BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Clinton/Gore '96 General	)	**MURs 4544; 4407**
Committee, Inc.	)	
Joan Pollitt, as treasurer	)	
	)	

MOTION TO QUASH

NOW COMES the Clinton/Gore '96 General Committee, Inc. (the "General Committee") and Joan Pollitt, as treasurer, pursuant to 11 C.F.R. section 111.15, and moves to quash the subpoena issued by the Federal Election Commission (the "Commission" or "FEC") to the Committee in connection with Matters Under Review ("MURs") 4407 and 4544. For the reasons stated below, the Commission should quash this subpoena in its entirety.

Introduction

The complaints in these MURs allege that legislative issue advocacy advertisements sponsored by the DNC in 1995 and early 1996 exceeded contribution and expenditure limitations applicable to the DNC and the General Committee for the 1996 Presidential election cycle. The General Committee seeks to have the Commission quash the subpoena issued in this MUR on the grounds that it is based on incorrect facts, is based on a procedurally defective ruling and is contrary to law. While certain of the DNC ads in question mentioned President Clinton, none of them expressly advocated the election or defeat of any clearly identified candidate. Similarly, none of the ads even mentioned an election or urged the audience to vote. In addition, no ads were run in any State for thirty days prior to a primary election and no ads were run after President Clinton became a candidate in the general election. The General Committee does not dispute that the Commission, upon a procedurally proper finding, would have jurisdiction to examine the ads for the purpose of determining whether they contain an electioneering message. However, the General Committee maintains that in conducting such an examination, the Commission lacks jurisdiction over any communications which do not contain words of express advocacy.

Grounds for Motion to Quash

MUR 4407 was initiated by a complaint filed by a third party against the Clinton/Gore '96 Primary Committee, Inc. (the "Primary Committee"). The Primary Committee timely responded on August 19, 1996. No further communication has been received from the Commission by the Primary Committee in connection with this MUR.

Similarly, MUR 4544 was initiated by a compliant filed by a third party against the Primary Committee. The Primary Committee timely responded on August 13, 1996. No further communication has been received from the Commission by the Primary Committee in connection with this MUR.

On February 10, 1998, the Commission found reason to believe that the General Committee may have violated the Federal Election Campaign Act of 1971, as amended, (the "Act") and issued the subpoena which is the subject of this motion to quash to the General Committee. Apparently, no reason to believe finding was made with respect to the Primary Committee, and no subpoena was issued to the Primary Committee.

A. The reason to believe finding is based on incorrect facts.

The Commission's reason to believe ("RTB") finding is based on an erroneous calculation regarding the General Committee's expenditures. The General Counsel's Office Legal and Factual Analysis states that the General Committee's reported expenditures as of July 15, 1997, were $62,109,491.01. The General Counsel's Office then concludes that the General Committee is "apparently already exceeding the limitation [of $61,820,000.00] by $289,491.01." MUR 4407, Office of General Counsel's Factual and Legal Analysis at p. 18. It appears that the General Counsel's Office reached the incorrect figure by adding the General Committee's net operating expenditure figures for 1996 with the 1997 calendar year-to-date expenditures and then subtracting the expenditure limitation. However, the General Counsel's Office failed to subtract funds owed to the Committee and itemized on line 11 of the Committee's July 15, 1997 quarterly report. The correct amount of net operating expenditures is $59,880,679.72, well under the applicable expenditure limitation. Had the General Committee been afforded an opportunity to respond prior to the Commission's reason to believe finding, this very elementary mathematical error could have been brought to the Commission's attention, thereby avoiding the incorrect finding that the General Committee had apparently violated the spending limit.

B. The reason to believe finding is not authorized by law, because it relies on a newly invented standard which reverses all previous precedents applied by the Commission in other cases.

The Commission's reason to believe finding is not authorized by law in that it is premised on a standard which can not be applied in this MUR for two reasons. First, the Commission in this MUR seeks to apply a completely novel standard never before used in any other MUR or advisory opinion. Second, this novel standard runs counter to, and indeed reverses, the standards previously used by the FEC in judging indistinguishable activities undertaken by other candidates and political parties.

The standard underlying the RTB finding in this MUR is synthesized in one sentence of the General Counsel's Factual and Legal Analysis:

> 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. MUR 4407, Office of General Counsel's Factual and Legal Analysis, February 19, 1998 at p. 8.

In adopting this standard the Commission is reversing two long standing precedents enunciated over and over again in enforcement actions and advisory opinions. First, while the Commission has held for many years that party committees are permitted to coordinate fully their activities with party candidates, the standard in this MUR seeks to distinguish "permissible interaction" from "coordinated activity" between a political party and its candidates. Second, while the Commission has held for many years that where the content of a communication lacks an electioneering message, it will not be subject to any contribution or expenditure limitation, the standard in this MUR seeks to examine the "purpose," as well as the content, of such a communication in determining whether any limitation applies. As more fully discussed below, the Commission's action in this MUR contradicts its own precedents, violates FECA requirements that the Commission propose all new rules of law through the regulatory process, and creates a standard which is unconstitutional. For these reasons, the subpoena should be quashed.

1. The Commission in this MUR is applying a newly invented standard which examines the purpose of a communication in determining whether it constitutes issue advocacy.

In finding RTB in this MUR, the Commission is adopting and applying a completely new standard for determining whether a communication is issue advocacy or candidate related. Until this MUR, the Commission has in the past always applied a two prong test to the content of a communication in order to determine whether it is issue advocacy or candidate related . The Commission has thus reviewed the content (i.e., text and images) of an ad and found them to be candidate related only if "the communication both (l) depicted a clearly identified candidate and (2) conveyed an electioneering message...." FEC Advisory Opinion 1985-14, Fed. Election Camp. Fin. Guide (CCH) &5766 (1985). This test has been repeatedly relied upon in Commission Advisory Opinions and enforcement proceedings. (See FEC Advisory Opinion 1995-25, Fed. Election Camp. Fin. Guide (CCH) par. 6162 (1995), MUR 2216 (August 1, 1989), MUR 2370 (June 5, 1986), MUR 4246 (May 6, 1997) and the MUR which eventually led to Colorado Republican Campaign Committee v. FEC ("Colorado Republican"), 116 S. Ct. 2309 (1996).

Despite this mountain of precedent, the Commission for the first time in this MUR is applying a new test which looks not only to the content but also to the "purpose"

of a communication. See Office of General Counsel's Factual and Legal Analysis , MUR 4407, p. 8. In so doing, the Commission is embarking on the application of a standard never before applied to issue advocacy communications.

In applying a new standard that has never before been used in any previous ruling, the Commission is in essence ignoring, indeed reversing, its own long standing precedent established years ago in enforcement actions and Advisory Opinions. In so doing, the Commission is itself violating the FECA which requires the Commission to initially propose any new rule of law as a regulation. 2 U.S.C. Sec. 437f(b). This statutory provision serves two purposes. First, it insures that all candidates and political parties will prospectively know what rules will be applied to their conduct during a campaign. Second, the statutory provision insures that all candidates will compete on a level playing field where the same standards apply regardless of party affiliation.[1] In failing to follow statutory requirements, the Commission's actions thus fly in the face of basic fairness and common sense.

2. The Commission in this MUR is violating a basic underlying legal presumption of the FECA that political parties may fully coordinate campaign activities with their candidates, thereby reversing the standard used in its own previous rulings.

The Commission has until this MUR consistently taken the position that candidates and their political parties are permitted to fully coordinate their campaign activities. From its inception, the Commission has presumed that activities undertaken by political parties are coordinated with party candidates. This presumption has for many years been reiterated by the Commission in numerous advisory opinions, rulemaking proceedings, and enforcement matters.

Most recently the Commission has represented to the United States Supreme Court that "... with respect to the campaign expenditures of political party committees, 'coordination with candidates is presumed and "independence" precluded,'" citing AO 1988-22, Brief for the Respondent at 24, Colorado Republican. The Commission stated to the Court that its determination rested "...in part on the empirical judgment that party officials will as a matter of course consult with the party's candidates before funding communication intended to influence the outcome of a federal election." Brief for the Respondent at 27, Colorado Republican. In addition to basing this presumption on its empirical judgment, the Commission also stated that this presumption was a required statutory interpretation of the FECA: "That Congress regarded political party campaign expenditures as necessarily coordinated with the party's candidate is further demonstrated by the legislative history of the 1976 amendments to the FECA." Brief for the Respondent at 28, Colorado Republican.. After making these statements to the Supreme Court and repeatedly ruling that such a presumption exists, how can the Commission in this MUR completely reverse itself and now state that a distinction exists between

[1] See section 3 below.

"permissible interaction and coordinated activity" by a political party and its candidates? The Commission's statements in its Brief to the Supreme Court, in its Advisory Opinions and its enforcement actions are simply not reconcilable with its finding in this MUR.[2]

Moreover, respondents in this MUR are not alone in their interpretation that the Commission has in its past rulings unequivocally held that parties may fully and completely coordinate all activities with their candidates. The Justice Department has also come to the same conclusion:

> Indeed, the Federal Election Commission...has historically assumed coordination between a candidate and his or her political party.... With respect to coordinated media advertisements by political parties...the proper characterization of a particular expenditure depends not on the degree of coordination, but rather on the content of the message." Letter from Attorney General Reno to Senator Hatch (April 14, 1997) at 7.

Finally, the distinction which the Commission seeks to draw between "permissible interaction" and "coordinated activity" seems quite illogical in light of the fact that the statute permits a Presidential candidate to designate the national committee of a political party as his or her principal campaign committee. 2 U.S.C.§432(e)(3)(A)(i). It is the only situation in which a party committee can be designated as a candidate's principal campaign committee. This provision is clear proof that the statute contemplates complete coordination of all activities undertaken by a political party and its Presidential candidate.

3. The Commission has created a basic inequity by applying a different standard to DNC ads in this MUR from that applied to RNC ads in Advisory Opinion 1995-25.

In Advisory Opinion 1995-25 the Commission sanctioned as issue advocacy a series of RNC media ads which specifically criticized President Clinton on certain legislative issues. The Commission acknowledged in its opinion that such ads were intended to gain popular support for the Republican legislative agenda and to influence the public's positive view of Republicans. The Commission in its Opinion specifically concluded that the "stated purpose" of the ads "encompasses the related goal of electing Republican candidates to Federal office." FEC Advisory Opinion 1995-25, Fed. Election Camp. Fin. Guide (CCH), 6162 .

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[2] In Colorado Republican, the Supreme Court did nothing to disturb the presumption of coordination between political parties and their candidates. The Court simply held that the presumption can be rebutted by a showing of independence.

The Commission in the instant MUR has before it ads which were run in the same campaign cycle and are virtually indistinguishable from the ads dealt with in Advisory Opinion 1995-25. The Commission in the very language of its opinion stated that the ultimate "purpose" of the RNC ads was "electing Republican candidates to Federal office," yet the Commission did not in reaching its holding look to the purpose of those ads, but only the content. In stark contrast, the Commission in this MUR seeks to apply contribution limitations to DNC ads on the basis that the "advertisements appear calculated to bolster the President's bid for re-election." If the purpose of the RNC ads was to elect Republican candidates to Federal office and those ads were treated as issue advocacy not subject to any limitation, how can the Commission attempt to impose contribution limitations on amounts spent by the DNC on similar ads simply because those ads were calculated to bolster the President's campaign? In so doing, the Commission is applying a different standard to President Clinton and the DNC ads. The RNC advertisements that were the subject of Advisory Opinion 1995-25 specifically criticized President Clinton's record after the time he was a candidate for President and the Commission can not now hold that the DNC is not permitted to respond under the same rules -- that is, that expenditures for advertisements which do not contain an electioneering message are not subject to any contribution or expenditure limitation. Basic fairness and justice require that the Commission apply the same standards to all candidates in a Presidential election cycle. To conclude otherwise will ultimately lead to Federal Election Commission interference in the national electoral process.

The DNC was by statute entitled to rely on the Commission's opinion in 1995-25. The DNC ads were indeed tailored specifically to meet the requirements of that advisory opinion, as well as all of the Commission's previous pronouncements of the issue. See 2 U.S.C. Sec. 437f(c).

4. The standard used by the Commission in finding reason to believe in this MUR is unconstitutionally vague.

The Commission in this MUR appears to be holding that it will look to the underlying purpose of an ad when determining the degree of coordination that can legally occur between a candidate and its party with regard to that communication. This standard is very broad and incurably vague. The Commission's efforts to limit expenditures for communications which do not contain express advocacy have been repeatedly rebuffed by the courts. (See attached Brief at p. 21-25). Most recently the Court of Appeals for the Fourth Circuit, citing to the Commission's "string of losses" on this issue, summed up all existing case law on the topic by concluding that those cases "unequivocally require 'express' or 'explicit'' words of advocacy of election or defeat of a candidate.' MRLC, 914 F.Supp at 10-12." FEC v. Christian Action Network, 894 F,Supp 946 (W.D. Va. 1995) aff'd No. 95-2600 (4th Cir. April 7, 1997) Fed. Election Camp. Fin. Guide (CCH) par. 9409. The standard by which the Commission seeks to gauge communications in this MUR obviously does not rely on express advocacy, but rather seeks to glean the supposed purpose of an expenditure and to gauge whether discussion between a political party and its candidates amount to "permissible interaction" or "coordinated activity."

Lacking in specificity and incredibly vague, these terms can not form the basis for imposing a limitation on expenditures for political speech by parties and candidates.

C. Because the Commission's reason to believe finding against the General Committee is procedurally defective, this subpoena is not authorized by law and therefore invalid.

1. Because the Commission never notified the General Committee of the complaints, nor afforded the General Committee an opportunity to respond to the alleged violations, the Commission's reason to believe finding is barred by law.

The Commission failed to notify the General Committee that either of these complaints pertained to it, and therefore, the General Committee was deprived of the statutorily mandated opportunity to demonstrate that no findings should be made with respect to it. The law clearly states that "[w]ithin 5 days after receipt of a complaint, the Commission *shall notify*, in writing, any person alleged in the complaint to have committed such a violation." 2 U.S.C. §437g(a)(1) (emphasis added). See also 11 C.F.R. §111.5(a) ("Upon receipt of a complaint, the General Counsel *shall...within five (5) days* after receipt notify *each respondent* that the complaint has been filed...")

Even if the Commission were to contend that, after consideration of the two complaints herein, the appropriate respondent for a reason to believe finding was the General Committee, the General Committee should have been afforded the same opportunity to demonstrate that no reason to believe finding should have been made, prior to the Commission's determination. However, the Commission entirely ignored its enforcement procedures set forth in 11 C.F.R. §111.6 which state as follows:

(a) A respondent *shall* be afforded an opportunity to demonstrate that no action should be taken on the basis of a complaint by submitting, within fifteen (15) days from receipt of a copy of the complaint, a letter or memorandum setting forth reasons why the Commission should take no action.

(b) The Commission shall *not take any action , or make any finding,* against a respondent other than action dismissing the complaint, *unless it has considered such response*...(emphasis added).

A respondent's opportunity to respond is mandated by law, yet the Committee was not given this required opportunity. Although specifically precluded by statute and regulation, the Commission found reason to believe without due consideration of the Committee's response. The failure of the Commission to grant the General Committee that opportunity is clearly contrary to law. 2 U.S.C. § 437g(a)(1).

The General Counsel's Factual and Legal Analysis states that these matters were generated based on information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities. This is contradictory to earlier transactions in these MURs. Specifically, the Commission notified the Primary Committee that two complaints had been filed against it, one numbered 4407 and one numbered 4544. It is extremely disingenuous for the Commission to now characterize this MUR as one generated in the course of carrying out its supervisory responsibilities. Had that been the case, this MUR would have emanated from an audit report or a Reports Analysis Division referral. The Commission is using its fabricated characterization of the generation of this MUR as means to conduct an investigation prior to a Commission reason to believe finding and to avoid granting each respondent an opportunity to respond prior to such a finding. The Commission's actions are clearly designed to circumvent the requirements of the law.

Finally, the Commission, as a governmental agency, has an affirmative obligation to adhere to long-standing constitutional principles of due process in its treatment of respondents. Accordingly, without a statutorily authorized or constitutionally valid reason to believe finding, there is no authority for this subpoena. Therefore, the subpoena must be quashed.

2. Although issued to the General Committee, the subpoena purports to apply to the Primary Committee and is therefore inherently contradictory.

This subpoena was issued and addressed to the General Committee. However, the Definition section of the subpoena states that "'Clinton/Gore' shall mean the Clinton/Gore '96 Primary Committee, Inc." The terms of the subpoena require information and documents from the Primary Committee. None of the information or documents requested by the Commission relates to the General Committee. Thus, if the documents and information sought are truly that which is described in the subpoena, then the subpoena should have been directed to the Primary Committee, subsequent to a finding of reason to believe against that committee. See 2 U.S.C. §437g(a)(2) in which a Commission investigation is authorized only after a reason to believe finding. See also 11 C.F.R. §§111.6(b) and 111.10(a); Federal Election Commission Annual Report 1993, *Legislative Recommendations, "Modifying Standard of Reason to Believe Finding"* at p. 56 ("Under the present statute, the Commission is required to make a finding that there is 'reason to believe a violation has occurred' *before* it may investigate."(emphasis added); and Annual Reports 1994, 1995. Thus, since the Commission has not made a finding of reason to believe against the Primary Committee, the subpoena is unauthorized and invalid, and must be quashed.

Indeed, the activity which forms the basis of this MUR occurred prior to the creation of the General Committee. The DNC issue advocacy advertisements were aired in 1995 and early 1996. Only the Primary Committee was in existence at that time and

after the creation of the General Committee on August 1, 1996, no ads were run. Hence, the Commission's finding against the General Committee is inconsistent with the facts.

Conclusion

The Commission should quash the subpoena issued to the General Committee because it is based on incorrect facts, not authorized by law, and based on a reason to believe finding which is procedurally defective.

Sincerely,

Lyn Utrecht
General Counsel

Eric Kleinfeld
Chief Counsel