid by a state party committee for the purpose of influencing reapportionment activities, Advisory Opinion 1982-14, Fed. Elec. Camp. Fin. Guide (CCH) ¶5655; and costs paid by a state party committee to administer primary elections, Advisory Opinion 1991-33, Fed. Elec. Camp. Fin. Guide (CCH) ¶6035. Elsewhere, the Commission has stated that "[l]obbying activity in general is exempt from the Commission's jurisdiction," Advisory Opinion 1984-57, Fed. Elec. Camp. Fin. Guide (CCH) ¶5799 at 11,140, and that "expenditures relating only or exclusively to ballot referenda issues, and not to elections to any political office, do not fall within the purview of the Act." Advisory Opinion 1989-32, Fed. Elec. Camp. Fin. Guide (CCH) ¶5989 at 11,629. The Commission also has recognized, however, that political party disbursements for media advertisements focusing on national legislative activity, and promoting a political party, should be considered as being made in connection with both federal and non-federal elections and should be allocated. Advisory Opinion 1995-25, *supra.*

Section 110.8(e) provides a clear and specific test for determining when party activity is for the purpose of influencing the election of a specific candidate and when it is not. In so doing, it recognizes the traditional political party role in winning elections for its candidates as well as party activity which is part-building and need not be counted as a contribution to a specific candidate. In my view, the Office of General Counsel and my colleagues should have applied the easily understood standards of § 110.8 in these matters.

C.

As I consider the varying approaches of others in these matters, I might focus my criticism on my friend and colleague, Commissioner McDonald, who always heretofore has joined me in finding similar party communications to be in-kind contributions or coordinated expenditures, *See, e.g.*, Statements of Reasons in MURs 4378 and MUR 2370. However, his votes here seem to have been occasioned, in part, by the inconsistent application of the law by his colleagues on the other side of the aisle.[8]

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[8] Over the years, the Commission has had a number of split votes on whether a party committee's ads constituted an in-kind contribution to one of its candidates. Until today, my Republican colleagues regularly have opposed making such a finding in these cases. *See, e.g.*, MUR 4378 (National Republican Senatorial Committee); MUR 2370 (West Virginia Republican Party); MUR 2186 (Colorado Republican Party, all but one ad); and MUR 2116 (National Republican Congressional Committee).

It is important to note that in a case where there has been a split vote, the Commission has not exercised, by a majority vote of four members, any of its duties or powers and taken a substantive position on the contested issues. *See* 2 U.S.C. § 437c(c). Thus, as a matter of law, an enforcement action where there has been a split vote does not create an official agency position. *See also Common Cause v. Federal Election Commission*, 842 F.2d 436, 449 n.32 (D.C.Cir. 1988)(An opinion of less than four Commissioners is "not binding legal precedent or authority for future cases. The statute clearly requires that for any *official* Commission decision there must be at least a 4-2 majority.")(emphasis in the original). For this reason, I view those situations where a majority of the Commission *has* found party ads subject to the contribution or coordinated expenditure limits to be most relevant. *See, e.g.*, Advisory Opinion 1984-15, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5766 (Republican Party ads); Advisory Opinion 1985-14, Fed. Elec. Camp. Fin. Guide

In this regard, the votes of Commissioners Mason and Wold do seem at odds with their prior actions. Less than six months earlier, they voted in MUR 4378 to dismiss a similar matter against the National Republican Senatorial Committee (the "NRSC") and the Republican senate campaign of Montanans for Rehberg which also involved advertisements run in 1996. Despite evidence that representatives of the NRSC and the Rehberg campaign met to discuss "specifics" of a 1996 NRSC media campaign, MUR 4378 General Counsel's Probable Cause Report at 37 (November 13, 1998), Commissioners Mason and Wold rejected the General Counsel's factual conclusion that coordination existed (*id.* at 52-55) and, instead, found a "lack of evidence of coordination" between the NRSC and the Rehberg campaign. MUR 4378 Statement of Reasons of Commissioners Wold, Elliott and Mason at 12 (October 28, 1999)("MUR 4378 Statement"). They accepted, however, the General Counsel's finding of coordination with respect to the DNC and the Clinton campaign in MURs 4713 and 4970.

Commissioners Mason and Wold also found, with much certainty, that the 1996 election year advertisements run by the NRSC (saying "Tell him it's time to vote for term limits" after accusing Senator Baucus of raising taxes "by more than $2600 per family" and staying in Washington "for twenty-one long, liberal years") were not for the purpose of influencing an election: "It appears to us incontestable that the ads were expressly lobbying (i.e., non-federal election) expenditures." MUR 4378 Statement at 12. They reached this conclusion despite a candidly-worded press release issued by the NRSC which bluntly stated that it intended to target certain Democratic Senators with these negative campaign ads in connection with the 1996 Senate elections. Under the heading, "GOP SENATE CAMPAIGN COMMITTEE PREPARING TO USE CLINTON 'TAXED TOO MUCH' COMMENT *IN 1996 SENATE RACES*," John Heubusch, Executive Director of the NRSC, stated "[w]e plan on letting *voters* know their Senator supported the Clinton tax increase and, that now, the President said the tax increase was too big." September 2, 1997, Response of Dennis Rehberg to Document Request (*emphasis added*). The NRSC Press Release expressly indicated that "[p]ossible ad targets include Senator Max Baucus/MT. . . ." *Id.* Mr. Heubusch promised that:

> We will ensure that *voters* know their Democratic Senator and Democratic Senate *candidates* 'raised taxes too much.' This is a great issue for the GOP because *voters* always suspected it was true—and now the President has himself confirmed it.

Id. (emphasis added). Elaborating for the *Washington Times*, Mr. Heubusch enthusiastically explained: "*We're going to hammer the Democrats* who voted for this and ask them if they are going to apologize too. He's [President Clinton] created *a great 1996 election issue.*" *Washington Times*, October 20, 1995 (emphasis added). Despite

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(CCH) ¶ 5819 (Democratic Party mailer); and MUR 2186 (Colorado Republican Party ad). As a practical matter, however, the Commission's split votes undoubtedly send a very confusing message to the regulated community on whether a party advertisement should be considered "for the purpose of influencing" the candidacy of a specific candidate.

this evidence, Commissioners Mason and Wold insisted that the 1996 NRSC advertisements were simply lobbying efforts and not communications made in connection with a federal election. With respect to the respondents now before us, however, Commissioners Mason and Wold found that not only were the 1996 advertisements for the purpose of influencing an election, but the 1995 non-election year advertisements were, as well.[9]

Like Commissioner McDonald, I believe the Commission has sent confusing signals and given the impression that the law has not been applied even-handedly. Nonetheless, I voted to find the most obvious of the ads in question to be in-kind contributions because I think it is essential that the statute be enforced in a way that will effect congressional intent. If the Commission fails to apply the law properly in other cases, the complainants should pursue that failure in court pursuant to 2 U.S.C. § 437g(a)(8).[10]

III.

I also voted against the Office of General Counsel's alternative recommendation that the RNC and the DNC violated 11 C.F.R. § 106.5(a) and 2 U.S.C. § 434(b). If the Commission found that the expenditures for the advertisements were not contributions, and were therefore allocable party expenditures, the Office of General Counsel questioned whether the expenditures were properly allocated under the state party allocation formula. Taking a position rejected by the Commission in the past, the Office of General Counsel contended that the funds should have been allocated under the national party allocation formula and not a state party formula since it believed the national party committees had transferred funds to the state parties with the intention that those funds be used for advertisements.[11]

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[9] In deciding MUR 4378, Commissioners Mason and Wold also attached considerable importance to the fact that the NRSC had paid for a portion of the advertisements with federal funds under the Commission's allocation regulations. They wrote:

> To the extent that the ads in question, like nearly all political party expenditures, arguably had some (in this case federal) electoral purpose, it strikes us that the allocation regulations are precisely the *correct means* for addressing them.

MUR 4378 Statement at 12 (emphasis added). Just as the NRSC advertisements were allocated, so too were the Democratic Party advertisements at issue here. Unlike the NRSC advertisements, however, Commissioners Mason and Wold decided to find that the Democratic Party ads were in violation of the FECA. Although the allocation regulations may have been the "correct means" for addressing the NRSC ads, they were apparently not the "correct means" for addressing the Democratic Party ads.

[10] I note that of the four examples of split votes cited in footnote 8, only one generated a lawsuit pursuant to 2 U.S.C. § 437g(a)(8). In that case the district court in fact ruled the Commission's failure to find a violation contrary to law. *Democratic Congressional Campaign Committee v. FEC*, 645 F.Supp. 169 (D.D.C. 1986). On appeal, the D.C. Circuit remanded the case to the Commission to have a Commissioner Statement of Reasons prepared, but the complainant then oddly dropped the matter. 831 F.2d 1131 (D.C.Cir. 1987).

This issue was settled by the Commission several years ago when it specifically allowed the use of the state party formula in MUR 4215. In that matter, the DNC transferred federal and non-federal funds to the Michigan Democratic State Central Committee ("MDP") in 1994 so the MDP could place certain television advertisements entitled "Deal." The DNC considered this buying of air time to have been state party generic voter activity. Rather than apply the 60% federal/ 40% non-federal formula set forth in the Commission's regulations for national party expenditures for its transfers, the DNC transferred funds to the MDP under the state party formula which permitted 78% of the payment to the media buyer to be made with non-federal funds.

In MUR 4215, the Commission unanimously rejected the General Counsel's argument that the funds transferred by the national party to the state party should have been allocated under the national party formula and not the state party formula. The statute and Commission regulations permit unlimited transfer of funds among state and national political committees of the same party. 2 U.S.C. § 441a(a)(4); 11 C.F.R. § 110.3(c). In a Statement of Reasons signed by all five voting Commissioners, the Commission explained:

> *We voted against the General Counsel's recommendations because there is nothing in the current regulations of the Commission that clearly prevents the activity at issue here.* To the contrary, the regulations permit a national party committee to make unlimited transfers to a state party committee. 11 C.F.R. § 110.3(c). *Under the Commission's regulations, it is reasonable to view these transferred monies as if they were state party monies that can be utilized as the state party allocation rules allow.*
>
> The sole regulatory restriction on the use of transferred national party funds is they cannot be used by a state party either to pay for campaign materials which otherwise may qualify for the "volunteer exception," *see* 11 C.F.R. §§ 100.7(b)(15)(vii) and 100.8(b)(16)(vii), or to pay for certain presidential get-out-the-vote activities that are exempted from

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[11] In 1990, the Commission created a comprehensive scheme governing the allocation of federal/non-federal expenses by party organizations. Pursuant to 11 C.F.R. § 106.1(e), party committees making disbursements for specified categories of activities in connection with both federal and non-federal elections must allocate those expenses between federal and non-federal accounts in accordance with 11 C.F.R. 106.5. These categories include administrative expenses, fundraising costs, the costs of certain activities which are exempt from the definitions of "contribution" and "expenditure," and the costs of generic voter drives. 11 C.F.R. § 106.5(a)(2)(i-iv). "Generic voter drives" include activities that "urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate." 11 C.F.R. § 106.5(a)(2)(iv).

Generally, state party committees using separate federal and non-federal accounts must allocate the costs of the above categories of expenses, including generic voter drives, using the "ballot composition method." 11 C.F.R. § 106.5(d). National party committees, other than Senate or House campaign committees, must allocate the costs of generic voter drives according to fixed percentages; in non-presidential years the fixed amount for the federal account's share is at least 60%. 11 C.F.R. § 106.5(b)(2)(ii).

> treatment as a contribution or expenditure. *See* 11 C.F.R. §§ 100.7(b)(17)(vii) and 100.8(b)(18)(vii). [omitted footnote points out that these regulatory restrictions have "no application to the case at hand where televised advertisements are involved"]. *Significantly, there is no similar 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 and intent of those transfers.*

MUR 4215 Statement of Reasons at 1-2 (March 26, 1998)(emphasis added). The General Counsel's Reports in the above-captioned matters hopes to overturn the result with which it disagreed in MUR 4215.

The rationale stated in MUR 4215 applies with equal force to the above-captioned matters. The Commission's regulations still permit national parties to make unlimited transfers to state party committees. 11 C.F.R. § 110.3(c). Moreover, there is still 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 and intent of these transfers." MUR 4215 Statement of Reasons at 1-2. Just as the Commission took no action against the respondents in MUR 4215, I do not believe the Commission should take any action against the national party committees in the above-captioned matters.

The Office of General Counsel attempts to distinguish MUR 4215 by asserting that in that matter: "The Commission found nothing improper in such transfers, noting, among other things, that that [sic] the state committees 'clearly retained ultimate control over the disbursements, not the DNC.'" MUR 4969 General Counsel's Report at 46 n. 36 *quoting* MUR 4215 Statement of Reasons at 3 (March 26, 1998). By contrast, the Office of General Counsel felt that in MUR 4969, "the RNC did retain total control over the amounts transferred through the state committee accounts." *Id.*

The Office of General Counsel's analysis misses the mark in several respects. First, as the above-quoted portion of the MUR 4215 Statement of Reasons demonstrates, a "control" test was not determinative to the Commission's decision in MUR 4215. Rather, the central rationale for the Commission's decision in MUR 4215 was the permissive nature of the Commission's regulations which allowed a national party committee to make unlimited transfers to a state party committee. 11 C.F.R. § 110.3(c). Although the Commission's regulations placed some restrictions on transferred national party funds, *see, e.g.*, 11 C.F.R. §§ 100.7(b)(15)(vii) and 100.8(b)(16)(vii), they placed no restrictions on the use of those funds for generic voter activity once the funds had been deposited into the accounts of the state party.

Second, as a matter of fact, the amount of control exercised by the state parties in MUR 4215, *i.e.*, the disbursement of funds deposited in state accounts, was the same as that exercised by the state parties in the above-captioned matters. Following the language

quoted by the Office of General Counsel from the Commission's Statement of Reasons in MUR 4215, the Commission went on to explain (in language not quoted in the General Counsel's report) that:

> The funds at issue actually had been transferred to the state parties. *In transferring these funds, the DNC relinquished, and the state parties had gained, control over those funds.* Moreover, each state party decided whether to accept and spend the funds transferred by the DNC. . . The state party committees could have rejected the funds offered by the DNC.

MUR 4215 Statement of Reasons at 3-4 (emphasis added). In other words, once the national party funds had been transferred to the accounts of the state party, it can be said that "the state parties had gained control over the funds." *Id.*

In MUR 4215, "the DNC made transfers to the respective state Democratic Party committees, which in turn used the DNC funds to pay the television stations involved." MUR 4215 General Counsel's Report at 5 (January 29, 1998). This appears to have been the same procedure as that followed by the national party committees in the above-captioned matters. For example, in MUR 4969, national party funds were actually deposited into state party accounts and disbursed by the state parties: "[t]he advertising invoices from the vendors were actually paid by the respective state Republican Party committees in the respective broadcast states, although the funds originated at the RNC." MUR 4969 General Counsel's Report at 45 (January 11, 2000). Similarly, "most of the payments from the DNC to the media vendors were made through intermediate *transfers through state committee accounts*." MUR 4713 and MUR 4970 General Counsel's Report at 55 (emphasis added). Just as the state party committee in MUR 4215 had gained control over DNC funds once they had been transferred to and deposited in a state party committee account, so too the state party committee in MURs 4713 and 4970 gained control over DNC funds once they had been transferred to and deposited in a state party committee account.

Once again, however, it must be emphasized that the issue of control is relatively insignificant under the current regulatory scheme. In a footnote, the Commission's Statement of Reasons in MUR 4215 noted the Supreme Court's interpretation of 2 U.S.C. § 441a(a)(4) and the Court's recognition of the flexibility inherent in the use of funds transferred from national party committees to state party committees:

> *See FEC v. Democratic Senatorial Campaign Committee ("DSCC")*, 454 U.S. 27, 40-41 (1981)("Money transferred to the state committee presumably would be spent as the state committee decided."). On the other hand, the Supreme Court also recognized that the national party "easily could insist that funds transferred to a state committee could be utilized in a certain manner." 454 U.S. at 41.

Id. at 4 n. 2.

In its proposed "soft money" regulations, the Commission is currently considering changes to its regulations which would prevent national party committees from taking advantage of a state party committee's allocation formula.[12] The Notice of Proposed Rulemaking for those regulations recognizes that current allocation rules allow a national party committee to take advantage of a state party allocation formula:

> [T]he differences between the allocation methods applicable to national party committees and those applicable to state and local party committees create an incentive for a national party committee that wants to engage in a mixed activity to transfer hard dollars to a state or local party committee and have the recipient committee *conduct the activity using more favorable allocation ratios. This problem exists under the current rules.*

63 Fed. Reg. 37721, 37730 (July 13, 1998)(emphasis added). I personally favor this change in the Commission's "soft money" regulations and hope that my colleagues will join me in this regulatory review. Until this change is made in the Commission's comprehensive regulatory scheme for the allocation of party activity, however, I must follow the current regulations and the precedent established by a unanimous Commission in MUR 4215.

IV.

It was my hope that the Commission could have concluded these matters under the test provided at 11 C.F.R. § 110.8(e). Even if the Commission had accepted little from the RNC and the DNC in terms of a civil penalty, a conciliation agreement based on 11 C.F.R. § 110.8(e) would have given important guidance to the political parties and their candidates for the upcoming 2000 elections. Such a settlement would have provided the regulated community with clear direction as to when a party advertisement will be considered "for the purpose of influencing" the election of a specific candidate.

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[12] One such approach, for example, would "seek to limit the incentive for national party committees to transfer funds to state and local party committees in order to take advantage of the recipient committee's more favorable allocation ratios. 63 Fed. Reg. 37721, 37730 (July 13, 1998). This approach:

> . . .would require a national party committee that transfers hard dollars to a state or local party committee to include a written communication identifying the state or local party committee activity for which the transferred funds are to be used. The national party committee would also be required to include a copy of the written communication in its next regularly scheduled disclosure report to the Commission. *See* section 106.5(b) of variation two.
>
> The recipient state or local party committee would then be required to use the transferred funds for the identified activity, and pay any additional costs incurred in the identified activity entirely with hard dollars. This would ensure that funds that originate with a national party committee are used in accordance with the rules that apply to national party committees.

Id.

Certainly, there is nothing complicated about the January 1 "bright line" test. Perhaps, most importantly, application of § 110.8(e) would eliminate the inconsistencies which currently exist. Until § 110.8(e) is applied by the Commission in such matters, I fear that similar advertising campaigns will continue to be labeled as "incontestable lobbying" in some instances and "for the purpose of influencing" in others.[13]

May 25, 2000
Date

Scott E. Thomas
Commissioner

[13] This Statement of Reasons is being issued well beyond the time called for in the FEC's regulations at 11 C.F.R. §4.4(a)(3). In an effort to coincide with the public availability of the underlying MUR file, I awaited that process. Now that one of the complainants has filed suit against the agency and the matter has become public, see Money & Politics, May 25, 2000, I see no reason to further await the processing of the underlying file.