



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

In the Matter of)
)
Carolyn Malenick d/b/a Triad)
Management Services;)
Triad Management Services, Inc. and) MURs 4568, 4633, 4634 and 4736
Carolyn Malenick, as corporate officer;)
Citizens for the Republic Education Fund)
and Carolyn Malenick, as corporate)
officer, and Citizens for Reform)

STATEMENT OF REASONS

COMMISSIONER BRADLEY A. SMITH

On April 10, 2002, the Commission voted by 4-1 to 1¹ to find Probable Cause to Believe that Carolyn Malenick dba Triad and Triad Management Services, Inc. violated the Act. On May 7, 2002, the Commission failed to find Probable Cause to Believe by 3-

¹ The Commission voted by 4-1 to 1 to find Probable Cause to Believe that Carolyn Malenick dba Triad violated 441a(f) and 11 C.F.R. 102.5; and that Triad Management Services, Inc., violated 2 U.S.C. 441a(f). Commissioners Mason, McDonald, Sandstrom, Thomas voted affirmatively. I dissented. Commissioner Toner, who joined the Commission after the Counsel's report was filed and just days before the final vote, correctly chose, in my view, to abstain in light of the massive record and scope of this case, and the numerous prior votes that preceded his appointment.

The Commission failed by 3-2 to 1 to find Probable Cause to Believe that Carolyn Malenick dba Triad and Triad Management Services, Inc., violated 441a(a)(8). Commissioners McDonald, Sandstrom and Thomas voted affirmatively. Commissioners Mason and I dissented. Commissioner Toner abstained.

The Commission voted by 5-0 to 1 to find Probable Cause to Believe that Carolyn Malenick dba Triad Management Services violated 2 U.S.C. 433, 434, 441a(a)(1), 441b; and that Triad Management Services, Inc. violated 2 U.S.C. 433, 434, 441a(a)(1), 441b and 11 C.F.R. 102.5. Commissioner Toner abstained.

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2 to 1² that Citizens for the Republic Education Fund and Citizens for Reform violated 2 U.S.C. 433, 434, 441a(a)(1), 441a(f), 441b, and 11 C.F.R. 102.5. On June 13, 2002, the Commission voted 4-1 to 1 to approve suit authority to file suit against Carolyn Malenick dba Triad Management Services, Triad Management Services, Inc., and Carolyn Malenick, as corporate officer.³ I issue this statement to explain my reasons for rejecting certain of the General Counsel's recommendations in this matter.⁴

I. Introduction

The Commission voted to approve the recommendations of the General Counsel's office as set forth in the General Counsel's March 19, 2002 Probable Cause to Believe Report ("GC Report"), which was based on the General Counsel's Brief of July 19, 2001. In that Report, the General Counsel recommended that the Commission find probable cause to believe that Carolyn S. Malenick dba Triad ("Triad CSM"), and Triad, Inc.⁵ are political committees that failed to register and report under the Act; that Triad made excessive contributions; that certain Triad controlled PACs failed to report earmarked contributions; and that other entities controlled by Triad, Citizens for Reform ("CR") and Citizens for the Republic Education Fund ("CREF"), either made prohibited corporate contributions or failed to register and report as political committees.

Before explaining the specifics of my votes in this matter,⁶ I think it worthwhile to set forth a few principles that I believe are axiomatic. First, nothing in the Federal Election Campaign Act ("FECA" or "the Act") requires individuals to make their political contributions in ignorance – citizens have a right to seek out information on candidates and groups they may wish to support. Second, nothing in the Act prohibits citizens from hiring or contracting with others to gather this information on their behalf. Third, nothing prohibits candidates and campaigns from responding to requests for information. Fourth, nothing prohibits individuals or organizations from providing such information to others, either for a fee or at no charge. Fifth, none of these rights are lost simply because citizens have a goal of and otherwise lawful strategy for changing the

² Chairman Mason joined me in voting against these recommendations. Vice Chairman Sandstrom and Commissioners McDonald and Thomas voted in favor. Commissioner Toner abstained.

³ Chairman Mason, McDonald, Sandstrom and Thomas voted affirmatively. I dissented. Commissioner Toner abstained.

⁴ I have already written separate Statement of Reasons explaining my votes dissenting from the Commission's decisions to proceed against several respondents in related parts of these MURs. See Statement of Reasons of Commissioner Bradley A. Smith in MURs 4568, 4633, 4634, and 4736, Bob Riley, Jr., et al.; Statement of Reasons of Commissioner Bradley A. Smith in MURs 4568, 4633, 4634, and 4736, John and Ruth Stauffer et al.; Statement of Reasons of Commissioners Mason, Wold and Smith in MURs 4568, 4633, 4634, and 4736, Rick Hill for Congress Committee.

⁵ Triad/CSM was a sole proprietorship operated by Carolyn Malenick. She later incorporated the company as Triad, Inc. For convenience, I will simply refer to these organizations as "Triad", except where it is necessary to distinguish one organization from another.

⁶ The General Counsel's recommendations are listed at pp. 23-25 of the GC Report. I voted to adopt recommendations 1-3, 6, 7, 16, 19, 21 and 22 and to reject recommendations 4, 5, 7-15, 17, 18 and 20.

partisan make-up of Congress. Further, I take it as obvious that when citizens or groups of citizens attempt to gain information and to participate rationally in organized political activity, their actions, even if not coordinated with their favored candidates in a manner contrary to law, will usually benefit those candidates, and will raise many of the same political themes and issues being raised by the candidates.

I am compelled to make these points for two reasons. First, throughout this lengthy, extensive six-year proceeding, the Commission and its staff seem frequently to have assumed that efforts of individuals to educate themselves before making contributions are in some way inherently suspect. Second, the Commission and its staff seem, at regular intervals, to have assumed that only sheer, unlikely coincidence, or illegally coordinated activities between campaigns and other persons, can explain activities by individuals or groups that benefit campaigns and tend to echo the themes of campaigns. I think that both of these assumptions are clearly wrong, and have contributed to the Commission's turning this MUR from a rather routine case of minor reporting violations into a massive investigation with literally dozens of respondents, the vast majority of whom have ultimately been dismissed with no official action taken. In the course of doing so, the Commission has, I believe, bullied various respondents into settlements, harmed good reputations, and wrongfully discouraged what is, and should be, lawful activity pursuant to the FECA.

II. Facts

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 political action committees ("PACs") in connection with their political and charitable contributions. General Counsel's Brief of March 12, 2001, at 7. Triad attempted to link ideologically 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. 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 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 PACs or to resurrect small or dormant PACs for the purpose of supporting conservative Republican congressional candidates in

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the 1996 elections. Representatives from several of these organizations and PACs testified that Malenick approached them about forming a "coalition" or "network" of PACs that could work together to support Republican candidates and offset the support that labor unions were expected to provide Democratic candidates, and also to assist conservative candidates in contested Republican primaries. *Id.* at 8.

Triad then tried to inform potential contributors 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.* To gather information on the worthiness of potential candidates PACs ought to endorse, Triad retained a California-based political consultant named Carlos Rodriguez to serve as its Political Director. General Counsel's Brief of July 19, 2001 ("GC Brief") at 22.

In 1995 Triad/CSM made disbursements of \$221,496, of which substantial portions went to pay Mr. Rodriguez, to finance travel to meet prospective donors, to pay salaries, and to cover various start-up and overhead costs. *Id.* at 23. At the beginning of 1996, Triad agreed to pay Mr. Rodriguez a retainer of \$20,625 per month over a two-year period (for a total payment of \$495,000) in exchange for devoting approximately 90% of his time to Triad projects. *Id.*

Over the course of the 1995-96 election cycle Triad had Rodriguez perform or oversee approximately 250 "political audits" on the campaigns of Republican candidates for Federal office. GC Brief at 40. The audits involved multiple contacts with the campaigns, and were conducted through telephone contacts, the exchange of pre-printed materials, and, in the case of approximately 50 campaigns, face-to-face meetings. *Id.* The topics that Triad discussed with each campaign staff typically included information regarding the campaign's fundraising goals and performance; the campaign's operating budget and staffing plans; the identity of the campaign's professional consultants, the campaign's advertising plans, recent polling results, issues being advanced by the candidate; and the campaign's assessment of its needs as well as its strengths and weaknesses, including those of its opponent, and its prospects for victory. GC Brief at 42. Triad used the audits to develop information needed to select the candidates that it would recommend for support to its coalition of PACs. GC Brief at 41. Triad informed

each of the audited campaigns that the information obtained during the political audit would be used by Triad in making recommendations to individuals regarding possible political or financial support for their campaigns. *Id.* During the audits, campaigns were asked for the names of their "maxed-out" donors that Triad could contact to ascertain their interest in giving to other, similarly oriented candidates. GC Brief at 42.

As part of some political audits, Triad would arrange for an outside research company called Trenton West to perform a "background check" for the purpose of vetting a congressional candidate prior to issuing a contribution recommendation. GC Brief at 48. Additionally, during 1996, Triad sent approximately 60 separate daily editions of a newsletter (that sometimes included a solicitation message) called the "Fax Alert", or sometimes referred to as the "Daily Fax Alert," to a list of approximately one hundred sixty persons and entities. GC Brief at 49.

Also in 1996, Triad, Inc. managed the activities of Citizens for the Republic Education Fund (CREF) and Citizens for Reform (CR), two non-profit corporations with no offices or employees of their own. Acting on CREF's and CR's behalf, Triad, Inc. raised funds for, and managed the production and distribution of approximately \$3 million in television, radio, direct mail and telephone bank advertising prior to the 1996 congressional elections. Triad was responsible for managing all production of the advertising programs on behalf of CREF and CR, including selection of the media markets, approval of scripts and the authorization of disbursements for production and placement of CREF advertisements. *Id.* at 26, 28. None of the advertisements expressly advocated the election or defeat of a clearly identified candidate for Federal office. GC Brief at 27, 28.

The General Counsel asked the Commission to find probable cause to believe that CREF and CR either were political committees that failed to register and report with the Commission, or, alternatively, that they made impermissible in-kind corporate contributions through payments for coordinated issue advertising. GC Report at 13, 17.

III. Merits

A. Triad/CSM and Triad, Inc. as Political Committees

The General Counsel recommended that the Commission find probable cause to believe that Triad/CSM and Triad Inc. were political committees under the Act that failed to register and report in violation of 2 U.S.C. §§ 443 and 434. GC Report at 1. A political committee is defined as any committee, club, association or other group of persons that receives contributions or makes expenditures aggregating in excess of \$1000, and whose "major purpose" is the nomination or election of a candidate. 2 U.S.C. §431(4)(A); *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). An expenditure is a payment made "for the purpose of influencing any election for Federal office." 2 U.S.C. §431(9)(A)(i). The General Counsel lists the following disbursements and activity as bases for

determining that Triad and Triad CSM were political committees: The \$495,000 paid to Carlos Rodriguez for "political audits" that OGC claims were "in-kind" contributions; the \$32,750 paid to Trenton West for opposition research of candidates; and the monies paid for Fax Alerts.

1. Major Purpose

Triad's major purpose is not substantially in dispute. As noted by the General Counsel, Triad's brochures, promotional videotape and other publications set forth election-related goals, such as returning Republican House freshman to office; increasing by 30 the Republican House Majority; and increasing Senate Republicans to a Filibuster-proof 60. GC Brief at 77. Triad did not engage in lobbying or other non-election related activities. One could argue that Triad's major purpose was not to elect Republicans, but to help others due so, but for purposes of probable cause I am comfortable that the major purpose test has been met. 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. *Id.* at 78.

2. Expenditures and Contributions

A. Rodriguez Fees

Major purpose alone is not enough to establish committee status under the Act. Additionally, an organization or group must receive contributions or make expenditures in excess of \$1000. While some of the payments cited by the General Counsel appear to qualify as contributions or expenditures under the Act, the General Counsel vastly overstates the amounts by incorrectly attributing the full dollar value of each activity as counting toward political committee status.

The Counsel's most notable overstatement of activity is its conclusion that the entire \$495,000 paid to Carlos Rodriguez qualified as in-kind contributions to campaigns. In the course of conducting political audits, Carlos Rodriguez engaged in conversations with candidates and campaign operatives. Various reports and Fax Alerts and Mr. Rodriguez's own contemporaneous observations indicate that in a small number of cases he may have provided advice to certain campaigns both during and after his political audit visits. GC Brief at 42. Because Mr. Rodriguez testified that he did not volunteer his time to any campaign in 1996, *id.*, the General Counsel attributed the entire value of Rodriguez's activities to Triad.

There is no evidence, however, that the entire \$495,000 value of Rodriguez's services were in-kind "contributions" spread amongst each of the 250 campaigns that were audited. GC Report at 10, 21. Much of Triad's activity was to recommend candidates and PACs to contributors willing to assist Republican candidates for Federal

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office. This activity is legal and does not qualify as an in-kind contribution to any campaign. To carry out this legal activity, Triad was required to investigate campaigns in order to choose amongst the various candidates running for office throughout the nation, and to gain data to determine which campaigns were deserving of a recommendation. The activity was conducted for the benefit of Triad, not for the direct benefit of the candidates themselves. The mere fact that a candidate or campaign gains knowledge from a conversation with a knowledgeable member of the public does not mean that a contribution has been made to the campaign. For example, candidates and campaigns may learn information from an interview with a reporter, but that does not constitute an in-kind contribution. From the information provided by the General Counsel, it appears that at most only a small fraction of Rodriguez's activity for Triad would qualify as in-kind contributions. In fact, the Counsel's brief and report only attempt to define a handful of cases as in-kind contributions, even while attributing the full \$495,000 paid to Rodriguez as in-kind benefits.

For example, Rodriguez audited the Vince Snowbarger campaign in Kansas' 3rd Congressional District on behalf of Triad. GC Brief at 45. While Mr. Rodriguez only remembered giving verbal advice, the Snowbarger campaign reported receiving a document that set forth Mr. Rodriguez's plan. *Id.* Further, Rodriguez's audit report states that Triad would identify "ten House members who can each give [Snowbarger funds]" and that he intended to work with a consultant who had been hired by the Snowbarger campaign to "find out how much money we need to generate for [Snowbarger] from some of our clients and from some ideological PACs who may already be willing to help." GC Brief at 46. The value of the document given to Snowbarger (assuming such a document was produced), and perhaps the value of any training of the Snowbarger consultant, if later performed,⁷ could be in-kind contributions made by Triad through the person of Rodriguez.

Triad also audited the Ed Merritt campaign and discussed with it the benefits of using telephone banks in the upcoming general election. In the audit report, Rodriguez stated:

During my visit today they planned to only do a volunteer phone bank. I spent a considerable amount of time educating Ed Merritt and [campaign manager] Dennis Suiter on the essential need to seriously consider augmenting their budget to include a paid phone bank operation.

GC Brief at 46. Casually asking during an audit why a campaign did not use a phone bank does not, in my view, constitute an in-kind contribution to that candidate, even though asking the question itself plants an idea in the mind of the interviewee. It is lawful to learn about a campaign before deciding to support that campaign, and it is

⁷ The General Counsel's brief does not cite further evidence that either the report or the consulting services were actually carried out.

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equally lawful to have an agent such as Rodriguez gather information on one's behalf. Rodriguez stood to gather important information about the worthiness of the campaign by its answer to the question. That the candidate may have had an idea planted is no different than if that idea were planted by a reporter's question. Extensively educating the campaign on the need for a phone bank, however, as may have been done in this case (though it is not clear at what point casual conversation becomes "considerable time educating," and the Counsel's office, apparently assuming the illegality of the activity, does not appear to have developed this for the record), could constitute a contribution by Triad through Rodriguez, given that Rodriguez testified that he did not volunteer his services to any campaign, including Merritt's.⁸ GC Brief at 42.

Out of 250 campaigns audited by Triad, these are the only two cases in which the Counsel's office made a convincing showing that Rodriguez's activities should be considered contributions to the campaigns. Only one other case cited by the Office of General Counsel is a reasonably close call. In early April 1996, Mr. Rodriguez conducted an audit of the congressional campaign of Joe Pitts in the Pennsylvania Sixteenth District Republican primary. Mr. Rodriguez spoke with Pitts campaign officials to discuss the needs of the campaign, for funding and otherwise: "[R]odriguez spoke with Joe Pitts and campaign officials to identify the needs of the campaign—not just in terms of dollars, but how those dollars would be spent. The decision was made that a major phone bank effort was imperative." GC Brief at 43. Pitts also states that "[a]fter discussions with Triad, a phone bank program was *developed by the campaign* and the cost determined. GC Brief at 44 (emphasis added). The "cost of the phone bank ... was estimated *by the campaign* to be \$20,000." *Id.* (emphasis added). Pitts also acknowledged that "[T]riad played a major role for its clients identifying what our campaign needed." If Rodriguez was among the individuals that "made the decision," or if he provided detailed advice, this would indicate that he was providing consulting services to the Pitts campaign, rather than asking it what methods it intended to use in the upcoming election. But even this evidence, taken at face value, indicates it was the campaign that "developed" the phone bank program and "determined" its cost, not Rodriguez or Triad. Similarly, the General Counsel indicates that once the phone bank program was developed, this "information [that Pitts would conduct a phone bank] was provided to TRIAD clients," as if this were incriminating. *Id.* But taken by itself, providing information to potential contributors was Triad's lawful purpose, and not a contribution to the Pitts campaign.

There is stronger evidence for the General Counsel, however. "[T]riad clients were contacted about helping Joe Pitts." *Id.* If Triad did the contacting – another issue undeveloped in the brief – this amounts to a solicitation and any expenses in connection could be an in-kind contribution under the Act. If the Pitts campaign did the soliciting, the value of Triad's donor list would be an in-kind contribution to the Pitts campaign

⁸ Had Rodriguez volunteered his services, of course, they would have been exempted from the Act as volunteer activity.

under the Act. Despite its failure to develop this last point, the General Counsel has produced enough evidence that Rodriguez consulted heavily with the Pitts campaign in creating a phone bank that the Commission could find probable cause that the value of the consultations were in-kind contributions by Triad. Unfortunately, the value of these contributions, for both the consulting services and the solicitations (or, alternatively, a donor list) is left undeveloped by the General Counsel.

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The two other campaigns discussed by the General Counsel clearly do not constitute contributions to a particular candidate from Triad via Rodriguez. The first such case is the Bob Riley Jr. (Riley) campaign. In discussing that case, the General Counsel notes that the Riley campaign did not have its own paid consultant, and Triad may have played a role in getting the National Rifle Association ("NRA") to endorse Riley's candidacy. *Id.* at 45. But Triad's core purpose was to find campaigns that PACs would feel comfortable supporting. It is not illegal for a person or organization to try to convince other organizations to endorse a particular candidate, even if that person has taken the time to learn something about the candidate. That is to say, nothing in the Act prohibits Triad, or anyone else, from lobbying the NRA to endorse particular candidates, or providing the organization with information that may sway its decision. The NRA, a separate and distinct political organization with decision-making authority independent of Triad, made the endorsement. That the Riley campaign was grateful to Triad for talking up the campaign to groups such as the NRA does not make Triad's activity an in-kind contribution to the Riley campaign. *See also* Statement of Reasons of Commissioner Bradley A. Smith, in MURs 4568, *et al.*, Bob Riley, Jr. *Cf.* GC Brief at 45.

Another case cited by the General Counsel that falls short of the mark is the Bob Schaffer campaign. The General Counsel presents evidence that Triad was thinking of ways to get a potential fundraiser to fulfill a commitment to the Schaffer campaign. GC Brief at 47. Rodriguez recalls meeting with the fundraiser but could not recall the purpose of the meeting. *Id.* The audit report for the Schaffer campaign also indicates a need to find money to pay for a survey to determine where Schaffer was, "in relation to the other candidates before the eyes of the voters who are likely to vote in the Republican primary in August." *Id.* Had Triad done those things for the campaign, it might have supported a finding of probable cause. But the General Counsel notes there is no evidence that the survey was ever conducted, or if it was conducted, that Triad paid for the survey or even asked third parties to raise money for a survey. Indeed, the General Counsel lacks evidence that Rodriguez even consulted with the campaign on how a survey should be developed or conducted. *Id.*

Of the 250 audits conducted or overseen by Rodriguez, the General Counsel discusses only these five, and, putting the best possible gloss on the evidence, produces sufficient evidence to find probable cause against Triad in only three. This is not a basis for categorizing Rodriguez's entire salary as contributions dispersed amongst 250 candidates.

b. Fax Alerts

During 1996, Triad sent approximately 60 separate daily editions of a newsletter called the "Fax Alert", or sometimes referred to as the "Daily Fax Alert," to a list of approximately one hundred sixty persons and entities. GC Brief at 49. A majority of the editions included research compiled on individual races, and contribution solicitations and other exhortations of support for specific candidates. *Id.* Many, but by no means all, of the solicitations made plain that any funds raised would be used to elect the candidate in question for both the primary and general elections. See GC Brief at pp. 49-58. This makes the requests solicitations that constitute contributions under the rationale of *Federal Election Commission v. Survival Education Fund*, 65 F.3d 285, 294-95 (2d Cir. 1995) (the phrase "contributions ... earmarked for political purposes" must, for reasons of vagueness, also be limited to contributions earmarked for communications that expressly advocate the election or defeat of candidates for office). The cost of those fax alerts would therefore count as contributions that go toward the threshold triggering political committee status.

But the value of these faxes is limited. 60 faxes sent to 160 persons yields 9600 faxes. If half of the faxes contained express advocacy or were solicitations meeting the requirements of *Survival Education Fund*, *supra*, this would yield 4800 faxes. If the cost of faxing were \$.05 per page then 20,000 pages could be sent before reaching the \$1000 threshold. If each fax were two pages and the cost of faxing \$.05 per page then 10,000 such faxes could be sent before reaching the \$1000 threshold set forth in 2 U.S.C. § 431(4), whereas the cost of 4800 faxes would be just \$480. The General Counsel's brief makes little effort to flesh out the amount so spent. However, clearly something was spent by Triad that constituted an expenditure under the Act, thus counting toward triggering political committee status. How much is unclear, but nothing suggests it remotely includes the organization's entire fax budget, which is what the Counsel's office seemed to have concluded.

c. Background Checks

As part of its political audits, Triad would sometimes arrange for an outside research company called Trenton West to perform a "background check" for the purpose of vetting a congressional candidate prior to issuing a contribution recommendation. GC Brief at 48. The Trenton West company was paid a total of \$32,750 for its services. This effort was designed to preempt surprise disclosures that might later be uncovered by opposition research. *Id.* The purpose of this research was to help Triad gauge whether and how the campaign was prepared to respond to negative information, assuming such information became public. As part of its audit process, Triad would sometimes share the results of the background checks with the campaign if it uncovered information that raised questions about the candidate. *Id.* While Mr. Rodriguez does not recall ever withholding a contribution recommendation because of an adverse finding from a

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background check, he does recall asking some candidates about their past activities. GC Brief at 48. Triad did not assist campaigns in preparing responses to possible disclosures. If Triad had made the actual reports available to the respective candidates, the value of that research could constitute an in-kind contribution. However, the General Counsel produces no evidence of such an in-kind contribution.

The Counsel's theory seems to be that it is *per se* illegal for a potential donor to learn about a campaign, or to ask how the campaign might respond to potentially damaging information. However, groups and individuals need not make their contributions in the dark. Again, merely asking how the campaign might respond to damaging information is not a contribution under the Act. Even assuming, however, that in some cases Triad made the reports available, and that they were in-kind contributions, the General Counsel makes no attempt to apportion the \$32,750 Triad paid the Trenton West company among the Republican candidates that were researched.

d. Conclusion

By counting all of Rodriguez's salary, all fax expenditures, and all costs of opposition research as in-kind contributions, the General Counsel clearly overstates Triad's regulated expenditures and in-kind contributions by a very large margin. The General Counsel has made no effort to accurately determine the amounts of the expenditures and contributions that were made. Nevertheless, there is reason to find probable cause to believe that some of Carlos Rodriguez's activities, some faxes, and possibly some opposition research counted as contributions or expenditures under the Act. Together, there is probable cause to believe the total surpasses the very low \$1000 threshold required to find political committee status. This would make Triad a political committee that failed to register and report under 2 U.S.C. §§ 433 and 434, required to report its receipts and disbursements.

B. Triad's Excessive Contributions

Any statutory expenditures and in-kind contributions made by Triad count toward political committee status. Where they exceed \$1000 dollars to any one candidate, they are excessive contributions in violation of 2 U.S.C. § 441a(a)(1). I voted to approve the General Counsel's recommendation to find probable cause that Triad made excessive contributions, but I have some trouble deciphering from the General Counsel's Report and Brief just which campaigns received more than \$1000 dollars. We have probable cause to believe that Rodriguez may have provided the Snowbarger campaign advice and a written report. But the General Counsel does not indicate the approximate value of these items. Given the level of Rodriguez's salary, however, there may be enough to find probable cause that the value of items and services given Snowbarger exceeded \$1000.

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We have reason to believe that the Merritt campaign was given "a considerable amount" of education by Rodriguez. However, whether this was 30 minutes of Rodriguez's time – an amount certainly valued at less than \$1000 - or several hours of time is not made clear.⁹ Fax Alerts that expressly advocate the election or defeat of a clearly identified candidate are in-kind contributions, as are solicitations for funds to be put to the same use. But the value of Triad's total faxing to any one candidate cannot even begin to approach \$1000, let alone exceed it. We know that the Trenton West company was paid a total of \$32,750 for opposition research, but we do not know how many candidates this information was shared with, or even how many were investigated by Trenton West. *See ante* at pp 6-10.

There may be enough here to find probable cause that Triad made excessive contributions, but little to quantify the extent of the violations. What evidence there is suggests that they were far, far smaller than the \$903,121 for which the General Counsel argues. What is more, had Triad envisioned that the Commission would care about any of its activities, it could have registered early as a political committee, taken contributions from just a few more contributors, and enjoyed a \$5000 per candidate limit as a duly designated "multi-candidate" committee.¹⁰ Had it done so, the General Counsel would have been hard pressed, indeed, to demonstrate any excessive contributions made by Triad to any one candidate. It seems clear that Triad had attempted to structure its activities to avoid triggering political committee status, and did not believe that it had triggered committee status. Had it known that it had triggered committee status, it is also clear from the record that it could have qualified for multi-candidate committee status. *See* 11 C.F.R. 100.5(e)(3). This should have been, and in most cases is, considered in the penalty phase. In this case it was not.

C. Earmarking

The General Counsel has asserted that "Triad/CSM (for the Riley, Jr. contributions) and Triad, Inc. (for the Stauffer contributions) acted as conduits or intermediaries for ... earmarked contributions and had an obligation to report the earmarking to the Commission and the ultimate recipients." GC Report at 12-13. According to the Counsel, Triad handled earmarked funds from Robert Riley, Jr. to the

⁹ Rodriguez's salary indicates that he was paid approximately \$125 per hour, so that he would need to provide eight hours service to a campaign to equal \$1000.

¹⁰ The Act grants "multi-candidate" political committees a contribution limit of \$5000 per candidate per election. 2 U.S.C. § 441a(a)(2)(A). To be a multi-candidate committee, Triad must have been registered with the Commission for six months; received contributions from more than 50 persons; and made contributions to five or more candidates. 11 CFR 100.5(e)(3). Triad made contributions to more than five candidates through its Fax Alerts alone, GC Brief at 49-58, and received contributions from approximately three dozen contributors. GC Brief at 29 (six contributors including Cone), 30 (four including Cone), 31 (eleven individuals including Cone) and 33, n.33 (less than fifteen).

campaign of his father, Robert Riley, Sr., and from John and Ruth Stauffer to the campaign of their son-in-law, Sam Brownback, through two allegedly Triad-controlled PACs, Americans for Free Enterprise and Citizens Allied for Free Enterprise.

In earlier enforcement matters, however, the General Counsel specifically avoided pursuing an earmarking theory (*see* 2 U.S.C. § 441a(a)(8)) against Respondent Bob Riley, Jr. or Respondents John and Ruth Stauffer because there was no evidence that these respondents directed, controlled or in any way earmarked contributions to candidates Bob Riley, Sr. or Sam Brownback, respectively. In fact, because there was insufficient evidence of earmarking to find a violation, the General Counsel pursued Riley, Jr. and the Stauffers under a novel excessive contribution theory. The General Counsel stated that under 11 CFR 110.1(h), the Riley and the Stauffers "knew" their contributions to certain PACs would reach candidates to whom they had already maximized direct contributions, even though they did not direct or earmark their contributions for that purpose.¹¹ As I noted in my Statements of Reasons in those matters, the knowledge theory pursued by the General Counsel makes the earmarking statute at 2 U.S.C. 441a(a)(8) a redundancy (as any person who earmarks, directs or controls a contribution already has "knowledge" of where it will go), while simultaneously undercutting the constitutional justification for the overall individual aggregate contribution limit by eliminating the overall cap as a device to prevent the use of non-earmarked contributions to exceed contribution limits, 2 U.S.C. §441a(a)(3). *See Buckley v. Valeo*, 424 U.S. 1, 38 (1976).

Whatever the merits of the knowledge theory pursued by the General Counsel against the other respondents, once that theory was taken the earmarking theory was jettisoned. If there is no earmarking done by Riley, Jr. or the Stauffers through certain PACs, there is no basis for holding those PACs liable for failing to report "earmarking."

D. CREF and CR

During the latter half of 1996, Triad Inc. managed all of the activities of Citizens for the Republic Committee ("CREF") and Citizens for Reform ("CR"), two non-profit corporations that spent approximately \$3 million in television, radio, direct mail and telephone bank issue advertising prior to the 1996 congressional elections. Triad managed production of the advertising programs on behalf of CREF and CR, including selection of the media markets, approval of scripts and the authorization of disbursements for production and placement of CREF advertisements. GC Brief at 26, 28. None of the advertisements expressly advocated the election or defeat of a clearly identified candidate for Federal office, GC Brief at 27, 28.

¹¹ For further discussion on these matters see Statement of Reasons of Commissioner Bradley A. Smith in MURs 4568, 4633, 4634 and 4736, Bob Riley, Jr.; Statement of Reasons of Commissioner Bradley A. Smith in MURs 4568, 4633, 4634 and 4736, John and Ruth Stauffer.

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The General Counsel recommended that the Commission find probable cause to believe that CREF and CR are political committees that failed to register and report with the Commission in violation of 2 U.S.C. §§ 443 and 434. The General Counsel also recommended the Commission find that CREF and CR, as political committees, made excessive contributions through coordinated issue advertising in violation of 2 U.S.C. § 441a(a)(1). Alternatively, the General Counsel believed that CREF and CR, as corporations but not political committees, knowingly made impermissible corporate contributions by coordinating issue advertising with several candidates for Federal office in violation of 2 U.S.C. §§ 441a(f) and 441b. All of these arguments are invalid for the same reasons: whether coordinated or not under the law in effect at the time, corporate payments for public issue advocacy are not expenditures, and corporate payments for issue advocacy coordinated with candidates are not contributions.

There is no basis for finding that CREF and CR are political committees, regardless of "major purpose." A political committee is defined as any committee, club, association or other group of persons that receives contributions or makes expenditures aggregating in excess of \$1000. 2 U.S.C. §431(4)(A). An expenditure is a payment made "for the purpose of influencing any election for Federal office." 2 U.S.C. §431(9)(A)(i). The courts have made plain, time and again, that the First Amendment requires that speech which does not expressly advocate 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." Groups that spend only for issue advocacy are not "political committees." In other words, "[e]ven if the organization's major purpose is the election of a federal candidate or candidates, the organization does not become a "political committee" unless or until it makes expenditures in cash or in kind." *Federal Election Commission v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392 (D.C. Cir. 1981). The argument that "major purpose" alone is enough to make a group a "political committee" or make disbursements into "expenditures" as defined by the Act was specifically rejected in *Federal Election Commission v. GOPAC*, 917 F. Supp. 851, 861-62 (1996) ("As a matter of law, the Commission ... failed to demonstrate that GOPAC became a political committee within the meaning of the Act by *spending or receiving* \$1,000 or more and engaging in 'partisan politics' and 'electioneering.'") (emphasis added).

Nor are corporations that coordinate spending for issue ads with candidates "political committees." The Act treats expenditures coordinated with candidates as "contributions." 2 U.S.C. § 441a(a)(7)(B)(i). But to be "contributions" the payments must first be "expenditures" regulated under the Act. *Id.* The Supreme Court has made plain that where speech is implicated, the term "expenditure" in 2 U.S.C. § 441b is limited to "express advocacy." See *Massachusetts Citizens for Life v. FEC* ("MCFL"), 479 U.S. 238, 249 (1986). 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. 2 U.S.C. § 431(8)(B)(vi). In other words, corporate payments made for speech that lacks express advocacy are neither "expenditures" nor "contributions" under

the Act, even where such payments are coordinated with candidates. As such, these payments do make an organization a political committee under 2 U.S.C. § 431(4), no matter their purpose, and no matter the number of dollars spent.¹² See Statement of Reasons of Commissioner Bradley A. Smith in MUR 4624, *The Coalition*.

The General Counsel argued that “[a]s political committees, CREF and CR could legally only contribute no more than \$1,000 per election to any candidate for federal office. ... Due to their affiliation, CREF and CR shared a single \$1,000 contribution limit with Triad.” GC Brief at 107. While I do not dispute that CREF and CR were established, financed, maintained or controlled by Triad, see 11 CFR 100.5(g)(3)(v), the affiliation rules apply to “committees,” not entities. CREF and CR are separately incorporated entities that did not qualify as political committees because they did not meet the statutory requirement of receiving contributions or making statutory expenditures in excess of \$1000 per year. As CREF and CR are not “committees” under the Act, they can not be affiliated committees.

As an alternative, the General Counsel suggested that if CREF and CR were not political committees under the Act, they made excessive corporate contributions. Again, however, to qualify as a contribution or expenditure, under current law, a public communication must include “express advocacy.” Otherwise, the Supreme Court has recognized the right of corporations to engage in unlimited issue advertising. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). Thus, this alternative theory must fail as well.¹³

IV.

¹² An organization also can become a political committee by receiving contributions in excess of \$1000, 2 U.S.C § 431(4), but they must be “contributions.” That is, they must be made for the purpose of influencing an election through express advocacy, not issue advocacy. See *GOPAC*, *supra*.

¹³ It is also possible that CREF and CR are entitled to a full exemption from the Act as ideological corporations under the *MCFL* exemption. Under the holding in *MCFL*, *supra*, the Act does not apply to expenditures by organizations that are created to promote political ideas; that do not engage in significant business activities; that lack shareholders or other persons with a claim on its assets or earnings; that are not established by a business corporation or labor union; and that have a policy of refusing contributions from such entities. *MCFL*, 479 U.S. at 263-64 (1986). After the Commission voted on the Counsel's recommendations in this case, the Fourth Circuit decided *Beaumont v. FEC*, 278 F.3d 261, 275 (4th Cir. 2002). The Fourth Circuit held that, “[t]he rationale used by the Court in *MCFL* to declare prohibitions on independent expenditures unconstitutional as applied to *MCFL*-type corporations is equally applicable in the context of direct contributions. ... As a consequence, neither [the group's] expenditures nor its contributions may be prohibited under the First Amendment.” *Beaumont*, *supra*, at 275.

There is strong precedent to suggest that a later judicial opinion has retroactive effect and that the date of the *Beaumont* decision does not preclude its application to Triad's past activities. See e.g. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (a new rule in criminal proceedings is applied to all cases with no exception for cases in which it establishes a break from the past). We cannot be sure whether the non-profit corporations CR and CREF would meet the *MCFL* test. But it is clear that whether or not *MCFL* status applies to CREF and CR, these organizations did not make contributions to candidates that are prohibited under 2 U.S.C. § 441b, or that would make them political committees under 2 U.S.C. § 431(4).

V. Conclusion

In my view, this MUR could and should have been concluded 3 years sooner, with an appropriate penalty of perhaps one-tenth that ultimately assessed.

Despite the Commission's findings in this case, it should be emphasized that citizens are not required to make their political decisions in the dark. It is permissible to make inquiries, to study campaigns, and to base one's activities on the basis of the information gathered.

¹⁴ As noted above, on May 7, 2002, the Commission failed to find Probable Cause to Believe by 3-2 to 1 that Citizens for the Republic Education Fund and Citizens for Reform violated 2 U.S.C. 433, 434, 441a(a)(1), 441a(f), 441b, and 11 C.F.R. 102.5. Chairman Mason joined me in voting against these recommendations. Vice Chairman Sandstrom and Commissioners McDonald and Thomas voted in favor. Commissioner Toner abstained.

The Commission's lengthy, extensive, overly broad investigation in this case is representative of the type of overzealousness that has typified Commission investigations for too long, and led it to be simultaneously scorned as both overbearing on First Amendment rights and inefficient in its legitimate enforcement role.



Bradley A. Smith, Commissioner



Date