CLINTON
GORE

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February 25, 1998

Lawrence M. Noble, Esquire
General Counsel
Federal Election Commission
999 E Street, NW
6th Floor
Washington, DC 20463

Re: MUR 4713

Dear Mr. Noble:

This response is being submitted on behalf of the Clinton/Gore '96 Primary Committee, Inc. (the "Committee") and Joan Pollitt, as treasurer, and Harold M. Ickes to the complaint filed by Lenora Fulani, former candidate for President in 1988 and 1992, pursuant to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. section 431 et seq. (the "Act"). As more fully explained below, this complaint should be expeditiously dismissed, because the complainant's allegations relate to unhappiness with actions taken by the Federal Election Commission (the "FEC" or "Commission"), and none of the allegations in the complaint are supported by any evidence of wrongdoing by any of the respondents named.[1]

INTRODUCTION

Lenora Fulani is a candidate who has sought and failed to be elected to the office of president in two of the last three presidential elections, both as an independent and as the nominee of various political parties. By her own pleading, she was not a candidate in the 1996 presidential election, though apparently considered a candidacy.[2] Also by her own pleading, complainant's decision not to become a candidacy was due either to certain adverse actions taken by the Commission in its audit of her previous campaigns or to actions taken by respondents in "manipulation" of the Commission.

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[1]The complainant purports to name twenty unknown "John Does" as respondents. Pursuant to the Act and the Commission's regulations, that portion of the pleading must be dismissed for failure to adequately identify the persons who are alleged to have violated the Act. 11 CFR § 111.4

[2]Fulani states that she coordinated her campaign with a Republican political operative. Apart from the surprising political ramifications of this statement regarding possible Republican interference in the Democratic primaries, certain legal implications are raised by this admission if Fulani campaign activity is indeed coordinated with the Republican Party or one or more Republican candidates. See Complaint paragraph 13.

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Clearly, in any reasonable reading of this complaint its absurdity is obvious. Non-candidate Fulani is seeking to blame respondents and use the Commission as a forum for her (1) political unhappiness over the outcome of the 1996 election and (2) legal unhappiness over her disputes with the Commission. The Commission should not allow itself to be so used and should not permit a matter to be sustained against respondents on such a basis.

DISCUSSION

1. Respondents did not induce or otherwise solicit any improper contributions.

Complainant Fulani alleges that respondents "induced" individuals and groups to contribute to the Democratic National Committee (the "DNC"). Complaint paragraph 10.a. and 10.b. No section of the Act or Commission regulations is cited as being violated.

Respondents deny inducing any person or group to contribute to the DNC or any other entity in violation of the Act's limitations or prohibitions. Further, respondents deny actually soliciting any person or group to contribute to the DNC or any other entity in violation of those limitations and prohibitions. In fact, the Committee undertook great effort to inform all potential contributors to it of the limitations and prohibitions of the Act and widely disseminated information among its fundraising staff and volunteers designed toward this end. With respect to the DNC's fundraising activities, the Committee has no particular information, however, any fundraising efforts that were engaged in jointly were done so specifically in compliance with the joint fundraising regulations, by which the Committee and the DNC are permitted to conduct such activity.

Complainant submits absolutely no evidence or other information to support its allegations. Accordingly, the Commission should find no reason to believe that any violation was committed with respect to this allegation.

2. Respondents did not engage in the "coordination of any conspiracy."

Fulani alleges that respondents arranged for respondent Harold Ickes "to coordinate the conspiracy."[3] Complaint paragraph 10.c. No section of the Act or Commission regulations is cited as being violated.

Mr. Ickes, as Deputy Chief of Staff to the President, was permitted to engage in political

[3]The Act contains no provision pertaining to conspiracy, therefore, the allegation of coordinating a conspiracy is not within the Commission's jurisdiction.

activities.[4] His participation could include involvement with both the Committee and the DNC. No specific actions of Mr. Ickes are complained of, and therefore, there are no specifics to rebut herein. However, all of Mr. Ickes actions were consistent with and entirely legal under the Act.[5]

Complainant submits absolutely no evidence or other information to support its allegations. Accordingly, the Commission should find no reason to believe that any violation was committed with respect to this allegation.

3. Respondents did not induce the Commission to take any actions.

Fulani alleges that respondents "induced" the Commission to issue a repayment determination against Fulani which prevented her from becoming a candidate. Complaint paragraph 10.d. No section of the Act or Commission regulations is cited as being violated.

This allegation is absurd on its face. Obviously, the Commission should well know that respondents took no action inducing it to make or not make any finding with respect to Fulani. Complainant submits absolutely no evidence or other information to support its allegations. Accordingly, the Commission should find no reason to believe that any violation was committed with respect to this allegation.

4. Respondents did not coordinate the expenditure of soft money for purpose of discouraging a Fulani candidacy.

Fulani alleges that the DNC, in coordination with respondents, herein expended so-called "soft" money on television advertisements which had as their purpose to discourage Fulani from becoming a candidate. Complaint paragraph 10.e. No section of the Act or Commission regulations is cited as being violated.

Respondents herein deny that they expended any soft money. Moreover, respondents further deny that the purpose of the DNC television ads was to discourage Fulani from becoming a candidate or running for president. The purpose of the advertisements was a bona fide effort on the part of the party and the administration to sway public opinion on critical national issues facing Congress. That they also benefitted Democratic candidates in the 1996 election was both legal and appropriate, and was done in a manner absent of express advocacy or electioneering, as required by law.

Even assuming, arguendo, that these issue ads had a secondary benefit to the president, to

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[4]If complainant is attempting to make an argument, however wrongfully, that Mr. Ickes could not engage in political activities, that is not a matter within the jurisdiction of the Commission.

[5]Mr. Ickes' role is not unprecedented. For example, James Baker played a similar, though arguably even more political, role in the Bush Administration.

claim that they were designed to prevent Fulani from running requires an extraordinary leap of faith and demonstrates an utterly unrealistic and revisionist view of the contemporary political environment in late 1995 and early 1996. To put it quite bluntly, the Committee's political view was that Fulani's potential candidacy was not a consideration for any actions or decisions. For anyone to allege otherwise may serve a political purpose in 1998, but is simply wrong and absurd on its face.

Complainant submits absolutely no evidence to support its allegations. However, complainant attaches a copy of a letter from Common Cause to the Attorney General, which, interestingly enough, Common Cause has chosen not to submit to the Commission. Respondents contend that Commission procedures and precedents preclude the Common Cause letter from being considered a complaint against respondents unless filed by Common Cause itself. However, to the extent that the Office of General Counsel disagrees and permits Fulani to incorporate the Common Cause letter into her complaint, respondents have attached a separate legal brief addressing those allegations and incorporates it herein.[6] Accordingly, for the reasons stated both herein and in the brief attached by respondents, the Commission should find no reason to believe that any violation was committed with respect to this allegation.

5. Respondents did not engage in any manipulation of the Commission.

Fulani alleges that respondents created a "political environment" in which they could "manipulate" the Commission, so that the Commission and its staff would impede Fulani by enforcing the Act against her but not similarly enforcing it against respondents.[7] Fulani specifically complains about the audit of her previous campaign, as well as about certain negative press accounts of her campaign which contained serious allegations as to the misuse of funds. Complaint paragraphs 11-15. No section of the Act or Commission regulations is cited as being violated.

These allegations are ludicrous. Complainants submits absolutely no evidence or other information to support its allegations. The Commission well knows that respondents have no ability to manipulate the FEC, an independent agency, as created by Congress, and that respondents have taken no actions with respect to the Commission's appropriate audit of the Fulani campaign. The Commission is also fully familiar that, while the audit process has not yet been completed with respect to the 1996 election, the Act was fully enforced with respect to the 1992 election and the audit of the Committee's 1992 predecessors, the Clinton for President

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[6]Fulani also refers to *The Choice*, a book authored by Bob Woodward, for the proposition that President Clinton "controlled" the DNC advertising. While respondents deny that the president controlled the DNC advertising, the legal significance of "control" is addressed in the attached brief of respondents. In addition, the allegations of the Woodward book have been previously addressed by the Committee in a response to the Commission in MUR 4407, which is incorporated herein by reference in its entirety.

[7]Fulani also complains about the "political orientation" of the Commission.

Committee and Clinton/Gore '92. In fact, those Committees would argue that the Commission singled them out for disparate treatment and chose to audit or enforce certain matters not audited or enforced against other campaigns or committees. Accordingly, there are no grounds for the complainant's allegation, and the Commission should find no reason to believe that any violation was committed with respect to this allegation.

6. Respondents did not expend soft money to cause the Commission to audit Fulani.

Finally, Fulani alleges that the DNC in coordination with respondents herein used "soft" money to cause the Commission to audit and make determinations adverse to Fulani, thus "subverting" a possible 1996 candidacy by her. Complaint paragraph 16. No section of the Act or Commission regulations is cited.

Such an allegation is absurd on its face. Complainant submits absolutely no evidence or other information to support its allegations. Respondents deny that soft money was used to cause the Commission to take any action or make any determination. Respondents did not so expend funds for such a purpose and did not coordinate the expenditure of funds with any other person or group for such a purpose. Accordingly, the Commission should find no reason to believe that any violation was committed with respect to this allegation.

CONCLUSION

It is clear from any considered and reasonable analysis of Fulani's allegations that her real complaint is with the Commission's treatment of her in the audit process. The allegations with respect to respondents are made with no support or evidence whatsoever, and Fulani does not even attempt to show what provision of the Act or regulations may have been violated. Her unhappiness with the Commission's actions as well as the outcome of the 1996 election make transparently clear that she is positioning herself for either an upcoming candidacy, legal action against the Commission or both. The Commission should see through this meritless complaint and expeditiously dismiss it, finding no reason to believe that respondents committed any violation of the Act.

Respectfully submitted,

Lyn Utrecht
General Counsel

Eric Kleinfeld
Chief Counsel

Attachment

BEFORE THE FEDERAL ELECTION COMMISSION

RESPONSE OF THE DEMOCRATIC NATIONAL COMMITTEE, THE CLINTON/GORE '96 PRIMARY COMMITTEE, INC. AND THE CLINTON/GORE '96 GENERAL COMMITTEE, INC.

Lyn Utrecht
General Counsel
Clinton/Gore '96

Joe Sandler
General Counsel
Democratic National Committee

Eric Kleinfeld
Chief Counsel
Clinton/Gore '96

February 1998

SUMMARY OF ARGUMENT

I. In creating the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 et seq. ("FECA"), Congress explicitly recognized that political parties are unique entities, and as a result, the law contains provisions applicable solely to party spending. These provisions are different from the rules governing all other organizations. The Federal Election Commission ("FEC" or "Commission") -- the independent agency specifically entrusted by Congress with the duty of interpreting and enforcing the FECA -- has set forth specific rules over the past twenty years permitting parties to spend both regulated Federal and unregulated non-Federal funds, i.e., hard and soft money, in coordination with the party ticket of Federal and non-Federal candidates. See, e.g., 11 C.F.R. §106.5 (1996).

II.A. Political party issue ads addressing legislation under congressional consideration and of import to the respective party platforms are precisely the type of party activity which the FEC has permitted to be paid for with a mix of regulated and unregulated money. In so doing, the FEC has explicitly recognized that such ads have a secondary benefit to all candidates on the party ticket. See FEC Advisory Opinion 1995-25, Fed. Election Camp. Fin. Guide (CCH) ¶6162 (1995) (issue advertising "encompasses the related goal of electing Republican candidates to federal office"). Under applicable provisions of the FECA, the only standard in determining whether party ads qualify as issue advocacy is the content of the ads. If the ads do not contain words of express advocacy or an electioneering message, then they qualify as issue ads and are not considered candidate ads. See FEC Advisory Opinion 1984-15, Fed. Election Camp. Fin.

Guide (CCH) ¶5766 (1984); FEC Advisory Opinion 1985-14, Fed. Election Camp. Fin. Guide (CCH) ¶5819 (1985); FEC Advisory Opinion 1995-25, Fed. Election Camp. Fin. Guide (CCH) ¶6162 (1995).

B. The FEC has ruled in legally binding advisory opinions that unless an "electioneering message" is present in the communication, e.g., explicit references to an upcoming election, explicit exhortation to take action with respect to an election, identification of an individual as a candidate for Federal office, or other explicit electoral message, the communication is not considered a contribution to or expenditure in connection with a Federal candidate's campaign, even if that candidate is mentioned in the communication. Id. In addition, nearly every court which has reviewed FEC actions in applying this standard has taken an even narrower view -- unless the ad contains words such as "elect" or "defeat" when referring to a clearly identified candidate, the ad is constitutionally protected and is not subject to the contribution or spending limits of the FECA. See FEC v. Massachusetts Citizens for Life ("MCFL"), 479 U.S. 238 (1986); FEC v. Christian Action Network, Civil Action No. 94-0082-1 (W.D. Va. dismissed June 28, 1995), aff'd 894 F. Supp. 946 (3d Cir. 1996). This content-based standard requiring a communication to contain words of express advocacy in order for it to be subject to the provisions of FECA dates back twenty years to the landmark Supreme Court case of Buckley v. Valeo, 424 U.S. 1 (1976).

C. Because the proper analysis of the permissibility of issue ads is dependent solely on content, whether any coordination occurred between the party and its presidential candidate is irrelevant. In fact, the FECA and the FEC have, since their inception, presumed that party activity is always coordinated with candidates of the party. As recently as 1996, the FEC stated

in a brief filed at the Supreme Court that, "party officials will as a matter of course consult with the party's candidates before funding communications intended to influence the outcome of a Federal election". Brief for the Respondent at 17, Colorado Republican Federal Campaign Committee v. Federal Election Commission, 116 S. Ct. 2309 (No. 95-489)("Colorado Republican"). Unlike the separation which is required between independent non-party organizations and candidates, the law does not require any separation between a party and its candidates. Indeed, the opposite is true -- the law actually contemplates close coordination between a party and its candidates, even authorizing a presidential candidate to merge his or her campaign committee with the party committee, if he or she so desires. 2 U.S.C. §432(e)(3)(A) and (i).

D. Because coordination is fully permissible and actually presumed to occur, there is no limit on what form that coordination takes. Under FEC regulations, coordination runs the gamut from mere suggestion to complete direction and control. 11 C.F.R. §109.1 (a)-(e)(1996). There is no distinction in the law -- nor has the FEC ever made a distinction -- between coordination and control, and there is absolutely no authority for the proposition that coordination is permitted while control is not. Under the applicable provisions of the law, a presidential candidate may fully participate in the making, editing and airing of party issue ads without any legal consequences as to the payment for those ads. Therefore, it is both legal and appropriate for the President to be involved in reviewing and approving the ads that promote the issues of his Administration and the Democratic party.

III.A. The Democratic National Committee ("DNC") issue ads aired in 1995 and 1996 discussed legislative issues pending before Congress. They were intended to sharpen and clarify

the differences between Democrats and Republicans on the balanced budget, Medicare and Medicaid, welfare, education and other critical issues facing Congress. These ads did not contain words of express advocacy nor, under any analysis of their content, an electioneering message. There was no reference to an election or to any individual as a candidate. The DNC ads were indistinguishable from identical ads proposed by the Republican National Committee in FEC Advisory Opinion 1995-25, wherein the Commission did not require attribution to the 441a(d) party expenditure limitation. Fed. Election Camp. Fin. Guide (CCH) ¶ 6162 (1995). The FECA entitles the DNC and the Clinton/Gore campaign to rely on this advisory opinion as legally binding protection, and they did rely on that opinion. 2 U.S.C. 437f.

B. For a political party and its candidates to utilize all legal avenues of spending money in order to disseminate their message -- particularly where, as here, the avenues have been sanctioned by the FEC -- does not amount to a conspiracy to evade the FECA limits simply because candidates are benefitted from the legal spending. The FEC has spent over twenty years attempting to draw workable lines and distinctions for the regulated community governing party activities. These rules are laid out in advisory opinions, regulations, enforcement matters, court briefs and judicial decisions, all of which were adhered to in the 1996 campaign. There simply cannot be a criminal conspiracy when as recently as December 1996, a majority of Commissioners at the FEC could not agree that issue ads are regulated at all by FECA. Matter Under Review 4246 (December 27, 1996) (Democratic National Committee, Inc.). Hence, the expenditures for the DNC issue ads were made in full compliance with the law.

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INTRODUCTION

The Democratic National Committee sponsored a series of legislative advocacy media advertisements in 1995 and early 1996, focusing exclusively on legislative issues and proposals pending before Congress. Those ads, which mentioned the President, discussed him in the context of his plan or position on issues such as Medicare, Medicaid, education, environment, welfare reform, Social Security or balancing the budget. The ads contrasted the current Administration's policies with the legislative agenda of the Republican Congress, and included mention of Senator Bob Dole as Majority Leader, and Representative Newt Gingrich, as Speaker of the House. The ads did not urge the audience to vote for any particular candidate or party, nor was there any mention of an election. None of the ads ran during the general election campaign and, during the period of the 1996 primaries, ads were not run in States holding primaries for thirty days prior to that primary.[1] The DNC coordinated and consulted with Democratic officeholders and candidates, including the President, in developing and broadcasting the ads.

The FECA limits contributions by the national committee of a political party to party candidates for Federal office and, in addition, limits expenditures by such committees "in connection with" the general election campaigns of those candidates. 2 U.S.C. §441a(a) and 44la(d)(hereinafter referred to as "441a(d) expenditures"). In addition to contributions and 441a(d) expenditures, political parties can engage in other activities benefitting candidates. These include general party building activities as well as activities supporting the party ticket

[1] The general election campaign period dated from the national nominating convention in August 1996 through the November 1996 general election.

(e.g., slate cards, bumper stickers, get-out-the-vote drives, etc.) See 2 U.S.C. §§431(8)(A)(v),(x) and (xii). The Federal Election Commission in its Advisory Opinions has for more than 12 years held that issue ads which neither promote nor oppose any specific candidate are outside the scope of the 44la(d) expenditure limitation, even if candidates on the party ticket reap the benefit of such ads. FEC Advisory Opinion 1985-14, Fed. Election Camp. Fin. Guide (CCH) ¶ 6162; FEC Advisory Opinion 1995-25, Fed. Election Camp. Fin. Guide (CCH) ¶ 5819 (1995). The DNC issue ads fall squarely within these prior advisory opinions, and, hence, amounts spent on those ads are not attributable to either the committee's 44la(d) expenditure limitation, or its contribution limit. 2 U.S.C. §441a(a).

Recognizing the role that political parties have historically played in supporting candidates on their ticket, as well as the role that candidates play in the operation and structure of their parties, the Commission has always presumed that parties coordinate all activities with their candidates, whether the activity involves advertising to promote specific candidates or issue advocacy advertising. This presumption, grounded in the truism that political parties and their candidates are inextricably intertwined, leads to two conclusions: l) coordination with a party candidate can never convert an expenditure for issue advocacy ads, that is, ads which are not candidate related, into a 44la(d) expenditure attributable to a specific candidate; and 2) expenditures for issue ads which do not contain express advocacy never count against the 44la(d) limitation, regardless of coordination.

Not only was it permissible for the DNC to coordinate with any candidate or committee in the production of legislative issue ads, but the underlying assumption has always been that such coordination would occur. Thus, expenditures for issue advertisements do not count against

any contribution or expenditure limit applicable to the DNC for the 1996 Presidential election campaign, regardless of coordination. Additionally, as permitted by FEC regulations, the costs of such ads may be defrayed with a mixture of "hard" and "soft" money. See also Matter Under Review 4246 (December 27, 1996) (Democratic National Committee, Inc.) (hereinafter "MUR 4246").[2]

Moreover, the courts have viewed issue advocacy as constitutionally protected speech. Numerous courts, including the Supreme Court, have held that communications which lack explicit terms expressly advocating the election or defeat of a clearly identified candidate are not within the purview of the FECA prohibitions. These decisions adhere to the basic tenet that issue oriented political speech is a constitutionally guaranteed right protected by the First Amendment.

As rulings of both the courts and the Commission make clear, issue advocacy communications remain issue advocacy communications regardless of whether or not those communications are coordinated with a candidate. Coordination cannot transform an issue advocacy communication into an express advocacy communication. A communication which lacks any explicit exhortation to vote for a specific candidate can never reach the level of an express advocacy communication and therefore, is constitutionally protected speech.

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[2] A MUR number is the designation assigned by the Federal Election Commission to an investigation.

DISCUSSION

I. FECA PRESERVES ROLE OF POLITICAL PARTIES IN SUPPORTING CANDIDATES

A. The Role Of Political Parties Under FECA Is Unique

Congress, in drafting the FECA, recognized the unique role political parties have historically played in the electoral process. By nominating candidates who appear on the ballot, political parties have traditionally been a dominant force in the selection of political officeholders at all levels of government. The FECA defines the term political party as follows:

> The term "political party" means an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization. 2 U.S.C. §431(16).

Clearly, this is a limited definition, covering only a part of what a political party does -- the nominating function -- and only with respect to Federal (rather than State and local) candidates. However, this definition recognizes a basic principle of the American electoral process -- that parties and candidates are interrelated and if the two were required through a misguided interpretation of the law to be absolutely separate, then political parties would be rendered meaningless.

The FECA also specifies definitions for the terms "national committee" and "State committee," which are "responsible for the day-to-day operation" of the party at the State or national levels. 2 U.S.C. §431(14) and (15). The Commission has in its regulations added to these definitions the term "subordinate committee of a State committee" which is "responsible for the day-to-day operation" of the party at the level of city, county, neighborhood, ward, district, precinct or any other subdivision of a State...". 11 C.F.R. §100.14(b)(1996). Thus,

political party committees are structured with and operate at many different tiers, from neighborhood to national, at both Federal and non-Federal levels.

The legislative history underlying the FECA indicates that Congress purposefully crafted this network of FECA provisions uniquely applicable to political parties. Congressional intent was to assure that political parties would continue to have an important role in Federal elections, especially in "publicizing issues," and, indeed, Congress foresaw that public financing would result in "large sums" of money going to "financially hard pressed parties," viewing this result as positive by increasing their voice. S. REP. NO. 93-689, 93d Cong., 2d Sess. (1974). Specifically, the Senate Committee on Rules and Administration stated:

> [A] vigorous party system is vital to American politics.... [P]ooling resources from many small contributors is a legitimate function and an integral part of party politics.... Thus, parties will play an increased role in building strong coalitions of voters and in keeping candidates responsible to the electorate through the party organization.
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> In addition, parties will continue to perform crucial functions in the election apart from fundraising, such as registration and voter turnout campaigns, providing speakers, organizing volunteer workers and publicizing issues. Indeed, ...the combination of substantial public financing with limits on private gifts to candidates will release large sums presently committed to individual campaigns and make them available for donation to the parties, themselves. As a result, our financially hard-pressed parties will have increased resources not only to conduct party-wide election efforts, but also to sustain important party operations in between elections. Id. at 7-8 (emphasis added).

Recognizing this special role created in the FECA by Congress, the Supreme Court in its recent decision in Colorado Republican Federal Campaign Committee v. Federal Election Commission, 116 S. Ct. 2309 (1996) stated:

> In fact, rather than indicating a special fear of the corruptive influence of political parties, the legislative history demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections. Id. at 2320.

Thus, unique and different rules for political parties are ingrained in the framework of the law governing campaign financing. Much of the confusion surrounding the realm of permissible activities for political parties is caused by disregard for the party-related provisions of the law and the mistaken application of the non-party provisions to party activities.[3]

B. There are Two Legal Types Of Spending By Political Parties: Federal vs. Non-Federal Spending

Political parties play an integral role in the selection of candidates at every level of government with the typical party slate including candidates at the national, State and local levels. Their expenditures for activities involving State and local candidates are governed by State law, while expenditures concerning Federal candidates are governed by the FECA. It is unrealistic to expect that a party can or will absolutely segregate its nominating function on behalf of Federal candidates from its nominating function on behalf of state and local candidates, nor is a party required to. The Commission has never insisted that there be a wall between Federal and non-Federal activity, but instead recognizes a natural blending of the two and in fact, has dealt with this in the so-called "allocation" regulation. 11 C.F.R. §106.5 (1996). This regulation expressly permits parties to pay for activities benefitting both Federal and non-Federal

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[3] For example, non-party issue-oriented organizations must comply with a different subset of legal requirements when engaging in activities similar to those at issue herein. See 11 C.F.R. §114 (1996).

candidates with a mix of money, some of which is regulated by the FECA and some of which is not. The FEC requirement that parties allocate between their Federal ("hard" money) and non-Federal ("soft" money) accounts is based on the recognition that virtually all party spending is intended to, and does, benefit the election of party candidates. For example, 11 C.F.R. §106.5(a)(2)(1996) provides:

> Party Committees that make disbursements in connection with federal and non-federal elections shall allocate expenses according to this section...

See also FEC Advisory Opinion 1978-46, Fed. Election Camp. Fin. Guide (CCH) ¶ 5348 (1978); FEC Advisory Opinion 1995-25, Fed. Election Camp. Fin. Guide (CCH) ¶6162 (1995).[4]

The types of activities covered by this regulation are wide-ranging and reflect a variety of party functions. Administrative expenses, fundraising, the production of sample ballots and campaign materials, voter registration or get-out-the-vote drives, and generic advertising all may be paid for using a mixture of regulated money and unregulated money, as reflected in the Commission's regulations. See 11 C.F.R. §106.5(a)(2)(i)-(iv)(1996).[5]

The combined effect of these above cited provisions is to create, within the framework of the FECA, a unique regulatory and statutory scheme for political parties to assist those organizations in carrying out their mission -- the nomination and election of candidates who will

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[4] This blending of hard and soft money is also recongnized with respect to *raising* this money. Candidates and parties are expressly permitted to engage in "joint fundraising" during which hard and soft money are raised simultaneously. See 11 C.F.R. § 102.17 (1996). Nothing in the FECA or FEC regulations prohibits a Federal candidate from raising soft money for his or her political party.

[5] In fact, the Commission has recognized since 1978 that parties may use unregulated money to pay for certain activities, even where Federal candidates are benefitted by the activities. See 55 Fed. Reg. 26058, 26059 (June 26, 1990)(Commission's Explanation and Justification). In adopting provisions codified at 2 U.S.C. §431(8)(B)(x)(2) and (xii)(2), Congress ratified the agency's previous rulings in Advisory Opinions 1978-10 and 1978-46 on the use of unregulated money. See H.Rep.No. 96-422, 96th Cong., 2nd Sess. (1979) at 8 and 9.

become officeholders at every level of government. No other group is accorded similar treatment under the FECA, thereby distinguishing political parties and their committees from all other organizations. Clearly, the Commission would never have promulgated these regulations unless it fully intended to allow parties to use soft money in paying expenditures for issue ads.

C. The DNC And State Parties Were Legally Permitted To Pay For The Issue Advertising That Benefitted The Entire Democratic Ticket

As noted above, the same FEC ruling that clearly authorized the DNC and state parties to run issue advertising promoting the party's message on legislative issues also authorized the payment for those advertisements to be made with a prescribed combination of Federally-regulated ("hard") and non-Federal ("soft") money. The FEC's rules require that activities that promote the party as a whole -- "generic" activity -- be paid for by party committees with a prescribed ratio of "hard" to "soft" money. This ratio is fixed by rule in the case of national party committees, and in the case of state party committees is based on the ratio of Federal to non-Federal offices on the ballot in the next general election. 11 C.F.R. §106.5.

In Advisory Opinion 1995-25, the FEC ruled that issue advertising proposed to be run by the RNC, which was identical in nature to that run by the DNC and state Democratic parties, "should be considered as made in connection with both Federal and non-Federal elections" and should therefore be paid for with a combination of hard and soft money based on the party committee's applicable ratio as specified in the FEC regulations. 2 CCH Fed. Elec. Camp. Fin. Guide ¶ 6162 at p. 12,109. That is exactly what the DNC and the state Democratic parties did.

Republicans and some so-called reform groups have charged that the use of soft (non-

Federal) money to pay part of the costs of the advertising, although completely legal under FEC rules as explained above, was nevertheless somehow wrong because the advertising was really run to influence only the Presidential election -- not state or other non-Federal races. In fact, the DNC's ads, which highlighted the differences between the Democratic and Republican positions on key issues including Medicaid, Medicare, educational funding, environmental enforcement and criminal justice, were intended to and did benefit Democratic candidates up and down the ticket by changing voters' image of the Democratic party, its values, what it stood for and what it was trying to achieve:

- During the period the DNC and Democratic state parties ran the issue advocacy advertising, public identification with the Democratic party increased nearly 10 points -- from about 29% in August 1995 to about 39% in August 1996.

- The DNC ran issue ads in 33 states and no ads in 17 states. Of the 22 new seats the Democrats picked up in the U.S. House of Representatives, 100% were in states where the DNC and/or state parties ran issue advertising.

- Five of seven Governorships won by Democrats in 1996 were in states where the DNC and/or state parties ran issue ads (Washington, Missouri, New Hampshire, North Carolina and Florida).

- Three of the four State Senate chambers where control was shifted from the Republicans to the Democrats were in states where the DNC and/or state parties ran issue ads (Wisconsin, Tennessee and Connecticut).

• Five of six State House chambers where control was shifted from the Republicans to the Democrats were in states where the DNC and/or state parties ran issue ads (California, Nevada, Illinois, Michigan and Maine).

• Of the 31 total seats that Democrats picked up (i.e., won open seats or beat GOP incumbents) in State Senate chambers, 22 (71%) were in states where the DNC and/or state parties ran issue ads.

• Of the 134 total seats that Democrats picked up in State House chambers, 115 (86%) were in states where the DNC ran issue advertising.

Thus, the DNC and Democratic state party issue advertising was not only absolutely legal, it was an extremely valuable and entirely appropriate means of conveying the Democratic message and benefitting the party and its candidates as a whole.

II. THE STANDARD FOR DETERMINING 441a(d) VS. ISSUE ADVOCACY EXPENDITURES IS EXPRESS ADVOCACY.

Recognizing the close ties between a political party and its candidates, Congress, in enacting the FECA, granted political parties a special spending right with regard to their Federal general election candidates. 2 U.S.C. §441a(d). This section is not, and has never been construed to be, the only way parties may spend money for advertisements, but is simply one category of spending which is directly regulated by the FECA.

Section 441a(d) permits a national committee to make limited expenditures "in connection with" the general election campaign of its Presidential candidate, while both a

national committee and a state committee each have a separate limitation for expenditures in connection with the general election campaign of its House or Senate candidates. 2 U.S.C. 441a(d). The party committee must make these expenditures from its Federal account.[6]

Expenditures for communications which have a sufficient nexus to a candidate's election to be deemed "in connection with" that candidate's campaign count against the 441a(d) limit. See FEC Advisory Opinion 1985-14, Fed. Election Camp. Fin. Guide (CCH) ¶ 5766 (1985). However, expenditures for communications which discuss or advocate issues do not count against that limit, even if those communications depict or mention a candidate. The sole factor which the Commission has ever used in determining whether an expenditure for a communication to the general public is attributable to the 441a(d) limit is the content of that communication. Thus, what words and images appear in the communication determine the treatment under the FECA of the expenditures for that communication[7].

In examining the content of a communication to determine which expenditures are in connection with a Federal candidate's campaign and hence count against the 441a(d) limitation, the courts have applied a very narrow "express advocacy" standard, based on the landmark Supreme Court decision in Buckley, while the Commission has applied a somewhat broader

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[6] Many recent press reports have incorrectly suggested that the DNC ads should have been paid for by Clinton/Gore '96, the principal campaign committee. Even assuming arguendo that the ads did not qualify as issue ads, they still would not have to be paid for by Clinton/Gore '96. Rather, the DNC would still be fully justified in paying for them. However, as demonstrated below, all of these ads fully qualified as issue ads.

[7] In the Office of General Counsel's Factual and Legal Analysis in MUR 4407, the Commission apparently employs a newly invented standard based not only on the content of the communication but the purpose, as well. See e.g., Analysis at p. 8 ("The opinion of the Commission is that the distinction between permissible interaction and coordinated activity, in cases involving speech-related activity, lies in the purpose and content of any resulting expenditure.") This gross misrepresentation and exaggeration of the Commission's standard has never previously been adopted, in either rulemaking or opinion, as the Commission's official position and is utterly without precedent to the extent it suggests that anything other than content is determinative.

"electioneering message" standard. By either standard, as demonstrated below, the DNC ads clearly fall outside the scope of Section 441a(d).

A. The Appropriate Standard Under FEC Advisory Opinions Is Whether The Advertisements Contain An Electioneering Message

The Commission's content based standard for determining the permissibility of issue ads can be traced back to at least 1985. In Advisory Opinion 1985-14, the FEC, ruling that issue advocacy ads are not subject to the 441a(d) expenditure limitations, enunciated an electioneering message standard for determining whether party committee expenditures would be subject to that limit.[8] FEC Advisory Opinion 1985-14, Fed. Election Camp. Fin. Guide (CCH) ¶5766 (1985). The Commission stated:

> "...the limitations of Section 44la(d) would apply where the communication both (1) depicted a clearly identified candidate and (2) conveyed an electioneering message... Id.

Advisory Opinion 1985-14 concerned ads which discussed government waste, the farming crisis and bank failures. The Commission concluded that those ads containing the phrase "Let your Republican Congressman know what you think," did not count against the 44la(d) limit, nor did ads containing the statement "Let the Republicans in Congress know what you think - Vote Democratic." Id. Thus, even ads containing an explicit exhortation to vote for a certain

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[8] The Commission has vacillated on the standard to apply for 441a(d) expenditures. In Advisory Opinion 1978-46, an "express advocacy" test was applied. FEC Advisory Opinion 1978-46, Fed. Election Camp. Fin. Guide (CCH) ¶ 5348 (1978). The Commission held that only if a State party newsletter contained communications expressly advocating the election or defeat of a clearly identified candidate, would a portion of the expenditures for that newsletter count against the 441a(d) limitation for those candidates. Id. Several years later when addressing issue ads in Advisory Opinion 1985-14, the Commission, without explanation, apparently decided to use an "electioneering message" standard. FEC Advisory Opinion 1985-14, Fed. Election Camp. Fin. Guide (CCH) ¶ 5766 (1985).

party were deemed by the Commission to be outside the scope of the 44la(d) limits on the basis that they did not contain an "electioneering message." Although not attributable to the 441a(d) limit, the Commission concluded that expenditures for the ads were operating expenditures which could be paid only from the party's federal "hard" money account consisting of funds raised in accordance with the FECA.[9] Id.

The Commission reaffirmed its content-based electioneering test some ten years later. Advisory Opinion 1995-25 dealt with a series of ads sponsored by the Republican National Committee ("RNC") attacking President Clinton on welfare reform, Medicare, the budget and similar issues. FEC Advisory Opinion 1995-25, Fed. Election Camp. Fin. Guide (CCH), ¶6162 (1995).[10] The ads did not refer to an election nor did they include an exhortation to vote for any particular candidate or party. Even though the Commission acknowledged that the goal of the ads was "to gain popular support for the Republican position on given legislative measures and to influence the public's positive view of Republicans and their agenda -- encompasses the related goal of electing Republican candidates to Federal office", these ads failed to meet the electioneering message standard.[11] Id. Expenditures for ads explicitly attacking PresidentClinton and his policies were not found allocable as coordinated party expenditures

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[9] In other words, the Commission required that payments for those ads be made from another category of party money. Just as 441a(d) is one such category, operating expenditures (which are not limited in amount) is another, and based on content, ads must be paid from one or the other.

[10] President Clinton, who at that time was a candidate for the Democratic nomination for President, was directly depicted in the ads.

[11] As such, the expenditures were in connection with both Federal and non-Federal elections and were required to be allocated between the party's Federal and non-Federal accounts in accordance with FEC regulations, in the same way that party administrative expenses or generic voter drive costs are allocated. See 11 C.F.R. §106.5 (1996).

subject to the 441a(d) limit, even though they were to air at a time when he was a candidate for President.[12]

The Commission has had an opportunity to revisit its analysis of party payment for issue advocacy ads in a recent enforcement action, MUR 4246, concerning ads similar to those involved in Advisory Opinion 1995-25. The ads in MUR 4246 addressed the health care issue then pending before Congress and were paid for by the DNC entirely from its non-Federal account. None of the expenditures for these ads were allocated in any amount to the DNC Federal account. Some of the ads featured or mentioned President Clinton. Many of the ads did not mention the Democratic party, and none urged the audience to vote for any particular party. MUR 4246, First General Counsel's Report, December 27, 1996, at 23. A clear reading of the Statement of Reasons published by the Commissioners reveals that only two apparently believed that the cost of the ads needed to be allocated between hard and soft money. MUR 4246, Statement of Reasons, June 16, 1997. Two other Commissioners stated that the ads were constitutionally protected issue advocacy outside of the FEC's jurisdiction and therefore could be allocated solely to the party's non-Federal account and paid completely with soft money.[13] Id.

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[12] As more fully explained below, the DNC was entitled by law to rely on this Advisory Opinion as it relates to the issue ads herein. The DNC ads were identical in all material respects to the ads considered by the Commission in 1995-25 and the legal protections afforded by that advisory opinion must be made available to the DNC. FEC Advisory Opinion 1995-25, Fed. Election Camp. Fin. Guide (CCH) ¶6162 (1995). See 2 U.S.C. 437f.

[13] The FEC's treatment of issue ads in MUR 4246 is consistent with their treatment in previous enforcement cases of Republican party communications which did not contain express advocacy. See MUR 2116 (August 1, 1989) (West Virginia Republican State Executive Committee), where a Republican party mailing which criticized an incumbent member of Congress for using his position to assist wealthy investors, was not attributed by the FEC to §441a(d)) and MUR 2370 (June 5, 1986) (National Republican Campaign Committee) where a Republican State party mailing criticizing Senate candidate Jay Rockefeller's record as Governor of West Virginia was not attributed by the FEC to §441a(d). Neither ad urged the public to vote for or against any candidate. See also Colorado Republican.

In other words, as recently as December 1996, a majority of the Commission could not agree that issue ads are regulated at all by the FECA. Most importantly, there was no suggestion that the content of the ads fails to meet the broad electioneering standard or that any of the costs of the ads should be attributed to the DNC's 441a(d) limit in connection with the presidential or any other Federal campaign. It is clear, as set forth below that the DNC ads at issue followed precisely the rule laid out in Advisory Opinions 1984-15 and 1995-25, i.e., they did not contain an electioneering message. FEC Advisory Opinion 1985-14, Fed. Election Camp. Fin. Guide (CCH) ¶5819 (1985); FEC Advisory Opinion 1995-25, Fed. Election Camp. Fin. Guide (CCH) ¶6162 (1995). Moreover, they are indistinguishable from the ads in MUR 4246 -- which the FEC did not require to be attributed to a specific candidate.

B. Under Nearly All Relevant Court Decisions, Express Advocacy Has Been Determined To Be The More Appropriate Standard In Considering The Application Of 441a(d)

While, as discussed above, the FEC has applied an electioneering message standard, courts have taken a narrower view and interpreted the law as requiring words of express advocacy in order to determine that an expenditure is "in connection" with the election of a candidate. Under the express advocacy standard, an expenditure for a communication would count against the 441a(d) limit only if the communication in explicit terms expressly advocates the election or defeat of a clearly identified candidate. Thus, in determining the treatment of an expenditure under the FECA, the express advocacy standard examines the language of an ad for explicit terms such as "elect" or "defeat," while the electioneering message standard considers whether there is a clear electoral message containing reference to candidacy or an election or whether the electoral portion of the message is unmistakable and unambiguous and whether

reasonable minds could not differ as to whether the message encourages the election or defeat of a clearly identified candidate.[14] No matter which standard is applied, the DNC ads qualified as issue ads and did not constitute expenditures in connection with the election of the President.

In using an "electioneering message" test to determine whether expenditures would count against a party committee's 44la(d) limit in Advisory Opinion 1985-14, the FEC specifically avoided the narrower "express advocacy" standard. FEC Advisory Opinion 1985-14, Fed. Election Camp. Fin. Guide (CCH) ¶5819 (1985); FEC Advisory Opinion 1995-25, Fed. Election Camp. Fin. Guide (CCH) ¶ 6162 (1995). Under that standard, an ad would fall within the scope of the Act and specifically of 441a(d) only if it communicated a message which expressly advocated the election or defeat of a clearly identified candidate. Id. However, in light of recent court decisions, as well as current trends in FEC regulations and enforcement actions, the express advocacy standard is the proper standard to apply to 44la(d) expenditure limitations.

1. The Origin of Term "Express Advocacy" Can Be Traced Back Over Twenty Years

The express advocacy language in the FECA is adopted directly from language in the Supreme Court's decision in Buckley. There, the Court considered the constitutionality of

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[14] The FEC in its regulations adopted a definition of express advocacy which is far more expansive than the interpretation given that phrase in the Buckley decision and which appears to be very similar to its "electioneering message" standard. 11 C.F.R. §100.22 (1996). The FEC regulation relies on reference to "external events" in determining if a communication "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of a candidate." Id. This regulation was invalidated in Maine Right To Life Committee v. Federal Election Commission , 914 F. Supp. 8 (D.Me. 1996), aff'd 98 F. 3d 1 (1st Cir. 1996). As used in this Brief, the term "express advocacy" has the same meaning given that term in Buckley -- a communication which in explicit terms expressly advocates the election or defeat of a clearly identified candidate. This is the only viable definition of that term.

language in the 1974 Amendments limiting to $1000 per year expenditures "...relative to a clearly identified candidate...advocating the election or defeat of such candidate...." Id. The Court concluded that in order to avoid invalidating that statutory language on the basis of vagueness, the phrase "must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for Federal office." The Court further elaborated by stating that this construction would restrict the application of the statutory provision to include only "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" Id. at 38 n. 52. The application of this construction has been relied on by numerous courts since the Buckley decision when interpreting the reach of the statute into constitutionally protected areas of free speech.

The discussion of the independent expenditure limitation in Buckley provides strong evidence of the Supreme Court's concern that FECA provisions avoid any limitation on constitutionally protected issue discussion. In concluding that constitutional deficiencies could be avoided only by interpreting the scope of the FECA to be limited to "...communications that include explicit words of advocacy of election or defeat of a candidate..." Buckley, 424 U.S. at 43, the Court stated:

> ...[T]he distinction between the discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest. Buckley, 424 U.S. at 42.

2. A Supreme Court Decision Interprets The Relevant Standard -- "In Connection With" -- To Be Limited To Express Advocacy

Section 441a(d), which, according to published reports, some observers have urged be applied to the DNC ads in question, limits expenditures by a national party committee "in connection with" the general election campaign of that party's Presidential candidate. 2 U.S.C. §441a(d). The phrase "in connection with" appears in another provision of the FECA -- 2 U.S.C. §441b, and the courts have clearly set forth the meaning and application of this phrase.[15]

In interpreting section 441b, the Supreme Court held in MCFL that expenditures must constitute express advocacy in order to be considered "in connection with" a Federal election. MCFL, 479 U.S. at 238. At issue in MCFL was a voter guide which presented candidate positions on pro-life issues, indicated whether the candidates agreed with the organization, and urged voters to "vote pro-life." Noting that such a statement is "marginally less direct than 'Vote for Smith,'" (the phrase used in the Buckley decision), the Court concluded that an exhortation to "vote pro-life" is express advocacy as it provides a specific directive to vote for certain candidates, rather than "a mere discussion of public issues." MCFL, 479 U.S. at 249.[16] Thus, while this case dealt specifically with the prohibition of corporate contributions and expenditures in connection with a Federal election, it impacts the interpretation of that statutory phrase elsewhere in the FECA. In other words, the phrase "in connection with" cannot have one meaning in one section of the same Act and a completely different meaning in another. Sullivan

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[15] Section 441b prohibits corporations and labor organizations from making contributions or expenditures "in connection with" a Federal election.

[16] While holding that MCFL's expenditures were in connection with a Federal election, the Court concluded that Section 441b is unconstitutional as applied to a nonprofit corporation such as MCFL. MCFL, 479 U.S. at 263.

v. Stroop, 496 U.S. 478,484 (1990); Barnson v. United States, 816 F. 2d 549 (10th Cir.), cert. denied, 484 U.S. 896 (1987). Accordingly, for a communication to be considered "in connection with" a Federal election, it must contain express advocacy.

The district court in Colorado Republican compared the use of the phrase "in connection with" in Section 441b and 441a(d) and concluded that there was no basis for giving "identical words, when used with reference to coordinated expenditures...a more expansive interpretation."

> ...[T]he fact that section 441a(d)(3) implicates first amendment freedoms argues for adoption of the more narrowly defined 'express advocacy' interpretation in order to minimize intrusions. Moreover, as Buckley notes, the limitation on contributions by State political committees, '[r]ather than undermining freedom of association...enhances the opportunity of bona fide groups to participate in the election process.' Buckley 424 U.S. at 33. Given that the effect of the regulation is to enhance political freedom of committees, I find that the 'express advocacy' standard, which is a less intrusive limitation on a committee's freedom, is consistent with the Act's purpose. I do not find any compelling justification...for expanding Buckley's carefully circumscribed exception to its prohibition against regulation of freedom of political speech. Colorado Republican, 839 F.Supp at 1454 (1993).

Moreover, contrary to what has been suggested, nothing in the Supreme Court's most recent ruling in Colorado Republican alters the express advocacy standard. In fact that decision applies the express advocacy standard to a new type of party spending -- for so-called independent expenditures.

3. The Relevant Court Decisions Have Held Where There Is No Express Advocacy, The Resulting Issue Advocacy Is Constitutionally Protected.

Since the MCFL decision, a number of lower court decisions have refused to uphold the application of the FECA provisions to issue discussion where there is no express advocacy of the election or defeat of a clearly identified candidate. The courts have reversed the FEC's attempts

line" test -- that expenditures must in express terms advocate the election or defeat of a candidate in order to be subject to the Section 44lb prohibition.

> The first amendment lies as the heart of our most cherished and protected freedoms. Among those freedoms is the right to engage in issue-oriented political speech. The highest court of this land has expressly recognized that as a nation we have a "profound... commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." New York Times v. Sullivan, 376 U.S. 254, 270 (1964). Buckley and Massachusetts Citizens For Life ensured that right for corporations as well as individuals by limiting the scope of the FECA to express advocacy. Faucher, 928 F.2d at 472.[18]

Thus, the Court invalidated FEC regulations on nonpartisan voter guides on the basis that those regulations define "partisan" to include issue advocacy within their scope and thus, barred expenditures for issue advocacy, rather than being limited to the narrower test of express advocacy. See also Faucher, 743 F. Supp. 64, 72 (D.Me. 1990), aff'd, 928 F. 2d 468 (1st Cir. 1991), cert. denied 502 U.S. 87 (1991).

Unwilling to accept the Faucher decision limiting its jurisdiction to express advocacy, the FEC tried again, promulgating new regulations incorporating an express advocacy standard into regulations governing corporate expenditures in connection with an election. 60 Fed. Reg. 64260 (December 14, 1995). As part of this rulemaking proceeding, a new definition of express

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[18] A seemingly different result occurred in Federal Election Commission v. Furgatch, 807 F.2d 857 (9th Cir. 1987), cert denied, 424 U.S. 850 (1987). In interpreting the reporting requirement for independent expenditures, the Court of Appeals for the Ninth Circuit concluded that Buckley "does not draw a bright and unambiguous line." Furgatch, 807 F. 2d at 861. Concluding that context was relevant, the Court held that it was sufficient to discern an express advocacy message from the communication as a whole despite the lack of specific words urging voters' support for a candidate. Furgatch, 807 F.2d at 862. The decision in Furgatch relies on and cites the Court of Appeals ruling in MCFL, 769 F.2d 13 (1st Cir. 1987), which was overturned by the Supreme Court. Furgatch, 807 F.2d at 860. The Supreme Court had issued its ruling in MCFL only 25 days prior to the Ninth Circuit ruling in Furgatch. Inasmuch as the Ninth Circuit made no reference the Supreme Court ruling, the lower court may not have been aware of that ruling. However, even under the Furgatch decision the DNC ads at issue herein would not constitute express advocacy, based on the discussion below.

advocacy was incorporated into FEC regulations. 11 C.F.R. §100.22 (1996). In determining whether express advocacy exists, the new regulation relies on a two prong test: (1) whether the communication includes specific words, such as "vote for," or "defeat" or words which in context could have no other reasonable meaning other than to urge the election or defeat of a clearly identified candidate; or (2) whether the communication, as a whole with limited reference to external events could only be interpreted by a reasonable person as advocating the election or defeat of a clearly identified candidate.[19] 11 C.F.R. §100.22(a)(1996). Obviously, this new definition goes far beyond the Buckley test of words of exhortation.

Despite this broad new definition, even the FEC recognized the need to eliminate constitutionally protected issue advocacy from its application. In its Explanation and Justification of the above regulation, the FEC unequivocally stated that the term "express advocacy" does not encompass pure issue advocacy. 60 Fed. Reg. 35304 (July 6, 1995). The Explanation and Justification accompanying Section 100.22 states:

> ...[T]he revised rules in Section 100.22(b) do not affect pure issue advocacy, such as attempts to create support for specific legislation, or purely educational messages. As noted in Buckley, the FECA applies only to candidate elections. See, e.g., 424 U.S. at 42- 44, 80. For example, the rules do not preclude a message made in close proximity to a Presidential election that only asked the audience to call the President and urge him to veto a particular bill that has just been passed, if the message did not refer to the upcoming election or encourage election related actions. Id.

In essence, the FEC recognized a line between express advocacy, which could be regulated, and

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[19] This second part of the definition of express advocacy appears to be the FEC's attempt to incorporate its "electioneering message" concept into the definition of what constitutes express advocacy. See Furgatch, 807 F. 2d 857.

to regulate expenditures for publications presenting the positions held by candidates on specific issues, as well as the agency's attempts to limit communications presenting an organization's views on the performance of specific officeholders with regard to certain issues. Federal Election Commission v. National Organization for Women), 713 F. Supp. 428, 433 (D.D.C. 1989) ("NOW") (letters that failed to "expressly tell the reader to go to the polls and vote against particular candidates" were not "in connection with" a Federal election under Section 441b) (emphasis added); CAN (ads clearly identifying the 1992 Democratic presidential nominee, but lacking a "frank admonition" to take electoral action," do not constitute express advocacy).[17] CAN, 894 F. Supp. at 948.

In addition to the decisions above which limit "in connection with" to express advocacy, a number of court decisions concerning candidate surveys published by right to life groups have protected issue advocacy from FEC regulation, even where the express purpose of the communication was electoral. Faucher and Maine Right To Life Committee, Inc. v. Federal Election Commission, 928 F.2d 468 (1st Cir. 1991), cert. denied, 502 U.S. 87 (1991) and Maine Right to Life Committee, Inc. et. al. v. Federal Election Commission, 914 F. Supp.8 (D. Me. 1996) aff'd 98 F.3d 1 (1st Cir. 1996) cert. denied, October 6, 1997 No. 96-1818 ("MRLC").

The first in this series of decisions was Faucher, in which the Court of Appeals for the First Circuit, citing Buckley and MCFL concluded that the Supreme Court had adopted a "bright

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[17] At issue in CAN were ads which clearly identified the 1992 Democratic Presidential candidate and were hostile to proposals endorsed by that candidate. The ads were found by the Court to be "devoid of any language that directly exhorted the public to vote." CAN, 894 F. Supp. at 953. Lacking a "frank admonition" to take "electoral action," the Court held that even a negative issue ad does not constitute express advocacy. According to the Court, the ads did not contain explicit words or imagery advocating electoral action, but instead represented issue advocacy intended to inform the public about issues germane to the election. As such, the Court held the ads to be fully protected political speech over which the FEC lacked jurisdiction. CAN, 894 F. Supp. at 948.

issue advocacy, which could not. Their line, however, was still too imprecise to be acceptable to the courts because the regulation continued to draw protected issue advocacy into its net.

Consequently, portions of the new FEC regulations have been invalidated in two court decisions. Within a few months of its adoption, the revised definition of express advocacy was overturned in MRLC on the basis that the regulation was not authorized by the FECA as interpreted by the Supreme Court in MCFL. Following the same "bright line" reasoning used in Faucher, the court stated "[t]he Supreme Court will not permit intrusion upon issue advocacy." MRLC, 914 F.Supp. at 12.

More importantly, a constitutional right to issue advocacy was reaffirmed (albeit on behalf of a non-profit corporation) because the chilling effect of FEC regulations on the discussion of issues between candidates and the public is, simply put, "patently offensive to the First Amendment". Clifton and Maine Right To Life Committee, Inc. v. Federal Election Commission, 114 F. 3d 1309 (1st Cir. 1997) (invalidating FEC regulations which were found to restrict contacts between citizens, including organizations, and candidates).

Clearly, the courts have consistently resisted attempts to limit communications as long as express advocacy is absent. Even if candidates' names are mentioned in issue ads, even if the issue ads are broadcast close in time to the election, and even if it is presumed, as the FEC does, that the issue ads will benefit some candidate or group of candidates, the FEC cannot exert jurisdiction over such ads in the absence of express advocacy. To the contrary, every time the FEC has interpreted express advocacy beyond the Buckley words of exhortation and in so doing, has captured issue advocacy, the courts have found the attempted extension of the FEC's jurisdiction unacceptable.

C. Coordination And Control Are Irrelevant In Determining The Legality Of Issue Advocacy Ads

As demonstrated above, both Commission rulings and case law focus exclusively on the content of a communication in determining whether that communication is issue advocacy or a 441a(d) expenditure. The assertion contained in some published reports that the President's involvement in DNC advertising converts those ads into 441a(d) expenditures is ludicrous. Coordination, indeed control, of party issue ads by a candidate or his agents is legal and does not transform those ads into expenditures attributable to the candidate under section 441a(d) or into contributions. Content alone is determinative. Any other approach completely lacks FEC precedent, is contrary to the historical role of political parties in campaigns, and would be constitutionally invalid[20].

1. Candidates And Their Parties Are Presumed By Law To Coordinate Their Activities

The FEC has consistently taken the position that candidates and their political parties are permitted to fully coordinate their campaign activities. Indeed, from its inception, and as embodied in its initial set of regulations, the Commission has presumed that activities undertaken by a political party are coordinated with party candidates. This presumption underlies all of the

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[20] As was stated in footnote 8 above, in the Office of General Counsel's Factual and Legal Analysis in MUR 4407, the Commission apparently employs a newly invented standard based not only on the content of the communication but the purpose, as well. See, e.g., Analysis at p. 8 ("The opinion of the Commission is that the distinction between permissible interaction and coordinated activity, in cases involving speech-related activity, lies in the purpose and content of any resulting expenditure.") This gross misrepresentation and exaggeration of the Commission's standard has never previously been adopted, in either rulemaking or opinion, as the Commission's official position and is utterly without precedent to the extent it suggests that anything other than content is determinative.

agency's precedents on the issue, and has, over the years, been reiterated by the FEC in its advisory opinions, rulemaking proceedings, enforcement matters, and in litigation.

Recently the FEC clearly stated and reviewed the history of this presumption in its Respondent Brief, Colorado Republican, filed before the Supreme Court:

> First a party expenditure is coordinated only if it is attributable to a particular candidate (as distinct from "generic" appeals for support for the party's candidates as a group). That determination is made on a case-by-case basis and depends upon whether the communication "(1) depict[s]a clearly identified candidate and (2) convey[s] an electioneering message." Advisory Opinion 1985-14 at 11, 185; see page 3, *supra*. If the expenditure is attributable to a particular candidate, it is then conclusively deemed to be coordinated with that candidate, based on the categorical determination that "[p]arty committees are considered incapable of making independent expenditures in connection with the campaigns of their party's candidates." Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 28-29 n.1. See 11 C.F.R. §110.7(b)(4) (party committees "shall not make independent expenditures in connection with the general election campaign of candidates for Federal office"); FEC Advisory Opinion. 1988-22, Fed. Election Camp. Fin. Guide (CCH) ¶5932 (1988) (with respect to the campaign expenditures of political party committees, "coordination with candidates is presumed and 'independence' precluded"). Brief for the Respondent at 23-4, Colorado Republican at 24.
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> The FEC's determination that political parties are 'incapable of making "independent" expenditures in connection with the campaigns of their party's candidates," DSCC, 454 U.S. at 28-29 n.1, is entitled to substantial deference. That determination [which] rests in part on the empirical judgment that party officials will as a matter of course consult with the party's candidates before funding communications intended to influence the outcome of a federal election." Brief for the Respondent at 27, Colorado Republican (emphasis added).

Similarly, the Attorney General, in a recent letter to Senator Orrin G. Hatch, dated April 14, 1997, reflected this view stating:

> The FECA does not prohibit the coordination of fundraising or expenditures between a party and its candidates for office. Indeed, the Federal Election Commission....has historically assumed coordination between a candidate and his or her political party.... With respect to coordinated media advertisements by political parties...the proper characterization of a particular expenditure depends not on the degree of coordination, but rather on the content of the message". Letter from Attorney General Reno to Senator Hatch (April 14, 1997) at 7 (emphasis added).

Clearly, the government has correctly observed the historical and unique relationship, whereby candidates and parties function in concert.

2. Control Is Legally Indistinguishable From Coordination

Apparently, acknowledging that coordination is permissible, some published reports and critics have advanced a non-existent legal distinction between "coordination" and "control". The idea that "control" is somehow legally different from "coordination" is completely without support. Under the law governing "independent" expenditures where, unlike here, coordination is an issue, expenditures made at the "direction" of the candidate are simply treated as coordinated. §109.1(b)(4)(i) (1996).[21] Under this regulation, coordination runs the gamut from mere suggestion to complete control. Id. Thus, in each instance when the FEC uses the word "coordinated", "control" would be one means of coordination. The fact that a party expenditure is "controlled" by a candidate, however, has nothing to do with the determination as to whether that expenditure is attributable to a particular candidate. That determination -- i.e., whether a party advertising expenditure coordinated with a candidate is an in-kind contribution to that

[21] Any assertion that the DNC issue ads should be treated -- or were intended -- as independent expenditures is mistaken. Under the law, they need not be treated as independent.

candidate or is allocable to the 441a(d) party spending limit -- depends on the **content of the ad** and whether it contains express advocacy.

The notion that "control" of party expenditures by a candidate (particularly the President who is viewed as the head of the party) would render every controlled expenditure allocable to that candidate is also undercut by other provisions of the Act. The statute specifically provides that the President may designate the national committee of the political party as his principal campaign committee.[22] 2 U.S.C. §432(e)(3); 11 C.F.R. §102.12(c)(1) and §9002.1(c)(1996). Had the President chosen to do that, there would not only be control by the President but complete **identity** between the President, his campaign committee and the national party committee. The assertion that the President cannot control the expenditures of his own party when it could legally function both as the national committee of the party and his own campaign committee is totally ludicrous.

Similarly, the notion that there are permissible and impermissible degrees of coordination is utterly without support. The primary reason that the FEC applies a **content** test to determine whether a party committee communication to the general public qualifies as a coordinated party expenditure under Section 441a(d) is because it is both legally and factually impossible to distinguish between degrees of coordination. If an expenditure is a little bit coordinated it is fully coordinated. To suggest that it was permissible for Senator Bob Dole to actually **make** an RNC "issue" ad describing his life story by speaking into the camera for the express purpose of

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[22] Designation of the national committee of the party as principal campaign committee cannot occur in the primary election period because ordinarily there is more than one candidate for nomination, and another provision of the law precludes a committee from serving as the principal campaign committee of more than one candidate. 2 U.S.C. §432(e)(3)(A).

making that ad, while it was impermissible for President Clinton to edit an advertisement talking about the policies of his administration and legislative priorities of the Democratic party is on its face absurd.[23]

3. No FEC Precedent Supports The Proposition That Candidate Control Of Party Activity Is Impermissible

The FEC, since acknowledging over 20 years ago the close relationship between a party and its candidates has consistently presumed that candidates had full input into the activities of their parties and that those activities were intended either directly or indirectly to benefit the election of the parties' candidates. Given this close relationship and obvious intent to achieve the election of its own candidates, the FEC set up a clear content-based test for determining when those expenditures are attributable as a contribution to or expenditure on behalf of a particular candidate. If the message does not contain express advocacy, the communication is not attributable to the 441a(d) limitation. No amount of coordination or control changes this analysis. [24]

Indeed, it is of no legal consequence if a party candidate completely controls the content of a party issue advocacy message, as well as the publication and distribution of that message. Coordination between a party candidate and party committee on a communication has no impact on the issue of whether that communication in explicit terms expressly advocates the election or

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[23] President Clinton was not involved in the filming of the issue ads; Senator Dole's involvement in the filming of the RNC ads exhibits as much, if not more, control than President Clinton's involvement.

[24] Indeed, in the MURs regarding party issue advertising, including the MUR that generated Colorado Republican and MUR 4246, the FEC General Counsel's office does not even identify coordination as an issue, because in each case it was presumed to exist.

defeat of a clearly identified candidate. The same is true in a situation where the party controls the message and its dissemination. To conclude otherwise would completely undermine the status accorded political parties under the FECA, which clearly indicates a congressional intent to preserve parties in their role in the nomination of candidates, as well as their ability to communicate and coordinate their activities with their nominees without concern that a violation of law may occur.

Such a theory would also totally undermine the party's role in shaping and furthering the legislative agenda and priorities of its candidates. After all, it is the party's platform on which its candidates, including the presidential candidate, run for election. A conclusion that the law requires candidates or Federal office holders to distance themselves from their party in its attempts to enact their agenda into law would have a chilling and catastrophic effect on the role of parties in attempting to achieve the enactment of its platform into law.

The authorities cited in some press accounts and other reported statements in support of this control theory, including statements by Ann McBride of Common Cause, demonstrate a complete lack of knowledge of FEC law and precedent treating party committees as a unique type of organization because of their unique historical role. No authority relied upon in these reports or statements pertains to activity by party committees.[25] In fact, some critics have cited

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[25] The Senator's reliance on Advisory Opinion 1984-15 completely distorts that opinion. Advisory Opinion 1984-15 clearly presumes coordination with candidates on issue advertising, and concludes that such expenditures, regardless of coordination, are attributable to a particular candidate only if that candidate is clearly identified and if the ad contains an electioneering message. FEC Advisory Opinion 1984-15, Fed. Election Camp. Fin. Guide (CCH) ¶ 5819 (1985). That Advisory Opinion analyzes proposed ads and concludes that ads which clearly identify a Democratic presidential candidate, attack his policies and say **"Vote Republican"** must be treated as 441a(d) expenditures. Thus, this Advisory Opinion dealt with ads that contained an electioneering message. In addition the Senator's use of Advisory Opinion 1985-14 is misapplied. While cooperation or consultation was absent in the factual presentation, the Commission did not premise its holding on that fact. Absence of cooperation, consultation or coordination never was part of the Commission's holding in that Advisory Opinion which concluded that ads to

FEC rulings pertaining to independent expenditure organizations and corporate commercial activity. Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480 (1985) ("NCPAC"); MUR 3918 (May 23, 1997) (Hyatt Legal Services). The law creates a critical distinction between these organizations and party committees.

The National Conservative Political Action Committee was a non-connected organization specifically established for the express purpose of making independent expenditures, including **express advocacy** communications to the general public. NCPAC. Under the law, independent expenditures must be made without cooperation, consultation or coordination with any candidate. 11 C.F.R. § 109 (1996). In the advisory opinion originally issued to NCPAC, the FEC identified various factors including overlapping consultants between NCPAC and various candidate's campaigns which the FEC determined would destroy the independence of the expenditures. NCPAC, 470 U.S. 180. This opinion does not apply to the DNC issue ads which do not contain words of express advocacy and which were made by a party committee that is presumed to coordinate with its candidates. Moreover, the Colorado Republican case discussed previously makes clear that at least with respect to Senate and House races, party committees also may make unlimited express advocacy communications on behalf of candidates provided that they are made independently of the candidate's campaign. If, however, as with the DNC issue ads, a party communication does not contain express advocacy, the law does not require independence from the campaign and the NCPAC case analysis is irrelevant.[26] While the respondents settled this

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be aired by a Democratic party committee in many Congressional districts criticizing Republican incumbents were not attributable to §441a(d).

[26] The reliance on the MUR 3918 (May 23, 1997) (Hyatt Legal Services) is similarly inapposite. That case involved commercial advertising by a corporate entity. In that case (which was settled by a conciliation agreement that notes that the respondents settled only in order to avoid additional legal bills), the FEC concluded that a campaign committee controlled a corporation's ads, and therefore corporate expenditures were made on behalf of a

case, it is very possible that had they chosen to litigate, the court would have applied an express advocacy test even though the Hyatt ads were commercial speech. In any event, the analysis in this MUR is off point to the very different regulation of party activity, where the FEC has laid out specific guidance as to when party expenditures are attributable to particular candidates, since all such expenditures are presumed to be coordinated. Id.

In order to buttress a newly concocted theory to support an allegation of illegality in the DNC issue advertising, some critics and press accounts have thus ignored the FEC precedent specifically dealing with party expenditures and instead attempts to rely on opinions and enforcement actions related to independent expenditure committees and corporate activity which are inapplicable to party committees.

4. Coordination And Control Do Not Transform Lawful Party Issue Advocacy Into A Conspiracy To Evade Spending Limits

Notwithstanding the FEC advisory opinions directly on point and the DNC's reliance thereon, some published reports suggest that the DNC, Clinton/Gore '96 and the President engaged in a conspiracy to evade the candidate spending limits by engaging in party issue advertising while agreeing to abide by the spending limits applicable to publicly financed candidates. This argument is completely without merit. The President's agreement to abide by spending limits with respect to Clinton/Gore '96 in no way changes the permissibility of the party's issue advertising efforts, nor does it change the standards by which the issue ads are analyzed, or otherwise circumscribe the level of the President's involvement in that advertising.

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candidate. In contrast to party expenditures, the FEC has consistently taken the position that corporate expenditures which are "accepted" by a candidate through a means of coordination count as in-kind contributions to that candidate. Thus, MUR 3918 involved commercial corporate activity not political party issue advocacy.

First, there cannot be a conspiracy to engage in activity that is lawful under the FECA and the FEC's explicit guidance. The DNC, Clinton/Gore '96 and the President were entitled to rely on the FEC guidance as to permissible party activity. The candidate agreements signed by President Clinton and Senator Dole in the primary election period are applicable only to spending by their respective campaign committees, and the agreement to abide by those limits does not in any way prohibit their respective party committees from engaging in all lawful means of spending to promote the parties, their candidates and their agendas. Signing those agreements, while binding on the campaign committees, in no way extends the coverage of the law or the jurisdiction of the Commission to areas not otherwise regulated. Just as the parties are not limited in their voter registration and get-out-the-vote efforts by their presidential candidates' agreement to limit campaign spending, they are also not limited in the amount of generic and issue ads they can run. There is no violation of law in maximizing the amount of money that can be spent **legally** to get the party's position on issues to the general public, and it is not a violation of the candidate's agreement to abide by the candidate spending limits to engage in lawful party activity in addition to direct campaign spending.

Conversely, nothing in the candidate agreements limits party spending of the type at issue. Nothing in the candidate agreements limits the candidates' -- including the President's -- role in interacting with the party or as a party leader. To read such unwritten provisions into the agreements would in effect, turn the FEC's regulation on its head. Those regulations explicitly permit the presidential candidate to designate the national party as his or her principal campaign committee, if so desired. See 11 C.F.R. §102.12(c)(1) and §9002.1(c) (1996). Clearly, to allege a criminal conspiracy even though a publicly financed presidential candidate may be fully

involved with his or her party is to wholly disregard the plain language of the candidate agreements and other FEC rules.

This was no conspiracy to evade a law. It was an effort to take full advantage in full public view of the right of party committees to engage in issue advertising pursuant to specific FEC opinions stating that such advertising is legal, including opinions issued during the very presidential campaign at issue. There was no attempt to hide, conceal or cover-up this party advertising which was aired nationwide. Every ad had the required disclaimer indicating that it was paid for by the DNC or state parties, thus disclosing to the nation who was running the ads. It was publicly disclosed to the FEC in full beginning back with the first advertising in 1995. Moreover, it was the same type of advertising in which the DNC engaged in 1994 regarding the President's health care initiative.[27] The party, the campaign committee and the President had every reason to believe that this activity was legal and appropriate and the effort to get the President's message out through this lawful means of advertising cannot legitimately be characterized as a conspiracy to evade the spending limits.

Without any legal support, some critics, including Ann McBride of Common Cause, allege a violation of the spending limits because the President was involved in the advertising, and allege that because of that involvement this party spending subverted the underlying purposes of public financing.[28] As explained above, the President's role, however involved, is

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[27] It is also the same type of activity that the Republican Party has engaged in as recently as 1997 in the special congressional election in the 13th district of New York, using issue ads specifically naming the Democratic candidate, Eric Vitaliano.

[28] In addition, it would be impossible, if not unconstitutional, to conclude a conspiracy occurred based on a subjective determination of intent or purpose. For example, this is illustrated clearly by numerous facts contained in this brief. As set forth in Section III. C., Dick Morris plainly states that the purpose of the issue ads was to influence swing Republicans and conservative Democrats to win the budget battle. In addition, the statistics

legally irrelevant since this party activity is specifically allowed under the law. The solution to the perceived problem is to change the law, not to level accusations of a criminal conspiracy against those who attempted to follow it as it is presently written.[29]

III. Because DNC Advertisements Neither Contained An Electioneering Message Nor Expressly Advocated The Election or Defeat Of Any Candidate, Expenditures For Those Ads Are Not Subject to 44la(d) limitations.

A. The DNC Ads Did Not Contain Words Of Express Advocacy Or An Electioneering Message.

The DNC ads aired in 1995 and 1996 contained no words of express advocacy, and, therefore, under the numerous court decisions reviewed above, were constitutionally protected and did not count against the Committee's 441a(d) limitation on expenditures in connection with President Clinton's general election campaign. Moreover, the DNC issue ads were reviewed under and designed to comply with the FEC's "electioneering message" standard which can encompass communications not including express advocacy.

Although the FEC has defined "electioneering message" primarily by way of example in advisory opinions and enforcement matters, in each instance where the issue has been confronted, the FEC has premised its rulings on the content of the ad. If a clearly identified candidate is referenced or depicted, the FEC has then looked for explicit references to an

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reflected in Section I. C. demonstrate that the effect of the advertising was to benefit state and local Democratic candidates as well as Federal candidates.

[29] Some of the most recent reports suggest that the President's involvement in raising soft money which was used for the ads points to a conspiracy. That notion is directly contradictory to FEC regulations which expressly permit candidates to be involved in party fundraising, including soft money fundraising, through joint fundraisers. See 11 C.F.R. § 102.17. Nothing in the FECA and FEC requirements prohibits a candidate from raising hard or soft money for a party. Thus, assuming arguendo, that President Clinton was "deeply" involved in raising funds for the ads, there is still no violation of law and no conspiracy.

upcoming election, identification of an individual as a Federal candidate, an exhortation to vote for a specific candidate or party or some other explicit *electoral* message. None of the FEC opinions or enforcement matters found an electioneering message in an ad in which there was no reference to an election, no reference to a person's candidacy and no reference to taking action to remove or elect someone to office. In fact, the FEC advisory opinions regarding issue advertising have analyzed advertisements indistinguishable from the 1995 and 1996 DNC issue ads, and in those instances, have specifically concluded that the ads did not contain an electioneering message. See FEC Advisory Opinion 1984-15, Fed. Election Camp. Fin. Guide (CCH) ¶ 5766 (1984); FEC Advisory Opinion 1985-14, Fed. Election Camp. Fin. Guide (CCH) ¶5819 (1985).[30]

None of the DNC issue ads contained words of express advocacy. The ads do not state "vote for" or "defeat" or any like verbiage with regard to a candidate. The Buckley language, as now codified at 11 C.F.R. §100.22 (1996), is absent. Similarly, none of the DNC issue ads contained an electioneering message. No ad contained any reference to an upcoming election, no ad identified or referred to any individual as a candidate for office. No ad contained an exhortation to vote or other explicit electoral message.

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[30] In sharp contrast to those ads found to lack an electioneering message are a limited number of cases where the Commission has required attribution of communication expenditures to the 441a(d) limitation. Generally, the Commission has required attribution only for party communications which 1) contain an exhortation to vote for a specific party (Advisory Opinion 1984-15, ad contrasting candidate statements with his record coupled with exhortation to "Vote Republican" Fed. Election Camp. Fin. Guide CCH) ¶5819 (1984)); or 2) refer to an individual's status as a candidate (Advisory Opinion 1985-14, mailer stating "...wave of the future could be an oil spill if Congressman X has his way," along with a list of contributions to Congressman X from oil industry, Fed. Election Camp. Fin. Guide (CCH) ¶5766 (1985)

Although the courts have consistently ruled that external factors outside the four corners of the ad cannot be considered in determining whether that communication contains express advocacy or electioneering, all relevant factors here indicate the ads did not constitute "electioneering". The DNC ads were not run in proximity to the election. No DNC issue ads were run after early August 1996. No issue ads were run during the entire general election period. During the primary season, no DNC issue ads ran in any primary state within 30 days of the election in that state. Majority Leader Dole and Speaker Gingrich appeared in DNC ads on only in their capacity as leaders of the Senate and House or as sponsors of specific legislative proposals. Once Senator Dole left the Senate, he was no longer depicted in ads. The only references to him were historical references to specific positions and legislation he advocated while Majority Leader or Senator, provided that those issues were still pending before Congress. Each and every DNC issue ad, was aimed at specific on-going legislative battles currently pending in Congress. Every mention of the President and the Vice President was in the specific context of their legislative agenda and proposals. These ads had as a corollary benefit the effect of increasing the electability of Democratic candidates as described in Section I. B. -- this was legal and entirely appropriate.

As a final note, although the facts and circumstances surrounding the ads (including the role of the President) are legally irrelevant, several reports have contained a number of factual inaccuracies and distortions, particularly with respect to the role of Dick Morris, who was one of the DNC's media consultants responsible for the ads. In fact, in his recently-made-public deposition to the House Committee on Government Reform and Oversight, Dick Morris makes abundantly clear that: (1) the primary goal behind the DNC issue advertising campaign was to

help the President win the budget battle in Congress, (Morris Deposition at 52, 55); (2) the DNC issue advertising was crafted under strict legal guidelines that made sure that the ads were bona fide issue ads about national issues pending before Congress at the time the ads were run (Morris Deposition at 117-120); (3) the advertising was targeted to affect the votes of swing Republican Senators and Congressman and to hold the votes of conservative Democrats specifically with a view toward winning the budget battle (Morris Deposition at 54-55, 133-136); (4) the RNC advertising attacking President Clinton and praising Senator Dole was in fact not on issues but, in contrast to the DNC advertising, was bereft of issue content and was thinly veiled campaign advertising (Morris Deposition at 114-116, 125-126) and (5) while the President played a role in the ads (which were after all about the policies and plans of his own administration), his role was no greater than that of many others and he was not the final arbiter of what aired or where it aired (Morris Deposition at 68, 183-184).

Thus, it is clear from Mr. Morris' testimony that the DNC issue ads were a bona fide effort on the part of the party and the administration to sway public opinion on critical national issues facing Congress. That they also benefitted Democratic candidates in the 1996 election was both legal and appropriate, and was done in a manner absent of express advocacy or electioneering, as required by law.

B. The DNC Ads Were Indistinguishable In Every Material Respect From Ads Which The FEC Previously Held Did Not Contain An Electioneering Message.

A comparison of the ads which were the subject of FEC advisory opinions and enforcement proceedings with those in question here demonstrates that the DNC issue ads were nearly identical to or were less election related than the ads which the Commission found lacked

an electioneering message. For example, one of the ads held in Advisory Opinion 1985-14 to be outside the scope of 441a(d) concerned the budget crisis. FEC Advisory Opinion 1985-14, Fed. Election Camp. Fin. Guide (CCH) ¶5819 (1985). The ad began by discussing recent bank collapses resulting in lost savings and then states, "The President and his Republican allies in Congress are all smiles and tell us not to worry". Id. The ad then points out that under Republican leadership the "budget deficit grows to monstrous proportions". Id. The ad concludes with "let's make sure this doesn't happen again. Let the Republicans in Congress know that their irresponsible management of the nation's economy must end -- before it's too late. Vote Democratic". Id. The Commission held that this ad did not include an electioneering message even though there was a reference to an election. Id.

A DNC ad aired in October 1995 on the balanced budget issue is very similar to the balanced budget ad in Advisory Opinion 1985-14. The DNC ad cited to "work, not welfare," public education, Medicare and tax cuts for working families as "values...behind the President's balanced budget plan -- Values Republican's ignore." The ad ended with the admonition "do what's right for our families," but did not urge the audience to take any action. The ad did not urge the viewer to contact his or her Congressman or woman, or to vote for or against anyone. This ad clearly contained no electioneering message under the reasoning applied in Advisory Opinion 1985-14. FEC Advisory Opinion 1985-14, Fed. Election Camp. Fin. Guide (CCH) ¶5819 (1985).

Similarly, in Advisory Opinion 1995-25, the Commission dealt with several ads including one on Medicare, entitled "Too Young To Die." The ad began with the statement,

"Medicare, you see, is going bankrupt in seven years," and then followed with a series of Republican pledges, such as "Republicans pledge that Medicare spending will not be cut." The ad concluded with "President Clinton knows Medicare is dying, but he has done nothing to save it. Apparently, his plan is to just let Medicare go bankrupt." As discussed above, the FEC did not require the expenditures for this ad to be attributed to 441a(d) limitations and permitted the use of soft money to pay a portion of the cost of those ads.

A DNC ad concerning Medicare, aired in April, 1996, was quite similar. It stated:

> "...when Dole and Gingrich insisted on raising taxes on working families, huge cuts in Medicare, education, cuts in toxic clean-up -- Clinton vetoed it. The President's plan: Preserve Medicare..."

Once again, the ads included no admonition to vote for or against any candidate or party. In all material respects, the DNC issue ads are indistinguishable from those at issue in Advisory Opinion 1995-25. FEC Advisory Opinion 1995-25, Fed. Election Camp. Fin. Guide (CCH) ¶ 6162 (1995). Those proposed ads mentioned and depicted President Clinton by name and attacked his policies after the time he became a candidate for President in 1996. Id. The FEC in that opinion specifically concluded that the proposed RNC ads attacking the President were properly defrayed with a mix of hard and soft money because they were deemed to benefit both Federal and non-Federal Republican candidates. Id. They were **not** attributable to any candidate as a contribution or expenditure. To suggest that the President and his policies could be attacked without limit by the RNC but that the DNC could not respond regarding the critical issues confronting Congress and the President is directly contrary to these FEC opinions and totally inequitable.

In addition to advisory opinions, the FEC in MUR 4246 reviewed DNC issue ads aired in 1994 on the topic of health care. As discussed above, that proceeding was terminated with the result that the expenditures for such ads can be paid for entirely with soft money. The Commission's dismissal of MUR 4246 is completely dispositive of any issue concerning the DNC issue ads in question here[31]. The termination of this enforcement proceeding clearly indicates that the current posture of this issue at the Commission is to treat issue advocacy as completely outside the scope of the FECA. Under this reasoning, the DNC ads, which contain no mention of an election and no exhortation to vote for any candidate could, based on the result of this MUR, permissibly be paid for entirely with soft money from the party non-federal account without any attribution to the 441a(d) limit.

Thus, a review of the factors applied by the FEC as well as an examination of the ads which the FEC has found to lack an electioneering message leads to the conclusion that the DNC issue ads in question here also lack an electioneering message. Therefore, expenditures for those ads do not count against the 441a(d) limit.

C. The DNC Was Legally Entitled To Rely On Prior FEC Advisory Opinions In Its Ad Campaign.

Pursuant to 2 U.S.C. §437f(c) --

> (1) Any advisory opinion rendered by the Commission under subsection (a) of this section may be relied upon by:...
>
> (B) Any person involved in any specific transaction or activity which indistinguishable in all its material aspects from the transaction or activity with respect

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[31] The DNC ads in MUR 4246 were part of a campaign to generate support for health care reform legislation. Some of the ads featured President Clinton and some mentioned the Republican party. For example, one ad featured noted Republicans, including Senator Dole, stating "There is no health care crisis." The ad then stated: "The Republican Party. First they said there was no recession. Now they say there is no health care crisis. They just don't get it."

which such advisory opinion is rendered.
(2) Notwithstanding any other provision of law, any person relies upon any provision or finding of an advisory opinion... and who acts in good faith in accordance with the provision and findings of that advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act...Id.

See also 11 C.F.R. §112.5 (1996). In undertaking its ad campaign, the DNC unquestionably relied upon Advisory Opinion 1985-14, in which the Commission advised, in key part, that proposed party committee expenditures for television advertisements, including those without an electioneering message or an exhortation to vote for that party, "will not be subject to the Act's limitations." FEC Advisory Opinion 1985-14, Fed. Elec. Camp. Guide (CCH) ¶5819 (1985). The Commission concluded that such advertisements would not be subject specifically to the limits of 2 U.S.C. §441a(d), regardless of whether the ads were viewed by prospective voters of the party's candidates. To the contrary, according to the Commission, the limits of 2 U.S.C. §441a(d) would apply only where an advertisement (1) depicted a clearly identified candidate and (2) conveyed an electioneering message.

The facts, in particular the advertisements herein are materially indistinguishable from the ads considered by the Commission in Advisory Opinion 1985-14. Id. Whereas the texts included as part of the Advisory Opinion covered three issues, the economy, the farm crisis and the oil industry, similarly, the DNC ads of concern here cover a variety of issues, including the budget, Medicare, education, crime, and the environment. Even more importantly, some of the ads considered by the Commission in the Advisory Opinion contained the closing phrase "Vote Democratic". Id. None of the DNC ads at issue contain such a phrase or any exhortation to vote, clearly making the DNC issue ads one step further removed from the electioneering message required by the FEC for application on 2 U.S.C. §441a(d).

The Commission's view was reaffirmed some ten years later in Advisory Opinion 1995-25 which was similarly relied upon by the DNC and lends additional protection to the Committee. FEC Advisory Opinion 1995-25, Fed. Elec. Camp. Fin. Guide (CCH) ¶6162 (1995). In that Advisory Opinion, the Commission considered the texts of three ads, one on the Balanced Budget Amendment two on Medicare, one of which mentioned President Clinton's name six times without a single reference to an election. Id. The Commission explicitly recognized that party committees may make expenditures for what the Commission called "legislative advocacy media advertisements," which would not be subject to the limits of 2 U.S.C. §441a(d), unless the test contained in Advisory Opinion 1985-14 was satisfied. Id. Such legislative advocacy media advertisements were distinguishable by the Commission in Advisory Opinion 1995-25 for focusing on "national legislative activity" and promoting the party. Id. The Commission stated that "[a]dvocacy of the party's legislative agenda is one aspect of building or promoting support for the party that will carry it forward to its future election campaigns." Id.

A review of th DNC's legislative advocacy ad at issue here reveals that these ads are materially indistinguishable from the ads considered by the Commission in Advisory Opinion Nos. 1995-25 and 1985-14. As a result of the DNC's reliance on these Advisory Opinions, it is legally entitled to protection from any sanction or adverse action under the Act.

CONCLUSION

Because the DNC ads complied with the FEC's rules set forth in Advisory Opinions 1984-15 and 1995-25 and contained neither an electioneering message nor words of express advocacy, they were not attributable to any candidate as a contribution or expenditure. It was entirely permissible for the President as any other candidate to be involved in the process of producing them.

Respectfully submitted,

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