



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

February 19, 1998

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

The Honorable William Jefferson Clinton
President of the United States of America
The White House
Washington, D.C. 20500

RE: MURs 4544; 4407
William Jefferson Clinton

Dear President Clinton:

On February 10, 1998, the Federal Election Commission found that there is reason to believe you violated 2 U.S.C. §§ 441a(b)(1)(A); 441a(b)(1)(B); 441a(f); 441b(a), provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Statements should be submitted under oath. All responses to the enclosed Subpoena to Produce Documents and Order to Submit Written Answers must be submitted within 30 days of your receipt of this subpoena and order. Any additional materials or statements you wish to submit should accompany the response to the subpoena and order. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

You may consult with an attorney and have an attorney assist you in the preparation of your responses to this subpoena and order. If you intend to be represented by counsel, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause

conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, requests for pre-probable cause conciliation will not be entertained after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the investigation to be made public.

For your information, we have attached a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Joel J. Roessner, the attorney assigned to this matter, at (202) 219-3690. As of March 2, 1998, this phone number will change to (202) 694-1650.

Sincerely,

Joan D. Aikens

Joan D. Aikens
Chairman

Enclosures
Subpoena and Order
Factual and Legal Analysis
Procedures
Designation of Counsel Form

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

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MURs 4407 and 4544

**SUBPOENA TO PRODUCE DOCUMENTS
ORDER TO SUBMIT WRITTEN ANSWERS**

**To: President William J. Clinton
The White House
1600 Pennsylvania Ave.
Washington, D.C.**

Pursuant to 2 U.S.C. §§ 437d(a)(1) and (3), and in furtherance of its investigation in the above-captioned matter, the Federal Election Commission hereby orders you to submit written answers to the questions attached to this Order and subpoenas you to produce the documents requested on the attachment to this Subpoena. Legible copies which, where applicable, show both sides of the documents may be substituted for originals.

Such answers must be submitted under oath and must be forwarded to the Office of the General Counsel, Federal Election Commission, 999 E Street, N.W., Washington, D.C. 20463, along with the requested documents within 30 days of receipt of this Order and Subpoena.

WHEREFORE, the Chairman of the Federal Election Commission has hereunto set her
hand in Washington, D.C. on this 18th day of February 1998.

Joan D. Aikens

Joan D. Aikens
Chairman
Federal Election Commission

ATTEST:

fa Mary W. Emmons
Marjorie W. Emmons
Secretary to the Commission

Attachments

Interrogatories and Document Requests

INSTRUCTIONS

In answering the interrogatories and requests for production of documents, furnish all documents and other information specified below, however obtained, including hearsay, that are in your possession, custody or control, or otherwise available to you, including documents and information appearing in your records.

Each answer is to be given separately and independently, and unless specifically stated in the particular discovery request, no answer shall be given solely by reference either to another answer or to an exhibit attached to your response.

The response to each discovery request propounded herein shall set forth separately the identification of each person capable of furnishing testimony concerning the response given, denoting separately those individuals who provided informational, documentary or other input and those who assisted in drafting the response.

If you cannot answer the discovery requests in full after exercising due diligence to secure the full information to do so, answer to the extent possible and indicate your inability to answer the remainder, stating whatever information or knowledge you have concerning the unanswered portion and detailing what you did in attempting to secure the unknown information. When an approximation or estimate is stated, designate the approximation or estimate as such and identify and describe each method by which, and each source of information upon which, the approximation was made.

Should you claim a privilege or other objection with respect to any documents, communications, or other items about which information is requested by the following interrogatory and requests for production of documents, describe such items in sufficient detail to provide justification for the claim or other objection. Each claim of privilege must specify in detail all grounds on which it rests. No part of a discovery request shall be left unanswered merely because an objection is interposed to another part of the request.

Unless otherwise indicated, the following discovery requests refer to the time period from January 1, 1995 to the present.

The following interrogatories and requests for production of documents are continuing in nature and you are required to file supplementary responses or amendments during the course of this matter if you obtain further or different information prior to or during the pendency of this matter. Include in any supplemental answers the date upon which such further or different information came to your attention.

DEFINITIONS

For the purpose of these discovery requests, including the instructions thereto, the terms listed below are defined as follows:

"Clinton/Gore" shall mean the Clinton/Gore '96 Primary Committee, Inc.

"Commission" shall mean the Federal Election Commission

"DNC" shall mean the Democratic National Committee and each of its accounts

"SKO" shall mean Squier Knapp Ochs Communications

"November 5" shall mean the November 5 Group, Inc.

"State Democratic Party" shall mean the Democratic Party entity for each state in the United States of America, the Democratic Party entity for each territory of the United States of America, and any other Democratic Party entity within the United States of America that is permitted to accept funds from any of the following DNC accounts, or any other DNC accounts: DNC Service Corp./Democratic National Committee, DNC Non-Federal Unincorporated Account, DNC Non-Federal Finance Fund, DNC Non-Federal Building Fund, DNC Non-Federal Corporate, DNC Non-Federal General, DNC Non-Federal Max-Pac, DNC Non-Federal General #2, and DNC Non-Federal Individual.

"Radio Station" means the place, building, or establishment from which radio services are provided or operations are directed.

"Television Station" means the place, building, or establishment from which television services are provided or operations are directed.

"You," "your" and "their" shall mean the named person or entity to whom these requests are directed, including all officers, employees, agents, volunteers and attorneys thereof.

"Person" shall mean an individual, partnership, committee, association, corporation, labor organization, or any other type of organization, entity or group of persons as defined in 2 U.S.C. § 431(11).

"Document" shall mean the original and all non-identical copies, including drafts, of all papers and records of every type in your possession, custody, or control, or known by you to exist. The term "document" includes data or information compiled or maintained in electronic or digital form, such as computer files, tables, spreadsheets or databases. The term "document" also includes, but is not limited to books, letters, contract notes, diaries, log sheets, records of telephone communications, transcripts, vouchers, accounting statements, ledgers, checks, check

ledgers, money orders or other commercial paper, invoices, receipts, wire transfers, telegrams, telexes, pamphlets, circulars, leaflets, reports, memoranda, correspondence, surveys, tabulations, audio and video recordings, drawings, photographs, graphs, charts, diagrams, lists, computer print-outs, electronic records, and electronic mail messages. Each draft or non-identical paper or electronic copy is a separate document within the meaning of this term.

"Identify" with respect to a document shall mean state the nature or type of document (e.g., letter, memorandum), the date, if any, appearing thereon, the date on which the document was prepared, the title of the document, the general subject matter of the document, the location of the document, and the number of pages comprising the document. "Identify" with respect to a document shall also mean the identification of each person who wrote, dictated or otherwise participated in the preparation of the document (typists need not be included), each person who signed or initialed the document, each person who received the document or reviewed it, and each person having custody of the document or a copy of the document. Identification of a document includes identifying all originals or copies of that document known or believed to exist.

"Identify" with respect to a person shall mean state the full name, the most recent business and residence addresses and telephone numbers, the present occupation or position of such person. If the person to be identified is not a natural person, provide the legal and trade names, the address and telephone number, and the full names of both the chief executive officer and the agent designated to receive service of process for such person.

"And" as well as "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these discovery requests all responses that otherwise might be construed to be out of their scope.

Except where the discovery request states otherwise, any reference to the singular shall be construed as including the plural, any reference to the plural shall be construed as including the singular, and any reference to one gender shall include the other.

The Commission incorporates herein by reference the full text of the definitions of other terms set forth in 2 U.S.C. § 431 and 11 C.F.R. § 100.

DOCUMENT REQUEST

1. All documents in your custody or control that refer to, relate to, or contain any information regarding television, radio or print advertisements developed and created by SKO which were paid for in whole or in part by the DNC. Such advertisements include, but are not limited to, the television advertisements entitled: "Protect," "Moral," "Emma," "Sand," "Wither," "Families," "Threaten," "Firm," "People," "Children," "Slash," "Table," "Supports," "Defend," "Values," "Enough," "Economy," "Photo," "Same," "Finish," and "Dreams." Responsive documents include, but are not limited to, all memoranda, scripts, correspondence,

notes, financial documents, contracts, agreements, telephone bills, logs, video or audio tapes, and records that reference the planning, organization, development and/or creation of any advertisements. Responsive documents also include any other information which satisfies the definition of "document."

2. All documents in your custody or control that refer to, relate to, or contain any information regarding television, radio or print advertisements developed and created by November 5 which were paid for in whole or in part by the DNC. Such advertisements include, but are not limited to, the television advertisements entitled: "Protect," "Moral," "Emma," "Sand," "Wither," "Families," "Threaten," "Firm," "People," "Children," "Slash," "Table," "Supports," "Defend," "Values," "Enough," "Economy," "Photo," "Same," "Finish," and "Dreams." Responsive documents include, but are not limited to, all memoranda, scripts, correspondence, notes, financial documents, contracts, agreements, telephone bills, logs, video or audio tapes, and records that reference the planning, organization, development and/or creation of any advertisements. Responsive documents also include any other information which satisfies the definition of "document."

3. All documents in your custody or control that refer to, relate to, or contain any information regarding television, radio or print advertisements developed and created by SKO which were paid for in whole or in part by any State Democratic Party. Such advertisements include, but are not limited to, the television advertisements entitled: "Protect," "Moral," "Emma," "Sand," "Wither," "Families," "Threaten," "Firm," "People," "Children," "Slash," "Table," "Supports," "Defend," "Values," "Enough," "Economy," "Photo," "Same," "Finish," and "Dreams." Responsive documents include, but are not limited to, all memoranda, scripts, correspondence, notes, financial documents, contracts, agreements, telephone bills, logs, video or audio tapes, and records that reference the planning, organization, development and/or creation of any advertisements. Responsive documents also include any other information which satisfies the definition of "document."

4. All documents in your custody or control that refer to, relate to, or contain any information regarding television, radio or print advertisements developed and created by November 5 which were paid for in whole or in part by any State Democratic Party. Such advertisements include, but are not limited to, the television advertisements entitled: "Protect," "Moral," "Emma," "Sand," "Wither," "Families," "Threaten," "Firm," "People," "Children," "Slash," "Table," "Supports," "Defend," "Values," "Enough," "Economy," "Photo," "Same," "Finish," and "Dreams." Responsive documents include, but are not limited to, all memoranda, scripts, correspondence, notes, financial documents, contracts, agreements, telephone bills, logs, video or audio tapes, and records that reference the planning, organization, development and/or creation of any advertisements. Responsive documents also include any other information which satisfies the definition of "document."

5. All documents in your custody or control that refer to, relate to, or contain any information regarding television, radio or print advertisements developed and created by SKO

which were paid for in whole or in part by Clinton/Gore. Responsive documents include, but are not limited to, all memoranda, scripts, correspondence, notes, financial documents, contracts, agreements, telephone bills, logs, video or audio tapes, and records that reference the planning, organization, development and/or creation of any television, radio or print advertisements. Responsive documents also include any other information which satisfies the definition of "document."

6. All documents in your custody or control that refer to, relate to, or contain any information regarding television, radio or print advertisements developed and created by November 5 which were paid for in whole or in part by Clinton/Gore. Responsive documents include, but are not limited to, all memoranda, scripts, correspondence, notes, financial documents, contracts, agreements, telephone bills, logs, video or audio tapes, and records that reference the planning, organization, development and/or creation of any television, radio or print advertisements. Responsive documents also include any other information which satisfies the definition of "document."

INTERROGATORIES

1. Identify each and every person who has knowledge or information regarding the planning, organization, development and/or creation of television, radio or print advertisements produced by SKO and paid for in whole or in part by the DNC.

2. Identify each and every person who has knowledge or information regarding the planning, organization, development and/or creation of television, radio or print advertisements produced by SKO and paid for in whole or in part by any State Democratic Party.

3. Identify each and every person who has knowledge or information regarding the planning, organization, development and/or creation of television, radio or print advertisements produced by November 5 and paid for in whole or in part by the DNC.

4. Identify each and every person who has knowledge or information regarding the planning, organization, development and/or creation of television, radio or print advertisements produced by November 5 and paid for in whole or in part by any State Democratic Party.

5. State the time and date of each meeting and telephone conversation during which there was any discussion of any kind concerning the planning, organization, development and/or creation of television, radio or print advertisements. Such discussion includes but is not limited to discussion of advertisements produced in whole or in part by SKO, advertisements produced in whole or in part by November 5, advertisements paid for in whole or in part by the DNC, advertisements paid for in whole or in part by any State Democratic Party, and advertisements paid for in whole or in part by Clinton/Gore. "Meeting" means any discussion among two or more persons, including discussions that were incidental to another meeting topic, telephone conversations, and discussions by any other electronic medium. For each meeting:

- a. Identify the location of the meeting, and for telephone or other electronic discussions, the location of each participant.
 - b. Identify each and every person who attended, heard or participated in any meeting. For each identified person, indicate which meeting that person attended, heard or participated in, and the date that each meeting occurred.
 - c. Describe the substance, decisions, discussion and details of each and every meeting.
 - d. Identify who produced the specific advertisements discussed in the meeting, including SKO, November 5, or some other entity or person.
 - e. Identify each person or entity that paid in whole or in part for any advertisements that were discussed, including but not limited to the DNC, State Democratic Committees and Clinton/Gore, and the amount paid by each person or entity.
6. Identify each and every person from whom SKO purchased time to air television or radio advertisements. For each identified person, indicate what advertisements aired, the television or radio station on which the advertisements aired, the date the advertisements aired, how many times the advertisements aired, the price of airing the advertisements, and who paid for the airing of the advertisements.
 7. Identify each and every person from whom November 5 purchased time to air television or radio advertisements. For each identified person, indicate what advertisements aired, the television or radio station on which the advertisements aired, the date the advertisements aired, how many times the advertisements aired, the price of airing the advertisements, and who paid for the airing of the advertisements.
 8. Identify each and every newspaper, magazine or other publication where SKO purchased space to publish advertisements. For each identified publication, indicate what advertisements were published, the date the advertisements were published, the price of publishing the advertisements, and who paid for the publication of the advertisements.
 9. Identify each and every newspaper, magazine or other publication where November 5 purchased space to publish advertisements. For each identified publication, indicate what advertisements were published, the date the advertisements were published, the price of publishing the advertisements, and who paid for the publication of the advertisements.
 10. Identify each and every person who has knowledge or information regarding the planning, organization, development and/or creation of television, radio or print advertisements produced by SKO and paid for in whole or in part by Clinton/Gore.

11. Identify each and every person who has knowledge or information regarding the planning, organization, development and/or creation of television, radio or print advertisements produced by November 5 and paid for in whole or in part by Clinton/Gore.

12. Identify each and every television, radio or print advertisement that SKO planned, organized, developed and/or created for Clinton/Gore.

13. Identify each and every television, radio or print advertisement that November 5 planned, organized, developed and/or created for Clinton/Gore.

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

MURS

4407, 4544

RESPONDENT:

President William J. Clinton

I. GENERATION OF MATTER

These matters were generated based on information ascertained by the Federal Election Commission ("the Commission") in the normal course of carrying out its supervisory responsibilities. See 2 U.S.C. § 437g(a)(2).

II. FACTUAL AND LEGAL ANALYSIS

A. LAW

1. Contribution Limitations

No candidate or political committee shall knowingly accept any contribution that violates the contribution limitations of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431 et seq., ("the Act"). 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, 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). 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." Advisory Opinion ("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 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. Public Funding of Primary Campaigns

The Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042, ("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 441a(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).

4. 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 441a(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 441a(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, *inter alia*, 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).

B. ANALYSIS

These matters involve possible coordinated expenditures made by the Democratic National Committee ("DNC") for the purpose of influencing President Clinton's election that resulted in excessive in-kind contributions to President Clinton, coordinated party expenditures in excess of the 2 U.S.C. § 441a(d)(2) limit, or both. These expenditures apparently resulted in President Clinton accepting excessive contributions from the DNC in violation of 2 U.S.C.

§ 441a(f), exceeding the expenditure limitation for the 1996 Presidential nominating process in violation of 2 U.S.C. § 441a(b)(1)(A) and (f), and exceeding the expenditure limitation for the 1996 Presidential general election in violation of 2 U.S.C. § 441a(b)(1)(B) and (f).

Based on information available to the Commission, including disclosure reports, the books *The Choice* and *Behind the Oval Office*, and various press reports,¹ 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 efforts.² Furthermore, the available information indicates that the President and campaign officials directed and actively participated in the development of this advertising campaign.³

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.

¹ E.g., *Boston Globe* article dated February 23, 1997, *National Journal* article dated May 11, 1996, *Washington Post* article dated October 16, 1997.

² 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.

³ It appears that during the initial formulation of the advertising campaign, the Primary Committee planned to pay for the advertisements, and that the Primary Committee paid for an initial advertisement concerning assault weapons. However, according to the information available to the Commission, it was subsequently decided that the DNC would pay for the advertising campaign.

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 available information also raises 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 common 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 in-kind contributions to the President's campaign or coordinated party expenditures subject to 2 U.S.C. § 441a(d). The opinion of the Commission is that the distinction between permissible interaction and coordinated activity, in cases involving speech-related 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 to DNC donors 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).⁴

⁴ 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. 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).

In *Behind the Oval Office*, Presidential consultant and author Dick Morris 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 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.

And he notes that "voter share zoomed where we advertised." 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.

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").⁵

The available advertisements have a similar tone and style to each other. In general, they discuss President Clinton's position on diverse subjects such as Medicare, the budget, education, health care, 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.⁶

⁵ It appears that SKO and November 5 may be interconnected. November 5 is a District of Columbia corporation that was established on February 5, 1996. 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. This address is the same as SKO's address.

⁶ The Commission's knowledge of the content of the advertisements is based on its review of advertisement scripts, where such scripts are available, as well as various other accounts which have been brought to the Commission's attention. The advertisement scripts are attached to this Factual and Legal Analysis. There may be other advertisements of which the Commission does not have knowledge at this time.

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." Another advertisement, titled "Protect" from August 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. . . ."

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

Finally we learn the truth about how the Republicans want to eliminate Medicare. First . . . [sic] Bob 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.

Twelve of the available advertisements specifically characterize Republicans as opponents to President Clinton's policies; six advertisements specifically mention Senator Dole and Speaker Gingrich as obstacles to passage of President Clinton's policies in Congress. 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. A number of advertisements link the names of Senator Dole and Speaker Gingrich. 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.

Similarly, other advertisements refer to the "Dole Gingrich attack ad" and the "Dole/Gingrich Budget." 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." *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 Primary Committee] to run television advertisements 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.

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. For example, Mr. Woodward also alleges that after 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.

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. . . .

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."

In *Behind the Oval Office*, Presidential consultant and author Dick Morris similarly suggests that the advertising campaign was developed with the active participation and interaction of President Clinton, his campaign staff, DNC representatives, White House staff and the media consultants.⁷ Mr. Morris states that he reviewed the questionnaires for the polls, the polling results, the scripts and test runs of the advertisements with President Clinton. He alleges:

⁷ 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. These included White House staff, DNC representatives and campaign officials such as Leon Panetta, Harold Ickes, Terry McAuliffe, George Stephanopoulos, Doug Sosnik, Erskine Bowles, 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.

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. . . .

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."

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 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.

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 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. 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.

Finally, these matters do not appear to involve generic political advertisements, such as the radio and television advertisements that the Commission in AO 1985-14 concluded would be reportable as operating expenditures. AO 1985-14 involved, and was limited to, "situations where expenditures for . . . communications are made without any consultation or cooperation, or any request or suggestion of . . ." the candidates.⁸ Furthermore, the advertisements which the

⁸ In AO 1985-14, the Commission limited its analysis to the question whether the proposed expenditures were reportable as expenditures subject to limitation under 2 U.S.C. § 441a(d) or as operating expenses, having first concluded that the AO request was limited to expenditures for communications that would be made without the cooperation of, or in consultation with, any candidate. The Commission's analysis thus recognized that the Section 441a(d) limit may apply even to expenditures which are made without such cooperation or consultation. See AO 1984-15. *But cf. Colorado Republican Campaign Committee v. FEC*, 116 S.Ct. 2309 (1996) (party committee may make independent expenditures in Congressional elections).

Commission in AO 1985-14 concluded were not subject to limitation under 2 U.S.C. § 441a(d) did not both depict a "clearly identified candidate" and contain an "electioneering message."⁹

In contrast, these matters involve expenditures for advertisements which appear to have been made with the cooperation of, or in consultation with, the candidate or his campaign staff, and which therefore appear to have been contributions regardless whether the advertisements contained an electioneering message or included reference to a clearly identified candidate. See *Buckley v. Valeo*, 424 U.S. 1, 78 (1976)(the term "contribution" includes "all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate")(emphasis added). Furthermore, these MURs involve advertisements which, according to the available information, explicitly identify President Clinton or Senator Dole, and which address the policies of the major party candidates in a manner which appears calculated to encourage the viewer to vote for one candidate over the other. Thus, there is reason to believe that the advertisements at issue meet both the "clearly identified candidate" and "electioneering message" tests.¹⁰

⁹ AO 1985-14 involved scripts for broadcast advertisements which purported to describe Republican policies. One such advertisement concluded by encouraging the voter to "[l]et your Republican Congressman know that you don't think this is funny . . .," or in another version of the same advertisement, "[l]et the Republicans in Congress know what you think about their sense of humor." Another advertisement urged voters to let "your Republican Congressman," or the Republicans in Congress, "know that their irresponsible management of the nation's economy must end -- before it's too late." Alternative scripts added the closing statement "Vote Democratic" to these advertisements. The Commission concluded that advertisements which referred to "the Republicans in Congress" were not subject to limitation under 2 U.S.C. § 441a(d), regardless whether the advertisement closed with the statement "Vote Democratic." The Commission also concluded that advertisements which referred to "your Republican Congressman" were not subject to limitation under 2 U.S.C. § 441a(d), if the advertisement did not close with the statement "Vote Democratic." However, the Commission on a tie vote was unable to decide whether advertisements which referred to "your Republican Congressman" and which closed with the statement "Vote Democratic" were subject to limitation under 2 U.S.C. § 441a(d).

¹⁰ Indeed, because the advertisements in these matters do identify major party candidates for President, these advertisements are more akin to the proposed mailers, also at issue in AO 1985-14, which identified specific congressmen by name. Based on its understandings that the proposed mailers would be distributed in all or part of the district represented by the congressman identified in that mailer, the Commission concluded that the costs of production and distribution would be subject to limitations under the Act.

It appears that the total amount spent on the advertising campaign was between \$15,000,000 and \$50,000,000.¹¹ 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. See 11 C.F.R. § 9033.5(c). The DNC reported the purpose of the expenditures as "media;" thus, it appears that this amount was paid for the advertising campaign.

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. 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.

Specifically, it appears that upon receipt of the 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 the advertisements. 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 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." Barbara Guttman, the Illinois Democratic Party Press

¹¹ Throughout this analysis, the Commission has used the \$25,000,000 figure.

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." Finally, Tony Wyche, the Missouri Democratic Party Communications Director, when asked by Mr. Barnes about the authority his state committee had over the ads, stated "We have to agree to do it. . . . [But][i]t's just a technicality."

The Commission 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. At this time, the Commission has not determined how much of this total amount was related to the advertisement campaign.

Based on the information available to the Commission, it is not clear whether the expenditures for the advertisement campaign should be treated as excessive in-kind contributions from the DNC to the President and his Primary Committee, coordinated party expenditures that exceeded the DNC's 2 U.S.C. § 441a(d)(2) limitation, and thus, in-kind contributions to the President and the Clinton/Gore '96 General Committee, Inc., or some combination of both. The Commission has found reason to believe with respect to both possibilities.

President Clinton was permitted to accept \$5,000 from the DNC as a multicandidate committee. See 2 U.S.C. §§ 441a(a)(2)(A) and 441a(f). It appears that the advertisement campaign was for the purpose of influencing President Clinton's election, and President Clinton and his campaign officials were involved in the development and creation of the advertisements. The Commission has found reason to believe that President William J. Clinton accepted excessive in-kind contributions from the DNC in violation of 2 U.S.C. § 441a(f).

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 President Clinton's expenditure limitation. Accordingly, the Commission has found reason to believe that 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 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, the advertisements may have also related to the general election. Therefore, the Commission has found reason to believe 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.

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.