FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

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MUR 4407
Date Complaint Filed: July 2, 1996
Date of Notification: July 9, 1996
Date Activated: September 26, 1996

COMPLAINANT: Dole for President, Inc.

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

Democratic National Committee, and
Carol Pensky, as treasurer

President William J. Clinton (Internally Generated)

Vice President Albert Gore, Jr. (Internally Generated)

Clinton/Gore '96 General Committee, Inc., and
Joan Pollitt, as treasurer (Internally Generated)

MUR 4544
Date Complaint Filed: October 28, 1996
Date of Notification: November 1, 1996 (DNC)
July 24, 1997
(Primary Committee)
Date Activated: October 15, 1997

COMPLAINANT: Rebecca Roczen Carley, M.D.

RESPONDENTS: Democratic National Committee and
Carol Pensky, as treasurer

Clinton/Gore '96 Primary Committee, Inc. and
Joan Pollitt, as treasurer

President William J. Clinton (Internally Generated)

Vice President Albert Gore, Jr. (Internally Generated)

Clinton/Gore '96 General Committee, Inc. and
Joan Pollitt, as treasurer (Internally Generated)

RELEVANT STATUTES/REGULATIONS:

2 U.S.C. § 431(8)(A)(i)
2 U.S.C. § 431(9)(A)(i)
2 U.S.C. § 431(17)
2 U.S.C. § 431(18)
2 U.S.C. § 434
2 U.S.C. § 434(a)(1)
2 U.S.C. § 434(b)(2)(C)
2 U.S.C. § 434(b)(4)
2 U.S.C. §§ 434(b)(4)(H)(i) and (iv)
2 U.S.C. § 437g(a)(1)
2 U.S.C. § 437g(a)(5)(B), (6)(C) and (d)(1)
2 U.S.C. § 437f(c)
2 U.S.C. § 441a(a)
2 U.S.C. § 441a(a)(2)(A)
2 U.S.C. § 441a(a)(7)(B)(i)
2 U.S.C. § 441a(b)
2 U.S.C. § 441a(b)(1)(A)
2 U.S.C. § 441a(b)(1)(B)
2 U.S.C. § 441a(b)(2)(B)
2 U.S.C. § 441a(c)
2 U.S.C. § 441a(d)
2 U.S.C. § 441a(d)(2)
2 U.S.C. § 441a(f)
2 U.S.C. § 441b
2 U.S.C. § 441b(a)
2 U.S.C. § 441e
2 U.S.C. § 441f
26 U.S.C. § 9002(2)
26 U.S.C. § 9003
26 U.S.C. § 9003(a) and (b)

26 U.S.C. § 9003(b)(1)
26 U.S.C. § 9003(b)(2)
26 U.S.C. § 9004
26 U.S.C. § 9004(a)(1)
26 U.S.C. § 9007(a)
26 U.S.C. § 9032(2)
26 U.S.C. §§ 9033
26 U.S.C. §§ 9033(a) and (b)(1)
26 U.S.C. § 9035
26 U.S.C. § 9035(a)
26 U.S.C. § 9036(a)
26 U.S.C. § 9038(a)
11 C.F.R. § 100.7(a)(1)(iii)
11 C.F.R. § 100.22
11 C.F.R. § 100.22(b)
11 C.F.R. § 102.5(a)(1)
11 C.F.R. § 102.5(a)(1)(i)
11 C.F.R. § 104.10(b)(1)
11 C.F.R. § 104.13(a)
11 C.F.R. §§ 104.13(a)(1) and (2)
11 C.F.R. § 106.5
11 C.F.R. § 106.5(a)
11 C.F.R. §§ 106.5(a)(2)(i) and (iv)
11 C.F.R. §§ 106.5(b)(2)(i) and (ii)
11 C.F.R. § 106.5(b)
11 C.F.R. § 106.5(d)
11 C.F.R. § 106.5(d)(1)
11 C.F.R. § 106.5(d)(1)(i)
11 C.F.R. § 106.5(d)(2)
11 C.F.R. § 109.1
11 C.F.R. § 110.7(a)(6)
11 C.F.R. § 110.8(a)(1)(iv)(A)
11 C.F.R. § 110.8(e)
11 C.F.R. § 110.8(e)(1), and (2)(i), (ii), (iii)
11 C.F.R. § 111.4
11 C.F.R. §§ 111.4(b)
11 C.F.R. §§ 111.4(d)
11 C.F.R. §§ 111.4(d)(1), (2), (3) and (4)
11 C.F.R. § 111.5(a) and (b)
11 C.F.R. § 111.6
11 C.F.R. §§ 114.2(a), (b)
11 C.F.R. § 9033.5(c)
11 C.F.R. § 9034.4(e)
11 C.F.R. § 9034.4(e)(5) and (6)(ii)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTERS

MUR 4407 was generated by a complaint filed by Dole for President, Inc. ("Dole Committee"). MUR 4544 was generated by a complaint filed by Rebecca Roczen Carley, M.D. The Dole Committee alleges that the Clinton/Gore '96 Primary Committee, Inc. ("Primary Committee") and Joan Pollitt, as treasurer, violated 2 U.S.C. § 441a(b) by failing to adhere to the expenditure limitations for publicly funded Presidential candidates.[1] Attachment 1. Moreover, the Dole Committee alleges that the Primary Committee violated 2 U.S.C. § 434 by failing to report expenditures that the Democratic National Committee ("DNC") made on its behalf. Alternatively, the Dole Committee alleges that the DNC violated 2 U.S.C. § 441a(d) by making coordinated party expenditures on behalf of the Primary Committee that exceeded the coordinated party expenditure limit for the 1996 election cycle, and that it violated 2 U.S.C. § 434 by failing to report these coordinated party expenditures. Dr. Carley alleges that the national Republican and Democratic parties are guilty of "clear cut criminal violations of campaign contribution laws" based on statements made by Ann McBride, president of Common Cause, that were aired on C-Span's Washington Journal. Attachment 22. As part of her

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1 The Primary Committee is the authorized committee of President William J. Clinton for his campaign for the Democratic nomination in the 1996 Presidential elections. The Primary Committee registered with the Commission on April 14, 1995 and received $13,412,197.51 in public funds for the purpose of seeking the nomination. *See* 2 U.S.C. §§ 9033(a) and 9036(a). President Clinton received the nomination of the Democratic Party on August 28, 1996. The Clinton/Gore '96 General Committee, Inc. ("GEC") and Joan Pollitt, as treasurer, is the authorized committee for President Clinton and Vice President Albert Gore for the general election campaign. The GEC registered with the Commission on August 1, 1996, and received $61,820,000 in public funds for the general election campaign. *See* 26 U.S.C. §§ 9003 and 9004.

complaint, Dr. Carley sent the Commission a videotape of Ms. McBride's appearance on C-Span.

II. FACTUAL AND LEGAL ANALYSIS

A. COMPLAINTS

1. MUR 4407

On July 2, 1996, the Dole Committee filed a complaint against the Primary Committee and the DNC. Attachment 1. The Dole Committee alleges that the Primary Committee attempted to circumvent the expenditure limit set forth at 2 U.S.C. § 441a(b) by "directing the DNC to make expenditures above and beyond [the expenditure] limit on behalf of the Campaign." *Id.* at 1. The complaint specifically refers to excerpts from *The Choice*, and states that "President Clinton personally directed and controlled from the White House several ad campaigns that were paid for by the DNC." *Id.* at 1-2. The Dole Committee contends that President Clinton "was apparently so intimately involved with the DNC advertising that he personally decided what photos should be used in the ads." *Id.* at 2. The complaint further asserts that campaign consultant Dick Morris and Robert Squier, head of the media firm Squier Knapp Ochs Communications ("SKO"), took direction from President Clinton, directed the day-to-day management of the advertisement campaign, and took these actions "in an apparent concerted effort to circumvent the spending limits." *Id.* The complaint also alleges that the cost of these advertisements is "at least $25,000,000" and concludes that the advertisements should be "treated as [Primary Committee] expenditures" to prevent the Primary Committee from circumventing the expenditure limits. *Id.* The Dole Committee further maintains that the Primary Committee should be required to report the expenditures and asserts that the cost of

these advertisements, when added to the Primary Committee expenditures of $12,861,948 as of May 31, 1996, would "bring the [Primary Committee] expenditures clearly over the $30,910,000 limit." *Id.*

If the advertisements are not considered Primary Committee expenditures, then, the complaint alleges, the advertisements constitute coordinated expenditures pursuant to 2 U.S.C. § 441a(d). *Id.* at 3. The complaint asserts that because the cost of these advertisements totaled $25,000,000, the DNC exceeded the coordinated expenditure limit set forth at 2 U.S.C. § 441a(d)(2). *Id.* The complaint claims that the DNC made coordinated party expenditures in connection with the general election campaign because its expenditures, although made during the primary campaign, were coordinated with a candidate who was assured of his party's nomination. *Id.* (citing AO 1984-15).

Finally, the complaint alleges that irrespective of whether the advertisements are Primary Committee expenditures or coordinated party expenditures for the general election, corporate funds were used to pay for the advertisements in violation of 2 U.S.C. § 441b. *Id.* The complaint refers to excerpts from *The Choice* and claims that these excerpts suggest that "the opportunity to use corporate money was a prime factor in the decision to run the ad campaigns through the DNC."[2] *Id.*

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2 The complaint also requested the Commission to suspend any further payments of matching funds to the Primary Committee. Attachment 1 at 4. On September 12, 1996, the Commission denied this request and issued a Statement of Reasons setting forth the basis for this denial.

2. MUR 4544

On October 21, 1996, Dr. Carley filed a complaint against the national Democratic party.[3] Dr. Carley alleges that the national Democratic party is guilty of "clear cut criminal violations of campaign contribution laws" based on statements made by Ann McBride, president of Common Cause, that were aired on C-Span's Washington Journal. Attachment 20.[4] Ms. McBride's comments were made during a press conference publicizing a complaint that Common Cause filed on October 9, 1996 with the United States Department of Justice. Attachment 25. The DOJ complaint requests that the Attorney General appoint an independent counsel to investigate whether the DNC and the Primary Committee criminally violated federal campaign finance laws.

In general, Common Cause alleges that the Primary Committee spent millions of dollars in excess of the overall presidential primary spending limit by having the DNC pay for television advertisements that benefited President Clinton at the direction of the Primary Committee. Common Cause alleges that the money the DNC spent on the television advertisements was not counted against the spending limit applicable during the presidential primary period. Specifically, it claims that "from the summer of 1995 through the summer of 1996, the [Primary] Committee ran an ad campaign through the [DNC] to promote President Clinton's reelection." *Id.* at 16. Common Cause further contends that the Primary Committee spent at least $34 million

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3 Dr. Carley also alleged violations of campaign laws by the national Republican party. Attachment 22. This Report only discusses the alleged violations of the national Democratic party; violations of the national Republican party are addressed in MUR 4553. On August 21, 1997, Dr. Carley's allegations against the Republican party were severed from the allegations in MUR 4544, and were designated MUR 4671. MUR 4671 was activated October 15, 1997. The Office of General Counsel received additional correspondence from Dr. Carley on November 8, 1996 and November 25, 1996; the Office of General Counsel responded to this correspondence on November 19, 1996 and November 27, 1996, respectively. Attachment 21.

4 Dr. Carley ordered a videotape copy of Ms. McBride's appearance from C-Span to be sent to the Commission to supplement her complaint. On November 27, 1996, the Office of General Counsel received a copy of the videotape, which is contained in the official docket files for MUR 4544 and is available for review in the Office of General Counsel.

more on the television advertising campaign than "it was legally permitted to spend during the presidential primary campaign, and in doing so used at least $22 million in 'soft money' contributions that cannot be legally used to directly support a presidential candidate." *Id.* at 17. Common Cause refers to *The Choice*, by Robert Woodward, as well as various press articles that discuss the television advertising campaign paid for by the DNC. Common Cause also asserts that Primary Committee agents designed, produced, and raised money to pay for the television advertisements, in addition to determining and making the advertisement placements. Moreover, it suggests that based on FEC disclosure reports, the DNC spent $27 million on the advertisement campaign in 12 targeted states between July 1, 1995 and June 30, 1996. *Id.* at 22. Finally, Common Cause alleges that the television advertisements were "the same kind of ads that any candidate would run to promote his candidacy or criticize his opponent." *Id.* at 25.

B. RESPONSES

1. DNC Responses

On August 16, 1996, the DNC submitted its response to MUR 4407.[5] Attachment 2. The DNC contends that the Commission should either dismiss the complaint or, in the alternative, find no reason to believe that it violated the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431 et seq. ("the Act"). *Id.* at 1.

The DNC argues that the complaint does not comply with 11 C.F.R. § 111.4(d)(3) because it does not contain "a recitation of *any* facts which describe a violation by the DNC of 2 U.S.C. § 441a(d)(2) or of any other statutory provision or regulation." *Id.* at 3. The DNC

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5 On July 19, 1996, the DNC requested a 20-day extension of time to respond to the complaint. On July 23, 1996, the Office of General Counsel granted this request. Thus, the response was due by the close of business on August 16, 1996. On September 26, 1996, the DNC submitted a supplement to its response, which included a declaration by Robert D. Squier. Attachment 4.

maintains that the complaint fails to identify or describe the advertisements in question and fails to indicate the broadcast dates of the advertisements or their contents. *Id.* at 4. The DNC asserts that the complaint contains no facts suggesting or indicating that the advertisements conveyed an electioneering message as required by Advisory Opinion ("AO") 1985-14, and therefore, it made no coordinated party expenditures pursuant to 2 U.S.C. § 441a(d).[6]

The DNC further claims that even if the allegations of coordination were "legally relevant," the complaint contains no evidence to support them. *Id.* at 7. The DNC argues that *The Choice* is not "a factual or accurate report of the events and conversations it recounts" and "[i]t is not the kind of material that should be treated as substantial, cognizable evidence of anything." *Id.* The DNC asserts that even though the Commission permits complaints to be based on newspaper articles, such articles need to be "well-documented and substantial." *Id.* The DNC claims that the excerpts from *The Choice* in the complaint are neither well-documented nor substantial.[7] *Id.* at 8.

The DNC makes the alternative argument that even if the Commission accepts the complaint pursuant to 11 C.F.R. § 111.4(d)(3), no violation of the Act has occurred, because the advertisements it ran during the 1995-96 election cycle were not subject to 2 U.S.C. § 441a(d)

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6 The DNC further argues that under the "electioneering" test, the Commission presumes that a party coordinates its communications with its candidates. Attachment 2 at 5. The DNC, relying on *Colorado Republican Campaign Committee v. FEC*, 116 S.Ct. 2309 (1996), asserts that coordinated party expenditures are subject to limitation under 2 U.S.C. § 441a(d) only when the communication depicts a clearly identified candidate and contains an electioneering message. *Id.*

7 As an example of the inaccuracy of *The Choice*, the DNC cites a letter from the General Counsel to *The Washington Post* disputing statements that were attributed to him. Attachment 2 at 8. In addition, on September 26, 1996, the DNC submitted a sworn statement from Robert D. Squier, president of SKO, entitled "Presentation of Robert D. Squier." Attachment 4. Mr. Squier disputes several statements in *The Choice* that were attributed to him. *Id.*

under either the "electioneering message" standard (set forth in AOs 1985-14 and 1995-25), or the "express advocacy" standard (which the DNC contends is the appropriate standard). *Id.*

With respect to the electioneering message standard, the DNC claims that the advertisements it ran during the 1995-96 election cycle were legislative in nature and were the same type of advertisement as was described in AOs 1985-14 and 1995-25. The DNC contends that, pursuant to 2 U.S.C. § 437f(c), it was "clearly entitled" to rely on these advisory opinions in determining that its advertisements did not contain an electioneering message. *Id.* at 12.

The DNC argues that its advertisements likewise do not satisfy the definition of "expressly advocating" set forth at 11 C.F.R. § 100.22(b), nor do they "expressly advocate the election or defeat of any candidate" as that term has been defined by several courts.[8] *Id.* at 12-16. The DNC further urges that the "express advocacy" standard, not the "electioneering message" standard, is proper test for determining whether expenditures for advertisements are subject to 2 U.S.C. § 441a(d). Specifically, the DNC asserts that the Commission should construe the limits of 2 U.S.C. § 441a(d) to apply only when a communication expressly advocates the election or defeat of a clearly identified candidate, because a broader construction would impair its ability to communicate party positions on various issues and would have a direct impact on its First Amendment associational rights. *Id.* at 16-22. The DNC further argues that "not all party expenditures that are coordinated with candidates implicate the statutory purposes [of 2 U.S.C. § 441a(d)]." *Id.* at 23. The DNC claims that it may need to communicate

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8 The DNC cites *Federal Election Commission v. Christian Action Network*, No. 95-2600, 1996 U.S. App. LEXIS 19047 (4th Cir., August 2, 1996) (*per curiam*); *Maine Right to Life Committee, Inc. v. Federal Election Commission*, 914 F. Supp. 8 (D. Me. 1996); and *Federal Election Commission v. Survival Education Fund*, No. 89 Civ. 0347, 1994 U.S. Dist. LEXIS 210 (S.D.N.Y., Jan. 12, 1994), *aff'd in part, rev'd in part on other grounds*, 65 F.2d 285 (2d Cir. 1995).

with candidates because they are also "party officials, leaders and spokespersons" and that party positions and communications may need to be coordinated with one or more candidates. *Id.* at 25. Moreover, the DNC claims that 2 U.S.C. § 441a(d), if construed broadly, may be unconstitutionally vague because the DNC will be "required to guess at what point along the broad spectrum the limits of section 441a(d) will apply." *Id.* at 26.

On November 20, 1996, the DNC submitted its response to MUR 4544. Attachment 22. The DNC contends that the complaint does not directly name the DNC nor does it recite any facts that allege any violation of the Act. *Id.* The DNC argues that the complaint "merely alludes to statements made by Ann McBride of Common Cause" and that it is impossible for it to file any meaningful response to the complaint because it has not been provided a copy of the C-Span videotape.[9] *Id.* As a result, the DNC asserts that it has "clearly been prejudiced." *Id.* Finally, the DNC argues that this Office may have failed to comply with 11 C.F.R. § 111.5(b) "since the receipt date on the complaint is illegible," and further argues that the service of the complaint is in violation of 11 C.F.R. § 111.5(a) since the complaint fails to meet the technical requirements of 11 C.F.R. § 111.4. *Id.* at 2. Accordingly, the DNC requests that the complaint be dismissed. *Id.*

9 On December 9, 1996, the Office of General Counsel forwarded a copy of the C-Span videotape to the DNC. The DNC has not amended its original response.

2. Primary Committee Responses

On August 19, 1996, the Primary Committee submitted its response to MUR 4407.[10] Attachment 3. The Primary Committee contends that the Commission should either dismiss the complaint or, in the alternative, find no reason to believe that it violated the Act. *Id.* at 1.

The Primary Committee argues that the complaint fails to satisfy 11 C.F.R. § 111.4(d)(3) because it does not provide any facts, such as the contents and timing of the specific advertisements in question and how the cost of the advertisements was calculated, that constitute a violation of the Act. *Id.* at 2. The Primary Committee claims that the complaint's reliance on excerpts from *The Choice* is problematic because the author, Mr. Woodward, has no personal knowledge of any meetings that involved the President where the advertisements in question were discussed. *Id.* at 3. The Primary Committee maintains that due to his lack of personal knowledge, Mr. Woodward "admits that he is telling a 'story' and that this is simply one version of the story." *Id.* Moreover, the Primary Committee asserts that the complaint fails to state how the President controlled the advertisements in question. *Id.* In addition, the Primary Committee contends that the complaint fails to allege that the advertisements contain an electioneering message. *Id.*

The Primary Committee further argues that even if the Commission determines the complaint satisfies 11 C.F.R. § 111.4, the complaint must be dismissed because none of the advertisements contain an "electioneering message," and, at the time of its advertisement campaign, the DNC relied upon prior advisory opinions pursuant to 2 U.S.C. § 437f(c) in

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10 On July 15, 1996, the Primary Committee requested a 20-day extension of time to respond to the complaint. On July 16, 1996, the Office of General Counsel granted this request; thus, the response was due by the close of business on August 19, 1996.

determining that its expenditures for the advertisements were not subject to 2 U.S.C. § 441a(d). *Id.* at 4-5, 9-10.. The Primary Committee claims that the advertisements are "materially indistinguishable from the ads considered by the Commission" in AOs 1985-14 and 1995-25. *Id.* at 4-5. In particular, the Primary Committee argues that the advertisements "do not mention or refer to any election" and that the advertisements "merely provide information on current congressional legislative proposals." *Id. at 10.* The Primary Committee further asserts that references to the President, Senate Majority Leader Dole and House Speaker Gingrich in the advertisements relate solely to their respective officeholder positions. *Id.*

The Primary Committee also argues that, apart from the DNC's reliance on prior advisory opinions addressing the "electioneering" standard, the DNC advertisements in fact contain neither "express advocacy," nor an "electioneering message." *Id.* at 5-10. Like the DNC, the Primary Committee urges that "express advocacy" is the appropriate test, and argues that the advertisements do not expressly advocate the election or defeat of a clearly identified candidate under 11 C.F.R. § 100.22. *Id.* at 5-7. The Primary Committee claims that reasonable minds could not dispute that the advertisements "urged viewers to do -- *nothing,*" and that the advertisements "do not provide explicit directives to vote against these politicians." *Id.* at 8-9. The Primary Committee argues that all of the advertisements ran while related legislation was actively under consideration by Congress. *Id.* at 9. Moreover, the Primary Committee asserts that the complaint's claim that the President controlled the advertising campaign is meaningless under 11 C.F.R. § 100.22 and 2 U.S.C. § 441a(d) because "[t]he candidate is presumed to be coordinating with his or her party's expenditures." *Id.*

On August 13, 1997, the Primary Committee submitted its response to MUR 4544.[11] Attachment 23. The Primary Committee claims that the complaint contains no reference to the Primary Committee nor does it contain a description of "any facts constituting a violation of the Act." *Id.* at 1. The Primary Committee also notes that the complaint "oblique[ly]" refers to statements made by Ms. McBride and provides no other facts of her own knowledge or personal belief. *Id.* The Primary Committee argues that because it was notified of the complaint 266 days after it was filed, rather than within five days, the complaint is defective under 2 U.S.C. § 437g(a)(1). *Id.* at 2.

In the alternative, the Primary Committee asserts that the complaint fails to meet the requirements of a valid complaint set forth at 11 C.F.R. § 111.4(d)(3) because it fails to provide any facts which might constitute a violation of the Act or any Commission regulations. *Id.* The Primary Committee argues that a complaint cannot be based solely on information that identifies potential violations of the law, but that the complainant must identify within it the alleged violations of the law. *Id.* The Primary Committee further argues that the complaint is "completely devoid of any facts" and contains only statements made by Ms. McBride; thus, it asserts that the complaint contains no factual allegations that "even suggest a possible violation of the law." *Id.* Due to the absence of any facts, the Primary Committee alleges that it cannot provide a meaningful response because "there is nothing to respond to." *Id.* at 3. However, the Primary Committee states that if the Commission construes the complaint as valid, it incorporates by reference its response to MUR 4407. *Id.*

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11 The Central Enforcement Docket transferred MUR 4544 to the Public Financing, Ethics and Special Projects Section on July 18, 1997. The Primary Committee was served with a copy of Dr. Carley's complaint on July 24, 1997.

C. VALIDITY OF COMPLAINTS

Any person who believes that a violation of the federal election campaign laws[12] has occurred may file a complaint with the Commission. 2 U.S.C. § 437g(a)(1). A complaint shall provide the full name and address of the complainant, and the contents of the complaint shall be sworn to and signed in the presence of a notary public and notarized. 11 C.F.R. § 111.4(b). The complaint should clearly identify as a respondent each person or entity who is alleged to have committed a violation; identify the source of information which gives rise to the complainant's belief in the truth of statements which are not based on the complainant's personal knowledge; contain a clear and concise recitation of the facts which describe a violation; and be accompanied by any documentation supporting the facts alleged if such documentation is known of, or available to, the complainant. 11 C.F.R. § 111.4(d).[13]

The Office of General Counsel concludes that the complaints in MURs 4407 and 4544 are legally sufficient. The complaints each contain the full name and address of the complainants and were signed and sworn in the presence of a notaries public.

The complaints also comply with the recommended factors stated at 11 C.F.R. § 111.4(d). For instance, the complaint in MUR 4407 clearly identifies the DNC and Primary Committee as respondents who are alleged to have committed violations of the Act and the Presidential Primary Matching Payment Account Act, as amended, 26 U.S.C. §§ 9031 et seq. ("Matching Payment Act"). *See* 11 C.F.R. § 111.4(d)(1). Although the complainant did not

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12 These laws consist of the Act, the Presidential Election Campaign Fund Act, as amended, 26 U.S.C. §§ 9001 et seq. and the Presidential Primary Matching Payment Account Act, as amended, 26 U.S.C. §§ 9031 et seq.

13 The Office of General Counsel notifies complainants when they do not comply with the factors set forth at 11 C.F.R. § 111.4.

have personal knowledge of the violations, the complainant refers to *The Choice* and the Primary Committee disclosure reports as the source of the information which gives rise to its belief in the truth of its assertions. *See* 11 C.F.R. § 111.4(d)(2).[14] The complaint also contains a clear and concise recitation of factual allegations which, as discussed below, describe violations of a statute or regulation over which the Commission has jurisdiction. *See* 11 C.F.R. § 111.4(d)(3).[15]

The complaint in MUR 4544 also meets the requirements of 11 C.F.R. § 111.4(d). It identifies the national Democratic party as an entity who is alleged to have committed violations of the Act and the Matching Payment Act. *See* 11 C.F.R. § 111.4(d)(1). Although the complaint in MUR 4544 does not specifically name the Primary Committee as a respondent who allegedly committed a violation, statements made by Ms. McBride, which are part of the complaint, clearly refer to violations of federal campaign laws allegedly committed by the Primary Committee. Moreover, in references in the complaint and in forwarding the videotape to the Commission, Dr. Carley identified the source of information which gave rise to her belief in the truth of her assertions against the DNC and the Primary Committee. *See* 11 C.F.R. § 111.4(d)(2). The complaint in MUR 4544 also contains a clear and concise recitation of factual allegations which,

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14 On November 15, 1979, the Commission determined to continue to accept complaints based on newspaper articles containing substantive facts. Commission Memorandum 663. This Office believes that books containing substantive facts are no different from newspaper articles containing substantive facts. The attached excerpts from *The Choice* contain substantive factual allegations, such as named persons, particular acts and possible violations of federal election campaign laws. *See* MUR 1641 (complaint satisfied Commission criteria when it referred to newspaper article naming particular persons, acts, and alleged violations of the Act). Additional information obtained from *Behind the Oval Office,* a book written by a close advisor to the President, and various newspaper articles bolsters the allegations made in the complaints. *See, e.g.,* Attachments 10 (*Boston Globe* article dated February 23, 1997) and 12 (*National Journal* article dated May 11, 1996).

15 Although the complaint does not mention any particular advertisements, the Office of General Counsel believes that the complaint's reference to excerpts from *The Choice,* which are attached as a complaint exhibit, is sufficient to constitute a "clear and concise recitation of the facts." 11 C.F.R. § 111.4(d)(3).

as discussed in detail below, describes a violation of statutes and regulations over which the Commission has jurisdiction. *See* 11 C.F.R. § 111.4(d)(3).[16]

Finally, both complaints are accompanied by documentation available to the complainants, which supports the alleged facts. *See* 11 C.F.R. § 111.4(d)(4). The complaint in MUR 4407 contains excerpts from *The Choice* describing the advertisements and meetings between the President, Vice President Gore, Primary Committee officials and DNC representatives. The complaint in MUR 4407 also contains disclosure reports filed by the Primary Committee. The complaint in MUR 4544 was supplemented with a videotape copy of Ms. McBride's C-Span appearance. Therefore, this Office believes that the complaints satisfy the requirements of 2 U.S.C. § 437g(a)(1) and 11 C.F.R. § 111.4(b), as well as the suggestions of 11 C.F.R. §§ 111.4(d)(1)-(4).[17]

16 The Office of General Counsel believes that videotape copies of press conferences which allege substantive facts are no different than newspaper articles or books which allege substantive facts. *See supra* note 14. Like newspapers articles that are referred to in other complaints, the videotape copy of Ms. McBride's appearance, which includes references to the DOJ complaint, as well as the sources cited within the DOJ complaint, demonstrate that the alleged violations of the Act, the Matching Payment Act and the Fund Act by the DNC and the Primary Committee were based on substantive allegations. *See* MUR 1641 (complaint satisfied Commission criteria when it referred to newspaper article naming particular persons, acts, and alleged violations of the Act).

17 The Primary Committee asserts that the MUR 4544 complaint is defective because it received notification 266 days after the complaint was filed, not within five days as required by 2 U.S.C. § 437g(a)(1) and 11 C.F.R. § 111.5(a). Attachment 23 at 2. The Office of General Counsel believes that the failure to notify a respondent within the five-day period does not result in dismissal of the complaint against that respondent because the five-day notification period is non-jurisdictional. *See* 11 C.F.R. § 111.5(a). So long as the Office of General Counsel notifies a respondent of a complaint, and the respondent is given copies of the complaint, any relevant materials that accompanied the complaint, and compliance procedures, as well as a 15-day opportunity to respond to the complaint pursuant to 11 C.F.R. § 111.6, the respondent is not prejudiced from the untimely notification. The Primary Committee was given such information and the requisite time period to respond to the complaint.

The DNC also argues that it was entitled to, but did not receive, five days notice pursuant to 11 C.F.R. § 111.5(b) in MUR 4544. However, because this Office concludes that the complaint in MUR 4544 is sufficient, the DNC's argument is moot.

D. LAW

1. Contribution Limitations

The Act prohibits multicandidate 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). Similarly, no candidate or political committee shall knowingly accept any contribution that violates the contribution limitations. 2 U.S.C. § 441a(f). Publicly-funded general election candidates are barred from accepting any private contributions. *See* 26 U.S.C. § 9003(b)(2).

Corporations and labor unions cannot make contributions in connection with federal elections. 2 U.S.C. § 441b(a); 11 C.F.R. §§ 114.2(a), (b). No candidate or political committee shall knowingly accept such a prohibited contribution. A political committee that accepts contributions from corporations and/or labor unions for permissible purposes must establish separate accounts or committees for the receipt of federal and non-federal funds. 11 C.F.R. § 102.5(a). A political committee that maintains both federal and non-federal accounts shall make disbursements for federal elections from its federal account only. 11 C.F.R. § 102.5(a)(1)(i); *see also* in *Colorado Republican Campaign Committee v. FEC*, 116 S.Ct. 2309, 2316 (1996)("Unregulated soft money contributions may not be used to influence a federal campaign.")

A contribution includes any gift, subscription, loan, advance, deposit of money or anything of value made by any person for the purpose of influencing any election for federal office. 2 U.S.C. § 431(8)(A)(i). "Anything of value" includes all in-kind contributions. 11 C.F.R. § 100.7(a)(1)(iii). An expenditure includes any purchase, payment, distribution, loan,

advance, deposit, gift of money or anything of value, made by any person for the purpose of influencing any election for federal office. 2 U.S.C. § 431(9)(A)(i). "Anything of value" includes in-kind contributions. 11 C.F.R. § 110.8(a)(1)(iv)(A).

An expenditure made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents shall be considered a contribution to such candidate. 2 U.S.C. § 441a(a)(7)(B)(i). In *Buckley v. Valeo*, 424 U.S. 1, 78 (1976), the Supreme Court of the United States explicitly recognized that expenditures made in coordination with candidates are "contributions" within the meaning of the Act. As the Court stated, the term "contribution" includes "not only contributions made directly or indirectly to a candidate, political party, or campaign committee . . . but also *all* expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate," and found that, "[s]o defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign." 424 U.S. at 78. The Court held that payments for communications that are independent from the candidate, his or her committee, and his or her agents are free from governmental regulation so long as the communications do not "in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 44, 46-47. The Court held that communications that are authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate are to be treated as expenditures of the candidate and contributions by the person or group making the expenditure. 424 U.S. at 46-47 at note 53. The Court stated that coordinated expenditures are treated as in-kind contributions subject to the contribution limitations in order to "prevent attempts to circumvent the Act

through prearranged or coordinated expenditures amounting to disguised contributions." 424 U.S. at 46-47.

Subsequent cases have reiterated these basic principles. In *FEC v. Massachusetts Citizens for Life, Inc.*, the Court stated that expenditures by corporations that are made independent of any coordination with a candidate are prohibited by 2 U.S.C. § 441b only if they "expressly advocate the election or defeat of a clearly identified candidate." 479 U.S. 238, 248-49, 256 (1986)(quoting *Buckley*, 424 U.S. at 80). More recently, in *Colorado Republican Campaign Committee v. FEC*, the Court held that political parties may make independent expenditures on behalf of their congressional candidates without limitation. 116 S.Ct. 2309 (1996). In *Colorado*, the Court reiterated the *Buckley* distinction between independent expenditures and coordinated contributions, and focused on whether the expenditures in that case were in fact coordinated. The Court noted that in previous cases, it had found constitutional "limits that apply both when an individual or political committee contributes money directly to a candidate and also when they indirectly contribute by making expenditures that they coordinate with the candidate, § 441a(a)(7)(B)(i)." 116 S.Ct. at 2313. The Court's plurality opinion expressly declined to address the issue of whether limitations on coordinated expenditures by political parties are constitutionally permissible. The opinion notes the similarities between coordinated expenditures and contributions: "many such expenditures are also virtually indistinguishable from simple contributions (compare, for example, a donation of money with direct payment of a candidate's media bills. . .)." 116 S.Ct. at 2320.

2. Coordinated Party Expenditures

The national committee of a political party may make expenditures in connection with the general election campaign of its Presidential candidate that do not exceed an amount equal to two cents multiplied by the voting age population of the United States. 2 U.S.C. § 441a(d)(2). These "coordinated party expenditures" on behalf of a national party committee's candidate in the Presidential general election campaign are not subject to, and do not count toward, the contribution and expenditure limitations found at 2 U.S.C. §§ 441a(a) and (b).[18] 2 U.S.C. § 441a(d). A coordinated party expenditure allows party committees to engage in activity that would otherwise result in an excessive in-kind contribution to a candidate. In *Colorado*, the Supreme Court stated that section 441a(d) creates an exception from the $5,000 contribution limitation for political parties, and creates substitute limitations on party expenditures. 116 S.Ct. at 2313-2314. Conversely, a coordinated party expenditure in excess of the 2 U.S.C. § 441a(d)(2) limitations would constitute an excessive in-kind contribution from the national party to the candidate. Coordinated party expenditures do not count against a publicly-funded Presidential candidate's expenditure limitations. 11 C.F.R. § 110.7(a)(6); *see* 2 U.S.C. § 441a(b).

In determining whether specific communications paid for by parties were coordinated expenditures subject to the 2 U.S.C. § 441a(d) limitations, the Commission has considered whether the communication refers to a "clearly identified candidate" and contains an "electioneering message." AO 1984-15; AO 1985-14. The term "clearly identified" means that the name of the person involved appears, a photograph or drawing of the candidate appears; or

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18 The coordinated party expenditure limitation for the 1996 general election was $11,994,007.

the identity of the candidate is apparent by unambiguous reference. 2 U.S.C. § 431(18). The definition of "electioneering message" includes statements designed to urge the public to elect a certain candidate or party, or which would tend to diminish public support for one candidate and garner support for another candidate. *FEC v. Colo. Republican Fed. Campaign Comm.*, 59 F.3d 1015, 1023 (10th Cir. 1995) (citing to AO 1984-15), *rev'd on other grounds*, 116 S.Ct. 2309 (1996) (The Court did not address the content of the advertisements at issue); *see* AO 1985-14 ("electioneering messages include statements 'designed to urge the public to elect a certain candidate or party'") (citing *United States v. United Auto Workers*, 352 U.S. 567, 587 (1957)). The Commission has also stated that "expenditures pursuant to 2 U.S.C. § 441a(d) may be made without consultation or coordination with any candidate and may be made before the party's general election candidates are nominated." AO 1985-14, citing AO 1984-15.

3. Allocation

A political committee that finances political activity in connection with both federal and non-federal elections shall segregate funds used for federal elections from funds used for non-federal elections. 11 C.F.R. § 102.5(a)(1). If a political committee makes disbursements in connection with both federal and non-federal elections, it must allocate those disbursements between federal and non-federal funds. 11 C.F.R. § 106.5(a). Allocable disbursements include administrative expenses not attributable to a clearly identified candidate, and generic 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)(i) and (iv).

In Presidential election years, national party committees shall allocate at least 65% of their administrative and generic voter drive expenses to their federal accounts. 11 C.F.R. § 106.5(b)(2)(i). This allocation is "intended to reflect the national party committees' primary focus on presidential and other federal candidates and elections, while still recognizing that such committees also participate in party-building activities at state and local levels . . . ." Explanation and Justification for 11 C.F.R. § 106.5(b), 55 *Fed. Reg.* 26,063, 26,063 (June 26, 1990). In non-Presidential election years, national party committees shall allocate at least 60% of their administrative and generic voter drive expenses to their federal accounts. 11 C.F.R. § 106.5(b)(2)(ii).

All state and local party committees in states that hold federal and non-federal elections in the same year shall allocate their administrative and generic voter drive expenses according to the ballot composition method. 11 C.F.R. § 106.5(d)(1). Under this method, expenses shall be allocated based on the ratio of federal offices expected to be on the ballot to total federal and non-federal offices expected on the ballot in the next general election to be held in that state or jurisdiction. 11 C.F.R. § 106.5(d)(1)(i).

All state and local party committees in states that do not hold federal and non-federal elections in the same year shall allocate their generic voter drive expenses according to the ballot composition method based on a ratio calculated for that calendar year, and their administrative expenses based on a ratio calculated for the two-year Congressional election cycle. 11 C.F.R. § 106.5(d)(2).

4. Reporting

Each treasurer of a political committee shall file reports of its receipts and disbursements. 2 U.S.C. § 434(a)(1). Each report shall disclose for the appropriate reporting period all receipts, including all contributions received from political party committees. 2 U.S.C. § 434(b)(2)(C). Political committees other than authorized committees shall also disclose for the appropriate reporting period all disbursements, including contributions made to other political committees, as well as expenditures by national committees in connection with the general election campaigns of candidates for federal office. 2 U.S.C. §§ 434(b)(4)(H)(i) and (iv). Each in-kind contribution shall be reported as both a contribution and an expenditure. 11 C.F.R. §§ 104.13(a)(1) and (2); 2 U.S.C. § 434(b)(4). Moreover, if a political committee is required to allocate disbursements between federal and non-federal funds, the treasurer must report the appropriate allocation ratios. 11 C.F.R. § 104.10(b)(1).

5. Public Funding of Primary Campaigns

The Matching Payment Act governs the public funding of candidates who seek the Presidential nomination of a political party. "Candidate," for the purposes of the Matching Payment Act, means an individual who seeks nomination for election to be President of the United States. 26 U.S.C. § 9032(2).

Publicly-funded candidates are subject to expenditure limitations. 2 U.S.C. §§ 441a(b) and (c). No publicly-funded primary candidate shall knowingly incur qualified campaign expenses in excess of the expenditure limitations applicable under 2 U.S.C. § 441a(b)(1)(A). 26 U.S.C. § 9035(a). Moreover, no candidate or political committee shall knowingly make expenditures in violation of the primary election expenditure limitation at 2 U.S.C. § 441a(b).

2 U.S.C. § 441a(f). An expenditure is made on behalf of a publicly-funded candidate if it is made by: an authorized committee or any other agent of the candidate for purpose of making any expenditure; or any person authorized or requested by the candidate, an authorized committee of the candidate or an agent of the candidate to make the expenditure. 2 U.S.C. § 441a(b)(2)(B). The expenditure limitation for each publicly-funded candidate who participated in the 1996 Presidential nominating process was $37,092,000. 2 U.S.C. §§ 441a(b)(1)(A) and (c).

To be eligible to receive public financing, a candidate must certify to the Commission that, *inter alia*, he or she and his or her authorized committees will not incur qualified campaign expenses in excess of the expenditure limitation. 26 U.S.C. § 9033(b)(1). Moreover, a primary candidate must sign a written agreement permitting the Commission to review all qualified campaign expenses incurred by the candidate and his or her authorized committees. 26 U.S.C. § 9033(a).

6. Public Funding of Presidential Campaigns

The Presidential Election Campaign Fund Act, as amended, 26 U.S.C. §§ 9001-9013 ("Fund Act") applies to the public financing of the general election campaign of Presidential and Vice Presidential candidates. A "candidate" under the Fund Act is an individual who has been nominated for the office of President or Vice President by a major party or has qualified to have his or her name on the ballot as the candidate of a political party in 10 or more states. 26 U.S.C. § 9002(2).

Publicly-funded candidates are subject to expenditure limitations. 2 U.S.C. §§ 441a(b) and (c). No candidate or political committee shall knowingly make expenditures in violation of the general election expenditure limitation at 2 U.S.C. § 441a(b). 2 U.S.C. § 441a(f). The

expenditure limitation for each publicly-funded Presidential candidate of a major party who participated in the 1996 Presidential general election was $61,820,000. 2 U.S.C. §§ 441a(b)(1)(B) and (c).

To be eligible to receive public financing, a candidate must certify to the Commission that, *inter alia*, he or she and his or her authorized committees will not incur qualified campaign expenses in excess of the aggregate payments to which they will be entitled. 26 U.S.C. § 9003(b). Eligible candidates of each major party are entitled to payments. 26 U.S.C. § 9004(a)(1). Moreover, a publicly-funded general election candidate must sign a written agreement agreeing, *inter alia*, to provide evidence of qualified campaign expenses and certifying that he or she will not incur qualified campaign expenditures in excess of the aggregate public funds to which they are entitled and that they will not accept any contributions to defray qualified campaign expenses. 26 U.S.C. §§ 9003(a) and (b).

E. ANALYSIS

These matters involve possible coordinated expenditures made by the DNC for the purpose of influencing President Clinton's election that resulted in excessive in-kind contributions to his Primary Committee, coordinated party expenditures in excess of the 2 U.S.C. § 441a(d)(2) limit, or both, as well as other related violations.

Based on the allegations in the complaints and public information, including disclosure reports, the books *The Choice* and *Behind the Oval Office*, and various press reports,[19] it appears that the DNC may have paid for a major advertising campaign in 1995 and 1996, the timing, geographic focus and content of which were calculated to further President Clinton's re-election

19 *E.g.*, *Boston Globe* article dated February 23, 1997, *National Journal* article dated May 11, 1996, *Washington Post* article dated October 16, 1997.

efforts.[20] *See, e.g.,* Attachments 1, 5, 6, 7, 8, 10, 11, 12, and 24. Furthermore, the available information indicates that the President and campaign officials directed and actively participated in the development of this advertising campaign.[21]

Significantly, these matters involve the possible circumvention of expenditure limitations imposed upon a publicly-financed Presidential campaign. Expenditure limitations are an integral part of the public financing system, and the Supreme Court in *Colorado*, for example, implicitly recognized that different considerations may apply in cases involving candidates who accept public funding. *See* 2 U.S.C. § 441a(b); 26 U.S.C. §§ 9003(b), 9033, 9035. Similarly, in *Republican National Committee v. FEC*, the district court held that the burdens on free expression, if any, caused by conditioning eligibility for public funding on a presidential candidate agreeing to expenditure limitations do not violate the First Amendment. 487 F. Supp. 280, 284-87 (S.D.N.Y. 1980), *aff'd mem.* 445 U.S. 955 (1980); *see also Buckley*, 424 U.S. at 57, 86-108.

The allegations in these matters also raise questions concerning the relationship between a President and his or her party. As titular head of his or her party, the President will necessarily interact frequently with officials of the national party, party candidates, office holders, and supporters in working toward legislative and policy positions and goals, as well as in the context of campaign activity. The crucial question is at what point specific party expenditures become

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20 The available information discusses a campaign of television advertisements; however, it is possible that radio or other advertising media were also part of the advertisement campaign. This Office's investigation of this matter will seek to clarify this question.

21 It appears that during the initial formulation of the advertising campaign, the Primary Committee planned to pay for the advertisements, and that it paid for an initial advertisement concerning assault weapons. However, according to the complaint and other available information, it was subsequently decided that the DNC, rather than the Primary Committee or GEC, would pay for the advertising campaign.

in-kind contributions to the President's campaign or coordinated party expenditures subject to 2 U.S.C. § 441a(d). The opinion of this Office is that the distinction between permissible interaction and coordinated activity lies in the purpose and content of any resulting expenditure. Where, as here, there is information suggesting that campaign officials were actively involved in planning the advertisement campaign that the President acknowledged was central to sustaining public support for him, and where the content, timing and broadcast areas of the advertisements appear calculated to bolster the President's bid for re-election, then there is reason to believe that the coordinated expenditures were in-kind contributions to President Clinton's re-election campaign or coordinated party expenditures subject to 2 U.S.C. § 441a(d)(2).[22]

In *Behind the Oval Office*, Presidential consultant and author Dick Morris[23] explains that the advertising campaign was the "key" to the President's re-election campaign strategy:

> [T]he key to Clinton's victory was his early television advertising. . . . In 1996, the Clinton campaign, and, at the President's behest, the DNC spent upwards of eighty-five million dollars on ads. . . .
>
> Week after week, month after month, from early July 1995 more or less continually until election day in '96, sixteen months later, we bombarded the

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22 Although the content, timing and broadcast areas of the advertisements appear calculated to bolster the President's bid for re-election, the available advertisements do not appear to expressly advocate the election or defeat of any candidate. In its response in MUR 4407, the DNC urges dismissal of the complaint, arguing that absent such express advocacy the expenditures for the advertisements are not subject to 2 U.S.C. § 441a(d). *See supra*, page 10. This Office recommends that the Commission reject this argument.

While the Supreme Court has limited regulation of independent expenditures to communications containing express advocacy because of constitutional concerns, it has not imposed any similar restriction on the regulation of coordinated expenditures or other contributions. Express advocacy is not required for the regulation of expenditures which are coordinated with candidates and their campaigns, and such expenditures are in-kind contributions or coordinated party expenditures subject to 2 U.S.C. § 441a(d)(2). Because there is reason to believe that the expenditures in these matters were made in cooperation with, and at the direction of, the candidate and campaign staff, recent cases involving independent expenditures and express advocacy are inapposite. *See, e.g., Federal Election Commission v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997).

23 Mr. Morris was a consultant to the President who worked closely with the DNC, the Primary Committee, White House staff and SKO. Because he was a key figure in the President's campaign, his recorded recollections provide a basis for the recommended reason to believe findings set forth in this report.

> public with ads. The advertising was concentrated in the key swing states . . . . for a year and a half. This unprecedented campaign was the key to success.

Attachment 8 at 1. And he notes that "voter share zoomed where we advertised." *Id.* at 4. Mr. Morris states that the intent was to keep the advertisements on the air until election day, in order to secure the President's nomination and re-election. *Id.*

The advertising campaign appears to have included advertisements shown in a number of battleground states throughout 1995 and 1996. It appears that the advertisements were created by SKO and/or the November 5 Group, Inc. ("November 5").[24] Attachments 3 and 4. The available advertisement copies for 1996 indicate that the advertisements were run on television; however, no similar markings exist on the 1995 advertisement copies.

The advertisements provided by the DNC have a similar tone and style to each other.[25] In general, they discuss President Clinton's position on diverse subjects such as Medicare, the budget, education, health care, children, taxes and immigration and contrast his views with those of the Republicans in Congress, particularly Senator Dole, who eventually became the Republican Presidential nominee, and House Speaker Gingrich.

For example, an advertisement titled "Moral" dated August 1995 states, in part: "The Republicans are wrong to want to cut Medicare benefits. And President Clinton is right to protect Medicare . . . [sic] right to defend our decision, as a nation, to do what's moral, good and right by our elderly." Attachment 2 at 37. Another advertisement, titled "Protect" from August

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24 It appears that SKO and November 5 may be interconnected. Attachments 9 and 10. November 5 is a District of Columbia corporation that was established on February 5, 1996. Attachment 9. Its Board of Directors consists of Anthony Parker, William Knapp, and Robert Squier, and, during the period of time leading up to the general election, its principal place of business was 511 Second Street, N.W., Washington, D.C. 20002. *Id.* This address is the same as SKO's address. *Id.*

25 Specific advertisements are identified in attachments to the complaint, excerpts from *The Choice*, by Bob Woodward, as well as in the DNC's response. *See* Attachments 1 at 11, 12, and 2 at 33-51.

1995 states: "There is a way to protect Medicare benefits and balance the budget. President Clinton. . . . The Republicans disagree. They want to cut Medicare $270 billion. . . ." *Id.* at 36.

While some of the advertisements contrasted the President's views with Republican positions, others were essentially negative attacks on Senator Dole and Speaker Gingrich. An advertisement called "Wither" from November 1995, for example, stated:

> Finally we learn the truth about how the Republicans want to eliminate Medicare. First . . . [sic] Robert Dole. 'I was there, fighting the fight, voting against Medicare, one of 12 -- because we knew it wouldn't work -- in 1965.' Now . . . [sic] Newt Gingrich on Medicare. 'Now we don't get rid of it in round one because we don't think that that's the right way to go through a transition, but we believe it's going to wither on the vine.' The Republicans in Congress. They never believed in Medicare. And now, they want it to wither on the vine.

Id. at 40. Twelve of the available advertisements characterize Republicans as opponents to President Clinton's policies; six advertisements imply that Senator Dole and Speaker Gingrich are obstacles to passage of President Clinton's policies in Congress. *See id.* at 36-51. Some of the advertisements focused on the budget battle between the President and Congress, contrasting the President's budget plan with Republican plans to cut education, environmental protection and health care. *See, e.g., id.* at 45-46. A number of advertisements link the names of Senator Dole and Speaker Gingrich. For example, an advertisement titled "Table" from January 1996 states:

> The Gingrich Dole budget plan. Doctors charging more than Medicare allows. Head Start, school anti-drug help slashed. Children denied adequate medical care. Toxic polluters let off the hook. But President Clinton has put a balanced budget plan on the table protecting Medicare, Medicaid, education, environment. The President cuts taxes and protects our values. But Dole and Gingrich just walked away. That's wrong. They must agree to balance the budget without hurting America's families.

Id. at 47. Similarly, other advertisements refer to the "Dole Gingrich attack ad" and the "Dole/Gingrich Budget." *Id.* at 36-51. It appears that the advertisements continued until mid-1996.

There is reason to believe that the DNC-funded advertising campaign was the result of cooperation between the DNC and the President and his campaign organizations. According to *The Choice*, the DNC "functioned as the unofficial arm of the Clinton campaign" and President Clinton "directed the committee's efforts." Attachment 1 at 10. *The Choice* describes several White House meetings between President Clinton, Vice President Gore, Primary Committee officials and DNC officials where the advertisements were discussed. For example, Mr. Woodward writes:

> [Dick] Morris wanted more money from the Clinton-Gore campaign to run television advertising emphasizing the President's policy of protecting Medicare, not cutting it. The crime ads which had run earlier in the summer had been a giant smash hit, Morris was still arguing.
>
> Clinton liked the idea and wondered aloud why they were not up on the air talking about his agenda.
>
> Terry McAuliffe argued strenuously against spending more money on ads. 'They'll be using our precision money,' he said. . . .
>
> Harold Ickes said he agreed 100 percent with McAuliffe. The Clinton-Gore money was their insurance policy during the primary season. Even though it looked like there was no challenger to Clinton, one could emerge in a flash.

Id. at 9.[26] It appears that Clinton's re-election strategists decided to take advantage of Clinton's role as titular head of the Democratic Party to use the DNC's money to further his re-election.

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26 At the time these meetings allegedly occurred, Harold Ickes was the President's Deputy White House Chief of Staff and Terry McAuliffe was the DNC Finance Chairman.

For example, Mr. Woodward also alleges that as a result of further discussions about the President's re-election efforts:

> Clinton wanted an ad campaign. Morris was pressing, Ickes and McAuliffe were resisting.
>
> There was only one other place to get the money: the Democratic National Committee, which functioned as the unofficial arm of the Clinton campaign. And Clinton, as the head of the party, directed the committee's efforts. The [DNC] could launch a new fund-raising effort as it had in 1994 when millions had been raised in a special effort to televise Pro-Clinton health care reform ads. Though opponents of his health care reform plan had spent much, much more, the idea was sound. Clinton said he was not going to be drowned out this time, and directed a special fund-raising effort.

Id. at 10. Mr. Woodward further writes:

> In all, some $10 million was raised in the special fund-raising effort . . . to finance what eventually became a $15 million advertising blitz.
>
> For several months, Morris and Robert Squier had been testing a half a dozen possible 30-second scripts and television ads a week for possible use. At weekly evening meetings in the White House, Clinton went through them, offered suggestions and even edited some of the scripts. He directed the process, trying out what he wanted to say, what might work, how he felt about it, and what it meant. . . .

Id. Finally, Mr. Woodward asserts that "Clinton remained heavily involved in the day-to-day presentation of his campaign through television advertising. . . . Clinton personally had been controlling tens of millions of dollars worth of DNC advertising." *Id.* at 11-12.

In *Behind the Oval Office,* Mr. Morris similarly suggests that the advertising campaign was developed with the active participation and interaction of the candidate, campaign staff, DNC representatives, White House staff, and the media consultants.[27] Mr. Morris states that he

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27 In *Behind the Oval Office*, Mr. Morris states that in addition to the President, Vice President and himself, a number of other individuals were involved in White House meetings to discuss the development or creation of the advertisements. Attachment 8 at 5. These included White House staff, DNC representatives and campaign officials such as Leon Panetta, Harold Ickes, Terry McAuliffe, George Stephanopoulos, Doug Sosnik, Erskine Bowles,

reviewed the questionnaires for the polls, the polling results, the scripts and test runs of the advertisements with President Clinton. Attachment 8 at 3. He alleges:

> the [P]resident became the day-to-day operational director of our TV-ad campaign. He worked over every script, watched every ad, ordered changes in every visual presentation, and decided which ads would run where. He was as involved as any of his media consultants were. The ads became not the slick creations of ad-men but the work of the [P]resident himself. . . .

Id. at 4. Indeed, he states that "the entire fate of Clinton's presidency hinged on this key decision" to run advertisements, and "the decision to advertise early and continually" was one of the "keys to victory in '96" and "took us into 1996 with a lead over Dole." *Id.* at 6.

It also appears that President Clinton acknowledged to DNC donors that the purpose of the DNC-funded advertisement campaign was to bolster the President's election bid. A videotape released by the White House reportedly shows the President addressing DNC donors invited to a May 21, 1996 White House lunch and stating:

> Many of you have given very generously and thank you for that [. . .] The fact that we've been able to finance this long-running constant television campaign . . . where we're always able to frame the issues . . . has been central to the position I now enjoy in the polls, [. . . The ads helped] sustain an unbroken lead for five and a half months.

Attachment 24 at 1.

Based on the foregoing information, at this time it appears that these matters do not involve independent expenditures. An "independent expenditure" is an expenditure that expressly advocates 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 a

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Senator Chris Dodd, Peter Knight, and Ann Lewis. In addition, a number of consultants attended these strategy meetings including Robert Squier, Bill Knapp, Marius Penczner, Hank Sheinkopf, Mark Penn and Doug Schoen. Mr. Squier and Mr. Knapp are partners in SKO; Mr. Penczner is a media consultant; Mr. Sheinkopf is a media consultant with the firm of Austin-Sheinkopf; and Mr. Penn and Mr. Schoen are pollsters. *Id.* at 2-5.

candidate, and which *is not* made in concert with, or at the suggestion of, any candidate or any authorized committee or agent of a candidate. 2 U.S.C. § 431(17); 11 C.F.R. § 109.1. Conversely, any expenditure that *is* made with cooperation or consultation, in concert with, or at the suggestion of any candidate, agent of a candidate, or authorized committee *cannot* be an independent expenditure. Rather, such a coordinated expenditure is an in-kind contribution to the candidate. 2 U.S.C. § 441a(a)(7)(B)(i).

Likewise, the information presently available to the Commission suggests that these matters do not involve legislative advocacy advertisements like the advertisements at issue in AO 1995-25 and MUR 4246. In AO 1995-25, the Commission concluded that costs related to advertisements focusing on national legislative advocacy activity and the promotion of the Republican Party were allocable between the Republican Party's federal and non-federal accounts pursuant to 11 C.F.R. §§ 106.5(b)(2)(i) and (ii). However, unlike the situation in AO 1995-25, here the timing of the media campaign, the apparent coordination between campaign officials and the DNC, and the content of the advertisements together give reason to believe that the purpose of the advertising campaign was to influence the election of President Clinton.

In MUR 4246, this Office recommended that the Commission enter into a pre-probable cause conciliation agreement

However, the events in MUR 4246 occurred in 1993, the year immediately following the President's election, whereas the advertisement campaign at issue here occurred during the primary and general election

campaigns.[28] Furthermore, in MUR 4246 there were no facts to suggest that any amount at issue was expended in cooperation with the President and for the purpose of influencing his election. To the contrary, the facts and circumstances of MUR 4246 suggest that the respondents' advocacy of the President's health care reform initiative was specifically calculated to sway public opinion in favor of the Democratic Party, and its candidates in general. *See* MUR 4246, First General Counsel's Report dated December 24, 1996 at 19-24.

It appears that the total amount spent on the advertising campaign was between $15,000,000 and $50,000,000.[29] The DNC directly paid $2,703,034.67 to SKO and/or November 5 between January 1, 1995 and August 28, 1996, the date that President Clinton received the Democratic Party nomination for President of the United States.[30] *See* 11 C.F.R. § 9033.5(c). The DNC reported the purpose of these expenditures as "media," and it therefore appears that this amount was paid for the advertising campaign. Attachment 5.

The advertisements provided with the DNC's response to the complaint aired between August 16, 1995 and July 16, 1996. The DNC disclosure reports for these periods (January 22,

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28 In the context of party reimbursement of a Presidential candidate's expenses arising from appearing at a party event, the Commission has presumed that, if the candidate for President appears at an event prior to January 1 of the year of the Presidential election, the candidate's appearance is presumed to be party-related and the candidate's party may reimburse the candidate's expenses. 11 C.F.R. § 110.8(e). Conversely, if an event is on or after January 1 of the Presidential election year, any related contributions or expenditures are presumed to be governed by the Act's contribution and expenditure limitations. *Id.* Either presumption may be rebutted by demonstrating that the candidate's appearance at the event was or was not party-related. 11 C.F.R. § 110.8(e)(2)(iii).

29 The total amount that the DNC spent on the advertising campaign is not clear. The complaint in MUR 4407 alleges that the cost was $25,000,000. *The Choice* puts the cost at $15,000,000. Attachment 1 at 10. In *Behind the Oval Office* Dick Morris states that the DNC spent $35,000,000. Attachment 8 at 1-2. Based on this Office's preliminary review of DNC disclosure reports for the periods covering July 1, 1995 through September 30, 1996, it is possible that the total amount spent on the advertisement campaign may have been as much as $50,485,000. A full investigation of this matter is necessary to determine the correct amount involved. Throughout this report, this Office has used the $25,000,000 figure from the complaint in MUR 4407.

30 This figure is derived from a review of DNC disclosure reports for periods covering July 1, 1995 through September 30, 1996. Attachment 5.

1996; April 15, 1996; July 15, 1996; and October 15, 1996) indicate that the DNC allocated 60% of its disbursements to SKO and November 5 between July 1, 1995 through December 31, 1995 to its federal accounts, and 65% of its disbursements to SKO and November 5 to its federal accounts for the periods between January 1, 1996 and September 30, 1996.[31] *See id.*

In addition to the amounts disbursed by the DNC directly to SKO and November 5, it appears that the DNC indirectly funneled millions of additional dollars to SKO and November 5 through the accounts of various state Democratic Party committees ("state committees") as intermediaries. *See, e.g.*, Attachment 11. Based on the similarity of the timing and amounts of the transfers, the reported purpose of the disbursements, and the statements of state committee officials, it appears that the funds paid to SKO and November 5 through state committee accounts were DNC funds, not state committee funds, and that the DNC used the state committee accounts to take advantage of state allocation ratios, which allow a greater percentage of funds for administrative expenses to be paid from non-federal accounts. *See* 11 C.F.R. § 106.5(d).

Specifically, it appears that upon receipt of these DNC funds, state committees quickly disbursed the transferred amounts, often on the day of receipt, to SKO and/or November 5 for the purchase of advertisements.[32] *See, e.g.*, Attachment 11. Furthermore, available information suggests that state committee officials may have believed that state committee disbursements to SKO and November 5 were made with DNC funds at the DNC's behest. For example, it is

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31 The DNC allocated the cost of these advertisements, apparently based on its contention that the advertisements were legislative advocacy advertisements and thus allocable as either administrative expenses or generic voter drive costs. *See* AO 1995-25; 11 C.F.R. § 106.5.

32 Because of the distinct similarity between the timing and the amounts of the transfers from the DNC to the state committees, and the transfers from the state committees to SKO and November 5, no first-in/first-out, or first-in/last-out analysis has been performed on these transfers prior to making the reason to believe recommendations set forth in this report.

reported that Jo Miglino, the Florida Democratic Party Communications Director, when asked by James A. Barnes, a reporter from *The National Journal*, about advertisements aired in Florida, stated, "Those [advertisements] aren't ours; those are the DNC's." Attachment 12 at 4. Barbara Guttman, the Illinois Democratic Party Press Secretary, reportedly gave a similar response when Mr. Barnes asked about advertisements aired in Illinois; stating, "The DNC and Squier kind of review the numbers and the points. . . . The DNC pays for it." *Id.* Finally, Tony Wyche, the Missouri Democratic Party Communications Director, when asked by Mr. Barnes about the authority his state committee had over the ads, is reported to have responded "We have to agree to do it. . . . [But][i]t's just a technicality."[33] *Id.*

This Office has identified DNC transfers to state committees totaling approximately $54,000,000 from various federal and non-federal accounts between January 1, 1995 through August 28, 1996.[34] At this time it is not clear how much of this total amount was related to the

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33 DNC transfers to the Democratic Party of New Mexico ("New Mexico") illustrate the pattern of activity. The DNC transferred $599,801 to New Mexico from federal and non-federal accounts between January 1, 1996 and August 28, 1996. During this period, New Mexico reported disbursements totaling $531,866 to SKO and/or November 5. For example, on January 11, 1996, the DNC transferred $29,640 ($10,967 or 37% from its federal account + $18,673 or 63% from its non-federal account) to New Mexico. On January 19, 1997, New Mexico reported receiving $10,967, the federal funds from the DNC. On the same day, New Mexico disbursed $29,639.20 ($11,263.20 (federal account) + $18,367 (non-federal account)) to SKO for "generic media." The total disbursed by New Mexico was virtually identical to the total transferred from the DNC. Based on the DNC's contention that these advertisements are allocable, if the DNC had directly disbursed $29,640 to SKO, it would have been required to pay $19,266 from its federal accounts and $10,374 from its non-federal accounts. *See* 11 C.F.R. § 106.5(b)(2)(i). However, by transferring the money to New Mexico, the DNC "saved" $8,299 in federal money ($11,263.20 (state allocation ratio) compared to $19,266 (national party allocation ratio)). Therefore, if the advertisements were allocable expenditures, the DNC would have "saved" substantial federal funds each time it transferred federal and non-federal funds to a state committee for the purchase of advertisements.

Since it appears that the DNC and state committees paid SKO and November 5 in part with funds from non-federal accounts, some of the funds that were used for these in-kind contributions may have come from improper sources, such as excessive contributions, funds from foreign nationals, or contributions in the name of another, that may give rise to FECA violations. *See* 2 U.S.C. §§ 441a(a), 441a(f), 441e, 441f.

34 This figure is derived from a review of DNC disclosure reports for the periods covering January 1, 1995 through September 30, 1996. Attachment 5.

advertisement campaign. This Office has also examined disclosure reports for all 50 state committees and the District of Columbia, for the periods from January 1, 1995 through June 30, 1997. As a result of the review of 24 of the state committee disclosure reports, this Office has identified DNC transfers totaling approximately $9,865,000 to state committees, who, in turn, disbursed approximately $6,350,000 to SKO and/or November 5.[35] Further investigation is necessary for this Office to determine the exact amount which was disbursed through the state committees for the advertising campaign, and which should be included in the calculation of the total amount which the DNC expended.[36]

Based on the information available at this time and the allegations of the complaints, it is not clear whether the expenditures for the advertisement campaign should be treated as excessive in-kind contributions from the DNC to the Primary Committee, coordinated party expenditures that exceeded the DNC's 2 U.S.C. § 441a(d)(2) limitation, and thus, were in-kind contributions to the GEC, or some combination of both. This Office concludes that reason to believe findings for both alternatives are appropriate.

As a multicandidate committee, the DNC was permitted to contribute only $5,000 to the Primary Committee and President Clinton. The Office of General Counsel therefore recommends that the Commission find reason to believe that the Democratic National Committee and Carol Pensky, as treasurer, made excessive in-kind contributions to the

35 This Office notes that this amount is an approximate calculation which may significantly increase once all the data in the other 26 state committee disclosure reports is examined and totaled.

36 In order to focus these matters and best utilize the Commission's limited resources, this Office is not making any recommendation at this time concerning possible violations by state committees.

Clinton/Gore '96 Primary Committee, Inc. and President William J. Clinton in violation of 2 U.S.C. § 441a(a)(2)(A).[37]

Because it appears that the advertisement campaign was for the purpose of influencing President Clinton's election, and that President Clinton and his campaign officials were involved in the development and creation of the advertisements, this Office recommends that the Commission find reason to believe that the Clinton/Gore '96 Primary Committee, Inc., its treasurer, Joan Pollitt, and President William J. Clinton violated 2 U.S.C. § 441a(f) by accepting these excessive in-kind contributions.

As a prerequisite to receiving public funds, President Clinton signed a written agreement certifying to the Commission that he and his Primary Committee would not incur qualified campaign expenses in excess of $37,092,000. *See* 26 U.S.C. §§ 9033(a), 9033(b)(1) and 9035(a). As of December 31, 1996, the Primary Committee reported qualified campaign expenditures totaling $30,171,336.74. To the extent that the expenditures for the advertising campaign were for the purpose of influencing President Clinton's primary election campaign, they count against the Primary Committee expenditure limitation. The Office of General Counsel therefore recommends that the Commission find reason to believe that the Clinton/Gore '96 Primary Committee and Joan Pollitt, as treasurer, and President William J. Clinton exceeded the overall expenditure limitation in violation of 2 U.S.C. §§ 441a(b)(1)(A) and 441a(f), and 26 U.S.C. § 9035(a).

While the available information indicates that the advertisements may have been focused on the primary election, investigation of this matter is necessary to explore this issue.[38]

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37 On September 15, 1995, the DNC made an in-kind contribution to the Primary Committee in the amount of $1,861.21. Attachment 6.

Therefore, this Office recommends alternative reason to believe findings that some portion, or all, of the expenditures made for the advertisement campaign were coordinated party expenditures related to the general election that exceeded the 2 U.S.C. § 441a(d)(2) limitation.[39]

The coordinated party expenditure limitation for the 1996 Presidential general election was $11,994,007. Although the DNC reported coordinated party expenses, as of July 31, 1997, totaling $8,314,020.75, none of the advertisements at issue here appears to be included in this amount. When the apparent cost of the advertisement campaign is added to the amount of the reported coordinated party expenses, the amount exceeds the 2 U.S.C. § 441a(d)(2) expenditure limitations. This Office therefore recommends that the Commission find reason to believe that the Democratic National Committee and Carol Pensky, as treasurer, exceeded the 2 U.S.C. § 441a(d) coordinated party expenditure limitations in violation of 2 U.S.C. §441a(f). This Office further recommends that the Commission find reason to believe that the Clinton/Gore '96 General Committee and Joan Pollitt, as treasurer, accepted excessive contributions from the

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38 Most, if not all, of the advertisements apparently were created and broadcast prior to President Clinton's nomination. If the campaign had paid for these advertisements and if they were considered qualified campaign expenditures, the cost of these advertisements may have been attributed to the primary election expenditure limitation. 11 C.F.R. §§ 9034.4(e)(5) and (6)(ii); *see cf.* Final Repayment Determination in Reagan-Bush '84 General (July 11, 1988). However, the purpose of some or all of the advertisements may have been to influence the general election. This Office has compared the text of television advertisements funded by the DNC with videotapes of television advertisements funded by the Primary Committee (the latter were received pursuant to an audit subpoena). There appear to be substantial similarities between the television advertisements funded by the DNC and those funded by the Primary Committee.

39 Although coordinated party expenditures may be made before the party's general election candidates are nominated, the timing of the advertisements is relevant to determining how they should be allocated between the primary and general election campaigns, and what sorts of funds may be used to pay for them. See AO 1984-15, AO 1985-14. Developments in public financing cases and the Commission's regulations since the issuance of AO 1984-15 have emphasized the importance of the timing of expenditures. For example, the Commission acknowledged the significance of both timing and purpose in its recently revised regulations at 11 C.F.R. § 9034.4(e), which set forth rules for attributing expenditures between the primary and general election limitations for candidates who receive both primary and general public funds. Under these regulations, expenditures for communications are allocated based on the date of broadcast; media production costs for media used both before and after the date of nomination are attributed 50% to the primary campaign and 50% to the general campaign. 11 C.F.R. §§ 9034.4(e)(5) and (6)(ii).

Democratic National Committee in violation of 2 U.S.C. § 441a(f). This Office also recommends that the Commission find reason to believe that President Clinton and Vice President Gore accepted excessive contributions from the Democratic National Committee in violation of 2 U.S.C. § 441a(f).

To the extent that the expenditures exceeded the 2 U.S.C. § 441a(d)(2) limitations, they were in-kind contributions from the DNC to President Clinton, Vice President Gore and the GEC. President Clinton and Vice President Gore signed a written agreement certifying that they would not incur qualified campaign expenditures in excess of the aggregate public funds to which they are entitled. *See* 26 U.S.C. § 9003(b)(1). The general election limitation was $61,820,000.00, and the reported amount of expenditures as of July 15, 1997, was $62,109,491.01 (apparently already exceeding the limitation by $289,491.01). This Office therefore recommends that the Commission find reason to believe that the Clinton/Gore '96 General Committee and Joan Pollitt, as treasurer, exceeded the general election expenditure limitation in violation of 2 U.S.C. §§ 441a(b)(1)(B) and 441a(f). This Office also recommends that the Commission find reason to believe that President William J. Clinton and Vice President Albert Gore, Jr. exceeded the general election expenditure limitation in violation of 2 U.S.C. §§ 441a(b)(1)(B) and 441a(f).

There is reason to believe that the DNC made in-kind contributions to the Primary Committee, or made coordinated party expenditures in excess of the 2 U.S.C. § 441a(d)(2) limitations that constituted in-kind contributions to the Primary Committee, the GEC, or both, by paying for an advertisement campaign in 1995 and 1996 to benefit President Clinton's re-election campaign. The DNC did not report the disbursements for the advertisements as

contributions to the Primary Committee or the GEC. Nor did it report the expenditures as coordinated party expenditures. Since the expenditures were not allocable, there is reason to believe that the DNC improperly reported the disbursements when it allocated its direct disbursements to SKO and November 5. Further, there is reason to believe that the DNC improperly reported the transfers to the state committees, which may have been payments to SKO and November 5 that were funneled through the state committees to disguise their origin. Therefore, the Office of General Counsel recommends that the Commission find reason to believe that the Democratic National Committee and its treasurer, Carol Pensky, violated 2 U.S.C. § 434(b)(4).

Moreover, there is reason to believe that the Primary Committee was required to report the cost of these advertisements as both contributions and expenditures but failed to do so. *See* 11 C.F.R. § 104.13(a). Therefore, the Office of General Counsel recommends that the Commission find reason to believe that the Clinton/Gore '96 Primary Committee and its treasurer, Joan Pollitt, violated 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).

Further, since the advertisement campaign may have been related to the general election in whole or in part, there is reason to believe that the GEC was required to report the cost of the advertisements, to the extent that they exceeded the 2 U.S.C. § 441a(d)(2) limitation, as both contributions and expenditures but failed to do so. *See* 11 C.F.R. § 104.13(a). Therefore, the Office of General Counsel recommends that the Commission find reason to believe that the Clinton/Gore '96 General Committee and its treasurer, Joan Pollitt, violated 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).

It also appears that the DNC used funds from its non-federal accounts to pay for these advertisements. These accounts likely contained corporate and labor organization contributions, which are prohibited with respect to federal activities. Therefore the Office of General Counsel recommends that the Commission find reason to believe that the DNC and its treasurer, Carol Pensky, violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 102.5(a). Further, it appears that the campaign committees and the candidates knew that non-federal funds were used to pay for these advertisements. Therefore, the Office of General Counsel recommends that the Commission find reason to believe that the Clinton/Gore '96 Primary Committee and its treasurer, Joan Pollitt; the Clinton/Gore '96 General Committee and its treasurer, Joan Pollitt; President William J. Clinton and Vice President Albert Gore, Jr. violated 2 U.S.C. § 441b(a).

III. DISCUSSION OF INVESTIGATION

In order to clarify the facts surrounding the advertisements, this Office plans to investigate this matter by issuing document and deposition subpoenas, as well as through informal discovery where practicable.

This Office is also exploring whether the burdens of discovery may be reduced, and the case may be processed more quickly, through the use of admissions by the respondents in connection with facts which the respondents do not contest. To the extent that the respondents indicate that particular factual matters are not in dispute, further discovery would not be warranted.

This Office seeks authority to depose a number of individuals specifically mentioned in *The Choice, Behind the Oval Office,* or in media accounts as persons with direct knowledge of

meetings that led to the creation of the advertisements in question, or who held positions where they would have had knowledge of the advertisement campaign, such as officials of the DNC. Initially, we seek authority to depose several key individuals, including Dick Morris; SKO employees Robert Squier, William Knapp, Betsy Steinberg and Jamie Sterling; media consultants Hank Sheinkopf and Marius Penczner; pollsters Mark Penn and Doug Schoen; White House Staff Erskine Bowles, Leon Panetta, George Stephanopoulos, Doug Sosnik, Harold Ickes and Marsha Scott; DNC official Terry McAuliffe; Primary Committee staff Peter Knight, and state committee staff Jo Miglino.[40] These individuals may possess information that demonstrates whether the advertisements were made "in cooperation, consultation, or concert with, or at the request or suggestion of" President Clinton, campaign officials and their agents and whether the advertisements were for the purpose of influencing President Clinton's election. *See* 2 U.S.C. §§ 431(8)(A)(i), 441a(a)(7)(B)(i) and 441a(b)(2)(B). Moreover, the investigation will clarify whether the advertisements were related to the primary election, the general election or both, and whether the advertisements were coordinated party expenditures.

This Office also seeks subpoena authority for the production of documents related to the advertisements by each of these individuals, as well as SKO and November 5, the Primary Committee, the GEC, the DNC, President Clinton, Vice President Gore and the Executive Office of the President. This Office anticipates that such documentation will enable us to examine all of the advertisements in this matter, as well as Primary Committee television advertisements aired

40 Based on the results of our investigation, it may not be necessary to depose all of these individuals. Moreover, because of the apparent involvement of the President and Vice President in the creation and development of the advertisements, it may prove necessary during the investigation to depose President William J. Clinton and Vice President Albert Gore, Jr. However, this Office is not seeking authorization for depositions of these individuals at this time.

during the same time as the advertisements.[41] Moreover, this Office anticipates that the documentation will enable us to determine the total amount spent by the DNC, the Primary Committee, and the GEC for advertisements.[42] Finally, the review of documents produced pursuant to the subpoenas will allow this Office to determine the best order in which to take depositions and to prepare the best questions to put to the deponents.

IV. RECOMMENDATIONS

1. Find reason to believe that the Democratic National Committee and Carol Pensky, as treasurer, made excessive contributions to the Clinton/Gore '96 Primary Committee, Inc. and President William J. Clinton in violation of 2 U.S.C. § 441a(a)(2)(A);

2. Find reason to believe that the Clinton/Gore '96 Primary Committee, Inc., its treasurer, Joan Pollitt, and President William J. Clinton accepted excessive contributions from the Democratic National Committee in violation of 2 U.S.C. § 441a(f);

3. Find reason to believe that the Clinton/Gore '96 Primary Committee, Inc., its treasurer, Joan Pollitt, and President William J. Clinton exceeded the expenditure limitation for the 1996 Presidential nominating process in violation of 2 U.S.C. §§ 441a(b)(1)(A) and (f) and 26 U.S.C. § 9035(a);

4. Find reason to believe that the Democratic National Committee and Carol Pensky, as treasurer, exceeded the coordinated party expenditure limitations in violation of 2 U.S.C. § 441a(f);

5. Find reason to believe that the Clinton/Gore '96 General Committee, Inc., its treasurer, Joan Pollitt accepted excessive contributions from the Democratic National Committee in violation of 2 U.S.C. § 441a(f);

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41 This Office does not recommend seeking discovery from Bob Woodward. To overcome the journalist's privilege, which Mr. Woodward would certainly invoke, the Commission would have to show that it was unable to obtain the information sought from any other source. *Branzburg v. Hayes*, 408 U.S. 665 (1972); *N.L.R.B. v. Mortesnen*, 701 F. Supp. 244 (1988). Until the fruits of discovery from other sources are evaluated, there is no purpose to be served by attempting to compel broad discovery from Mr. Woodward. This Office does not believe that the journalist's privilege protects Mr. Morris, who has knowledge of the events in question because he was a participant, not an investigative journalist.

42 Staff of this Office will coordinate our investigation of this matter with staff assigned to other enforcement matters involving the DNC or the Clinton/Gore '96 Committees.

6. Find reason to believe that President William J. Clinton and Vice President Albert Gore, Jr. accepted excessive contributions from the Democratic National Committee in violation of 2 U.S.C. § 441a(f);

7. Find reason to believe that the Clinton/Gore '96 General Committee, Inc., its treasurer, Joan Pollitt exceeded the expenditure limitation for the 1996 Presidential general election in violation of 2 U.S.C. §§ 441a(b)(1)(B) and 441a(f);

8. Find reason to believe President William J. Clinton and Vice President Albert Gore, Jr. exceeded the expenditure limitation for the 1996 Presidential general election in violation of 2 U.S.C. §§ 441a(b)(1)(B) and 441a(f);

9. Find reason to believe that the Democratic National Committee and Carol Pensky, as treasurer, failed to properly report coordinated party expenditures and contributions that it made to the Clinton/Gore '96 Primary Committee, Inc. and to the Clinton/Gore '96 General Committee, Inc. and President William J. Clinton in violation of 2 U.S.C. § 434(b)(4);

10. Find reason to believe that the Clinton/Gore '96 Primary Committee, Inc., and its treasurer, Joan Pollitt, failed to report in-kind contributions that it received from the Democratic National Committee as contributions and expenditures, in violation of 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);

11. Find reason to believe that the Clinton/Gore '96 General Committee, Inc., and its treasurer, Joan Pollitt, failed to report in-kind contributions that it received from the Democratic National Committee as contributions and expenditures, in violation of 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);

12. Find reason to believe that the Democratic National Committee and its treasurer, Carol Pensky, disbursed funds from its non-federal account in connection with a federal election in violation of 2 U.S.C. § 441b(a) and 11 C.F.R. § 102.5(a);

13. Find reason to believe that the Clinton/Gore '96 Primary Committee and its treasurer, Joan Pollitt; the Clinton/Gore '96 General Committee and its treasurer, Joan Pollitt; President William J. Clinton and Vice President Albert Gore, Jr. knowingly accepted prohibited contributions in violation of 2 U.S.C. § 441b(a).

14. Authorize the Office of General Counsel to depose the following individuals:

    Dick Morris, Robert Squier, William Knapp, Erskine Bowles, Leon Panetta, Harold Ickes, Terry McAuliffe, Jo Miglino, Hank Sheinkopf, Marius Penczner, Mark Penn, Doug Schoen, George Stephanopoulos, Doug Sosnik, Jamie Sterling, Betsy Steinberg, Marsha Scott and Peter Knight;

15. Authorize the Office of General Counsel to subpoena documents from the following individuals and entities:

    Dick Morris, Robert Squier, William Knapp, Erskine Bowles, Leon Panetta, Harold Ickes, Terry McAuliffe, Jo Miglino, Hank Sheinkopf, Marius Penczner, Mark Penn, Doug Schoen, George Stephanopoulos, Doug Sosnik, Peter Knight, Jamie Sterling, Betsy Steinberg, Marsha Scott, the Clinton/Gore '96 Primary Committee, Inc., and its treasurer, Joan Pollitt, the Clinton/Gore '96 General Committee, Inc., and its treasurer, Joan Pollitt, the Democratic National Committee, and its treasurer, Carol Pensky, Squier Knapp Ochs Communications, the November 5 Group, Inc., President William J. Clinton, Vice President Al Gore, Jr., and the Executive Office of the President;

16. Approve the attached sample subpoenas;

17. Approve the attached Factual and Legal Analyses; and

18. Approve the appropriate letters.

12/23/97
Date

Lawrence M. Noble
General Counsel

Attachments:

1. Dole for President, Inc. Complaint dated July 2, 1996
2. Democratic National Committee response to Dole for President, Inc. Complaint, dated August 16, 1996
3. Clinton/Gore '96 Primary Committee, Inc. response to Dole for President, Inc. complaint received August 19, 1996
4. Letter from Democratic National Committee, supplementing its response, dated September 26, 1996
5. Federal Election Commission disclosure reports filed by the Democratic National Committee, dated January 22, 1996; April 15, 1996; July 15, 1996; and October 15, 1996
6. Disclosure report filed by the Democratic National Committee, dated January 22, 1996
7. Disclosure report filed by the Clinton/Gore '96 Primary Committee, Inc. for period December 1, 1996 through December 31, 1996 received by Commission on January 31, 1997
8. Excerpts from *Behind the Oval Office*
9. Corporation Information Pertaining to The November 5 Group, Inc.
10. *Boston Globe* article dated February 23, 1997
11. Democratic Party of New Mexico Transfer and Disbursement Chart
12. *National Journal* article dated May 11, 1996

13. Sample deposition subpoena
14. Two sample document subpoenas and orders to submit written answers (Robert D. Squier and Jo Miglino)
15. Factual and Legal Analysis for the Democratic National Committee
16. Factual and Legal Analysis for the Clinton/Gore '96 Primary Committee, Inc.
17. Factual and Legal Analysis for President William J. Clinton
18. Factual and Legal Analysis for Clinton/Gore '96 General Committee, Inc.
19. Factual and Legal Analysis for Vice President Albert Gore, Jr.
20. Rebecca Roczen Carley, M.D., Complaint dated October 21, 1996
21. Letter from Rebecca Roczen Carley, M.D., dated November 8, 1996 and November 25, 1996 (with relevant attachments)
22. DNC response to Dr. Carley's Complaint, dated November 20, 1996
23. Primary Committee's response to Dr. Carley's Complaint, dated August 13, 1997
24. *Washington Post* article, dated October 16, 1997
25. Common Cause complaint filed with the United Stated Department of Justice, dated October 9, 1997

FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARJORIE W. EMMONS/VENESHE FEREBEE-VINES VFV
COMMISSION SECRETARY

DATE: JANUARY 6, 1998

SUBJECT: MURs 4407 & 4544 - First General Counsel's Report
dated December 23, 1997

The above-captioned document was circulated to the Commission on **Monday, December 29, 1997**.

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

Commissioner Aikens	XXX
Commissioner Elliott	XXX
Commissioner McDonald	XXX
Commissioner McGarry	XXX
Commissioner Thomas	XXX

This matter will be placed on the meeting agenda for **Monday, January 13, 1998**.

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