

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 4568
Triad,)
et al.)

**Statement of Reasons
Vice Chairman Karl J. Sandstrom**

On April 10, 2002, by a 5-0 vote¹, the Commission voted to find probable cause to believe that Carolyn S. Malenick dba Triad ("Triad CSM") and Triad, Inc. (collectively "Triad") are political committees that failed to register and report under the Act in violation of 2 U.S.C. §§ 443 and 434. On May 7, 2002, the Commission, by a 3-2 vote, failed to find that Citizens for Reform ("CR") and Citizens for the Republic Education Fund ("CREF") were required to register and report as political committees. Commissioners Sandstrom, McDonald and Thomas voted in the affirmative. Commissioners Mason and Smith dissented.² I write this Statement of Reasons to explain why Triad, CR, and CREF should have all been deemed to be political committees.

A political committee is defined as any committee, club, association or other group of person that receives contributions or makes expenditures aggregating in excess of \$1000. 2 U.S.C. § 431(4)(A). As a political committee, the organization is required to register and report to the Federal Election Commission, 2 U.S.C. §§ 433(a) and 434(a)(1), and to abide by the applicable contribution limitations and prohibitions. 2 U.S.C. § 441a.

¹ Commissioner Toner, newly arrived at the Commission, abstained.

² Commissioner Toner abstained.

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I. FACTS

A. Triad

The Office of General Counsel concluded that Triad/CSM and Triad, Inc. were organized and operated for political, not commercial, purposes; that each received far in excess of \$1000 in contributions and that each also made far in excess of \$1000 in expenditures. All five Commissioners voting concurred that Triad met the standard to be deemed a political committee. The "evidence demonstrates that most of Triad's 1995-1996 activities and disbursements were geared toward garnering financial and other support for the election, and reelection, of conservative Republicans in the 1996 congressional elections." Statement of Reasons of Commissioner Bradley A. Smith, dated October 1, 2002, in MURs 4568, 4633, 4634, and 4736 at 5 (citing GC Brief at 78).

The purpose of Triad was made explicitly clear by Triad's own publications and statements. A 1996 Triad, Inc. publication stated that Triad had already put together a team of political advisors and interested organizations and was working on a team of donors to work "for the same goal: Retaining GOP control of Congress and the advance of a conservative agenda. Triad believes that its activities will ultimately complement the efforts by others to regain GOP control of the White House." Stipulations at 2.1(a) (citing FECTR 000131). In numerous publications, both Triad/CSM and Triad, Inc. repeatedly stated that their overall "GOALS" for 1996 were to:

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B. Citizens for the Republican Committee ("CREF") and Citizens for Reform ("CR")

The complaint alleged that CREF and CR had accepted more than \$3 million in contributions and had spent similar sums to make coordinated expenditures in connection with at least 29 congressional races, and had violated FECA by failing to register and report to the Commission as one or more political committees and by making excessive contributions to various campaigns. The complaint also alleged that as corporations, CREF and CR violated FECA by making prohibited corporate contributions in the form of advertising expenditures that were coordinated with various congressional campaign committees.

CREF and CR were non-profit 501(c)(4) corporations closely linked to Triad. Carolyn Malenick, Triad's Finance Director, ordered the incorporation of CREF in June 1996 and named herself and another Triad employee as CREF's only officers. During the latter part of 1996, Triad's officers managed CREF and CR, and used both of these organizations as separate bank accounts from which to make coordinated expenditures in connection with federal races. Triad utilized these accounts to run advertisements favoring the same candidates that Triad also was supporting. GC Brief at 25-27. The

CREF officers worked out of the Triad offices and did not receive any additional pay for their CREF duties. GC Brief at 25-27. Each of the bank accounts for Triad, CREF, and CR were controlled by the same persons. On several occasions, funds were moved from one account to another without documentation. GC Brief at 64-65. Triad was responsible for managing all of CREF's and CR's activities, including soliciting and accepting funds for the placement and production of advertising programs on behalf of CREF and CR, controlling selection of media markets, approving scripts and authorizing expenditures for the production and placement of CREF and CR ads. GC Brief at 25-27.

In 1996, Triad distributed a number of written materials, including sixty editions of its newsletter "Fax Alert" on letterhead with the heading "Privatized Republican National Coalition" or "PRNC", which featured a graphic of an elephant superimposed on a map of the United States. Stipulations 2.3. These Fax Alerts and booklets with the letterhead expressly made recommendations to individuals on specific congressional districts, specific Republican congressional candidates and candidate support. Stipulations 2.3. In 1996, Triad Inc. solicited funds for CR and CREF advertising programs in various editions of these Fax Alert newsletter.

"In certain instances, some topics and issues that Triad/CSM or Triad Inc. discussed with a particular candidate or campaign committee during a political audit (as reflected in the audit report) were subsequently the focus of CR or CREF advertising aired in a media market within that senatorial or congressional district." Stipulations 3.12. As part of one of these political audits, "Montana congressional candidate Rick Hill or his agents met with Triad Inc.'s consultant, Carlos Rodriguez, and discussed the results of a Hill campaign survey regarding likely public reaction to selected facts about the past personal conduct of Mr. Hill's opponent, Bill Yellowtail. Following this meeting, Mr. Rodriguez wrote an internal Triad audit report stating that one of the Hill campaign's top needs was for a "3rd Party to expose Yellowtail" on his personal conduct.

At another political audit, Rodriguez met with South Dakota congressional candidate John Thune. Rodriguez wrote his audit report stating that "[I]f there is anything we [Triad] can do to help it would probably be in the area of 501(c)(4) education with regard to the liberal tendencies of his opponent." Stipulations at 3.4(b)(quoting from TR150001142). CR later ran advertisements that focused on Mr. Thune's opponent. Stipulations at 3.4(b). CR was a 501(c)(4) organization.

II. ISSUE ADVOCACY IS NOT THE SAME AS ELECTORAL ADVOCACY

Due to a lack of affirmative votes, the Commission rejected the Office of General Counsel's recommendation to find probable cause to believe that CREF and CR are

political committees under the Act and that they failed to register and report in violation of 2 U.S.C. §§ 443 and 434. OGC determined in its analysis that CREF and CR each met the criteria for political committee status by making more than \$1000 in coordinated expenditures, by accepting more than \$1000 in contributions, and by having a major purpose of supporting the election of candidates for federal office. GC Report at 15-16. OGC found the organizations were organized and operated for the purpose of running candidate-specific advertisements designed to influence various 1996 congressional elections.

In rejecting political committee status for CREF and CR, Commissioner Smith argues in his Statement of Reasons that corporate payments for public issue advocacy³ are not expenditures. Smith SOR at 13. He states that "courts have made plain, time and again, that the First Amendment requires that speech short of expressly advocating the election or defeat of a clearly identified candidate for Federal office is not speech made for the purpose of influencing an election, and spending for that speech is not a FECA 'expenditure.'" *Id.* Commissioner Smith contends, citing *Federal Election Commission v. Massachusetts Citizens for Life* ("MCFL"), 479 U.S. 238 (1986), that where speech is implicated, the term "expenditure" is limited to express advocacy. Hence, despite finding the "major purpose test" to have been met, Commissioner Smith could not deem CREF and CR to be political committees.

I respectfully disagree. There are identifiable categories of activities other than express advocacy that are for the purpose of influencing a federal election and involve speech, yet are neither vague nor overbroad. (See Statement of Reasons of Commissioner Karl J. Sandstrom, dated September 6, 2001, in MUR 4624, *The Coalition*.) I will refer to such activity as "electoral advocacy." Examples include surveying and polling voters to identify supporters of a candidate, using "push polls" to shape the electorate's view of a candidate, orchestrating absentee ballot campaigns on behalf of a candidate, and soliciting contributions on behalf of a candidate. Such activities are indeed persuasive communications that fall short of express advocacy, yet are no less directed at winning an election.

³ Because OGC determined the ads did not contain express advocacy, I will assume without deciding that the ads done by CR and CREF did not contain express advocacy of a clearly identified candidate. However, at least in the instance of the Bill Yellowtail ads, I would argue express advocacy was present. By my understanding, and that of my colleagues Commissioners McDonald and Thomas, express advocacy was present and if there was agreement by the other commissioners on express advocacy, all five commissioners would have agreed that CREF and CR were political committees.

In the Yellowtail ads, which CR funded, two ads and one telephone bank script focused on Yellowtail's prior criminal acts and allegations of spousal abuse. Calling a candidate a wife-beater should be construed to be express advocacy for the defeat of that candidate. GC Brief at 71. In *MCFL*, the Court held the publication "cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides *in effect* an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature." I would hope that the essential nature of calling a candidate a wife-beater, a dead-beat dad, or camera store robber would be essentially imploring the vote not to elect such a candidate.

Triad was a for-profit incorporated entity. Section 441b of the Act states that it is unlawful for "any corporation whatever ... to make a contribution or expenditure in connection with any [federal] election...." For the purposes of section 441, "expenditure" includes "anything of value... to any candidate, campaign committee, or political party or organization, in connection with any election to [federal] office." 2 U.S.C. § 441b(b)(2). Commissioner Smith is correct to point out that we must be careful not to run afoul of the First Amendment with vague or overbroad regulation of political speech. I could not agree more.

Yet if a category of campaign -related expenses is neither vague nor overbroad, then by what rationale would inclusion of such a category of expenses in the definition of "expenditure" be prohibited under either *Buckley*⁴ or *MCFL*? What is the rationale in either *Buckley* or *MCFL* for requiring an express advocacy test when problems of vagueness and overbreadth have otherwise been addressed and the distinction between issue advocacy and electoral advocacy can be ascertained?

The *Buckley* Court addressed the constitutional concerns that arose from the potential overbreadth and vagueness of the definition of expenditure in the context of political committee differently that it did in the context of independent reporting requirements. The express advocacy test in *Buckley* was applied to sections of FECA that applied only to individuals or groups that were not candidates or political committees. Indeed, the Court stated, "[e]xpenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought be addressed by Congress. They are, by definition, campaign related." *Buckley*, at 79. In *MCFL*, the Court stated that the express advocacy requirement was only necessary for the "provision that directly regulates independent spending." *MCFL*, 479 U.S. at 249.

CREF and CR raised and expended \$3.2 million (\$1.8 million by CREF and \$1.4 million by CR) in election-related political advertising programs, all of which featured clearly identified candidates for federal office. GC Brief at 62. CREF and CR only ran ads in congressional districts where Triad had audited and recommended support for Republican candidates. All of the ads were for the purpose of influencing federal elections and were targeted by CR and CREF's affiliated political committee, Triad.

Due to a lack of affirmative votes the Commission rejected the Office of General Counsel's recommendation to find probable cause to believe that CREF and CR are political committees under the Act that failed to register and report in violation of 2 U.S.C. §§ 443 and 434. I am disheartened by this conclusion, but more concerned that the Commission rectify the uncertainty pertaining to political committee status going forward.

⁴ See *Buckley v. Valeo*, 424 U.S. 1 (1976).

III. POLITICAL COMMITTEE STATUS IS TRIGGERED AT THE TIME A CONTRIBUTION IS RECEIVED WHEN THE AVOWED PURPOSE OF THE ORGANIZATION IS TO INFLUENCE FEDERAL ELECTIONS

The FECA is clear in its definition of "political committee":

Any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year
2 U.S.C. § 431(4).

Similarly, the FECA is clear that term "contribution" includes:

Any gift, subscription, loan, advance, or 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)(1).

Following the straightforward language of the statute, CREF and CR met the requirements for registering and reporting as a political committee by their receipt of funds that were intended to influence elections for Federal office. The record demonstrated that CREF and CR existed for the sole purpose of running public advertisements that commented on specific candidates in the 1996 congressional elections. GC Brief at 100. Both CREF and CR received over \$1000 in contributions in early October 1996 when they began to accept contributions for these advertising campaigns. OGC determined that this occurred no later than when it accepted a \$100,000 contribution from Robert Cummins on October 8, 1996, and for CR this occurred no later than the \$50,000 contribution from Fred Sacher on October 4, 1996. GC Brief at 101. This evidence alone should be sufficient for a finding of political committee status.

Nonetheless, the Office of General Counsel provided additional evidence that almost \$2 million donated to CR and CREF was for the purpose of influencing federal elections. OGC found that there is documentary evidence as to the purpose of the funds that Koch Industries, Inc. sent to CREF and CR through Economic Education Trust ("EET"). Documents provided by EET, an entity fund entirely by Koch, indicated that it provided \$1.8 million to CREF and CR as a means of participating in specific congressional races, with the hope of electing particular federal candidates. GC Brief at 101-02. Specifically, the documents produced by Koch stated that it intended to have an "impact" on the 1996 congressional elections by "making a difference in some really pivotal elections" and to "help the best candidate[]s win in whatever way we can." GC Brief at 101 (quoting Koch documents). The investigation by OGC further revealed that Koch/EET representative Kenneth "Buddy" Barfield played a significant role in selecting additional congressional districts for CREF and CR ad campaigns and in selecting the vendors used for production of the ads. GC Brief at 102 (citing Rodriguez Deposition).

At the moment CREF and CR accepted these funds, which were intended to influence federal elections, they became political committees under the plain language of the Act.

The election-related purpose of the contributions from CREF and CR in October 1996 is also clear from the context in which Triad solicited funds for CR and CREF. In its Fax Alert newsletters, Triad solicited funds on behalf of CR and CREF to rebut union ads about specific Republican congressional candidates. Numerous editions of the Fax Alert newsletter discussed the CR and CREF advertising programs. Stipulation 4.8. One discussed ads that had been placed essentially attacking ads that were being run by “[b]ig labor fat-cats ... claiming Republicans are out to destroy Medicare and crush the American minimum wage earner.” Stipulation 4.8. The newsletter went on to state that these “strategically placed ads” were done by “Citizens for the Republic [Education Fund].” Stipulation 4.8. The October 15, 1996 edition of the Fax alert states in a section entitled, “Democrats for Sale”:

“The unions are intent on holding several Democratic seats required for them to take control of the 105th Congress. Organized labor’s efforts to discredit and defeat Republican Freshman are well documented. Their education efforts about Republicans running in open Democrat seats have added a new dimension to the 1996 election. (Information about specific races omitted)...

TRIAD has finished the budgets and is working on fine tuning the media market targets of the 501(c)(4) Social Welfare Organizations which we managed [CREF and CR]. Your help now is instrumental in sending the message that economic and individual freedom are bigger than liberal scare tactics and special interest money. WE NEED TO HEAR FROM YOU!”

Stipulation 4.8 (quoting TR10 000143-44)(emphasis in original newsletter).

I believe it is apparent from this solicitation that money contributed to CR or CREF would be for the purpose of influencing the federal elections where the advertisements would be run.

Nonetheless, Commissioner Smith writes in his Statement of Reasons that this conclusion is invalid because “corporate payments for public issue advocacy are not expenditures, and corporate payments for issue advocacy coordinated with candidates are not contributions.” Smith SOR at 13.

Commissioner Smith acknowledges that more than \$1000 was received by CREF and CR, that CREF and CR disbursed more than \$1000, and that the “major purpose” test was met. Because Commissioner Smith found that CR and CREF did not have express advocacy in their ads, he determined that no expenditures were made. Continuing his logic, he then determines that because there were no expenditures, there could not have been any contributions. See Smith SOR at 14 (“But to be ‘contributions’ the payments must first be ‘expenditures’ regulated under the Act”). Hence, by this theory then,

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regardless of the intent of the contributors, it cannot be determined whether any donations are contributions until the entity has made an "expenditure." By Commissioner Smith's logic, until there is an expenditure, there is no contribution. Until such time, no reporting obligations exist.

If, as Commissioner Smith contends, "to be 'contributions' the payments must first be 'expenditures' regulated under the Act," Smith SOR at 14, then the structure of the definition of political committee makes no sense. Why would Congress have defined political committee status as being triggered either by contributions received or expenditures made, if the former does not exist without the latter? When the statute imposes political committee status on any group "which receives contributions . . . or which makes expenditures," 2 U.S.C. § 431(4)(A), I fail to see how one can read these words to mean anything other than presenting two separate concepts. Otherwise, one could give \$50,000 to a committee with the explicit direction to use it to influence a federal election, and there would be no possible repercussion until the money was spent.⁵

Commissioner Smith cites 2 U.S.C. § 431(8)(B)(vi) for support of his proposition that the "Act states that the term 'contribution' does not include any payment incurred by a corporation that would not first constitute an 'expenditure' by that corporation." Smith SOR at 14. However, that is not exactly what the statute states. This provision states that the term "contribution" does not include:

(vii) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization
2 U.S.C. § 431(8)(B)(vi)

The statute does not exclude, as Commissioner Smith states, "any payment incurred" but rather "any payment made or obligation incurred."

A donation *to* a corporation would not be excluded from the definition of contribution regardless of whether it constitutes an expenditure, because a donation is neither a payment made nor obligation incurred by a corporation. If the donation came *from* a corporation, it would not be excluded by this section because a donation would be a "gift," not a "payment." Black's Law Dictionary (7th ed. 1999) defines "payment" as:

⁵ The General Counsel correctly noted that as political committees, CREF and CR could legally only contribute no more than \$1000 per election to any federal office candidate and that due to their affiliation with Triad, all three shared a single \$1000 contribution limit with Triad. GC Brief at 107. In his Statement of Reason, Commissioner Smith does not dispute that CREF and CR were established, financed, maintain, or controlled by Triad, 11 C.F.R. § 100.5(g)(3)(v), but argues that because he does not think CREF and CR are political committees, that the regulation does not apply. However, because I believe CREF and CR were political committees by virtue of having received more than \$1000 in both contributions and expenditures, I conclude the affiliation regulation applies.

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1. Performance of an obligation, usu. by the delivery of money. * Performance may occur by delivery and acceptance of things other than money, but there is a payment only if money or other valuable things are given and accepted in partial or full discharge of an obligation. 2. The money or other valuable thing so delivered in satisfaction of an obligation.

Payment requires there to be an obligation, which would not exist in the case of a donation. Black's Dictionary defines "gift" as:

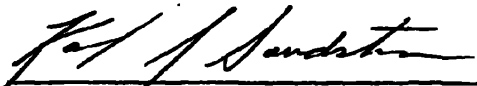
1. The act of voluntarily transferring property to another without compensation. 2. A thing so transferred.

Gifts are explicitly included in the definition of contribution. Surely, the exception for "payment made" and "obligation incurred" by a corporation is intended to exclude financial transactions with corporate obligations. This would not serve to exclude transactions with corporations that had the intent with their donation of influencing a federal election.

IV. CONCLUSION

CR and CREF raised and spent millions of dollars on mass advertising campaigns that ran in some of the closest Congressional races in the nation. However, because these entities were able to skirt this Commission's definition of express advocacy in their ads, they were (and will be) able to avoid making known to the public which corporations and individuals funded the media blitz. Since I arrived at the Commission, I have urged my fellow Commissioners to make clear what the rules are so that those who opt to follow them are not put at a disadvantage. Unfortunately, we have not done so when it comes to defining "contribution" and "expenditure" for purposes of meeting the threshold for political committee status. Nonetheless, I once again, and for the last time in this seat, encourage my colleagues, and Commissioners to come, to make clear for all what activity will make an entity a political committee.

December 9, 2002


 Karl J. Sandstrom, Vice Chairman