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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 4687
DATE COMPLAINT FILED: 10/29/97
DATE OF NOTIFICATION: 11/5/97
DATE ACTIVATED: 5/20/98

STAFF MEMBER: J. Michael Lehmann

COMPLAINANTS: Democratic Senatorial Campaign Committee
Robert F. Bauer, General Counsel

RESPONDENTS: Voinovich for Senate Committee and Vincent M. Panichi, as
treasurer
Keep Ohio Working and Roger R. Geiger, as treasurer
Wilson Grand Communications, Inc.

RELEVANT STATUTES: 2 U.S.C. § 431(4)
2 U.S.C. § 431(8)(A)(i)
2 U.S.C. § 431(9)(A)(i)
2 U.S.C. § 431(17)
2 U.S.C. § 433
2 U.S.C. § 434
2 U.S.C. § 441a(a)(2)(A)
2 U.S.C. § 441a(a)(7)(B)(i)
2 U.S.C. § 441b
11 C.F.R. § 109.1(b)(4)(i)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTER

This matter arises from a complaint filed with the Federal Election Commission (hereinafter the "Commission") on October 29, 1997. Complainant Democratic Senatorial Campaign Committee alleges that two advertisements by respondent Keep Ohio Working -- in

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"[C]ontrolled or coordinated expenditures are treated as contributions" under the Act. *Buckley v. Valeo*, 424 U.S. 1, 46 (1976). See also 2 U.S.C. § 441a (a)(7)(B)(i). The Commission has concluded that communications coordinated with candidates that do not expressly advocate the election of such candidates or the defeat of their opponents may constitute in-kind contributions. See, e.g., AO 1988-22; MUR 3669 (Christian Coalition), *FEC v. Christian Coalition*, Civ. Action No. 96-1781(JHG) (D.D.C. 1996).

An "expenditure" is "independent" when it is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and is not made in concert with, or at the request or suggestion of, any candidate or agent of such candidate. 2 U.S.C. § 431(17). The Commission's regulations define "made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate" as any "arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication." 11 C.F.R. § 109.1(b)(4)(i).

"The Commission has determined that financing [] activities [involving the participation of a Federal candidate] will result in a contribution to or expenditure on behalf of a candidate if the activities involve (i) the solicitation, making or acceptance of contributions to the candidate's campaign, or (ii) communications expressly advocating the nomination, election or defeat of any candidate. The Commission has also indicated that the absence of solicitations for contributions or express advocacy regarding candidates will not preclude a determination that an activity is 'campaign-related.'" See Advisory Opinion ("AO") 1994-15 (citations omitted).

The Act defines the term "political committee" as any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 or makes

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the context of a state initiative election -- were for the purpose of influencing an election for Federal office and were coordinated with Voinovich for Senate Committee and, accordingly, constituted in-kind contributions in violation of the Federal Election Campaign Act of 1971, as amended, (the "Act" or "FECA").

Respondents were notified of the complaint on November 5, 1997. Wilson Grand Communications, Inc. responded to the complaint on November 17, 1997.¹ Voinovich for Senate Committee and Vincent M. Panichi (hereinafter collectively referred to in the singular as "Voinovich") responded to the complaint on December 17, 1997. Keep Ohio Working and its treasurer, Robert R. Geiger (hereinafter collectively referred to in the singular as "KOW") responded to the complaint on December 18, 1997.

II. FACTUAL AND LEGAL ANALYSIS

A. Law

The Act defines "contribution" as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; . . ." 2 U.S.C. § 431(8)(A)(i). The Act defines "expenditure" as "any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; . . ." 2 U.S.C. § 431(9)(A)(i).

¹ As an exhibit to the complaint indicates that Wilson Grand Communications, Inc. produced one of the ads at issue, it was notified as a respondent.

expenditures in excess of \$1,000 during a calendar year. 2 U.S.C. § 431(4).³ A political committee must file a statement of organization within ten days of becoming a political committee. 2 U.S.C. § 433. The treasurer of each political committee must regularly file disclosure reports with the Commission. 2 U.S.C. § 434.

The Act sets limits on the amount of money that political committees may contribute to a candidate or authorized political committee. 2 U.S.C. § 441a(a)(2)(A). The Act also prohibits contributions or expenditures by national banks, corporations, or labor organizations with regard to Federal election activity, and prohibits persons or political committees from knowingly accepting such contributions. 2 U.S.C. § 441b.

B. Facts

On April 22, 1997, the Governor of the State of Ohio, George Voinovich, signed Senate Bill 45 ("SB 45"), an overhaul of Ohio's worker's compensation system.⁴ Opponents of the law initiated a referendum to challenge the law, which was placed on the November 4, 1997 ballot as

³ The Commission has found that to be a political committee a "major purpose" of the organization must be the election or defeat of clearly identified candidates. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). *But see Akins v. Federal Election Commission*, 101 F.3d 731 (D.C. Cir. 1996) (organization may be deemed a "political committee" even if its major purpose is not campaign-related activity), *vacated*, 118 S.Ct. 1777 (1998). *See also FEC v. GOPAC*, 917 F. Supp. 851, 859 (D.D.C. 1996) (The "major purpose" of an organization may be shown by public statements of its purpose or by other means, "such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates for federal office.")

⁴ Reform of Ohio's worker's compensation system had apparently been an item on Gov. Voinovich's legislative agenda for several years. *See Voinovich Pushing Worker's Comp Bill*, THE COLUMBUS DISPATCH, Nov. 6, 1997 ("Voinovich... has championed changes in the workers' comp system since he first ran for governor in 1990, ..."); *Campaign Becoming Expensive State Issue 2*, THE COLUMBUS DISPATCH, Oct. 26, 1997 ("Gov. George V. Voinovich has been the driving force behind reshaping the system for injured workers since taking office in 1991."); *Job Health Safety Issues on Labor's List*, ST. LOUIS POST-DISPATCH, Dec. 19, 1997 ("Republican Gov. George Voinovich often terms workers' compensation a 'silent killer of jobs.'") In 1993, the Ohio Legislature passed House Bill 107, which implemented a program of managed care to help monitor and control the medical expenses and treatment provided to an injured worker. In 1995, the Ohio Legislature enacted House Bill 103, which redefined and clarified employer liability -- beyond worker's compensation -- for on the job injuries. According to KOW, absent Governor Voinovich's support, the Ohio Legislature would not have enacted either piece of legislation. *See also Complaint over Issue 2 ads Dropped*, THE ASSOCIATED PRESS POLITICAL SERVICE, Jan. 8,

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Issue 2. Under Ohio law, enactment of the challenged legislation required an affirmative vote on the proposed ballot issue (i.e., "yes on Issue 2") from the electorate. *See* Ohio Const., Art. II, § 1c. Supporters of SB 45 formed Keep Ohio Working, an Ohio-registered political committee, to encourage voters to support Issue 2. According to Voinovich's response, at page 2, "[t]he 'Keep Ohio Working' Committee was a separate committee, with its own offices, own officers and own treasurer." There is no indication that any party committee was involved in KOW's campaign to enact Issue 2. Press accounts indicate that KOW received corporate contributions. *See e.g. Foes, Friends of Issue 2 Broke Bank, THE COLUMBUS DISPATCH*, Dec. 13, 1997.

KOW ran several advertisements in connection with the Issue 2 campaign. Gov. Voinovich appeared in two of the ads. Complainant appears to imply that Gov. Voinovich initiated his appearance in the ads. In its response, at page 2, Voinovich states as follows: "Governor Voinovich did not ask to appear in 'Keep Ohio Working' advertisements. Governor Voinovich appeared in 'Keep Ohio Working' advertisements *at their request* - not his." The first ad (hereinafter "Cheaters\Fraud\Lawyers") features a narrator advocating the passage of Issue 2 as a way to fix a worker's compensation system that is broken and listing a group of organizations and individuals, including Gov. Voinovich, who support Issue 2.⁵ The voice-over is reinforced by a visual indicating that the worker's compensation system is broken, that Issue 2 will fix it and listing newspapers that support the initiative. The ad ends with Gov. Voinovich asking voters to "vote yes on Issue 2."

1998 ("Although the issue failed in the November election, Gov. George Voinovich and other Republicans still want to go ahead with some of the less-controversial proposals.")

⁵ A transcript of "Cheaters/Fraud/Lawyers" appears as Exhibit A to Voinovich's response and as Exhibit A(1) to KOW's response. A summary of the ad, from the October 9, 1997 edition of *THE COLUMBUS DISPATCH* appears as Exhibit A to the complaint. For the Commission's convenience, a transcript of "Cheaters/Fraud/Lawyers" is attached to this Report as Attachment 1.

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The second ad (hereinafter "Scare Tactics") features Gov. Voinovich standing in front of an American flag, a book shelf and a desk chair.⁶ He addresses the camera and indicates what the proposed initiative would and would not do. As Gov. Voinovich continues to address the camera, various visuals appear on the screen to further illustrate the point. The ad ends with a visual of Gov. Voinovich in his office and a blue campaign button reading "Vote YES on Issue 2." Issue 2 was defeated in the November 1997 election by a margin of 57% to 43%.

C. Complaint and Responses

The complaint alleges that the KOW ads constitute (corporate and/or excessive) expenditures on behalf of Voinovich.⁷ According to complainant, the following factors "compel[] the conclusion that these [KOW ads] were designed to influence [the 1998 United States Senate] election:" (1) Gov. Voinovich is prominent in the ads and is the only individual who appears in them, (2) Gov. Voinovich is a declared candidate for Federal office, (3) the ads were shown to the same electorate that will vote in the Federal election, and (4) "[t]he advertisements include text favorable to [Gov.] Voinovich to accompany the mention of his name and his image, . . ." (Complaint, p. 3.) In support, complainant cites three advisory opinions regarding the limits of a candidate's ability to engage in public communications beyond the scope of the Act: AOs 1992-37, 1977-54, and 1977-31. Complainant also says (1) that the circumstances surrounding Gov. Voinovich's appearances in the ads raise certain questions as to whether the alleged expenditures were "coordinated" -- e.g., were the text of the ads drafted or

⁶ A transcript of "Scare Tactics" appears as Exhibit B to both the complaint and Voinovich's response and as Exhibit A(2) to KOW's response. For the Commission's convenience, a transcript of "Scare Tactics" is attached to this Report as Attachment 2.

⁷ Complainant does not actually specify the portion of the Act it believes has been violated, but says that the KOW ads at issue constitute "improper and illegal practices involving 'soft money.'" (Complaint, p. 4.)

edited by a Voinovich "operative"? does Voinovich possess documents relating to KOW's advertising campaign? -- and (2) that these questions can only be answered by an investigation.

In response, both Voinovich and KOW argue that the ads are not for the purpose of influencing a Federal election because (1) they advocate neither the election nor the defeat of any Federal candidate and contain no electioneering message for a Federal candidate, (2) they do not attempt to solicit contributions for any Federal candidate or committee, and (3) they do not discuss the 1998 Senate race.⁸ Respondents also cite several of the Commission's advisory opinions regarding the limits of a candidate's ability to engage in public communications beyond the scope of the Act -- including several involving advocacy in state campaigns -- arguing that the Issue 2 ads are indistinguishable from those public communications the Commission previously acknowledged were beyond its jurisdiction.⁹

D. Analysis

The complaint raises two basic issues: (1) whether, upon looking at the face of the ads themselves, it appears that they were designed for the purpose of influencing the 1998 United States Senate election in Ohio or (2) whether a purpose to influence the 1998 Senate election may be inferred from the content of the Issue 2 ads and the circumstances surrounding these public communications. Under either analysis, there is no indication that the advertisements were for the purpose of influencing a federal election. Therefore, this Office recommends that

⁸ The entirety of Wilson Grand Communications, Inc.'s response is as follows: "We are in receipt of your letter. [¶] We note that Wilson Grand Communications, Inc. is not mentioned in the complaint, only referred to. [¶] We fail to see any allegation against us in anything you sent us. [¶] Furthermore, to the extent the Commission sees any allegations, they are entirely frivolous."

⁹ Voinovich also cites MUR 4563 (D'Amato) in support of its argument for dismissing the complaint. The Commission voted 5-0 to close MUR 4563 on December 9, 1997. This Office recommended closing the file solely because the case had become stale under the Commission's Enforcement Priority System.

the Commission find no reason to believe that Voinovich, KOW and Wilson Grand Communications, Inc. violated the Act.

1. For the Purpose of Influencing any Election for Federal Office

As a quick review of the two transcripts, *see* Attachments 1 and 2, indicates that neither ad expressly advocates Gov. Voinovich's election to the United States Senate or solicits contributions to his campaign, the relevant issue is whether the two Issue 2 ads are otherwise "campaign-related"¹⁰ communications. *See* AO 1994-15 ("The Commission has also indicated that the absence of solicitations for contributions or express advocacy regarding candidates will not preclude a determination that an activity is 'campaign-related.'") None of the advisory opinions cited in the complaint -- two of which informed the requesting party that the activities in question would not be covered by the Act -- lead to the conclusion that the Issue 2 ads were for the purpose of influencing an election for *Federal office*.

In all three opinions, the Commission inquired as to the actual purpose of the public communications at issue. Where there was a clear purpose for the communications other than influencing an election for Federal office, such as expressing opposition to the Panama Canal Treaty, *see* AO 1977-54, the Commission concluded that the communications were not for the purpose of influencing a Federal election. Where there was no discernible purpose other than to influence a Federal election, *see* AO 1977-31, the Commission informed the requesting party that the communications would be within the scope (and limits) of the Act. *See also* AO 1983-12 (ads congratulating voters for electing certain Senators in prior election for purpose of influencing Federal election as "the activity in question does not seem to have specific and

¹⁰ Hereinafter, "campaign-related" refers to the campaign for the 1998 United States Senate election in Ohio.

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significant non-election related aspects that might distinguish it from election influencing activity").

The Commission has previously found that a Federal candidate's attempts to influence a state election are not subject to the Act. In AO 1982-56, a Congressman, whose district was located entirely within the relevant county, asked whether his appearance in a television commercial endorsing a candidate for county prosecutor constituted an in-kind contribution to his reelection campaign. He described the appearance as follows: "Then Congressman Jacobs comes down the steps of the Federal Building with 'Congressman Andy Jacobs' across the picture and says: 'I think Ann Delaney is one of the best courtroom prosecutors we've ever had in this country.'" AO 1982-56, p. 2. The Commission concluded, at page 3, that the ad would not constitute an in-kind contribution:

You state that the purpose of the advertisement, as well as the Congressman's appearance therein, is to endorse and influence the election of [the candidate for prosecutor]. Moreover, the content of the advertisement does not reflect an intent to influence Congressman Jacob's reelection. The advertisement identifies the Congressman only as "Congressman Andy Jacobs". It contains no mention of his own candidacy, does not advocate his election or the defeat of his opponent, and contains no solicitation of funds to his campaign.

The Issue 2 ads are very similar to the one at issue in AO 1982-56. Gov. Voinovich is identified only as "Governor Voinovich," not as a candidate for any office, Federal or otherwise. Compare AO 1980-25 (costs incurred in distributing correspondence in letter writing campaign opposing state initiative constitutes expenditures where candidate "intends[s] to put 'Congressional Candidate, 24th District, American Independent Party' on the letter below [candidate's] signature").

In sum, the complaint alleges that a governor's appearance in an ad supporting a ballot measure -- that he had earlier signed into law -- in a state election on an initiative (sponsored by

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opponents of the law) concerning an issue that had been a part of his legislative agenda for years constitutes an in-kind contribution to the governor's Federal campaign. Cf. AO 1994-15, p. 3 ("More specifically, the Commission has concluded that events in which Federal officeholders participate in the performance of their duties as officeholders are not campaign-related simply because the officeholders may be candidates for election or re-election to Federal office, and that payments associated with the expenses of such events are not contributions to that officeholder's campaign, absent any campaign-related activity at that event.") (citations omitted).¹¹ Given (1) the absence of any mention of Gov. Voinovich's Senate candidacy in the Issue 2 ads and the readily apparent "other" purpose of the ads, i.e., urge voters to enact Issue 2; (2) the temporal distance -- over a year -- between the ads at issue and the Federal election allegedly to be influenced; (3) the fact that Voinovich did not put the issue on the ballot, opponents of the law did; (4) Gov. Voinovich's history of support for workers' compensation reform, including signing into law the very legislation at issue in the referendum; and (5) the absence of any indication that KOW was a co-venture of the Ohio Republican party or any other party committee;¹² it does not appear that either "Cheaters/Fraud/Lawyers" or "Scare Tactics" were "otherwise campaign-related."

¹¹ For example, Congressman Dennis Kucinich, who is also a candidate for Federal office and has won his party's primary election, appeared in ads opposing Issue 2. See KOW Response, Exhibit C, p. 1. See also *Issue 2 Nastiest Fight of All*, THE CINCINNATI POST, Oct. 31, 1997 ("[I]n dueling TV ads, Ohio's two most popular politicians, Republican Gov. George Voinovich and Democratic U.S. Sen. John Glenn, ask voters to approve and defeat Issue 2, respectively.")

¹² This matter does not present any issues regarding the appropriate allocation of expenses between Federal and non-Federal activities by party committees. See 11 C.F.R. § 106.5.

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2. Echoing a Theme of the Federal Campaign

Complainant's theory appears to be, in part, that KOW (or, perhaps, Issue 2 itself) was a creation of Voinovich, presumably using this state ballot campaign -- and its advertising -- to influence a Federal election. Complaint, p. 1 ("Mr. Voinovich and his organization have devised a plan to attract soft money to his personal political cause.") In previous MURs, the Commission found reason to believe that putatively commercial public communications were campaign-related by inferring an attempt to influence an election for Federal office from an indication (1) that the communications echoed a theme of the campaign and (2) that the candidate or campaign was in control of the medium used for communications.

MUR 3918 (Hyatt Legal Services), First General Counsel's Report, p. 11 ("In short, although the Hyatt Legal Service advertisement does not expressly advocate the election or defeat of Mr. Hyatt, and does not specifically request contributions to his campaign, it does appear to echo a theme of the Hyatt campaign and could be viewed as an in-kind contribution if made in coordination with Mr. Hyatt's campaign.") (cf. AO 1990-5, p. 6 (where candidate published monthly newsletter "any reference to or discussion of your candidacy or campaign in the newsletter, or presentation of policy issues or opinions closely associated with you or your campaign, would be inevitably perceived by readers as promoting your candidacy, and viewed by the Commission as election-related and subject to the Act."))

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In the present matter, there is no indication that the message of the Issue 2 ads ("vote for Issue 2") "echoed" any of the themes of Gov. Voinovich's 1998 Senate campaign.

Given the timing of the Issue 2 campaign, a year before the 1998 general election, it is not clear that Gov. Voinovich's "theme" or "themes" had developed at that point or that the condition of Ohio's worker's compensation system -- a product of the Ohio Constitution, *see* Ohio Const. art. II, § 35 -- is an issue in the 1998 United States Senate race in Ohio.

There is also no indication that either Gov. Voinovich or his committee created KOW or that Gov. Voinovich was in control of KOW or controlled the "themes" of the Issue 2 campaign.

MUR 3918 (candidate was sole name partner in law firm and CEO of law firm's management company). Indeed, press accounts suggest that Gov. Voinovich's involvement with the Issue 2 election campaign did not begin until the month before the 1997 election. *See Bad Claims on Workers' Comp: Business is Waging a Vicious, Misleading Campaign to Defund this Basic Protection*, THE NATION, Nov. 10, 1997 ("In early October, Governor Voinovich entered the fray on behalf of business interests, and he is likely to appear in saturation advertisements as Election Day nears.") Finally, there is no indication that the two committees had overlapping staffs or used the same vendors. *See, e.g.* MUR 3918 (campaign director was former employee of candidate's law firm; candidate's management company provided support services to both his law firm and his campaign).

In light of the above, this Office recommends that the Commission find no reason to believe that Voinovich for Senate Committee and Vincent M. Panichi, as treasurer, Keep Ohio

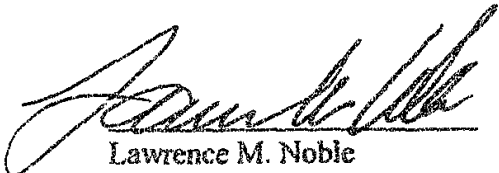
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Working and Roger R. Geiger, as treasurer; or Wilson Grand Communications, Inc. violated the Act in connection with the complaint in this matter.

III. RECOMMENDATIONS

1. Find no reason to believe that Voinovich for Senate Committee and Vincent M. Panichi, as treasurer; Keep Ohio Working and Roger R. Geiger, as treasurer; or Wilson Grand Communications, Inc. violated the Act in connection with this matter.
2. Approve the appropriate letters.
3. Close the file.

11/16/98
Date


Lawrence M. Noble
General Counsel

Attachments:

1. Transcript of "Cheaters/Fraud/Lawyers."
2. Transcript of "Scare Tactics"



FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARJORIE W. EMMONS/VENESHE FEREBEE-VINES
COMMISSION SECRETARY

DATE: NOVEMBER 17, 1998

SUBJECT: MUR 4687 - General Counsel's Report
dated November 16, 1998.

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The above-captioned document was circulated to the Commission
on Monday, November 16, 1998.

Objection(s) have been received from the Commissioner(s) as
indicated by the name(s) checked below:

Commissioner Elliott	—
Commissioner Mason	<u>XXX</u>
Commissioner McDonald	—
Commissioner Sandstrom	—
Commissioner Thomas	—
Commissioner Wold	—

This matter will be placed on the meeting agenda for
Tuesday, December 1, 1998.

Please notify us who will represent your Division before the Commission on this
matter.

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