CLINTON GORE 96

August 13, 1997

Lawrence M. Noble, Esquire
Office of General Counsel
Federal Election Commission
999 E St., N.W.
6th Floor
Washington, D.C. 20463

RE: MUR 4544
Clinton/Gore '96 Primary Committee, Inc. and Joan Pollitt, as treasurer

Dear Mr. Noble:

This is the response of the Clinton/Gore '96 Primary Committee (the "Committee") and Joan Pollitt, as Treasurer, to the complaint filed in the above-captioned MUR. As more fully explained below, the Committee respectfully requests that the Federal Election Commission (the "Commission" or "FEC") find no reason to believe that any violation of the Federal Election Campaign Act of 1971 (the "Act") (2 U.S.C. § 431 *et seq.*) as amended, occurred and close this matter.

Statement of the Case

Complainant filed with the Commission a two paragraph "complaint" containing no references to the Committee and no description of any facts constituting a violation of the Act. The sole reference in the complaint is an oblique reference that all statements made by Ann McBride, President of Common Cause, at a news conference on October 9, 1996 are true.[1] Complainant provides no other facts of her own knowledge or personal belief.[2]

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1 While Common Cause has previously sought and been denied Department of Justice action on the matters discussed at this press conference, the Committee has not been notified of a similar Common Cause complaint at the Commission.

2 A clear reading of this complaint plainly indicates that it is the actions of the Commission, rather than of the Committee, which are being complained of.

Discussion

I. The complaint should be dismissed on the basis that the FEC failed to notify the Committee within 5 days of receiving the complaint.

The Commission failed to notify the Committee of the complaint within five days after receipt, thus, the complaint is defective under 2 U.S.C. § 437(g)(a)(1). The United States Code specifically requires that the Commission notify, in writing, and within five days, any person alleged in the complaint to have committed a violation. 2 U.S.C. § 437(g)(a)(1). The Commission's stamp of receipt indicates that it was received on November 1, 1996, however, the Committee was not notified of the complaint until July 29, 1997--exceeding the statutory requirement by 266 days. Since the Commission failed to comply with the law, this complaint is defective and should be dismissed.

II. The complaint is legally insufficient as a matter of law and completely devoid of any factual support, compelling its immediate dismissal.

The Commission's regulations require a complaint, in order to be valid, to provide a "clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction....." 11 C.F.R. § 111.4(d)(3). The complaint in this matter does not satisfy this requirement because it fails to provide any facts which might constitute a violation of FECA or any FEC regulations.

The regulations provide that a complaint does not need to be based on personal knowledge but should be accompanied by identification of the source of information which gives rise to the complainant's belief in such statements. 11 C.F.R. § 111.4(d) (2). However, the source of information cannot be the sole basis of the complaint. The complainant must identify within the complaint the alleged violations of law. Where, as in the present case, there are no facts or allegations constituting a violation of law, the complaint is deficient and should be dismissed.[3]

The complaint is completely devoid of any facts.[4] Complainant fails to state any claim which violates FECA or any FEC regulation. The complaint merely claims that the statements made by Ann McBride of Common Cause (in her October 9, 1996 press conference) should be investigated, without reciting any facts or describing any violation, as is required by the Commission's regulations. Amid the unrelated information within the complaint regarding the efficacy of the Commission and need for truth, there are no factual allegations which even suggest a possible violation of law.

The Committee cannot properly prepare a response to facts or allegations which have never

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[3] A complaint must be based on factual allegations found within the four corners of the complaint itself.

[4] Not one mention of Clinton/Gore '96 is made in the complaint.

been expressed. The absence of any specific allegation makes it impossible for the Committee to provide a meaningful response because in fact there is nothing to respond to. Therefore, the Committee is denied the opportunity to effectively demonstrate that no action should be taken, as provided in 2 U.S.C. § 437g(a)(1).

Accordingly, the complaint fails to provide "a clear and concise recitation" of the facts which constitute a violation of FECA or FEC regulations.[5] Merely stating that the Commission should investigate Ms. McBride's allegations without identifying what, if any, violation has occurred is insufficient grounds to constitute a valid complaint under 11 C.F.R. § 111.4(d)(3), and this matter should be dismissed.

III. To the extent that the FEC mistakenly construes this complaint as a legitimate complaint, the Committee incorporates its response to MUR 4407.

While it is the Committee's position that the complaint is invalid, to the extent that the FEC construes the complaint otherwise, we incorporate by reference our response to MUR 4407 filed with the Commission on August 19, 1996. The issues discussed by Ms. McBride are addressed therein, and a copy is attached to this response (*See* attachment 1). In addition, a copy of the Department of Justice response to Ms. McBride's allegations is also incorporated and attached hereto (*See* attachment 2). For the reasons stated in both of those documents, this complaint should be immediately dismissed.

Conclusion

The Commission failed to notify the Committee of the complaint within five days of receipt, thus the complaint should be dismissed. Moreover, the complaint is deficient for failing to state any activity which violates a provision of the Act or the regulations. Accordingly, the Committee respectfully requests that the Commission find no reason to believe that any violation of the Act or of the Commission's regulations occurred with respect to the actions taken by the Committee.

Sincerely,

Lyn Utrecht, Esquire
General Counsel
Clinton/Gore '96 General Committee, Inc.

Eric F. Kleinfeld, Esquire
Chief Counsel
Clinton/Gore '96 General Committee, Inc.

Attachments

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[5] In accordance with 11 C.F.R. § 111.5 (b), the Commission should have immediately notified all parties involved that no action should be taken on the basis of the complaint for failure to comply with the requirements of 11 C.F.R. § 111.4(d)(3).

ATTACHMENT 1

BEFORE THE FEDERAL ELECTION COMMISSION

IN THE MATTER OF	)	
CLINTON/GORE '96 PRIMARY COMMITTEE, INC.	)	MUR 4407
AND JOAN POLLITT, AS TREASURER	)	

RESPONSE TO COMPLAINT

I. INTRODUCTION

This is the Response of the Clinton/Gore '96 Primary Committee, Inc. (the "Committee") and Joan Pollitt, as Treasurer, to the complaint filed by the Dole for President Committee (the "Complainant" or "Dole Committee") and designated by the Federal Election Commission (the "FEC" or "Commission") as Matter Under Review ("MUR") 4407. As fully demonstrated below, the Dole Committee's politically motivated complaint is factually and legally insufficient to be considered, absolutely devoid of any evidence or support, and should be dismissed by the Commission forthwith. In addition, the material submitted below will demonstrate conclusively that the Commission should find no reason to believe that the Committee has violated any provision of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 et. seq. (the "Act" or "FECA").

II. FACTUAL BACKGROUND

On July 15, 1996, the Committee received a complaint filed by the Dole Committee, supported solely by excerpts from The Choice, a book authored by Bob Woodward, alleging that the Committee had exceeded the expenditure limit set forth at 2 U.S.C. § 441a(b). Specifically, the Dole Committee alleges that a series of television advertisements paid for by the Democratic National Committee (the "DNC") were "personally directed and controlled" by President Clinton, and solely because of that one alleged "fact", the value of the ads should be added to the Committee's spending. Without identifying a single advertisement and without any other support, the Dole Committee arbitrarily values the DNC ads at $25 million.

III. DISCUSSION

A. The Dole Complaint Is Legally Insufficient As a Matter Of Law And Is Completely Devoid Of Any Factual Support, Compelling Its Immediate Dismissal.

1. The Dole complaint fails to demonstrate that a specific FECA violation has occurred.

The Commission's regulations require a complaint, in order to be valid, to provide a "clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction . . . ." 11 C.F.R. § 111.4(d)(3). The Dole complaint does not satisfy this requirement because it fails to provide any facts which might constitute a violation of FECA or any FEC regulations.

The Dole Committee complaint is so devoid of facts it only alleges two - - (1) that President Clinton "personally directed and controlled from the White House" several DNC television advertisement campaigns and (2) that the ads cost $25 million Complaint at 1-2. However, these are, in actuality, unsupported assertions made by complainant and not facts upon which a complaint can be based. Nor can this Committee possible prepare and submit an adequate response in light of the paucity of factual material in the complaint. To which ads is the Dole Committee referring? When did they air? How was the $25 million cost derived? The complaint neither identifies nor describes any text of the advertisements at issue or when the advertisements were shown. In the absence of these key facts, this Committee is clearly left to guess as to what the complainant is referring.

In addition, the Dole complaint provides absolutely no facts as to how the President impermissibly "controlled" advertisements or on what date such events occurred, nor does it explain why "control," even if it existed, would constitute a violation. The complaint merely states that President Clinton "personally directed and controlled from the White House several ad campaigns that were paid for by the DNC." Complaint at 2. [1]

The two simple facts alleged by the Dole Committee do not describe a violation of the Act. Even if the Committee were to concede their truthfulness -- which it does not -- the DNC could certainly spend $25 million on television advertisements, outside the limitations of 2

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[1]As more fully explained herein, presumably, the Dole Committee means "coordination" when it alleges control, since nothing in the Act or the Commission's regulations pertains to "control". Most importantly for this analysis is the fact that nothing in the Act, regulations or the Commission's Advisory Opinions requires coordinated party expenditures or generic party expenditures, whether or not coordinated, to be subsumed into a presidential candidate's spending limit or somehow converted into an obligation of that candidate's principal campaign committee.

U.S.C. § 441a(d) as long as the appropriate legal standard as to content of the ads is met. No where does the complainant even allege that the ads contained any sort of electioneering message. Unquestionably, and as more fully explained below, the absence of an allegation of electioneering leaves the complaint totally devoid of any allegation of a violation of the Act.

Accordingly, contrary to the explicit requirements of 11 C.F.R. § 111.4(d)(3), the Dole complaint fails to provide "a clear and concise recitation" of the facts which constitute a violation of FECA or FEC regulations. The Dole Committee is alleging an expenditure limit violation but without, at minimum, providing the basic facts of how and when a violation occurred. Even if the complaint's vague descriptions of meetings were true -- there would be no violation of the Act. Merely stating that a FECA violation occurred without providing more specific facts regarding an actual occurrence of a violation is insufficient to constitute a valid FEC complaint under 11 C.F.R. § 111.4(d)(3), and this matter should be dismissed.

2. The use of the Woodward book as a source of information for an alleged FECA violation is facially insufficient and must be found invalid.

The Dole Committee's allegations are based solely on excerpts from Bob Woodward's book, The Choice. Complaint at 1, 3. However, this reliance on the Woodward book as a basis for an FEC complaint is inadequate and misguided. Mr. Woodward has no personal knowledge of any meetings in which television advertisement scripts were ever discussed or reviewed by President Clinton. He merely reconstructed what he thought to have occurred. In no way can Woodward's reporting be considered a truthful and accurate representation of events and conversations.[2]

Mr. Woodward even admits his own limitations on discovering the facts for his book. In a chapter titled "a Note to Readers," Woodward writes: "this [book] is the best version of the story I could write based on the information available to me." Bob Woodward, The Choice 11 (1996). By his own language the author admits that he is telling a "story" and that this is simply one version of the story. It may not be the only version, and it may not be the correct or accurate version, but is the Woodward version. Most compelling, however, is Woodward's subtle admission that he did not have all information, but just certain "available" information. Id.

Thus, the Dole complaint is wholly based on Mr. Woodward's own version and interpretation of events and conversations in which he did not personally participate or witness. At least one similar account has been held to be an insufficient basis for the Commission to make a finding. Federal Election Commission v. GOPAC, 917 F. Supp. 851, 864 (D.D.C. 1996). To allow this insufficient complaint to proceed would indeed be a violation of the "letter and spirit"

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[2]Attached to this response is a copy of a letter from General Counsel Lawrence M. Noble to the Washington Post taking issue with certain inaccurate statements in Woodward's book.

of 11 C.F.R. § 111.4. The Commission should not allow a complaint based on such "third-hand" reporting as probative nor as sufficient enough evidence that this Committee has committed a FECA violation. For these reasons, the Commission must find the Dole complaint, in its present form, invalid under 11 C.F.R. § 111.4.

B. Prior FEC Advisory Opinions Were Relied Upon By The DNC And Compel Dismissal Of The Complaint.

Even if the Commission determines that the inadequate complaint filed by the Dole Committee is sufficient to further consider this matter, the complaint must still be dismissed on the grounds that the DNC relied upon prior Commission Advisory Opinions ("AO"s) that are identical in all material respects to the facts herein. Pursuant to 2 U.S.C. § 437f (c) --

> (1) Any advisory opinion rendered by the Commission under subsection (a) of this section may be relied upon by: . . .
>
> (B) Any person involved in any specific transaction or activity which indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.
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> (2) Notwithstanding any other provision of law, any person who relies upon any provision or finding of an advisory opinion . . .and who acts in good faith in accordance with the provision and findings of that advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act . . .

See also 11 C.F.R. § 112.5. In undertaking its ad campaign, the DNC unquestionably relied upon a prior FEC AO, 1985-14, in which the Commission advised, in key part, that proposed party committee expenditures for television advertisements, including those without an electioneering message or an exhortation to vote for that party, "will not be subject to the Act's limitations." Fed. Election Campaign Finance Guide (CCH) ¶5819. The Commission concluded that such advertisements would not be subject specifically to the limits of 2 U.S.C. § 441a(d), regardless of whether the ads were viewed by prospective voters of the party's candidates. To the contrary, according to the Commission, the limits of 2 U.S.C. § 441a(d) would apply only where an advertisement (1) depicted a clearly identified candidate and (2) conveyed an electioneering message.

The facts, in particular the advertisements, herein are materially indistinguishable from the ads considered by the Commission in AO 1985-14. Whereas the texts included as part of the AO covered three issues, the economy, the farm crisis and the oil industry, similarly, the DNC ads of concern here cover a variety of issues, including the budget, Medicare, education, crime, and the environment. Even more importantly, some of the ads considered by the Commission in the AO contained the closing phrase "Vote Democratic". Id. None of the DNC ads at issue contain such a phrase or any exhortation to vote, clearly making the DNC issue ads one step further removed from the electioneering message required by the FEC for application of 2 U.S.C.

§ 441a(d).

Advisory Opinion 1995-25 was similarly relied upon by the DNC and lends additional protection to the Committee. Fed. Election Campaign Finance Guide (CCH) ¶6162. In that AO, the Commission considered the texts of three ads, one on the Balanced Budget Amendment and two on Medicare, one of which mentioned President Clinton's name six times without a single reference to an election. Id. The Commission explicitly recognized that party committees may make expenditures for what the Commission called "legislative advocacy media advertisements", which would not be subject to the limits of 2 U.S.C. § 441a(d), unless the test contained in AO 1985-14 was satisfied. Fed. Election Campaign Finance Guide (CCH) ¶ 6162. Such legislative advocacy media advertisements were distinguishable by the Commission in AO 1995-25 for focusing on "national legislative activity" and promoting the party. Id. The Commission stated that "[a]dvocacy of the party's legislative agenda is one aspect of building or promoting support for the party that will carry it forward to its future election campaigns." Id.

A review of the texts of the DNC's legislative advocacy ad at issue here reveals that these ads are materially indistinguishable from the ads considered by the Commission in AO 1995-25. The clear unmistakable language of the texts relates in their entirety to national legislative activity. Similarly, the DNC ads simply cannot be materially distinguished from the 1985-14 ads in order to find an electioneering message. A comparison of the texts demonstrates there are no real differences. As a result of the DNC's reliance on this AO, the Committee must be protected from any sanction or adverse action under the Act. Accordingly, the Commission is precluded from finding reason to believe that any violation of the Act has occurred, and, instead, consistent with 2 U.S.C. § 437g, the Commission is compelled to dismiss the complaint.

C. The DNC Legislative Advocacy Ads Lack Express Advocacy, Lack Electioneering and Fall Outside the Commission's Jurisdiction, Including the Limitations of 2 U.S.C. § 441a(b) and (d).

As demonstrated below, none of the DNC advertisements contain express advocacy, or even, at a minimum, electioneering. In the absence of such a message, there is simply no legal basis for the costs of the ads to be applied to the limitations at 2 U.S.C. § 441a(b) or (d).

1. The DNC Ads Do Not Expressly Advocate the Election or Defeat of a Clearly Identified Candidate.

a. The express advocacy standard as it exists today.

If the Commission were to accept that the Dole Committee complaint contains a sufficient allegation that certain unidentified DNC television advertisements are subject to the Act's limitations on coordinated party expenditures at 2 U.S.C. § 441a(d), it must then determine the appropriate standard to use in analyzing the texts of the ads. The appropriate standard is that found in the Commission's regulations at 11 C.F.R. § 100.22(a), and, applying that standard to

the ads in questions, it can clearly be determined that the costs thereof are not subject to the limits of 2 U.S.C. § 441a(d), because none of the ads expressly advocated the election or defeat of any clearly identified candidate.

The Commission regulations, at § 100.22, define expressly advocating as

> any communication that - (a) Uses phrases such as "vote for the President," re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"
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> (b) When read as a whole, and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because - (1) The electoral portion of the communications is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22. In light of the recent ruling in Colorado Republican Federal Campaign Committee v. Federal Election Commission, No. 95-489 (decided June 26, 1996), party communications should be subject to the Acts limitations only when the communications contain express advocacy. In order to avoid unconstitutional vagueness and overbreadth, 2 U.S.C. § 441a(d) must be construed to apply only to those coordinated party communications that contain express advocacy. Colorado Republican, No. 95-489.

However, section 100.22, the Commission's definition of "express advocacy" goes beyond the Buckley decision and is, in fact, a codification of both Buckley v. Valeo, 424 U.S. 1, 44 n. 52 (1976), in subsection (a) and Federal Election Commission v. Furgatch, 807 F.2d 857, 865 (9th Cir. 1987), cert. denied, 484 U.S. 850 (1987) in subsection (b). Few courts have accepted the application of the Furgatch definition of express advocacy. In fact, in Maine Right to Life v. Federal Election Commission, 914 F. Supp. 8, 13 (D. Me. 1996), the district court invalidated 11 C.F.R. § 100.22(b) as beyond the power of the FEC and ruled that only the specific words such as those listed in subsection (a) constitute express advocacy.

At least two additional courts have limited the express advocacy standard to that contained in 11 C.F.R. § 110.22(a). In Federal Election Commission v. Christian Action Network ("CAN"), the court held that

> the only expenditures subject to the statutory prohibition are those that "expressly advocate" the election or defeat of a clearly identified candidate . . . by the use of such words as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject," . . .

894 F. Supp. 946, 951 (W.D.Va. 1993) aff'd, 1996 WL 431996 (4th Cir.). See also, Federal Election Commission v. Survival Education Fund, 65 F.3d 285 (2d Cir. 1995).

Accordingly, the correct standard is that found in 11 C.F.R. § 100.22(a), the "specific words" test.

b. The "four corners" of the DNC advertisements do not contain express advocacy

When analyzing the specific words in the text of a communication to determine whether express advocacy is present, the Commission may only look for and at the specific words themselves, i.e., the "four corners" of the communication. The Supreme Court's decision in Buckley does not permit a judicial inquiry beyond the words used in a television advertisement. Additionally, "courts generally have been disinclined to entertain arguments made by the Commission that focus on anything other than the actual language used in the advertisement." CAN, 894 F. Supp. at 958.[3]

Examination of the "four corners" and the specific words of the DNC television advertisements can lead only to the conclusion that the advertisements are not express advocacy under 11 C.F.R. §100.22. None of the advertisements expressly advocate the election or defeat of any candidate under the specific words test adopted by the courts in CAN, Maine Right to Life or Survival Education Fund.

The advertisements do not contain pointed exhortations to vote for or against particular

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[3] "[M]essages conveyed by imagery are susceptible to even greater misinterpretation than those that are conveyed by the written or spoken word. Consequently, if courts were to begin considering the images created by a communication to determine if a call to electoral action was present, the likelihood that protected speech would be chilled would be far greater. . . . To expand the express advocacy standard enunciated in Buckley [to include an analysis of the imagery of an advertisement] would be to render the standard meaningless. Such an expansion of the judicial inquiry would open the very Pandora's Box which the Supreme Court consciously sought to keep closed." CAN, 894 F. Supp. at 958.

persons. The advertisements are devoid of any language that directly exhort the public to vote. Even the few references to the Republican congressional leadership or other unambiguous references to the identity of particular candidates do not contain the required specific words.[4] The language of the DNC television advertisements educated viewers on legislative issues. The advertisements informed the public on the likely results of the legislative agenda of the Republican Congress and contrasted it with President's policies.

Nowhere in the advertisements were viewers asked to vote for or against any candidate. None of the advertisements requested any immediate action of the viewers.[5] No election was ever mentioned during the advertisements. Instead, viewers were presented with the President's positions and accomplishments on legislative issues such as Medicare, Medicaid, education, environment, welfare reform, Social Security, and a balanced budget. Viewers were told that the Administration's accomplishments and the President's plans sharply contrasted with some of the positions held and actions taken by the Republican Congress. The DNC advertisements represent the very type of issue advocacy the Buckley Court sought to exempt from governmental regulation.[6]

Accordingly, in the absence of express advocacy, there is no legal basis to apply the costs of the ads to 2 U.S.C. § 441a(b) or (d).

2. Even under the Commission's broadened definition, the DNC ads do not contain express advocacy.

Even accepting the broader interpretation of express advocacy as contained in 11 C.F.R. §100.22(b), i.e., the "reasonable minds could differ" test, all of the DNC ads fall short of express advocacy. Reasonable minds could certainly not dispute what the DNC's advertisements urged the viewers to do - nothing. The advertisements make no appeals for the viewer to vote, call anyone, or do anything. The advertisements merely provide facts about legislative issues that by their nature invoke the names of certain politicians. They do not provide explicit directives to

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[4]See CAN, 894 F. Supp. at 959 (advertisements are not express advocacy even though candidates were clearly identified).

[5]See NOW, 713 F. Supp. at 435 (finding that mailings were not express advocacy because NOW did not go beyond issue discussion to express advocacy; it merely attempted to make its views known).

[6]See also CAN, 894 F. Supp. at 953 (holding that CAN television advertisements that ran days before the 1992 presidential election and presented the Democratic presidential and vice presidential candidates' views on homosexual rights were not express advocacy)

vote against these politicians.[7]

For example, the one ad cited in the Woodward excerpts, "Slash" mentions no candidates by name and contains no exhortation. The plain language of "Slash" addresses the budget and specifically, reductions in the budget. The President's plan is mentioned, because the ad is about the plan. Even the Woodward book itself, although relying on an apparently fictional anecdote, describes clearly the relationships between "Slash" and the then-ongoing budget negotiations. The Choice p. 354. If this ad is to be considered unmistakable and suggestive of only one meaning, then that meaning is related to legislation rather than to an election.

Complainant's unsupported claim that the advertising campaign was controlled by the President is meaningless and does not change the conclusions to be drawn under 11 C.F.R. § 100.22. Nothing in the Act, Commission regulations or court cases makes "control" a relevant factor. Presumably, complainant means "coordination" when it states "control". Yet, such a statement simply highlights complainant's misunderstanding or misstatement of the correct standard. Coordination is irrelevant to the application of section 2 U.S.C. § 441a(d) -- content is controlling. The candidate is presumed to be coordinating with his or her party's expenditures, whether or not that meets the standards set forth herein.

Moreover, complainant suggests that coordination is the standard for whether an expenditure should be applied to the Committee's own base primary expenditure limit of $30,910,000. This suggestion is not worthy of Commission consideration for it would render the very essence of 2 U.S.C. § 441a(d) meaningless. Never has the Commission declared, nor does it have the jurisdiction to do so, that party advertisements could not be coordinated with a Federal candidate without the costs of those ads being attributed to the party spending limit[8].

Therefore, without a frank admonition to take electoral action, the plain language of the DNC advertisements does not constitute express advocacy, and there is no legal basis to apply the costs of the ads to the limitations of 2 U.S.C. § 441a(b) or (d).

3. The Democratic National Committee Ads Are Not Electioneering

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[7]Even when considering the timing of the 1996 presidential election, the advertisements at issue are not express advocacy. All of the DNC legislative advocacy ads ran while related legislation, e.g., the budget plan, was being actively being considered. Moreover, the timing of the advertisements, from August 1995 -- more than a year before the general election -- to July 1996, is clearly consistent with a legislative advocacy campaign, rather than an election campaign. See CAN, 894 F. Supp. at 958 (holding advertisements not to be express advocacy even though advertisements were just prior to the general election).

[8]Such a limitation would undoubtedly raise grave constitutional issues. See also, Noble Letter, attached hereto.

Messages.

Even if the Commission refuses to accept the recent court decisions setting forth the Buckley express advocacy standard as the appropriate standard, the DNC television advertisements at issue do not meet the broader, more suspect standard of electioneering. As discussed above, the Commission's requirement for an electioneering standard was set forth in AO 1985-14. Fed. Election Campaign Finance Guide (CCH) ¶5819. In AO 1985-14, the Commission defines an electioneering message as including statements "designed to urge the public to elect a certain candidate or party." Id. (citing United States v. United Auto Workers, 352 U.S. 567, 587 (1957)). Even the Commission has determined that the mere mention of an individual candidate by name is by itself insufficient to constitute electioneering. AO 1985-14, Fed. Election Campaign Finance Guide (CCH) ¶5819. See also GOPAC, 917 F. Supp. at 862-863 (finding that GOPAC letter that mentioned Speaker Wright by name and attacked generally the Democratic Congress was not electioneering). AO 1985-14 also provides "Vote Democratic" as an example of an electioneering messages. Fed. Election Campaign Finance Guide (CCH) ¶5819.

The DNC advertisements do not mention or refer to any election. There is no request for viewers to vote for or support any candidate or political party. Similarly, there is no reference to voting against or defeating any candidate or political party. The phrase "Vote Democratic" does not appear in any ad.

Moreover, like the ads in both AO 1985-14 and 1995-25, these advertisements merely provide information on current congressional legislative proposals. As with those AOs, Federal candidates are mentioned only as officeholders and to the extent of their officeholder duties, such as involvement in legislative activities. The references to the President involve solely his role as an officeholder and with regard to his specific legislative proposals and initiatives. Similarly, the references to Majority Leader Dole and Speaker Gingrich relate solely to their roles as officeholders and the leaders of their respective legislative bodies. Thus, the DNC advertisements meet none of the criteria for electioneering. The messages of those legislative advocacy ads fall clearly short of the standard elucidated by the Commission in its AOs and for that reason cannot be subject to the limitations of 2 U.S.C. § 441a(b) or (d).

4. The DNC Advertisements Consist Of Legislative Advocacy Which Is Outside the Commission's Jurisdiction.

Funds spent to propagate one's views on issues without expressly calling for the election or defeat of a clearly identified candidate are not covered by FECA. Buckley, 424 U.S. at 43. The communications at issue do not contain express advocacy nor do they contain an electioneering message as defined by either the courts or by the Commission. Therefore, these communications are not subject to FEC limitations and prohibitions. All of the advertisements at issue fall in the category of "legislative advocacy"-- a category of party communications clearly outside the jurisdiction and control of the Commission. See Buckley, 424 U.S. at 39-43 (holding

that restrictions on discussion of public issues limit political expression at the core of our electoral process and of First Amendment freedoms).

The texts of the DNC advertisements clearly demonstrate that each of the ads deal with legislative proposals offered or supported by President Clinton which contrast with the legislative proposals of the Republican Congress. The message of these advertisements is one of educating the public on the President's position on legislative proposals, initiatives and issues.

As strictly "legislative advertisements" or "generic party advertising," these ads cannot not be counted as 2 U.S.C. § 441a(d) expenditures as the Dole complaint alleges. These advertisements do not count toward the Act's expenditure limitations for a national party and should be outside the limitations of FECA under First Amendment analysis. See CAN, 894 F. Supp. at 955 ("[T]he ability to present controversial viewpoints on election issues has long been recognized as a fundamental First Amendment right."); Buckley, 424 U.S. at 14 ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.").

To apply the 2 U.S.C. § 441a(d) expenditure limitation here would be to restrain the very activity, legislative advocacy, that Buckley and its progeny sought to protect. In fact, the application of 2 U.S.C. § 441a(d) to these ads would extend the Commission into activity completely outside of its jurisdiction, as determined by the plain language of the Act, as well as by the intent of the Act's authors.[9] Accordingly, the Commission should not apply 2 U.S.C. § 441a(b) or (d) to these legislative advocacy ads.

IV. CONCLUSION

The Dole Committee's purely political complaint in this matter should be immediately dismissed by the Commission for several compelling reasons. First, the complaint's factual and legal basis is so inadequate, insufficient and devoid of information that no violation of the Act is described. Second, the DNC's ad campaign falls squarely within and is materially indistinguishable from the facts of two prior Commission Advisory Opinions. Finally, the DNC ads are plainly lacking in express advocacy or electioneering and are instead, legislative in nature, falling entirely outside the limitations raised by Complainant.

[9]Because of the serious First Amendment issues raised in any attempt to regulate legislative advocacy communications, the Committee will vigorously challenge any intrusion into activity protected by the First Amendment.

For the reasons stated above, the Committee respectfully requests that the Commission find no reason to believe that any violation of the Act has occurred, dismiss the complaint and close this matter.

Respectfully submitted,

Lyn Utrecht
General Counsel

Eric Kleinfeld
Chief Counsel

LEVEL 2 - 2 OF 2 STORIES

The Washington Post

June 27, 1996, Thursday, Final Edition

SECTION: OP-ED; Pg. A28; LETTERS TO THE EDITOR

LENGTH: 202 words

HEADLINE: Not What I Said

BODY:

In excerpting Bob Woodward's book "The Choice," The Post attributes to me a statement which I did not make and which does not appear in the book. Specifically, I would never say that "no presidential candidate should be deeply involved in his party's advertising." The law presumes that a candidate may be involved in his party's advertising, though the ramifications of that involvement on spending and contribution limits may raise difficult legal and factual questions.

In addition, the excerpt quotes me as saying that "we have forgotten the lessons of Watergate," but omits the book's disclaimer that I was not

referring to any specific factual situation in this presidential election. My real concern is that some courts are giving short shrift to the long-recognized compelling government interests that gave rise to the campaign finance laws.

The continuing debate about the campaign finance laws deals with issues central to our democracy. If the debate is be meaningful and constructive, it is important that we are accurate and avoid oversimplification in the quest for easily understandable analysis.

LAWRENCE M. NOBLE

General Counsel

Federal Election Commission

Washington

LANGUAGE: ENGLISH

LOAD-DATE: June 27, 1996

ATTACHMENT 2

Office of the Attorney General
Washington, D. C. 20530

April 14, 1997

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

On March 13, 1997, you and nine other majority party members of the Committee on the Judiciary of the United States Senate wrote to me requesting the appointment of an independent counsel to investigate possible fundraising violations in connection with the 1996 presidential campaign. You made that request pursuant to a provision of the Independent Counsel Act, 28 U.S.C. § 592(g)(1), which provides that "a majority of majority party members [of the Committee on the Judiciary] ... may request in writing that the Attorney General apply for the appointment of an independent counsel." The Act requires me to respond within 30 days, setting forth the reasons for my decision on each of the matters with respect to which your request is made. 28 U.S.C. § 592(g)(2).

I am writing to inform you that I have not initiated a "preliminary investigation" (as that term is defined in the Independent Counsel Act) of any of the matters mentioned in your letter. Rather, as you know, matters relating to campaign financing in the 1996 Federal elections have been under active investigation since November by a task force of career Justice Department prosecutors and Federal Bureau of Investigation (FBI) agents. This task force is pursuing the investigation vigorously and diligently, and it will continue to do so. I can assure you that I have given your views and your arguments careful thought, but at this time, I am unable to agree, based on the facts and the law, that an independent counsel should be appointed to handle this investigation.

1. The Independent Counsel Act

In order to explain my reasons, I would like to outline briefly the relevant provisions of the Independent Counsel Act. The Act can be invoked in two circumstances that are relevant here:

- First, if there are sufficient allegations (as further described below) of criminal activity by a covered person, defined as the President and Vice President, cabinet officers, certain other enumerated high Federal officials, or certain specified officers of the President's election campaign (not party officials), see 28 U.S.C. § 591(b), I must seek appointment of an independent counsel.

- Second, if there are sufficient allegations of criminal activity by a person other than a covered person, and I determine that "an investigation or prosecution of [that] person by the Department of Justice may result in a personal, financial or political conflict of interest," see 28 U.S.C. § 591(c)(1), I may seek appointment of an independent counsel.

In either case, I must follow a two-step process to determine whether the allegations are sufficient. First, I must determine whether the allegations are sufficiently specific and credible to constitute grounds to investigate whether an individual may have violated Federal criminal law. 28 U.S.C. § 591(d). If so, the Department commences a "preliminary investigation" for up to 90 days (which can be extended an additional 60 days upon a showing of good cause). 28 U.S.C. § 592(a). If, at the conclusion of this "preliminary investigation," I determine that further investigation of the matters is warranted, I must seek an independent counsel.

Certain important features of the Act are critical to my decision in this case:

- First, the Act sets forth the only circumstances in which I may seek an independent counsel pursuant to its provisions. I may not invoke its procedures unless the statutory requirements are met.

- Second, the Act does not permit or require me to commence a preliminary investigation unless there is specific and credible evidence that a crime may have been committed. In your letter, you suggest that it is not the responsibility of the Department of Justice to determine whether a particular set of facts suggests a potential Federal crime.

but that such legal determinations should be left to an independent counsel. I do not agree. Under the Independent Counsel Act, it is the Department's obligation to determine in the first instance whether particular conduct potentially falls within the scope of a particular criminal statute such that criminal investigation is warranted. If it is our conclusion that the alleged conduct is not criminal, then there is no basis for appointment of an independent counsel, because there would be no specific and credible allegation of a violation of criminal law. See 28 U.S.C. § 592(a)(1).

- Third, there is an important difference between the mandatory and discretionary provisions of the Act. Once I have received specific and credible allegations of criminal conduct by a covered person, I must commence a preliminary investigation and, if further investigation is warranted at the end of the preliminary investigation, seek appointment of an independent counsel. If, on the other hand, I receive specific and credible evidence that a person not covered by the mandatory provisions of the Act has committed a crime, and I determine that a conflict of interest exists with respect to the investigation of that person, I may -- but need not -- commence a preliminary investigation pursuant to the provisions of the Act. This provision gives me the flexibility to decide whether, overall, the national interest would be best served by appointment of an independent counsel in such a case, or whether it would be better for the Department of Justice to continue a vigorous investigation of the matter.

- Fourth, even this discretionary provision is not available unless I find a conflict of interest of the sort contemplated by the Act. The Congress has made it very clear that this provision should be invoked only in certain narrow circumstances. Under the Act, I must conclude that there is a potential for an actual conflict of interest, rather than merely an appearance of a conflict of interest. The Congress expressly adopted this higher standard to ensure that the provision would not be invoked unnecessarily. See 128 Cong. Rec. H 9507 (daily ed. December 13, 1982) (statement of Rep. Hall). Moreover, I must find that there is the potential for such an actual conflict with respect to the investigation of a particular person, not merely with respect to the overall matter. Indeed, when the Act was reauthorized in 1994, Congress considered a proposal for a more flexible standard for invoking the discretionary clause, which would have permitted its use to refer any "matter" to an Independent Counsel when the purposes of the Act would be served.

Congress rejected this suggestion, explaining that such a standard would "substantially lower the threshold for use of the general discretionary provision." H.R. Conf. Rep. No. 511, 103rd Cong., 2nd Sess. 9 (1994).

2. Covered Persons -- The Mandatory Provisions of the Act

Let me now turn to the specific allegations in your letter. You assert that there are "new questions of possible wrongdoing by senior White House officials themselves," and you identify a number of particular types of conduct in support of this claim. While all of the specific issues you mention are under review or active investigation by the task force, at this time we have no specific, credible evidence that any covered White House official may have committed a Federal crime in respect of any of these issues. Nevertheless, I will discuss separately each area that you raise.

a. Fundraising on Federal Property. First, you suggest that "federal officials may have illegally solicited and/or received contributions on federal property." The conduct you describe could be a violation of 18 U.S.C. § 607. We are aware of a number of allegations of this sort; all are being evaluated, and where appropriate, investigations have been commenced. The Department takes allegations of political fundraising by Federal employees on Federal property seriously, and in appropriate cases would not hesitate to prosecute such matters. Indeed, the Public Integrity Section, which is overseeing the work of the campaign financing task force, recently obtained a number of guilty pleas from individuals who were soliciting and accepting political contributions within the Department of Agriculture.

The analysis of a potential section 607 violation is a fact-specific inquiry. A number of different factors must be considered when reviewing allegations that this law may have been violated:

- First, the law specifically applies only to contributions as technically defined by the Federal Election Campaign Act (FECA) -- funds commonly referred to as "hard money." The statute originally applied broadly to any political fundraising, but in 1979, over the objection of the Department of Justice, Congress narrowed the scope of section 607 to render it applicable only to FECA contributions. Before concluding that section 607 may have been violated, we must have evidence that a particular solicitation involved a "contribution" within the definition of the FECA.

- Second, there are private areas of the White House that, as a general rule, fall outside the scope of the statute, because of the statutory requirement that the particular solicitation occur in an area "occupied in the discharge of official duties." 3 Op. Off. Legal Counsel 31 (1979). The distinction recognizes that while the Federal Government provides a residence to the President, similar to the housing that it might provide to foreign service officers, this residence is still the personal home of an individual within which restrictions that might validly apply to the Federal workplace should not be imposed. Before we can conclude that section 607 may have been violated, we must have evidence that fundraising took place in locations covered by the provisions of the statute.

Thus, while you express concerns about the possibility of "specific solicitations ... made by federal officials at the numerous White House overnights, coffees, and other similar events," we do not at this time have any specific and credible evidence of any such solicitation by any covered person that may constitute a violation of section 607.

We do not suggest, of course, that our consideration of information concerning fundraising on Federal property is limited to whether the conduct constituted a violation only of section 607. However, at this point in time, we have no specific and credible evidence to suggest that any crime was committed by any covered person in connection with these allegations.

b. Misuse of Government Resources. You next assert that Government property and employees may have been used illegally to further campaign interests -- conduct which might, in some circumstances, constitute a theft or conversion of Government property in violation of 18 U.S.C. § 641. Again, we are actively investigating allegations that such misconduct may have occurred. However, we are unaware at this time of any evidence that any covered person participated in any such activity, other than use of Government property that is permitted under Federal law, such as the reports that the Vice President used a Government telephone, charging the calls to a nongovernment credit card. Federal regulations permit such incidental use of Government property for otherwise lawful personal purposes. See, e.g., 5 C.F.R. § 2635.704; 41 C.F.R. § 201-21.601 (personal long distance telephone calls). Thus, for example, allegations that a Government telephone or telefacsimile machine may have been used on a few occasions by a covered person for personal purposes does not amount to an allegation of a Federal crime. To the extent that there are allegations warranting investigation that individuals not covered by the Independent Counsel Act diverted

Government resources, it is my conclusion, as I explain below, that there is at present no conflict of interest for the Department of Justice to investigate and, if appropriate, prosecute those involved in any such activity.

c. Foreign Efforts to Influence U.S. Policy. You next cite reports suggesting the possibility that foreign contributions may have been made in hopes of influencing American policy decisions. These allegations are under active investigation by the task force. The facts known at this time, however, do not indicate the criminal involvement of any covered person in such conduct.

It is neither unique nor unprecedented for the Department to receive information that foreign interests might be seeking to infuse money into American political campaigns. That was precisely the scenario that underlay the criminal investigations, prosecutions and congressional hearings during the late 1970s involving allegations that a Korean businessman was making illegal campaign contributions, among other things, to Members of Congress to curry congressional support for the Government of South Korea. In a more recent example, in 1996 an individual was prosecuted and convicted for funnelling Indian Government funds into Federal elections through the cover of a political action committee.

Absent specific and credible evidence of complicity by a covered person, it has never been suggested that the mere allegation that a foreign government may have been trying to provide funds to Federal campaigns should warrant appointment of an independent counsel. Nor can it be the case that an independent counsel is required to investigate because campaign contributors or those who donated to political parties believed their largesse would influence policy or achieve access. The Department of Justice routinely handles such allegations, and because of its experience in reviewing and investigating these sensitive matters, embracing, among other things, issues of national security, is particularly well-equipped to do so.

d. Coordination of Campaign Fundraising and Expenditures. You also suggest that the "close coordination by the White House over the raising and spending of 'soft' -- and purportedly independent -- DNC funds violated Federal election laws, and/or had the legal effect of rendering those funds subject to campaign finance limitations they otherwise would not be subject to." We believe this statement misapprehends the law. The FECA does not prohibit the coordination of fundraising or expenditures between a party and its candidates for office. Indeed, the Federal

Election Commission (FEC), the body charged by Congress with primary responsibility for interpreting and enforcing the FECA, has historically assumed coordination between a candidate and his or her political party.

Of course, coordinated expenditures may be unlawful under the FECA if they are made with funds from prohibited sources, if they were misreported, or if they exceeded applicable expenditure limits. However, we presently lack specific and credible evidence suggesting that any covered person participated in any such violations, if they occurred.

With respect to coordinated media advertisements by political parties (an area that has received much attention of late), the proper characterization of a particular expenditure depends not on the degree of coordination, but rather on the content of the message. Indeed, just last year the FEC and the Department of Justice took this position in a brief filed before the Supreme Court, in a case decided on other grounds. See generally, Brief for the Respondent, Colorado Republican Federal Campaign Committee v. FEC, (S. Ct. No. 95-489) at 2-3, 18 n.15, 23-24. In this connection, the FEC has concluded that party media advertisements that focus on "national legislative activity" and that do not contain an "electioneering message" may be financed, in part, using "soft" money, i.e., money that does not comply with FECA's contribution limits. FEC Advisory Op. 1995-25, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6162, at 12,109-12,110 (August 24, 1995); FEC Advisory Op. 1985-14, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5819, at 11,185-11,186 (May 30, 1985). Moreover, such advertisements are not subject to any applicable limitations on coordinated expenditures by the party on behalf of its candidates. AO 1985-14 at 11-185-11,186.

We recognize that there are allegations that both presidential candidates and both national political parties engaged in a concerted effort to take full advantage of every funding option available to them under the law, to craft advertisements that took advantage of the lesser regulation applicable to legislative issue advertising, and to raise large quantities of soft political funding to finance these ventures. However, at the present time, we lack specific and credible evidence suggesting that these activities violated the FECA. Moreover, even assuming that, after a thorough investigation, the FEC were to conclude that regulatory violations occurred, we presently lack specific and credible evidence suggesting that any covered person participated in any such violations.

3. Conflict of Interest -- The Discretionary Provisions of the Act

In urging me to conclude that the investigation poses the type of potential conflict of interest contemplated by the Act, you rely heavily on my testimony before the Senate Committee on Government Affairs in 1993 in support of reauthorization of the Independent Counsel Act. I stand by those views and continue to support the overall concept underlying the Act. My decisions pursuant to the Act have been, I believe, fully consistent with those views.

The remarks you quote from my testimony should be interpreted within the context of the statutory language I was discussing. When, for example, I referred to the need for the Act to deal with the inherent conflict of interest when the Department of Justice investigates "high-level Executive Branch officials," I was referring to persons covered under the mandatory provisions of the Act. With respect to the conflict of interest provision, my testimony expressed the conviction that the Act "would in no way preempt this Department's authority to investigate public corruption," and that the Department was clearly capable of "vigorous investigation of wrongdoing by public officials, whatever allegiance or stripes they may wear. I will vigorously defend and continue this tradition.". While I endorsed the concept of the discretionary clause to deal with unforeseeable situations, I strongly emphasized that "it is part of the Attorney General's job to make difficult decisions in tough cases. I have no intention of abdicating that responsibility[.]" These principles continue to guide my decisionmaking today.

There are times when reliance on the discretionary clause is appropriate, and indeed, as you point out, I have done so myself on a few occasions. However, in each of those cases, I considered the particular factual context in which the allegations against those persons arose and the history of the matter. Moreover, even after finding the existence of a potential conflict, I must consider whether under all the circumstances discretionary appointment of an independent counsel is appropriate. In each case, therefore, the final decision has been an exercise of my discretion, as provided for under the Act.

I have undertaken the same examination here. Based on the facts as we know them now, I have not concluded that any conflict of interest would ensue from our vigorous and thorough investigation of the allegations contained in your letter.

Your letter relies upon press reports, certain documents and various public statements which you assert demonstrate that "officials at the highest level of the White House were involved in formulating, coordinating and implementing the [Democratic National Committee's (DNC's)] fundraising efforts for the 1996 presidential campaign." You suggest that a thorough investigation of "fundraising improprieties" will therefore necessarily include an inquiry into the "knowledge and/or complicity of very senior White House officials," and that the Department of Justice would therefore have a conflict of interest investigating these allegations.

To the extent that "improprieties" comprise crimes, they are being thoroughly investigated by the agents and prosecutors assigned to the task force. Should that investigation develop at any time specific and credible evidence that any covered person may have committed a crime, the Act will be triggered, and I will fulfill my responsibilities under the Act. In addition, should that investigation develop specific and credible evidence that a crime may have been committed by a "very senior" White House official who is not covered by the Act, I will decide whether investigation of that person by the Department might result in a conflict of interest, and, if so, whether the discretionary clause should be invoked. Until then, however, the mere fact that employees of the White House and the DNC worked closely together in the course of President Clinton's reelection campaign does not warrant appointment of an independent counsel. As I have stated above, the Department has a long history of investigating allegations of criminal activity by high-ranking Government officials without fear or favor, and will do so in this case.

I also do not accept the suggestion that there will be widespread public distrust of the actions and conclusions of the Department if it continues to investigate this matter, creating a conflict of interest warranting the appointment of an independent counsel. First, unless I find that the investigation of a particular person against whom specific and credible allegations have been made would pose a conflict, I have no authority to utilize the procedures of the Act. Moreover, I have confidence that the career professionals in the Department will investigate this matter in a fashion that will satisfy the American people that justice has been done.

Finally, even were I to determine that a conflict of interest of the sort contemplated by the statute exists in this case -- and as noted above I do not find such a conflict at this time -- there would be a number of weighty considerations

that I would have to consider in determining whether to exercise my discretion to seek an independent counsel at this time. Because invocation of the conflict of interest provision is discretionary, it would still be my responsibility in that circumstance to weigh all the factors and determine whether appointment of an independent counsel would best serve the national interest. If in the future this investigation reveals evidence indicating that a conflict of interest exists, these factors will continue to weigh heavily in my evaluation of whether or not to invoke the discretionary provisions of the Act.

* * * * * * * * * * * *

I assure you, once again, that allegations of violations of Federal criminal law with respect to campaign financing in the course of the 1996 Federal elections will be thoroughly investigated and, if appropriate, prosecuted. At this point it appears to me that that task should be performed by the Department of Justice and its career investigators and prosecutors. I want to emphasize, however, that the task force continues to receive new information (much has been discovered even since I received your letter), and I will continue to monitor the investigation closely in light of my responsibilities under the Independent Counsel Act. Should future developments make it appropriate to invoke the procedures of the Act, I will do so without hesitation.

Sincerely,

Janet Reno

cc: Senator Patrick Leahy