BEFORE THE FEDERAL ELECTION COMMISSION

MAR 11 3 19 PM '98

In the Matter of	)	
	)	
The Honorable	)	**MURs 4544; 4407**
William Jefferson Clinton	)	
President of the United States	)	
	)	

MOTION TO QUASH COMMISSION SUBPOENA

Pursuant to 11 C.F.R. Section 111.15, a motion to quash the subpoena issued by the Federal Election Commission (the "Commission" or "FEC") to President Clinton in connection with Matters Under Review ("MUR") 4407 and 4544 is hereby submitted. 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 Democratic National Committee ("DNC") in 1995 and early 1996 exceeded contribution and expenditure limitations applicable to the DNC and the Clinton/Gore '96 General Committee, Inc. (the "General Committee") for the 1996 Presidential election cycle. This motion to quash is submitted on the grounds that the Commission's subpoena is based on incorrect facts, is procedurally defective and is contrary to law. Moreover, nothing in this matter warrants discovery directed to the President personally. 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 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, in conducting such an examination, the Committee maintains that 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. Similarly, MUR 4544 was initiated by

a complaint filed by a third party against the Primary Committee. The Primary Committee timely responded on August 13, 1996.

On February 10, 1998, the Commission found reason to believe ("RTB") against the General Committee, the Primary Committee, President Clinton and Vice President Gore that a violation the Federal Election Campaign Act of 1971, as amended, (the "Act" or "FECA") may have occurred and issued to President Clinton the subpoena which is the subject of this motion to quash.[1]

A. Nothing in this matter warrants discovery to the President personally.

It is unprecedented for the Commission to take this step of seeking discovery against a President personally, without first determining that the information sought is not obtainable from another source. The Commission's action is thus premature in that the Commission should first seek to obtain the information it desires from the DNC, or the Primary and General Committees. This may well obviate the need for directing any discovery to the President. It is simply outrageous and unwarranted for the Commission to direct discovery at this stage of these MURs to the President personally.

Further, the subpoena is duplicative and burdensome in that the Commission appears to be requesting the same information (i.e., identical documents, such as invoices) from numerous individuals and entities. This duplication will only serve to burden respondents and create a paper logjam at the Commission. For the sake of order and efficiency, the Commission should consider limiting its document requests to eliminate redundancy.

B. The reason to believe finding is based in part on incorrect facts.

The Commission's reason to believe 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

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[1] The Office of General Counsel mailed the Commission's subpoena to 1600 Pennsylvania Avenue, which, as the address used by the general public for The White House, receives thousands of items each day. Hence, the subpoena was not actually received by White House Counsel or counsel for Clinton/Gore '96 until Friday, March 6, 1998. This motion is filed within the 5 day time frame provided for at 11 C.F.R. §111.15(a). The Office of General Counsel has on file permanent designations of counsel for Lyn Utrecht as General Counsel for Clinton/Gore '96 and for Cheryl Mills regarding any communications from the FEC concerning the President or the Executive Office of the President, the latter dating back to 1994. Although the Commission's General Counsel's Office has properly mailed certain of the subpoenas in this MUR to designated counsel, inexplicably the subpoena to President Clinton was not mailed to either designated counsel, but instead mailed to The White House general address.

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 all parties now involved in this MUR 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.

C. 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) par. 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. §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.[2] In failing to follow statutory requirements, the Commission's actions thus fly in the face of basic fairness and common sense.

[2] See section 3 below.

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 applied 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 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 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 "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.[1]

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

[1] 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.

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 may legally 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 Republican National Committee ads in Advisory Opinion 1995-25.

In Advisory Opinion 1995-25, the Commission sanctioned as issue advocacy a series of Republican National Committee ("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) par. 6162 .

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." MUR 4407, Office of General Counsel's Factual and Legal Analysis at p. 9. 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 on the issue. See 2 U.S.C. §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. 22-31). 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. 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.

D. Due to procedural deficiencies in the Commission's handling of these matters, the Commission is required by the Act to quash the subpoena.

1. Until the Commission's allegations against President Clinton are substantiated, the Commission's finding and subpoena lack sufficient legal basis and thus are invalid.

The Commission relies on various publications and the Committee's disclosure reports to form the basis of its findings against President Clinton. None of these sources,

individually or cumulatively, recite any facts which describe a violation of the Act by the President. Moreover, the complaints do not directly name the President nor do they recite any facts that allege any violation of the Act by him. The regulations state that pursuant to a reason to believe finding, the Commission "*shall* ... [set] forth the sections of the statutes or regulations alleged to have been violated and the alleged factual basis supporting the finding." See 11 C.F.R. §111.9(a).

The Factual and Legal Analysis partially bases its findings on excerpts from two books, Bob Woodward's *The Choice* and Dick Morris' *Behind the Oval Office,* as well as various press reports.[4] Press reports and books written for the profit of their authors should never form the basis of a finding against the President. Such evidence is not sufficiently documented to support a Commission finding of reason to believe against the President at this stage in these MURs. Prior to the finding of RTB against the President personally, it is incumbent upon the Commission to seek credible corroboration from other sources in its investigation of other respondents in this MUR.

Moreover, the Factual and Legal Analysis suggests that, based on FEC disclosure reports, the President allegedly accepted excessive contributions from the Democratic National Committee and incurred qualified campaign expenditures in excess of the expenditure limitation. 2 U.S.C. §441a(f) and 26 U.S.C. §9003(b)(1). However, the Committees' disclosure reports, do not on their face reveal that any violation of the Act occurred, nor do they reveal whether the President had any specific knowledge of the cost of the advertisements and how they were paid. Therefore, the Commission's finding is invalid. There is no authority for this subpoena and it must be quashed.

2. The Commission made its finding against President Clinton without notifying or affording President Clinton an opportunity to respond to the alleged violations. Therefore, the Commission's finding and its authority for the subpoena are invalid.

The Commission failed to notify the President that either of these complaints pertained to him, and therefore, the President was deprived of the statutorily mandated opportunity to demonstrate, prior to a reason to believe finding, that no findings should be made with respect to him. 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); see also 11 C.F.R. §111.5(a) ("Upon receipt of a complai nt, 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 President, the President should have been afforded the opportunity to demonstrate that no

[4] See Factual and Legal Analysis at n.1.

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 states 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).

Although the opportunity to make this demonstration is mandated by law, President Clinton was not given this required opportunity. The Commission, while precluded from doing so, made a finding of reason to believe without due consideration of any response from President Clinton. The failure of the Commission to grant the President that opportunity is contrary to the Act. Moreover, 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.

Conclusion

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

Sincerely,

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