



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20461

MEMORANDUM

TO: The Commissioners
Staff Director
Deputy Staff Director
General Counsel

FROM: *MWD* Mary W. Dove/Lisa R. Davis *LRD*
Acting Commission Secretary

DATE: June 22, 2000

SUBJECT: Statement Of Reasons for MURs 4553 and 4671
MURs 4407 and 4544
MUR 4713

Attached is a copy of the Statement Of Reasons signed by
Vice Chairman Danny L. McDonald. This was received in the
Commission Secretary's Office on Wednesday, June 21, 2000
at 5:19 p.m.

cc: Vincent J. Convery, Jr.
Press Office
Public Information
Public Records

Attachment

In the Matter of

Dole for President, Inc. and Robert J. Dole,)
as treasurer; Dole/Kemp '96, Inc., and)
Robert J. Dole, as treasurer; Republican) MURs 4553 and 4671
National Committee and Alec Poitevint, as)
treasurer; Senator Robert J. Dole)

The Clinton/Gore '96 Primary Committee, Inc.)
and Joan Pollitt, as treasurer; The Democratic)
National Committee, and Carl Pensky, as) MUR 4713
treasurer; President William J. Clinton; and)
Harold M. Ickes, Esquire)

The Clinton/Gore '96 Primary Committee, Inc.)
and Joan Pollitt, as treasurer; the Democratic)
National Committee, and Carol Pensky, as)
treasurer; President William J. Clinton; Vice) MURs 4407 and 4544
President Albert Gore, Jr.; and Clinton/Gore)
'96 General Committee, Inc., and Joan Pollitt.)
as treasurer)

STATEMENT OF REASONS

VICE CHAIRMAN DANNY L. McDONALD

I.

The central issue deliberated in the above-cited matters involved various advertisements produced, distributed, aired and paid for by the Republican National Committee (RNC) and the Democratic National Committee (DNC) during the 1996 presidential election cycle. Specifically at issue was whether these national party committees had improperly coordinated the ads in question with their presumptive presidential nominees and, by doing so, made excessive in-kind contributions to these candidates using prohibited non-federal funds in violation of the Federal Election Campaign Act ("the Act"). The General Counsel's recommendations to the Commission were to find reason to believe violations of the Act occurred and to pursue enforcement actions in these matters.

II.

The history of these matters at the Commission is long, fragmented and confusing involving various externally-generated complaints, internally-generated statutory audit matters, and essentially two separate and distinct Commissions. My esteemed colleague,

Commissioner Scott E. Thomas, has recounted this tortured history masterfully in his Statement of Reasons issued on May 25, 2000. See Statement of Reasons of Commissioner Scott E. Thomas for MURs 4553 and 4671, 4713, 4407 and 4544 at 2-5. As such, this statement merely summarizes the essential information.

Initially, I joined my colleagues in voting unanimously to approve reason-to-believe findings in these matters on February 10, 1998.¹ My votes were based on the underlying law and the Commission's deliberations in Advisory Opinions 1984-15² and 1985-14³. The then-Commission voted to pursue enforcement actions for possible violations of the Act against the Democratic and Republican parties and the Clinton Gore and the Dole/Kemp campaigns for giving and accepting excessive contributions through so-called issue ads.

During the intervening time between my initial and most recent votes in these matters, however, circumstances at the Commission changed substantially. First and foremost, the composition of the Commission changed when three new commissioners joined the FEC in the fall of 1998. Next, there were significant developments regarding the two legal standards upon which the original findings were based. On June 24, 1999, four Commissioners, Elliott, Mason, Sandstrom and Wold, issued a Statement of Reasons objecting to the use of the shorthand reference "electioneering message" contained in Advisory Opinion 1985-14, Fed. Elec. Camp. Fin. Guide (CCH Transfer Binder), ¶ 5819 at 11,185, and noting that the "electioneering message" phrase never appeared at all in Advisory Opinion 1984-15, Fed. Elec. Camp. Fin. Guide (CCH Transfer Binder), ¶ 5766.⁴ Their Statement of Reasons disavowed the use of "electioneering message" as a legal standard for determining whether a communication was created "for the purpose of influencing" a federal election but provided no guidance as to what test or tests should be used instead.⁵ Further, on August 2, 1999, the United States District Court for the District of Columbia issued its opinion in Federal Election Commission v. The Christian Coalition, 52 F. Supp.2d 45 (D.D.C. 1999). It suggested a definition of coordination far

¹ With respect to MURs 4553, 4671, 4407 and 4544, I voted to find reason-to-believe that the national parties made, and the Clinton and Dole campaigns received, in-kind contributions in violation of the Act.

² Fed. Elec. Camp. Fin. Guide (CCH Transfer Binder), ¶ 5766.

³ Fed. Elec. Camp. Fin. Guide (CCH Transfer Binder), ¶ 5819 at 11,185.

⁴ Statement of Reasons of Vice Chairman Wold and Commissioners Elliott, Mason, and Sandstrom On the Audits of "Dole for President Committee, Inc." (Primary), "Clinton Gore '96 Primary Committee, Inc." "Dole/Kemp '96, Inc." (General), "Dole Kemp '96 Compliance Committee, Inc." (General), "Clinton Gore '96 General Committee, Inc.," and "Clinton/Gore '96 General Election Legal and Compliance Fund," at 1, footnote 2.

⁵ My colleagues did not purport to supersede Advisory Opinions 1985-14 and 1984-15, but instead disagreed with the phrasing of the legal analysis contained in the two opinions. See Statement for the Record in Audits of 1996 Clinton/Gore and Dole/Kemp Campaigns of Chairman Scott E. Thomas and myself at 5.

different than currently found in the statute or Commission regulations. On September 22, 1999, the same four Commissioners decided not to appeal that decision.

Finally, two rulemakings are underway in various pending stages at the Commission that potentially impact these circumstances: (1) the "Coordination" rulemaking seeks to devise a legal standard or standards for addressing coordination dealing with party and non-party committees; and (2) the "Soft-Money" rulemaking seeks to develop standards governing the raising and spending of soft money by national party committees. All of these developments created confusion at the Commission and rendered what previously was relatively well-settled law into unsettled legal tests and standards unsuitable to base reason-to-believe findings upon in these matters.

On January 11, 2000, the General Counsel submitted First General Counsel's Reports regarding MUR 4969 (Dole), MUR 4713 and MUR 4970 (Clinton) to the Commission for consideration.⁶ The Commission did not approve the General Counsel's recommendations regarding party issue ads and split 3-3 as to the 1996 ads, with Commissioners Mason, Thomas and Wold supporting the reason-to-believe recommendations in the Dole and Clinton matters, while Commissioners Elliott, Sandstrom and myself opposed.⁷ Accordingly, these votes did not reflect a split along party lines.

⁶ Statement of Reasons of Commissioner Scott E. Thomas for MURs 4553 and 4671, 4713, 4407 and 4544 at 4 ("Because the composition of the Commission had changed, the General Counsel made fresh "reason-to-believe" recommendations, rather than "probable cause to believe" recommendations based on the earlier unanimous findings.").

⁷ Specifically, with respect to MUR 4969 regarding the 1996 advertisements, the Commission split 3-3 on whether to find reason to believe the RNC violated 2 U.S.C. § 441a(a)(2)(A) by making excessive contributions; 2 U.S.C. § 441b(a) and 11 C.F.R. § 102.5(b) by improperly using prohibited contributions; and 2 U.S.C. § 434(b)(4) by improper reporting. The Commission split 3-3 on whether there was reason to believe the Dole Committee violated 2 U.S.C. § 441a(f) by knowingly accepting excessive contributions; 2 U.S.C. § 441b(a) by knowingly accepting prohibited contributions; 2 U.S.C. §§ 441a(b)(1)(A) and 441a(f), and 26 U.S.C. § 9035(a) by exceeding the overall expenditure limitation; and 2 U.S.C. §§ 434(b)(2)(C) and 434(b)(4), and 11 C.F.R. §§ 104.13(a)(1) and 104.13(a)(2) by improper reporting. The Commission also split 3-3 on whether Senator Dole violated 2 U.S.C. § 441a(f) by knowingly accepting excessive contributions; 2 U.S.C. § 441b(a) by knowingly accepting prohibited contributions; and 2 U.S.C. §§ 441a(b)(1)(A) and 441a(f), and 26 U.S.C. § 9035(a) by exceeding the overall expenditure limitation.

Similarly, with respect to the 1996 advertisements, the Commission split 3-3 on whether to find reason to believe the DNC violated 2 U.S.C. § 441a(a)(2)(A) for making excessive contributions; 2 U.S.C. § 441b(a) and 11 C.F.R. § 102.5(b) for improperly using prohibited contributions; and 2 U.S.C. § 434(b)(4) for improper reporting. With respect to the Primary Committee, the Commission split 3-3 on whether there was reason to believe the Committee violated 2 U.S.C. § 441a(f) for knowingly accepting excessive contributions; 2 U.S.C. § 441b(a) for knowingly accepting prohibited contributions; 2 U.S.C. §§ 441a(b)(1)(A) and 441a(f), and 26 U.S.C. § 9035(a) for exceeding the overall expenditure limitation; and 2 U.S.C. §§ 434(b)(2)(C) and 434(b)(4), and 11 C.F.R. §§ 104.13(a)(1) and 104.13(a)(2) for improper reporting. The Commission also split 3-3 on whether President Clinton violated 2 U.S.C. § 441a(f) for knowingly accepting excessive contributions; 2 U.S.C. § 441b(a) for knowingly accepting prohibited contributions; and 2 U.S.C. §§ 441a(b)(1)(A) and 441a(f), and 26 U.S.C. § 9035(a) for exceeding the overall expenditure limitation.

III.

As the record indicates, I did not vote to approve the Office of the General Counsel's recommendations regarding the party issue ads. My disagreement with the General Counsel and some of my colleagues was based on two factors: the unsettled state of the law and the apparent inconsistent application of the law governing whether the ads were made "for the purpose of influencing" an election and whether those ads were improperly coordinated.

First, because recent Commission actions hurled the relatively well-settled law governing advertisements into disarray, there appears to be no discernible legal standard on which to base a reason-to-believe finding in these matters. Second, inconsistent application of the law by some of my colleagues on the other side has left the Commission vulnerable to a charge of arbitrary enforcement if it were to proceed on cases like these. As a result, the regulated community is left with little, if any, idea as to what standard the Commission will apply in reviewing their activity. Given the unsettled nature of the law combined with the inconsistent application of the law, I declined to find violations occurred in these matters.

IV.

I understand and appreciate the criticism of my colleague, Commissioner Scott E. Thomas. He appropriately notes I have always joined the affirming Commissioners supporting reason-to-believe findings for similar party ads coordinated and made "for the purpose of influencing" an election. See Statement of Reasons of Commissioner Scott E. Thomas for MURs 4553 and 4671, 4713, 4407 and 4544 at 17. Likewise, I agree my votes rejecting the General Counsel's recommendations, in part, were based on my view the law has been confused and subsequently applied inconsistently by my colleagues on the other side of the aisle.⁸ *Id.* at 17.

The Statement of Reasons issued by Commissioner Thomas correctly sets forth the specific legal and factual details of one of the most egregious examples, in my view, of the inconsistent application of law. In MUR 4378, Commissioners Mason and Wold refused to find violations against the National Republican Senatorial Committee and the Republican senate campaign of Montanans for Rehberg based on the theory the so-called issue ads aired during 1996 were for lobbying purposes. On the other hand, the same two

However, with respect to the 1995 party advertisements, the Commission failed to approve the General Counsel's reason-to-believe recommendations on the above statutory violations by a 2-4 vote, with Commissioners Mason and Wold supporting the findings and Commissioners Elliott, Sanfilippo, Thomas, and myself opposed.

⁸ Because my Republican colleagues routinely oppose making reason-to-believe finding in these matters, the Commission has split numerous times on whether advertisements constitute in-kind contributions from national party committees to the presidential committees or to specific candidates. Those Commission split votes send mixed and confusing messages to the regulated community regarding the enforceability of these matters.

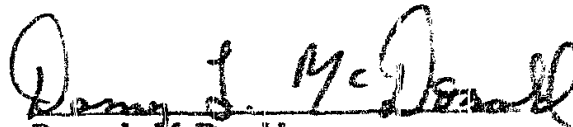
Commissioners supported finding violations for similar ads aired in 1995 and 1996 by the DNC and the RNC and the Clinton/Gore campaign and the Dole/Kemp campaign. They said at the table that the degree of coordination in the Dole and Clinton MURs was much greater than in prior examples.

V.

Given the unsettled nature of the law and the apparent inconsistent application of the law governing whether ads are made "for the purpose of influencing" an election and improperly coordinated, I respectfully, and correctly, declined to find that reason-to-believe violations of the Act occurred in these matters.

6-21-00

Date


Darryl L. McDonald
Vice-Chairman