FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission
Staff Director
General Counsel

FROM: Mary W. Dove/Veneshe Ferebee-Vines
Acting Secretary of the Commission

DATE: June 23, 2000

SUBJECT: Statement of Reasons for MUR 4713
MURs 4407 and 4544
MURs 4553 and 4671

Attached is a copy of the Statement of Reasons signed by Commissioner Lee Ann Elliott.

This was received in the Commission Secretary's Office on Friday, June 23, 2000 at 3:53 p.m.

cc: Vincent J. Convery, Jr.
Press Office
Public Information
Public Records

Attachments

FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

In the Matter of	)	
	)	
The Clinton/Gore '96 Primary Committee, Inc., and Joan Pollitt, as treasurer; The Democratic National Committee, and Carol Pensky, as treasurer; President William J. Clinton; and Harold M. Ickes	)	**MUR 4713**
The Clinton/Gore '96 Primary Committee, Inc., and Joan Pollitt, as treasurer; The Democratic National Committee, and Carol Pensky, as treasurer; President William J. Clinton; Vice President Albert Gore, Jr.; and Clinton/Gore '96 General Committee, Inc., and Joan Pollitt, as treasurer	)	**MURs 4407 and 4544**
Dole for President, Inc., and Robert J. Dole, as treasurer; Dole/Kemp '96, Inc., and Robert J. Dole, as treasurer; Republican National Committee and Alec Pointevint, as treasurer; Senator Robert J. Dole	)	**MURs 4553 and 4671**

STATEMENT OF REASONS

COMMISSIONER LEE ANN ELLIOTT

I am writing to state my reasons for voting not to approve the recommendations of the General Counsel that the Commission find reason to believe that various of the above captioned entities violated 2 U.S.C. § 441a(a)(2)(A) for making excessive contributions;[1] 2 U.S.C. § 441b(a) and 11 C.F.R. § 102.5(b) for improperly using prohibited contributions;[2] 2 U.S.C. § 434(b)(4) for improper reporting;[3] 2 U.S.C. § 441a(f) for knowingly accepting

[1] Alleged against the Democratic National Committee ("DNC") and the Republican National Committee ("RNC").
[2] Alleged against the DNC and the RNC.
[3] Alleged against the DNC and the RNC.

excessive contributions;[4] 2 U.S.C. §441b(a) for knowingly accepting prohibited contributions;[5] 2 U.S.C. §§ 441a(b)(1)(A) and 441a(f), and 26 U.S.C. §9035(a) for exceeding the overall expenditure limitation;[6] and 2 U.S.C. §§ 434(b)(2)(C) and 434(b)(4), and 11 C.F.R. §§ 104.13(a)(1) and 104.13(a)(2) for improper reporting.[7] All of the potential violations listed stem from the core question of whether the advertisements at issue run by the DNC and RNC constituted in-kind contributions from the national party committees to the presidential committees.

As was explained by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), because "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities," *id.* at 14, "express advocacy," consisting of speech expressly advocating the election or defeat of a clearly identified federal candidate, must be separated from other political speech, usually referred to as "issue speech" or "issue advocacy." *See id.* at 42. Because neither the Complainants,[8] nor the General Counsel,[9] alleged that any of the advertisements in question expressly advocated the election or defeat of a candidate for federal office, my decision was not difficult or complicated. My inquiry began - and in these matters ended - with the question of whether the advertisements contained express advocacy. They clearly did not.

I.

At least one Commissioner has confused the issue involved in these MURs by asserting that the Commission must first determine "whether the national party committees 'coordinated' the advertisements with the presidential committees," prior to reaching the question of whether the advertisements were made for the purpose of influencing an election (and therefore must contain express advocacy). *Statement of Reasons of Commissioner Scott E. Thomas*, p. 6 (May 25, 2000). That approach ignores the explicit language of the Commission's governing statute. § 441a(7)(B)(i) of the Federal Election Campaign Act states that:

> *[E]xpenditures* made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized

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[4] Alleged against the Clinton/Gore '96 Primary Committee ("Clinton/Gore Primary Committee"), President William J. Clinton, Dole for President, Inc. ("Dole Committee"), and Senator Robert J. Dole.

[5] Alleged against the Clinton/Gore Primary Committee, President Clinton, the Dole Committee, and Senator Dole.

[6] Alleged against the Clinton/Gore Primary Committee, President Clinton, the Dole Committee, and Senator Dole.

[7] Alleged against the Clinton/Gore Primary Committee and the Dole Committee.

[8] *See Lenora B. Fulani Complaint* (Jan. 29, 1998); *Common Cause Complaint* (originally filed Oct. 9, 1996 with the U.S. Department of Justice) (asserting that "whether the TV ads contained any terms of 'express advocacy' such as 'vote for' or 'vote against' is irrelevant." *Id.* at 14); *Rebecca Roczen Carley Complaint* (Oct. 21, 1996); *Democratic National Committee Complaint* (Oct. 30, 1996)(relying upon the discredited "electioneering message" standard for "for the purpose of influencing," rather then even asserting a violation of the Constitutionally required "express advocacy" standard.); *Republican National Committee Complaint* (July 2, 1996).

[9] *See* General Counsel's reports for MURs 4713, 4407, 4544, 4553, and 4671.

> political committees, or their agents, shall be considered to be a contribution to such candidate;

2 U.S.C. § 441a(7)(B)(i) (emphasis added). The operative term of that section is the subject and first word, "expenditure," and the term "expenditure," as unambiguously defined by the courts, is limited to express advocacy. Recently, in *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997), the Fourth Circuit explained that:

> [I]t is indisputable that the Supreme Court limited the FEC's regulatory authority to expenditures which, through explicit words, advocate the election or defeat of a specifically identified candidate.

110 F.3d at 1062. In *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986), the Supreme Court emphasized that the prohibition on corporate expenditures in 2 U.S.C. § 441b could not reach beyond "express advocacy." Referring to *Buckley*, the Court noted:

> *There, in order to avoid problems of overbreadth,* the Court held that the term 'expenditure' encompassed 'only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.'

479 U.S. at 249, citing 424 U.S. at 80 (footnote omitted). The Court continued that, "We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." 479 U.S. at 248-49. The list of courts that have re-affirmed that the FEC's regulatory authority is limited by the "express advocacy" standard announced in *Buckley* is extensive and exhaustive.[10] In fact, one of the Commission's relatively few substantive court victories came in *Orloski v. FEC*, 759 F.2d 156 (D.C. Cir. 1986) where the Commission itself argued, in the context of dismissing a complaint alleging that the costs of a picnic sponsored by a corporation were an illegal in-kind contribution to the candidate, that coordinated spending constitutes an in-kind contribution to the candidate if, and only if, the speech paid for expressly advocates the election of defeat of a clearly identified federal candidate. The D.C. Circuit agreed:

> Under the Act this type of "donation" is only a "contribution" if it first qualifies as an "expenditure" and, under the FEC's interpretation, such a donation is not an expenditure unless someone at the funded event expressly advocates the re-election of the incumbent or the defeat of an

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[10] *Clifton v. FEC*, 114 F.3d 1309, 1312 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1036 (1998); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 861 (D.D.C. 1996); *FEC v. National Org. for Women*, 713 F. Supp. 428, 435 (D.D.C. 1989); *See also Maine Right to Life Comm., Inc. v. FEC*, 98 F.3d 1, 1 (1st Cir. 1991), *cert. denied*, 118 S. Ct. 52 (1997); *Faucher v. FEC*, 928 F.2d 458, 471 (1st Cir. 1991), *cert. denied*, 502 U.S. 820 (1991); *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987) (applying "express advocacy" standard with very little weight accorded to external contextual factors), *cert. denied*, 484 U.S. 850 (1987); *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980)(en banc); *Right to life of Dutchess County, Inc. v. FEC*, 6 F. Supp.2d 248, 253-54 (S.D.N.Y. 1998); *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995); *FEC v. American Fed'n of State, County and Mun. Employees*, 471 F. Supp. 315, 316-17 (D.D.C. 1979). *But cf. FEC v. Christian Coalition*, 52 F. Supp.2d 45 (D.D.C. 1999).

> opponent or solicits or accepts money to support the incumbent's re-election.

759 F.2d at 163.

As outlined above, the courts have made it abundantly clear that the jurisdiction of the FEC is limited to expenditures which expressly advocate the election or defeat of a clearly identified federal candidate. Because the advertisements at issue clearly did not expressly advocate the election or defeat of President Clinton or Senator Dole, respectively, they by definition are not expenditures under the Federal Election Campaign Act, and therefore they are not within the Commission's jurisdiction to regulate.[11]

II.

My decision in the above captioned MURs began and ended with what I believe is the unambiguous law on the scope of the Commission's regulatory jurisdiction. It is worth noting, however, the policy implications of some of my fellow Commissioner's contrary views. If express advocacy were not the standard for what defined an "expenditure" under the Act, then we would be left with the bizarre situation where the President of the United States could not coordinate with his own political party on advertisements to support his (and presumably his party's) legislative priorities, yet outside groups could spend as much as they wanted to run advertisements opposing the President's legislative priorities. That result would be unfair to both the President and his political party,[12] and more importantly would be bad for the legislative debate that is so essential to our democratic process. I am sad to say that this Commission has had an abysmal track record of attempted over-reach to regulate what the courts have consistently made clear is core First Amendment protected speech.[13] I

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[11] Because both the DNC and the RNC advertisements, respectively, are not expenditures within the FEC's jurisdiction, there is no reason for me to reach the question of whether they were coordinated with their respective campaigns. It should be pointed out, however, that the evidence of coordination in the different MURs is not comparable. There is strong evidence that President Clinton was not just coordinating, but in fact personally directing and controlling, the advertisements run by the DNC. *See* Bob Woodward, *The Choice* (1996); *see also* Clinton/Gore '96 Response to Complaint in MUR 4407 (Aug. 19, 1996)(not denying coordination, but instead arguing, correctly, that coordination is irrelevant in the absence of express advocacy). In contrast, Dole for President provided evidence to support their vigorous denial of the "coordination" allegations against the RNC and Dole for President. *See First General Counsel's Report for MURs 4554 and 4671* at 6-8 (Dec 23, 1997); *Dole for President Response to Complaint in MUR 4553* (Dec. 13, 1996).

[12] *See Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604 (1996), where the Supreme Court explained that political parties deserve as much protection as any other actor in the political process:

> "We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited *independent expenditures could deny* the same right to political parties."

Id. at 618. Although the Court was referring to "independent expenditures" (which involve regulable express advocacy), it follows that political parties are due no less protection for issue advocacy (which no court has ever allowed the FEC to regulate).

[13] The Fourth Circuit admonished in *Christian Action Network* that,

> "The FEC is fully aware that the Supreme Court has required explicit words of advocacy as a condition to the Commission's exercise of power...there is no doubt the Commission understands that its position that no words of advocacy are required in order to support its

am optimistic, however, that by listening to the courts,[14] and re-focusing on our core functions and jurisdiction under the Federal Election Campaign Act, the Federal Election Commission can be a valuable part of the democratic process.

6/23/00
Date

Lee Ann Elliott (by CRS)
Lee Ann Elliott
Commissioner

jurisdiction runs directly counter to Supreme Court precedent." 110 F.3d at 1063-64; *See also supra*, n. 8.

[14] In reading one of my colleague's tortured explanation of his inconsistent votes, I was most struck by his rationalization that because a majority of the Commission finally has listened to the courts (*see supra.*, n. 13) and put a stake through the heart of the Commission's ill-conceived and unconstitutional "electioneering message" standard, those Commissioners "hurled the relatively well-settled law governing advertisements into disarray." *Statement of Reasons of Commissioner Danny L. McDonald*, p. 4 (June 21, 2000). The law is indeed well-settled (*see* list of court cases both implicitly and explicitly invalidating the "electioneering message" standard and instead requiring "express advocacy" *infra* n. 10), and it is the refusal to follow the *Buckley*-mandated bright-line express advocacy standard that has "created confusion" in the regulated community.