



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

In the Matter of

John and Ruth Stauffer;

Sam Brownback for Senate Committee

And Alan Groesbeck, as treasurer

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MURs 4568, 4633, 4634 and 4736

DISSENT OF COMMISSIONER BRADLEY A. SMITH

This MUR involves allegations that respondents violated 2 U.S.C. Sec. 441a(a)(1) by making contributions to various PACs with the knowledge that those PACs would then contribute to a candidate to whom the respondents had already made the maximum legal contributions. I voted against the Commission's Probable Cause findings in these matters because I believe that the statutory theory under which the Commission proceeded is erroneous as a matter of law, and that even if that theory were correct, the evidence is insufficient to support a finding of probable cause. Because I believe that an injustice has been done to the citizens involved and to the interpretation of the Federal Election Campaign Act ("FECA" or "the Act"), I write this dissent.

I. Background

A. Triad

Triad was a political consulting firm established and controlled by Carolyn Malenick. Formed after the 1994 elections, Triad described itself as a for-profit company providing specialized information, advice and services to conservative, usually Republican-oriented donors and PACs in connection with their political and charitable contributions. General Counsel's Brief of March 12, 2001, at 7. Triad attempted to link conservative PACs to a network of conservative donors and candidates. The idea was to assist these PACs in identifying candidates who shared the goals of the PAC and were involved in competitive campaigns, and then to link PACs to donors who shared the same goals. In that way, wealthy donors could feel relatively assured that the funds they gave to PACs would eventually support like-minded candidates engaged in competitive races.

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PACs would be able to more accurately target both donors and candidates, and conservative political money would be used to greatest effect in important races.

To identify candidates worth supporting, Triad would conduct what it called "political audits" of various campaigns. These audits were to assess the viability of the campaign, determine both whether the candidate needed financial assistance, and find out whether the candidate shared the goals of Triad's various PAC and donor clients. *Id.* at 9. Triad also contacted numerous conservative organizations, memberships groups and individual activists to encourage them to establish or resurrect dormant political action committees for the purpose of supporting conservative Republican congressional candidates in the upcoming 1996 elections. Representatives from several of these organizations and PACs testified that Malenick approached them about forming a "coalition" or "network" of political action committees that could work together to support Republican candidates and offset the support that labor unions were expected to provide Democratic candidates. *Id.* at 8.

Triad then tried to inform contributors of which PACs were predisposed to supporting which candidates. It told potential donors which PACs "agree with TRIAD's targeting approach for the 1996 elections," or which PACs "will participate in contested primaries." *Id.* at 9-10. Carolyn Malenick stated in a promotional video that by working with PACs and other donors, Triad would be able to provide "rapid fire" support to conservative Republican candidates in tightly contested races where additional funds were needed in a short amount of time. *Id.* at 8. Triad also communicated with PAC representatives by telephone and in writing. For example, Triad asked one PAC leader what candidates the PAC would "be pre-disposed to playing if the \$\$ [sic] were there. This will help us with our clients." *Id.* at 9.

During the Summer and Fall of 1995, Triad asked certain PACs to provide one paragraph synopses describing their philosophy and activities, and Triad compiled the information and provided it to potential donors. *Id.* Two such donors were John and Ruth Stauffer.

B. John and Ruth Stauffer

In 1996, John and Ruth Stauffer's son-in-law, then-Congressman Sam Brownback, ran for an open U.S. Senate seat from Kansas. The Stauffers donated volunteer time to their son-in-law's campaign, and by the time of the June, 1996 primary they had also contributed the legal maximum to the campaign.¹ At around that time, the Brownback campaign urged the Stauffers to contact Triad. Probable Cause Brief of March 23, 2001, p. 6. After the Stauffers viewed a Triad promotional video and talked with Carolyn Malenick, on June 26, 1996, Triad faxed the Stauffers a list of

¹ John Stauffer is the retired owner of a string of newspapers in the Midwest, and apparently an individual with considerable personal wealth.

recommended PACs to which the Stauffers might make contributions. The Stauffers then made contributions to six PACs.² In July, after further conversations with Malenick, the Stauffers contributed to three more PACs. All nine of these PACs made contributions to the Brownback campaign after receiving contributions from the Stauffers. Two of the nine eventually contributed the same amount to Sam Brownback's campaign that the Stauffers had contributed to the PAC; five contributed less; two contributed more. Table I sets forth these contributions.

On May 8, 2001, the Acting General Counsel ("AGC") recommended that the Commission find Probable Cause to believe that the Stauffers violated 2 U.S.C. 441a(a)(1) (making a contribution to a campaign in excess of \$1000) in connection with \$42,500 in contributions they had made to the nine PACs, of which the PACs allegedly contributed, in turn, \$33,450 to the Brownback campaign. The AGC also recommended that the Commission find probable cause to believe that the Sam Brownback for U.S. Senate Committee and Alan Groesbeck, as Treasurer ("the Brownback Committee") violated 2 U.S.C. 441a(f) (knowingly accepting contributions in violation of the Act), but that the Commission take no action and send an "admonishment letter" to the campaign. The AGC further recommended that the Commission take no further action and close the file as to five of the PACs involved, while taking no action but leaving the file open as to the other four PACs. On May 17, 2001, the Commission voted 5-1, over my dissent, to find Probable Cause as it pertained to the contributions made to five of the nine PACs. The Commission also voted 5-1 to find probable cause against the Brownback Committee, and to hold open the investigation not just against the five PACs recommended by the General Counsel, but against all nine of the conservative PACs that had received contributions from the Stauffers. The Stauffers eventually entered into a conciliation agreement with the Commission rather than litigate the matter.

Table I
John and Ruth Stauffer Contributions to PACS and
PAC Contributions to the Brownback Committee

Name of PAC	PAC Reports Receipt of Contribution	Amount of Stauffers' Contribution	Date of PAC Contribution To Campaign	Amount of PAC Contribution to Campaign
Citizens United Political Victory Fund	7/05/96	\$5000	7/18/96	\$5000
*Conservative	7/10/96	\$5000	7/12/96	\$4950

² Oddly, the Stauffers's checks to these PACs are dated before the Fax from Triad. However, the Stauffers apparently agree that they contributed to these PACs on Triad's advice. See Probable Cause Brief at 10-11 and n. 5.

Campaign Fund				
*Eagle Forum PAC	7/10/96	\$5000	7/02/96 9/11/96 10/11/96 10/25/96	\$4000 \$1000 \$1000 \$1000
*Conservative Victory Committee	7/12/96	\$5000	6/28/96 7/16/96 7/22/96 10/17/96	\$500 \$1000 \$2000 \$1000
Free Congress PAC	7/16/96	\$5000	7/16/96	\$4500
Citizens Allied for Free Enterprise	7/16/96	\$5000	7/19/96 7/31/96* *(never rec'd by campaign)	\$1000 \$3500* (never received by campaign)
American Free Enterprise PAC	7/19/96	\$5000	7/12/96 7/29/96	\$1000 \$3500
*Faith, Family & Freedom	7/26/96	\$2500	6/26/96 7/29/96	\$1000 \$4000
The Madison Project	7/29/96	\$5000	7/31/96	\$5000

*Denotes the Commission excluded these transactions from probable cause findings.

II. Law

The Federal Election Campaign Act permits individuals to contribute up to \$1000 per election to a candidate for federal office, and up to \$5000 per year to a political action committee, with a total federal contribution limit of \$25,000 per individual per year. See 2 U.S.C. §§ 441a(a)(1)(A), 441a(a)(1)(C), and 441a(a)(3). To prevent these limits from being easily evaded, Section 441a(a)(8) of the Act provides that "all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions that are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate." Additionally, Section 441f makes it illegal for a person to make a contribution in the name of another.

It is not alleged in this matter that either of the Stauffers directly contributed in excess of \$1000 to any particular campaign, or in excess of \$5000 to any particular PAC. Nor did the Commission proceed on the theory that the respondents made contributions to PACs that were in any way earmarked or otherwise directed to particular candidates. There is good reason for not proceeding under 2 U.S.C. Section 441a(a)(8): there is absolutely no evidence for it, as every witness has testified that no earmarking took place.

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John and Ruth Stauffer testified that they did not earmark contributions. *See* J. Stauffer Depo. at 34, 66, 72-75, 84, 86, 95, 97, 102, 106; R. Stauffer Depo. at 29, 40, 44-45, 83-84, 87, 100-101, 126. Prior to invoking her Fifth Amendment privilege, Carolyn Malenick testified by affidavit that there was no earmarking of contributions. Malenick Affidavit of June 16, 1997. There is evidence that Malenick exercised considerable control over two of the PACs involved in this matter, Americans for Free Enterprise PAC ("AFE"), and Citizens Allied for Free Enterprise PAC ("CAFE"). However, David Bauer, the Treasurer of AFE, testified that he made contributions to whomever Malenick recommended, but that contributions to the PAC were not earmarked. David Gilliard, Treasurer of CAFE, testified that he formed the PAC at Malenick's request, and that he only gave money to candidates recommended to him by Triad. However, he further testified that he was under no obligation to limit contributions to candidates recommended by Triad. Gilliard Depo. at 128-29. The other PACs had even less contact with Malenick, and their Directors also uniformly deny any earmarking in the Stauffer matter.

It is uncontested that there is no testimony anywhere in the record that any contributions by either Stauffers was earmarked or otherwise directed to particular candidates, whereas every witness asked denied such earmarking. Hence the Commission's decision not to proceed under 2 U.S.C. Section 441a(a)(8) demonstrated a certain prudence.

Nor did the General Counsel recommend, or the Commission proceed, on a theory that any of the contributions at issue violated 2 U.S.C. 441f, the prohibition on contributions made in the name of another. This was also a prudent decision, as there is no evidence that the money that the Stauffers gave to any PAC was anybody's but their own, nor evidence that they retained any ownership rights to the contributions once they had made them to the PACs, nor evidence that any PAC gave money in anything but its own name.

So why are we here?

The Commission's legal theory is that the respondents "knew" that if they contributed to the PACs, the PACs would in turn contribute to their favored candidates.³

³ Under this theory, it is also necessary to conclude that the donors knew that but for their contributions, the PACs would not contribute to the preferred candidates. Otherwise, it is impossible to suggest that the donors knew that their contribution would effectively go to the preferred candidates. In this case, we seem to have placed this evidentiary burden on the donors, since, as we will see, the Acting General Counsel's case seems to rely on the mere pattern of donations and disbelief of all contradictory testimony. But how donors can prove this negative, especially in cases such as these, where tens or even hundreds of thousands of dollars were passing through the PACs in question, and those PACs were giving to numerous donors, is beyond me.

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The theory is something less than the earmarking required by 2 U.S.C. § 441a(a)(8). As stated by the AGC:

[T]he Stauffers' knowledge that a substantial portion of the funds they contributed would be contributed to, or expended on behalf of, the Brownback Committee is sufficient to establish a violation, and there is no need to establish that the Stauffers "earmarked" their funds by giving instructions to the PACs or otherwise retained any direction or control over the use of the funds after the checks were written. *See* 11 CFR 110.1(h).

General Counsel's Report of May 8, 2001, at 5.

The AGC is aware that the respondents gave no direction for the contributions to go to those candidates, and that the respondents had no legal recourse if the contributions did not reach the candidate. It is for this very reason that the AGC recommended, and the Commission proceeded, not under an earmarking theory, but rather under 2 U.S.C. §441a(a)(1), the excessive contribution provisions. Yet on the face of it, none of the Triad donors violated section 441a(a)(1), as all contributions made by the Stauffers to both candidates and PACs were within the legal limits.⁴

Thus the Commission is left to rely not on statutory language, but rather on its regulations, specifically 11 CFR 110.1(h). Section 110.1(h), which purports to implement Section 441a, provides in pertinent part:

A person may contribute to a candidate or his or her authorized committee with respect to a particular election and also contribute to a political committee which has supported, or anticipates supporting the same candidate in the same election, as long as –

- (1) The political committee is not the candidate's principal campaign committee or other authorized political committee or a single candidate committee;
- (2) The contributor does not give with the knowledge that a substantial portion will be contributed to, or expended on behalf of, that candidate for the same election; and
- (3) The contributor does not retain control over the funds.

Nothing in the Act or its legislative history, however, suggests that "knowledge," absent direction, is enough to aggregate contributions to various entities.⁵ Section

⁴ The Stauffers's total of \$42,500 in contributions is below the aggregate \$25,000 limit of 2 U.S.C. § 441a(a)(3), as Ruth and John Stauffer were entitled to contribute up to \$25,000 each.

⁵ For added support of its interpretation, the Commission relies on dicta from a pair of its advisory opinions, AO 1984-02 (concerning the right of a candidate's authorized committee to contact donors to a similarly named but unauthorized committee without running afoul of 2 U.S.C. § 438(a)(4)) and AO 1976-

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441a(a)(8) of the Act specifically limits indirect, directed, or earmarked contributions to a candidate. It does not limit contributions to committees made with the mere knowledge that those committees, independently of the donor's direction, may make contributions to any particular candidate. Individuals can rest assured that they will not be liable for violations if, without directing, earmarking, or retaining control over the funds, they make contributions to PACs which contribute to candidates to whom the donors have already given money. This reading comports with the clear language of the statute, which specifically allows contributions to both candidates and PACs in the same cycle. The Act clearly allows and anticipates that individuals will make contributions both to particular campaigns and to PACs and party committees that might give to campaigns. The language of § 441a(a)(8) -- "earmarked or otherwise directed" -- indicates that the donor must take some positive action to direct the money to a particular candidate. To suggest that mere knowledge would be sufficient is counter to the law's express sanctioning of giving to both candidates and PACs.

The first, yet hardly most significant, problem with the Commission's interpretation of the statute is the evidentiary problems it would produce. For example, if a PAC (or national political committee) announced a list of targeted races, would any contributions to that PAC be made with the "knowledge" that those candidates would be supported? What percentage of the money contributed to a PAC must ultimately reach the candidate to be "substantial" enough to trigger application of the regulation? Would it matter if the donor thought, incorrectly, that many contributions would be raised, but instead his was the only one? Or perhaps more relevant to these matters, if the donors thought that their contributions would be the only ones, but in fact thousands of dollars passed through the PACs and the PACs contributed to many candidates? What if the donor made his decision to donate, but before actually making the donation was advised that no other donations had been received?

Party committee and PAC officials could find themselves in an interesting place - if they had made prior individual contributions to candidates, could they then contribute to their own PACs or party committees? Since they would presumably have knowledge of their own committees' intentions, they would have to avoid contributing to their own committees if those committees - as would be expected - supported or intended to support the same candidate as the officer. Or suppose that a PAC announced that the next \$5000 it raised would go to a particular candidate? Would any person who had previously donated to that candidate automatically be denied the right to donate to that PAC?⁶ The effect of the Commission's interpretation is that individuals who make direct

20 (concerning the proper reporting of contributions where state and federal PACs engage in joint fund-raising).

⁶ It might be argued that the answer is "no," provided the PAC had enough money flowing through it that any particular contribution cannot be traced through to a donor. Leaving aside the administrative problems this interpretation would present, it is hard to see why that exception would not apply to donations at issue in this matter, since the PACs here saw between \$39,675 and \$550,783 in activity in 1996. See FEC reports.

contributions to candidates must then be careful not to support the very PACs and party committees who support the same candidates as the donor, lest they be subject to investigation and prosecution on the same type of circumstantial evidence as in these MURs.

Under the Acting General Counsel's interpretation, adopted by the Commission, 11 C.F.R. 110.1(h) does not "specify any particular way that the knowledge referenced in 110.1(h) might be gained by the contributor - it could presumably come from any source." General Counsel's Report of March 20, 2001, p. 5. Thus, if a potential donor were to overhear a conversation in which a PAC manager moans, "If we could raise more money I'd contribute to Jones," the donor would violate the regulation if, the next day, he made a contribution the PAC. But would the result be different if the donor did not really believe the conversation? I suggest that this scenario is not so fanciful as it at first sounds - PAC managers and prospective donors often mingle at conferences and conventions, and such conversations are not especially rare.

The second problem with the Commission's interpretation is that earmarked or directed contributions would always be made with "knowledge" that the funds will support a particular candidate. This makes the statute's specific prohibition of earmarking or directed contributions redundant, since earmarked contributions always subsume the lower threshold of "knowledge."⁷ It is well settled that an interpretation of a

⁷ In recent oral argument in the Supreme Court, two of the Court's justices apparently agreed that one's knowledge that a substantial part of one's contribution to a committee will be contributed to a particular candidate does not trigger an aggregation of those contributions for the purpose of determining whether the contribution limits of Section 441a have been exceeded. In oral argument in *Federal Election Commission v. Colorado Federal Republican Campaign Committee*, 533 S.Ct. 431 (2001), the question at issue was whether or not a political party had a constitutional right to make unlimited coordinated expenditures with its candidates. However, in the course of oral argument Justice Breyer raised the following hypothetical: if parties were able to make unlimited coordinated expenditures, couldn't a candidate receive the legal maximum from a wealthy donor to his campaign committee, "then a candidate says to the 50 people who know him the best, thank you for the [contribution]. Now I'll tell you how you give me \$76,000 more. Just write the check to the party, and I'll keep a tally, and so do they. And believe me, I'll know where it comes from." *Id.*, Oral Argument Trans. at 25. In short, Justice Breyer presumed that under the present system, it would be legal to contribute to the candidate's committee, and then contribute to another committee with the knowledge that that committee would contribute the same amount to the candidate. Counsel twice agreed that such a scenario was legal under existing law. *Id.* 26-27. Justice Breyer then repeated his understanding that the law allows for such contributions: "I suppose any candidate would feel sympathetic to someone who was agreed to give \$80,000 to the State party, which he *knows* will be used to support him...." *Id.* at 30 (emphasis added). Justice Souter participated in the discussion and echoed that understanding of the law. *Id.* at 26-28. Certainly it is possible that, actually faced with the question, the assumptions of these justices and counsel might not hold. On the other hand, it seems not to have even occurred to any of the participants, or other members of the Court, that Section 441a(a)(8) might be interpreted to prevent such activity. If the court were to later adopt that understanding of 441a(a)(8), much of the rationale for the Court's decision in *Colorado II*, written by Justice Souter, would be undercut, since the limits on party coordination would no longer be needed to prevent the above scenario.

statutory provision that renders another superfluous cannot be correct. *See Arkansas Best Corporation v. CIR*, 485 U.S. 212, 218 (1988).

Third, the interpretation of Section 441a(a)(8) adopted by the Commission has the effect of undercutting the Constitutional justification for the \$25,000 cap on aggregate contributions. In *Buckley v Valeo*, 424 U.S. 1 (1976), the plaintiffs challenged, along with other portions of FECA, 2 U.S.C. § 441a(a)(3), the aggregate \$25,000 limits on contributions. Logically, this provision should have been struck down, consistent with the Supreme Court's broad holding that only corruption or the appearance of corruption is sufficient to uphold limits on campaign contributions and spending. In passing FECA, Congress concluded that a \$1000 contribution was not overly corrupting. If a \$1000 contribution from an individual to a candidate does not create the appearance of undue corruption, why would thirty \$1000 contributions to thirty candidates create such an appearance? But the Court upheld the aggregate \$25,000 limit, and did so precisely to address scenarios of such as those at issue in these MURs. The Court wrote:

[T]his quite modest restraint upon protected political activity serves to prevent evasion of the \$1000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through use of *unearmarked* contributions to political committees *likely* to contribute to that candidate

Buckley, 424 U.S. at 38 (emphasis added). In short, Section 441a(a)(3) is constitutional precisely because it addresses the situation allegedly taking place in these MURs. But if that situation is already addressed through Section 441a(a)(8), then grave doubt is cast on the constitutionality of Section 441a(a)(3), because that section loses its constitutionally acceptable justification.

Thus, the effort to shoehorn the Triad matters into a violation of 2 U.S.C. § 441a(a)(1) creates numerous problems. It runs afoul of the Act, which allows individuals to contribute to both candidates and PACs, and makes the earmarking provision of 2 U.S.C. § 441a(a)(8) and 11 CFR 110.6 redundant, since any earmarking would have the effect of providing the contributor with "knowledge" of where the contribution was going. Further, it creates very difficult factual and evidentiary problems that have a chilling effect on statutorily and constitutionally-protected speech. For what does it really mean for a contributor to "know" that his contribution will be targeted to a specific campaign, especially where, as here, he has no direct communication with the PAC and does not direct, earmark, or otherwise encumber the contribution? The knowledge requirement of 11 CFR 110.1(h)(2) therefore is, and consistent with the Act and the

If the nation's top judges and election law attorneys look at the statute and conclude that knowledge is not a barrier to further contributions, we should be concerned about the ability of more typical citizens to understand the majority's interpretation of the law, wherein knowledge is enough.

constitutional limits of the Act can only be, interpreted as an earmarked, encumbered, or directed contribution. The erroneous reading adopted by the Commission in these matters undercuts the constitutional rationale for the legitimacy of 2 U.S.C. § 441a(a)(3), the aggregate limit on giving.

Because the Commission's theory in this matter goes against the statute and constitution, I would dismiss this matter, as the Commission admits that the Stauffers neither earmarked nor directed contributions through the various PACs to the respective campaign committees. As such, they made no excessive contributions in violation of section 441a(a)(1)(A), nor did the campaign committees and their treasurers violate 2 U.S.C. §§ 441a(f) and 434 by receiving excessive contributions and failing to report them as received from the Stauffers.

III. Evidence

Even if the "knowledge" theory adopted by the Commission majority was correct, I would be reluctant to proceed in this matter, as I believe that the counsel's evidentiary case would be unlikely to lead to a favorable verdict if this MUR had gone to court. As the respondents have in fact reached conciliation agreements with the Commission, I will not dwell at great length on particular facts, but some review is in order to expose what I consider a glaring error in the general approach taken by the AGC and the Commission.

A. The Red Herring of Coincidence

The Commission concedes that there is no direct evidence that the Stauffers had knowledge that their contributions would benefit particular candidates.⁸ Thus the AGC presented a rather simple circumstantial case that runs more or less as follows. First, the individual donors had motive. The Stauffers had maxed out on contributions to their son-in-law's campaign, and hoped to do more to benefit the campaign. Second, Triad recommended PACs to which the Stauffers might want to make donations, and we know that Triad held discussions with each of those PACs. Third, the PACs to which the Stauffers donated made contributions to the campaign of Sam Brownback. This straightforward if not entirely convincing case is then spiced with the fact that Triad's Carolyn Malenick, after initially denying the allegations by affidavit, invoked her Fifth Amendment rights against self-incrimination; by allegations that the exculpatory testimony of the respondents and other witnesses is not credible; and by a belief repeatedly expressed in the Commission's deliberations that might be summed up as follows: "these patterns don't just happen in nature." Or, as the General Counsel put it, "[a]ny analysis must begin with the fact that all nine PACs to which the Stauffers

⁸ For lack of direct evidence regarding the Stauffer's alleged "knowledge," see General Counsel's Report of May 8, 2001, p. 4-5 ("However, the GC Brief is replete with testimonial and circumstantial evidence, which undercuts the Stauffers' direct testimony.... This Office's reliance on circumstantial evidence is necessary, given that Carolyn Malenick asserted her Fifth Amendment privilege.") See *id.*, generally, for lack of any direct evidence regarding the Stauffer contributions.

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contributed later contributed to Sam Brownback for US Senate Committee. ... Under any circumstances this would be a striking coincidence." General Counsel's Brief of March 12, 2001, at 17. It is this last assertion which I find most troublesome and why I take the time to comment on the evidence in light of the respondents' conciliation agreements.

The appearance of rational patterns in political giving is not the result of "coincidence" or wrongdoing. Quite the opposite is true, in fact. Even in the absence of an organization such as Triad, donors who give to multiple candidates and committees do not just randomly throw their contributions around. Ideological donors, in particular, will attempt to direct their contributions to PACs and other committees that support the same candidates the donors support with their individual giving. For example, when a donor gives to a pro-labor Democratic candidate, and also contributes to a labor union PAC, the donor normally hopes that the PAC will give to the candidate whom he has already supported with his individual contribution. When a donor contributes to a Republican candidate, and then gives to the Republican National Committee, which in turn gives to the same candidate, the donor does not consider it a coincidence, but rather a calculated result that almost certainly played a role in his decision to give to the RNC in the first place. Patterns of political giving are not random, and so patterns such as those we see here are to be expected.

Indeed, in just a few minutes on the internet, using FEC data to randomly review names of donors to 2000 U.S. Senate campaigns, my staff found the names of several donors who had maxed out to the candidate and also contributed to multiple PACs that gave to that same candidate.⁹ No doubt a systematic search could yield dozens, if not hundreds or even thousands of such donors.

Individual donors will usually give to PACs with the rational expectation that those PACs will support the same candidates that the donor supports with his contributions. No interpretation of the law, even that adopted by the Commission in this case, prohibits a donor from giving to a PAC in the reasonable expectation and hope that the PAC will give to a particular candidate. Thus, the types of patterns we see in these cases are not particularly unusual.

Furthermore, Triad existed precisely to make these patterns more common. What Triad offered, especially to relatively inexperienced donors such as the Stauffers, was

⁹ For example, on December 13, 1999, Candace Carroll of La Jolla, California, contributed \$1000 to Senator Jeff Bingaman (D-NM). On October 26, 2000, Ms. Carroll gave \$2000 to NARAL; on September 25, 2000, she gave \$1000 to the League of Conservation Voters; and on February 20, 1999, she contributed \$5000 to "PAC for a Change". All three PACs contributed to Senator Bingaman during his campaign. Ms. Carroll also contributed a total of \$6000 to Emily's List from September 7, 1999 through March 7, 2000. Emily's List, NARAL, and PAC for a Change all contributed to the Debbie Stabenow campaign for U.S. Senator from Michigan, in addition to the \$1500 Ms. Carroll contributed directly to Ms. Stabenow in 1999 and 2000.

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assistance in identifying PACs likely to support the candidates that the donors hoped to see supported. These would include candidates professing similar beliefs and involved in competitive races. To PACs, Triad similarly offered advice in identifying credible candidates with similar philosophies. With that came not only the prospect of having the PAC's contributions have a greater impact, but the possibility of pleasing existing donors and attracting new donors - such as the Stauffers - who shared similar goals. To campaigns, Triad offered a way to get the attention of potential donors. If Triad did its job well, exactly the types of contribution patterns we see in these matters would occur more often. Particularly when one considers that a stated goal of Triad was to participate in competitive races (it was primarily for this reason that Triad conducted "political audits"), and that in any election cycle there are rarely more than 50 competitive races for seats in Congress, we would expect patterns such as those at issue in these MURs to emerge, despite the lack of any actual knowledge on the part of contributors.

The AGC and the Commission seemed to act on the theory that the events here must either result from a "startling coincidence" or illegal activity. Thus, much of the Counsel's analysis is devoted to proving that "coincidence" could not be behind the patterns that emerged. But the evidence is not analyzed to consider if other, innocent explanations, such as a reasonable expectation on the part of the Stauffers, is equally or more likely.

Once the red herring of coincidence is cast aside, the circumstantial evidence on which the Commission based its findings of probable cause loses much of its zest. It would take many more pages to methodically pore through the thousands of pages of evidence in this MUR. I agree that a reasonable person could look at this evidence and conclude that the Stauffers "knew" that the PACs to which they were making contributions would in turn make contributions in the desired races, at least to the extent that one can say, for example, that of the \$228,847 in receipts and disbursements by the Conservative Campaign Fund in 1996, we can be confident that it was the Stauffer's \$5000 contribution that comprised a substantial portion of the \$4950 that the Fund later gave to Sam Brownback's campaign; or that of the over \$500,000 in receipts and disbursements by Eagle Forum PAC the Stauffers' \$5000 contributions were part of the \$7000 that Eagle Forum PAC gave to the Brownback Campaign. But I must put forth just a few more facts, and leave it to the reader to decide if it is really more probable than not that the Stauffers *knew* that their contributions would in turn be donated to the desired campaigns, or whether it is equally likely that they gave merely with a reasonable expectation, an educated guess, a well-founded hope, or a calculated risk that the PACs to whom they contributed would give to the desired candidates.¹⁰

¹⁰ Each of which would be legal under the Commission's theory, of course. It is worth noting that I am assuming that the respondents had such hopes or desires. The Stauffers indicated that their goal was to help elect conservative candidates, see General Counsel's Brief of March 9 at 26, a position that is not incompatible, of course, with the hope that their contributions to PACs might eventually end up as PAC contributions to Sam Brownback.

B. The Evidence

As with the case against other respondents in MUR 4568 et al., the "striking coincidence" is the backdrop to all of the AGC's interpretation of testimony and events. Because the AGC seems to believe that only a funneling scheme can account for this "coincidence," all contrary evidence and testimony is dismissed as "inconsistent" or "not credible."

Thus, the AGC gives no credence to testimony that Triad believed that the Brownback race was a "must win for TRIAD clients, for conservatism and for the country," even though the Brownback race was one of the most widely watched races of 1996 for conservatives.¹¹ GC Brief of March 12, 2001 at 10. All of the principle characters in the saga deny that the Stauffers "knew" that the PACs to which they contributed would later contribute to their son-in-law's campaign. "The Stauffers consistently denied that they were promised or guaranteed by Carolyn Malenick or Triad that any of their PAC contributions would be contributed, in turn, to their son-in-law's campaign." General Counsel's Brief of March 12, 2001, at 13. There is no evidence the Stauffers ever communicated directly with any of the nine PACs. *Id.* at 5.

Indeed, the Probable Cause brief once again demonstrates that it would be reasonable for the Stauffers to anticipate that their contributions to Triad-recommended PACs might help PACs that were helping their son-in-law. As the AGC notes, one reason that the Stauffers went to Triad was that the Stauffers already knew "that Triad was recommending Sam Brownback to donors", General Counsel's Brief of March 28, 2001, at 20; that the listed PACs shared Triad's view of their son-in-law's candidacy and that each of the PACs *were likely* to work together to support Brownback." *Id.* (emphasis added).

The General Counsel makes much of the great "coincidence." In fact, any donor who gave to any Triad-recommended PAC in 1996 helped the Sam Brownback campaign—fourteen of the fifteen Triad-recommended PACs made contributions to the Brownback campaign, and the one that did not sat out the 1996 elections. This further supports the fact that Triad, and conservatives generally, had made the race a top priority. Frankly, it appears to have been difficult to give to a conservative issue PAC without giving to a PAC that was helping Sam Brownback in 1996. *See* FEC Reports.¹² The AGC stated that "[i]t strains credibility to believe that the Stauffers would follow

¹¹ See David E. Rosenbaum, "Democrats Battle Odds to Regain Senate Control" NEW YORK TIMES, November 3, 1996, p.1; Guy Gugliotta and Helen Dewar, "Ten Tight Races Raising Democrats' Senate Hopes; GOP Must Lose Most Close Contests for Control to Shift" WASHINGTON POST, October 19, 1996, p. A01.

¹² According to the Center for Responsive Politics website, which categorizes PAC contributions by interest and orientation, Brownback in 1996 received a remarkable \$140,000 from ideological and issue oriented PACs, an extremely large amount from such organizations. *See* <http://www.opensecrets.org/1996os/detail/S6KS00122.htm>

[Triad's] advice as to how to contribute \$42,500 to PACs with which they had little or no familiarity, without *strong assurances* as to how and where the PACs would distribute their funds. *Id.* at 26 (emphasis added). Perhaps. But strong assurances are not the same thing as knowledge. There is no direct evidence that the Stauffers had actual knowledge, as required even under the majority's theory of the case, that a contribution to the several PACs would result in a contribution to the Brownback Committee.¹³

The behavior of Malenick and Triad after the Stauffers contributed to Triad-recommended PACs is hardly consistent with the idea that the Stauffers knew, in advance, what would happen with their contributions. For example, the Stauffers wrote checks for \$5000 to the Conservative Victory Committee ("CVC") on June 25, 1996. *Id.* at 11, n. 5. On June 28, CVC contributed \$500 to Brownback for Senate. On July 10 CVC received a fax from Triad urging support for Brownback, and PAC Director Brent Bozell sent in on to the PAC Treasurer with a note reading, "Let's send him \$1000. OK?" On July 16 Triad sent CVC another fax, urging the PAC to "max for Brownback." *Id.* at 16. A week later CVC contributed another \$2000 to Brownback, and in mid-October a final \$1000, bringing its total contributions Brownback to \$4500. Overall, the PAC made disbursements of over \$129,000 in 1996. Far from appearing as though Malenick "knew" at the time that the Stauffers made their PAC contributions that CVC would contribute to Brownback, this evidence suggests a need to cajole, plead, and urge after the Stauffers had already made contributions.¹⁴ The CVC contribution was eventually left out of the Commission's Probable Cause findings, but that only raises more questions. For given the reliance of the Commission on the "striking coincidence" that all nine PACs to which the Stauffers made contributions later contributed to the Brownback campaign, dropping some of the contributions from the scheme only makes the pattern go away. If it is conceded that the Stauffers did not have "knowledge" before making the CVC contribution, why not that the Stauffers did not have "knowledge" before making other contributions? If the answer is that Malenick's later behavior *vis a vis* CVC cuts against knowledge, that only makes the issue more puzzling in light of the fact that the circumstantial case for knowledge is otherwise exactly the same in the CVC contributions as in the others. Is it now the Commission's position that contributions will be presumed to be illegal absent later exculpatory behavior?

¹³ If there is liability here, it would seem to fall on Carolyn Malenick, as the person who may have directed PACs on where to send the money, not on the donors, who did not direct or earmark their contributions. But I can point to no provision of the FECA that punishes individuals for merely advising PACs where and how to use their contributions.

¹⁴ During Commission deliberations, it was actually suggested that this showed that Triad and the PAC had a deal beforehand, and Malenick was merely trying to see that the PAC kept its end of the bargain. But even if this were true—and there is no evidence to support the theory—it would demonstrate the general absurdity of the entire legal theory on which the Commission proceeded. What does it mean to say one has "knowledge" that his contribution will be funneled to a particular candidate, when the contribution is not earmarked for or directed to the candidate, and the donor has neither leverage nor legal recourse against the PAC?

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Similarly, the Stauffers contributed in June, 1996 to Citizens United Political Victory Fund ("CUPVF"), yet, "CUPVF Vice President Michael Boos remembers Carolyn Malenick calling him in July 1996 specifically to ask that CUPVF make a contribution to the Sam Brownback for US Senate Committee." *Id.* at 15. But if Malenick knew that the CUPVF would contribute to Brownback and advised the Stauffers of that in June, why was it necessary to ask in July that CUPVF make such a contribution? Another PAC to which the Stauffers contributed was Citizens Allied for Free Enterprise ("CAFE"). The Stauffers contributed \$5000 to CAFE in June, 1996, at which time CAFE was not a qualified multi-candidate committee, and so was limited to contributing just \$1000 to a candidate. It sent Brownback a \$1000 contribution a short time later. Later, when CAFE qualified as a multi-candidate committee, it contributed another \$3500 to the Brownback campaign. How could the Stauffers have had actual "knowledge" that CAFE could contribute more than \$1000 to the Brownback campaign, as the PAC's ability to attain multi-candidate status would have been beyond the control of the Stauffers or even the PAC itself, given that one criteria to attain multi-candidate status is the attraction of enough donors to the PAC?¹⁵

So it goes with the General Counsel's brief. We are informed that "it is reasonable to infer that the Stauffers were advised of Triad's contacts with PACs, including information regarding 'the candidates and types of candidates [the PACs] had targeted for their support.'" General Counsel's Brief at 14. To which one might answer, "so what?" Even if true, that would not support the Commission's legal theory of knowledge. We also learn that:

the Triad PAC memorandum... indicated that at least eight of the nine PACs agreed with Triad's 'targeting strategy' for the 1996 election, and that these PACs would participate in 'contested primaries' such as the Brownback-Frahm race. This information, when combined with the knowledge that Triad was endorsing Sam Brownback, would have told the Stauffers that each of the listed PACs shared Triad's view of their son-in-law's candidacy and that each of the PACs were likely to work together to support Sam Brownback.

Id. at 20-21. But again, so what? That may be exactly why the Stauffers chose those PACs. Even under the majority's legal theory, it would be lawful to give to PACs "likely

¹⁵ Under the Act multi-candidate PACs can contribute \$5000, versus just \$1000 for other PACs. 2 U.S.C. § 441a(a)(1)-(2). To qualify as a multi-candidate PAC, an organization must be registered with the FEC for six months, obtain donations from more than fifty individuals, and make contributions to at least five federal candidates. See 11 C.F.R. 100.5(e)(3). According to its Amended Statement of Organization filed August 2, 1996, CAFE did not reach the threshold of having more than 50 contributors until July 26, some weeks after the Stauffers contributed \$5000 to the PAC. That the Stauffers may have had a reasonable expectation that the PAC would attain multi-candidate status is certainly probable, but they could not have had actual knowledge that it would, and without multi-candidate status, it could not legally have made the larger contributions to the Brownback campaign. This further points up the problematic nature of the majority's legal theory in this case.

to work together to support" a candidate to whom the donor had already maxed out. That is the difference between "knowledge," as the majority's theory under 11 C.F.R. 110.1(h) specifically requires, and reasonable expectation or anticipation, which is perfectly lawful under any theory.

In the end, there is not a shred of evidence that the Stauffers "knew" to whom the PACs would give their money that is not also perfectly and equally consistent with their merely having a reasonable expectation of what might occur.

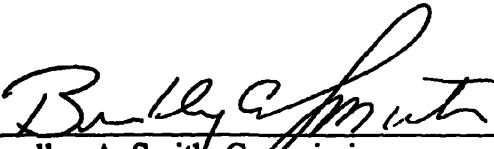
As I stated at the outset of this section, although I do not believe it is the best reading of the record, I believe that a reasonable person could conclude that the Stauffers met the knowledge theory under which the Commission, erroneously in my view, has chosen to proceed. Unfortunately, the reliance on the red-herring argument that only "coincidence" or illegality can explain these transactions means that the issue was never even properly analyzed. Rather, both the AGC and the Commission began with the assumption that only bizarre coincidence or illegality could account for the transactions, and then ignored or discounted all contrary evidence.

IV. Conclusion

The FECA allows individuals to contribute to candidates and to PACs in the same election cycle. The \$25,000 overall limit on individual contributions limits the amount an individual may give to PACs likely to contribute to his favorite candidate. Earmarking or directing a contribution through an intermediary is a contribution to that candidate. But merely giving with knowledge of what the recipient will do is permissible, and it is this possibility which is the constitutional justification for the \$25,000 cap on total hard money contributions. As long as it is the PAC who decides where its contributions are directed, there is no violation of the Act by the individual who maximizes his contributions to candidates and to PACs.

There is no guiding principle within the FECA that says contributors must be uninformed or that contributions must be somehow immaculate or spontaneous. Consulting groups may encourage dormant PACs to reinvigorate their efforts. PACs may make plain their intentions of support and individuals may contribute to those PACs in light of the representation. If a PAC were to say publicly, "We intend to support these five candidates;" or "We cannot wait to assist candidate Jones" individuals ought to be, and are, permitted to contribute to that PAC in a reasonable anticipation or strong assurance that their contribution will benefit some of the five candidates or Candidate Jones. Of course, the individual has no recourse against the PAC if it decides to support a 6th race, or candidate Baker, and the individual may not restrict his contribution to one of the five races or to Jones. Otherwise, however, the individual may contribute legally. Even if the PAC were to say publicly "The next five thousand dollars we receive will go to support Candidate Jones" an individual may contribute to that PAC or committee legally and confidently.

The fact is that there are a limited number of contested races in any given election cycle,¹⁶ and contributors who max-out to candidates also contribute to PACs which, in turn, contribute to the same candidates. These individual contributors should not be made to fear that the Federal government will find a circumstantial basis for prosecution in the contribution patterns they create by, what was up to now, their legal, permissible and patriotic participation in the American political process.



Bradley A. Smith, Commissioner



Date

¹⁶ See, e.g., Charlie Cook, "Six Races Hold Key to Control of Senate" THE NATIONAL JOURNAL, Oct. 20, 2001; Chris Cillizza, "Open Season: GOP Retirements Give Democrats Early edge on Key Playing Field" ROLL CALL, Jan. 14, 2002 (of the 37 total open seats in the House for the 2002 election cycle only 14 can be considered truly competitive).