FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: The Commissioners
Staff Director
Deputy Staff Director
General Counsel

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

DATE: June 21, 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 Commissioner Karl J. Sandstrom. This was received in the Commission Secretary's Office on Wednesday, June 21, 2000 at 1:12 p.m.

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

Attachment

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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 National Committee and Alec Poitevint, as treasurer; Senator Robert J. Dole	)	**MURs 4553 and 4671**
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 President Albert Gore, Jr.; and Clinton/Gore '96 General Committee, Inc., and Joan Pollitt, as treasurer	)	**MURs 4407 and 4544**
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; and Harold M. Ickes, Esquire	)	**MUR 4713**

STATEMENT OF REASONS

COMMISSIONER KARL J. SANDSTROM

At issue in the above matters were media advertisements financed by the national committees of the Democratic and Republican parties (collectively "the parties") during 1995 and 1996. The General Counsel recommended the Commission determine that the cost of these advertisements constituted in-kind contributions by the parties to their respective presidential candidates' committees which would have resulted in the candidates exceeding their primary or general election spending limits.[1] I write this Statement to explain my reasons for rejecting the General Counsel's recommendation.

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[1] In the alternative, the General Counsel recommended the Commission determine that the parties violated 2 U.S.C. § 434(b)(4) and 11 CFR 106.5(a) by transferring funds to various state parties. I rejected that recommendation because the General Counsel simply did not allege a violation. The General Counsel argued that

I.

The Federal Election Commission ("FEC") is vested with exclusive authority to "administer, seek to obtain compliance with, and formulate policy with respect to" the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455 ("FECA"), the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013, and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031- 9042. 2 U.S.C. § 437c(b)(1). In carrying out these responsibilities, the Commission has an obligation to promulgate clear and unambiguous rules, particularly those that touch upon activities protected by the First Amendment.[2] In the absence of that guidance, a regulated entity is denied due process because it is unable to determine in advance and with reasonable certainty what speech or conduct is subject to government regulation.

I voted to reject the General Counsel's recommendations because to support them would violate the most basic principles of due process.[3] No reading of the law, as it existed when these advertisements were aired, would have provided the parties with fair notice of the standard that the staff has subsequently suggested should be applied. Quite to the contrary, a fair reading of the law at that time would have clearly suggested that the ads were permissible. The respondents in this matter simply cannot be held to a standard that was not discernible prior to engaging in otherwise protected speech.

If one wants to understand the state of the law at that time, there is no better place start than with Advisory Opinion 1995-25.[4] Whatever narrow reading the Commission intended to give the opinion, its effect was to permit national party committees to finance and coordinate advertisements featuring federal candidates with a mixture of "hard" and "soft" dollars, giving the parties a "green light" to conduct the media campaigns at issue. Though this facially

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because the national parties "maintained control" over funds transferred to the state parties, the state parties should not have allocated the costs of the advertisements according to the "ballot composition method" but instead should have used the fixed percentages required by the Democratic and Republican national committees. *See* 11 CFR 106.5(b)(2)(ii) and106.5(d). However, the national parties are explicitly permitted to transfer funds to state parties without limitation. 11 CFR 110.3(c).

[2] *See Buckley v. Valeo*, 424 U.S. 1, 41, 96 S.Ct. 612, 645 (1976)(quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963))("'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms..."); *Id.* (quoting *Smith v. Goguen*, 415 U.S. 566, 573 (1974))("Where First Amendment rights are involved, an even 'greater degree of specificity' is required.")

[3] The Supreme Court has long recognized the danger of vague law.

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. . . . Vague laws may trap the innocent by not providing fair warning. . .[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. . .. [W]here a vague statute 'abuts upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms. . . . [B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.

Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298 (1972)(quoting *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S.Ct. 1316, 1322 (1964), quoting *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342 (1958)).

[4] This opinion was issued just prior to the onset of the advertising campaigns at issue.

conflicted with the FECA and the FEC's regulations governing the allocation of Federal and non-federal expenses by party organizations,[5] the respondents in the above matters were entitled to rely on the Commission's legal interpretation. Until the Commission supersedes that opinion, the Commission is barred by statute from sanctioning anybody who engages in materially indistinguishable activity.[6]

Though I personally cannot reconcile that opinion with our regulations, I cannot ignore what is plainly an applicable advisory opinion. I have an obligation to apply the law, not as I wish it to be, but as expressed by the Commission during the period in which the parties conducted their media campaigns.

II.

To understand the importance of Advisory Opinion 1995-25, one must place it in a broader legal context. The FEC "presumed coordination" between party committees and candidates until June 1996.[7] The Commission had determined that, because of their close relationship, parties were incapable of making expenditures independent of candidates. For example, an expenditure by a party committee for an advertisement promoting a candidate would count as an in-kind contribution to, or coordinated expenditure on behalf of, the candidate, regardless of any *actual* contacts or discussions.

This was indeed the Commission's position when it published Advisory Opinion 1995-25 in August 1995. Advisory Opinion 1995-25 was issued in response to a request by the Republican National Committee ("RNC"). The RNC was planning to produce and air media advertisements

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[5] The regulations governing the allocation of Federal and non-federal expenditures by party committees provides that, subject to certain exceptions, disbursements by party committees must be made entirely from funds subject to the prohibitions and limitations of the FECA. General public communications that reference Federal candidates clearly do not fall within one of the delineated exceptions to this general rule. In fact, the one exception -- generic voter drives -- that might arguably cover such activity expressly precludes from its coverage activity that mentions a federal candidate. 11 CFR 106.5.

[6] The Act provides that any advisory opinion rendered by the Commission "may be relied upon by" the person requesting the advisory opinion, or by "any person involved in any specific transaction or activity which is indistinguishable" in all material aspects from the activity at issue. 2 U.S.C. §437f(c)(1).

[7] The Supreme Court issued its decision in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) on June 26, 1996, invalidating the Commission's position that coordination could be presumed. In that case, the FEC brought suit after the Colorado Democratic Party alleged that the Colorado Republican Party had violated the spending limits established in 2 U.S.C. § 441a(d) by making expenditures for radio advertisements in early 1986 attacking Tim Wirth, a Democrat who eventually won the general election, though the Colorado Republican Party had assigned its right to make expenditures for the 1986 senatorial campaign to the National Republican Senatorial Committee. It was not disputed that the Colorado Republican Party had arranged for the advertisements on its own initiative, and had no discussion with any potential Wirth opponents. The FEC reaffirmed its view that political parties are incapable of making expenditures independent of candidates. The case eventually reached the Supreme Court and in a fractured 7-2 decision the Court vacated and remanded the case, holding that the application of 2 U.S.C. §441a(d) to truly independent expenditures violated the First Amendment. *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 613, 116 S.Ct. 2309, 2315 (1996).

featuring "legislative proposals" and it was unsure how to treat the costs of the ads under the FECA.[8]

The RNC stated that "the purpose of the ads will be to inform the American people on the Republican and Democratic positions on these issues, as well as attempt to influence public opinion on particular legislative proposals. The ads are intended to gain popular support for the Republican position on given legislative measures, and thereby influence the public's positive view of Republicans and their agenda."[9] The Commission requested and received examples of ads the RNC might run, two of which did not mention a federal candidate and a third that did. All three "urge support for the Republican position on the issues discussed."[10] One of the advertisements read in part:

> If Clinton lets Medicare go bankrupt, you can keep your existing coverage – but *only for seven years*. If Clinton lets Medicare go bankrupt, you can keep your own doctor – *but only for seven years*. If Clinton lets Medicare go bankrupt, you can still get sick -- *but only for seven years*. If Clinton lets Medicare go bankrupt, Medicare won't be there when you need it. Medicare will be gone.

(Advisory Opinion 1995-25, Attachment)(emphasis in original).

The Commission concluded that the cost of the advertisements "should be considered as made in connection with both Federal and non-federal elections" and that "for purposes of the allocation rules . . . it is immaterial whether these costs are characterized as administrative costs or generic voter drive costs."[11]

The Commission had determined in Advisory Opinion 1995-25 that a national party committee could pay for media ads promoting the party's agenda or its position on legislative issues without the costs constituting in-kind contributions or coordinated party expenditures. In reaching this conclusion, the Commission considered the following facts:[12]

- The communications did not contain any call for action other than urging the public to contact the mentioned officeholder (if any) and voice support or opposition to the legislation;

- If there was a reference to a federal officeholder who was also a federal candidate, there was no express advocacy of that officeholder's election or defeat and no reference to federal elections; and

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[8] Advisory Opinion 1995-25 at 12108.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] In response to a Commission request, the RNC provided the texts for three ads but stated that none of the ads provided served as the basis for the advisory opinion request, and that the ads may or may not be comparable to other such advertisements which the RNC may air in the future. Because the Commission did not require a specific advertisement, the AO ruling was applicable to the *type* of ad provided.

- The proposed communications did not contain an "electioneering message."

In other words, as long as the communication did not contain "express advocacy" or an "electioneering message," a party committee could allocate the cost of an advertisement featuring a federal candidate without the cost constituting an in-kind contribution to the candidate.[13] Because the Commission "presumed coordination" between party and candidate, any party-financed advertisement featuring a candidate would otherwise have constituted an in-kind contribution to that candidate or a 441a(d) expenditure. Advisory Opinion 1995-25 explicitly permitted parties to finance advertisements featuring candidates without making a contribution. Coordination was irrelevant because it was presumed. Absent express advocacy, the Commission had determined that an "electioneering message," not coordination, would determine the ultimate nature of the expenditure.

The "electioneering message" test was deeply flawed. It was incredibly vague and uncertain in application.[14] It can be neither found in the Act nor Commission regulations because it was derived from an advisory opinion.[15] A communication purportedly satisfied the "electioneering message" test if it contained a clearly identified candidate and included statements which were "designed to urge the public to elect a certain candidate or party, *or which would tend to diminish support for one candidate and garner support for another candidate.*"[16] (emphasis added). As expressed, a communication would satisfy this test, not based on its content, but on its hidden design or its effect on voters. This is precisely the sort of test that the Supreme Court has warned would not satisfy minimum requirements of due process.[17]

My colleagues and I formally rejected the use of this test on both procedural and substantive grounds when the Audit Division and the Office of General Counsel (collectively "the staff") attempted to apply it to the parties' media campaigns in the presidential candidate committee audits[18] conducted pursuant to 26 U.S.C. §§ 9038(a) and 9007(a).[19] We stated that the phrase

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[13] The Commission presumed that the ads would not qualify as "coordinated expenditures on behalf of any general election candidates of the Party under 2 U.S.C. §441a(d)." Advisory Opinion 1995-25 at 12109. This simply meant that Advisory Opinion 1995-25 may not apply to "coordinated expenditures" made on behalf of a candidate during the general election. *See* 2 U.S.C. §441a(d). Since the activity in the above matters took place prior to the candidates' nomination, §441a(d) limitations are irrelevant.

[14] In fact, Commissioners who approved the General Counsel's recommendations in these matters commented during Commission Open Sessions on the presidential audits and the media campaigns that "you can't help but come to the conclusion that the law in this area is hardly clear," "the staff's finding is based on a fuzzy legal standard," and "you come away scratching your head" trying to make sense of applicable Commission regulations and advisory opinions. *See* Commission Open Session record, December 3, 1998. *See also* "Election Panel Raises Doubts About Action on '96 Audits" *The Washington Post*, 10/4/98; "Commissioners Challenge Audit of '96 Campaigns" *USA Today*, 10/4/98; and "Ads in '96 Campaign Illegal, Audits Claim" *The New Orleans Times-Picayune*, 10/4/98.

[15] Advisory Opinion 1985-14, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 5819, p. 11,183 (May 30, 1985).

[16] The Commission cited both Advisory Opinion 1985-14 and *United States v. United Auto Workers*, 352 U.S. 567, 587 (1957)) as authority for the "electioneering message" test.

[17] *See Buckley v. Valeo*, *supra*.

[18] Specifically these committees were the Dole Primary Committee, Dole/Kemp '96, Inc. ("Dole General Committee"), the Dole/Kemp '96 Compliance Committee, Inc. ("The Dole GELAC"), the Clinton Primary Committee, the Clinton/Gore '96 General Committee, Inc. ("Clinton General Committee"), and the Clinton/Gore '96 General Election Legal and Compliance Fund ("Clinton GELAC").

"electioneering message" could not serve as a substantive test to describe the content of communications that are "for the purpose of influencing" an election. Procedurally, it was flawed because the test had not been promulgated as a regulation as statutorily required. The statute expressly requires a rule of law to be initially proposed only as a rule or regulation.[20] This statutory mandate serves to protect the regulated community from being judged by interpretations of the law that did not flow naturally and foreseeably from the law itself but were the mere product of administrative convenience or preference. We also stated that the phrase could not be used as a shorthand expression of the Commission's interpretation of the statutory standard "for the purpose of influencing" an election because the advisory opinions from which the standard was drawn did not convey a clear and consistent application of the statutory standard and the phrase was both too vague and too broad to have a sufficiently definite meaning.[21]

Nowhere is the inherent vagueness of this test more evident than in the application of its second prong. Focusing on this prong – statements "which would *tend* to diminish support for one candidate and garner support for another" – it is clear that any communication promoting one party's legislative agenda over another would satisfy the "electioneering message" test. Virtually any partisan communication featuring a federal candidate will *tend* to diminish support for one candidate and garner support for another.[22] Yet Advisory Opinion 1995-25 explicitly permitted communications featuring a federal candidate and promoting a party's legislative agenda.[23]

This can be shown by applying the "electioneering message" test to the communications at issue in Advisory Opinion 1995-25, which the Commission determined *did not* contain an electioneering message. For example, the advertisement supplied by the RNC read as follows:

> If Clinton lets Medicare go bankrupt, you can keep your existing coverage – but *only for seven years*. If Clinton lets Medicare go bankrupt, you can keep your own doctor – *but only for seven years*. If Clinton lets Medicare go bankrupt, you can still get sick – *but only for seven years*. If Clinton lets Medicare go bankrupt, Medicare won't be there when you need it. Medicare will be gone.

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[19] The staff concluded that the expenditures by the parties for the media campaigns were in fact in-kind contributions to the candidates and recommended that the Republican and Democratic presidential candidates pay back $17.7 million and $7 million, respectively. The Commission *unanimously* rejected that recommendation. It seems to me self-evident that if the media advertisements did not constitute a contribution in December 1999 when the Commission voted to reject the repayment recommendation, they cannot constitute a contribution in February 2000. If anything, a repayment determination would merit the application of a lesser standard than would be applied in finding a violation.

[20] 2 U.S.C. §437f(b)

[21] *See* Statement of Reasons on the Audits of the Dole Primary Committee, Dole Kemp '96, Inc. ("Dole General Committee"), the Dole/Kemp '96 Compliance Committee, Inc. ("The Dole GELAC"), the Clinton Primary Committee, the Clinton/Gore '96 General Committee, Inc. ("Clinton General Committee") and the Clinton Gore '96 General Election Legal and Compliance Fund ("Clinton GELAC"), signed by Vice Chairman Darryl Wold and Commissioners Lee Ann Elliot, David M. Mason and Karl J. Sandstrom. June 24, 1999.

[22] Thus, by making the "electioneering message" a critical element of Advisory Opinion 1995-25, the Commission had built in a fatal contradiction.

[23] Advisory Opinion 1995-25 at 12109.

(Advisory Opinion 1995-25, Attachment)(emphasis in original).

The Commission determined that this statement would *not* "tend to diminish support for one candidate and garner support for another" – in other words, that it did *not* contain an "electioneering message."[24]

This advisory opinion was issued to the national parties on August 25, 1995, after which the Democratic party began its advertising campaign.[25]

Each of the Democratic party's advertisements could be described as either "intended to gain popular support for the [Democratic] position on given legislative measures and thereby influence the public's positive view of [Democrats] and their agenda," or whose purpose was "to promote the [Democratic] party . . . ."[26] In other words, the advertisements had precisely the same characteristics as those approved in Advisory Opinion 1995-25.[27] (The subject matter and complete timetable for the Democratic Party ads can be found as an appendix to this statement.)

The following script was typical of the advertisements run by the Democratic party. This aired in October 1995:

> Preserving Medicare for the next generation. The right choice but what's the right way? Republicans say double premiums, deductibles. No coverage if you're under sixty-seven. Two-hundred and seventy billion in cuts but less than half the money reaches the Medicare trust fund. That's wrong. We can secure Medicare without the costs on the elderly. That's the President's plan. Cut waste, control costs, save Medicare, balance the budget. The right choice for our families.[28]

This looks strikingly like the advertisement submitted by the RNC in Advisory Opinion 1995-25 and diagnosed free of an "electioneering message" by the Commission.[29]

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[24] In fact, the Commission acknowledged the RNC's statement that "it is impossible to determine what effect these types of advertisements have on the electability of candidates at the Federal, state and local level." *Id.*

[25] Though the Democratic party ran one flight of ads from August 16 to August 31, 1995, no other ads were run until October 3, 1995.

[26] *Id.*

[27] *See* discussion of Advisory Opinion 1995-25, *supra*.

[28] *MUR 4407*, GCR Attachment 10.

[29] The General Counsel argued that this advertisement was used for the purpose of influencing the President's election. In fact, this and many of the advertisements were aired during an intense battle between the President and the Republican controlled congress over the federal budget and other legislation. This battle lasted from the middle of 1995 through the first several months of 1996. Though the General Counsel argued that all of the ads aired between 1995 and 1996 were "for the purpose of influencing" the candidates' elections, the documentary evidence tells a different story. A series of "agendas" of meetings between the President and his advisors obtained by the United States Senate Committee on Governmental Affairs makes it possible to track the administration's goals for running the advertisements. The agendas show that ads were produced for the purpose of persuading "Swing Republican Senators," the public and others to favor the administration's approach on a number of issues, including the budget, tobacco, education and Medicare. For example, this agenda discusses the strategy to pressure Republican Senators on the budget battle and Medicare.

> 3. PROPOSED BUDGET STRATEGY . . .

This ad aired in July 1996:

> Remember recession, jobs lost. The Dole GOP bill tries to deny nearly 1,000,000 families unemployment benefits. Higher interest rates, 10,000,000 unemployed with a Dole amendment. Republicans tried to block more job training today. We make more autos than Japan. Record construction jobs, mortgage rates down.

B. Pressure campaign aimed at Swing Republican Senators on Medicare During Recess
   1. Target recess paid media, funded by DNC, to aim at key moderate Republican Senators.
      a. Hit small states with moderate Republican Senators.
   2. Get constituency groups to bring pressure.
   3. flesh out Republican ideas and educate media.

C. Announce veto of all appropriation bills until across the board deal is signed.

D. Trainwreck scenario . . .
   2. Closing Govt. Down. . . .
      1. Strategy: amplify pain, don't mute it.

Agenda dated July 26, 1995, Audit Referral 99-15, Attachment 49.

Clearly the media advertisements discussed were used to pressure moderate Republican senators to support the President's budget, not to influence his election to office. Another agenda indicated similar intentions:

I. BUDGET STRATEGY - MEDICARE CUTS DERAIL REPUBLICANS

B. Strategy – fold out

1. Step one: Ads.
   a. Run ads in moderate Republican states to pry loose swing Senators
2. Step One: Free Media . . .
3. Step Two: Paid Media . . .
   e. goal: to raise the heat to such levels that Republicans
      1. abandon their plan
      2. try to postpone everything until Nov
      3. eventually feel the heat so much that they demand a quick resolution, a reconciliation on the President's terms to lower their political heat
   f. Splitting the Republicans . . .

Agenda dated August 3, 1995, Audit Referral 99-15, Attachment 50

II. AD RECOMMENDATIONS - KEEP UP PRESSURE

A. Stress President's commitment to balanced budget.
B. Shift Focus to Education, the key appropriations battlefield
C. Run Medicare spots in swing state markets along with education ads to bring public up to speed

Agenda dated September 7, 1995, *Id.*

The General Counsel did not find these documents persuasive and instead concluded that *all* advertisements were "for the purpose of influencing" the President's election. *See Audit Referral 99-15 at 54.*

10,000,000 new jobs, more women owned companies than ever. The President's plan. Education, Job training, economic growth for a better future.[30]

The Republican party ran similar ads focusing on a Balanced Budget Amendment, the repeal of the gas tax, Republican tax cut plans, illegal immigrants and welfare reform.[31] For example, this advertisement was produced May 15, 1996:

> [Bill Clinton is shown in several clips, in each one stating a different number of years to balance the budget.] For four years you heard a lot of talk from Bill Clinton. Double talk is expensive. Tell Mr. Clinton to support the Balanced Budget Amendment.

Each advertisement either promoted a party or its legislative agenda; most featured a federal office holder or candidate for federal office. None contained an "electioneering message" as identified by Advisory Opinion 1995-25.[32]

It is irrelevant to the analysis that many of these advertisements aired during a presidential election year. "Since 1995 is a non-presidential election year, the Commission concludes that the proper allocation for these expenditures is at least 60% to the Federal account, with a corresponding allocation to the non-federal account. *Should the RNC continue these activities into 1996, a presidential election year, the Federal share will rise to at least 65% of these costs.*" Advisory Opinion 1995-25 at 12110 (emphasis added).

Further analysis into whether these advertisements, as compared with the examples given by the RNC in Advisory Opinion 1995-25, actually contained an "electioneering message" is problematic. It puts the Federal Election Commission in the position of parsing the content of communications to divine their true design. This is far too precarious a line for the respondents to walk.[33]

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[30] *Id.*

[31] Audit Referral 99-13, Attachment 4.

[32] The "electioneering message" test was so vague in its application that the staff suggested particular advertisements satisfied the test based on their production value. For example, the staff argued that, regardless of the script, an ad visually portraying one party's position in gray tones and the other's in color constituted an "electioneering message." *See* Commission Open Session record, December 3, 1998.

[33] In holding the "relative to" standard in the original FECA impermissibly vague because it failed to clearly mark the boundaries between permissible and impermissible speech, the Court in *Buckley v. Valeo* noted the dangers of requiring the government to divine a speaker's intent:

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy and solicitation *puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.* Such a distinction offers no security for free discussion. In these circumstances it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Buckley v. Valeo, 424 U.S. 1, 41 (quoting *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315 (1945) (emphasis added)).

III.

Responsibility for the confusion surrounding the law resides with the Commission. It is incumbent upon the Commission to act promptly to clarify the law and restore it to an understandable state. The regulated community should not be left to guess whether its actions are in accord with the Commission's understanding of the law.

The first step in this restoration project is easy. The Commission should formally supersede Advisory Opinion 1995-25. Advisory Opinion 1995-25 – to the extent that it permits party committees which make disbursements in connection with federal and non-federal elections to allocate the costs of communications that reference federal candidates between federal and non-federal accounts – is clearly at odds with our regulations. Section 106.5 of our regulations provides that, subject to certain exceptions, disbursements by party committees must be made entirely from funds subject to the prohibitions and limitations of the Federal Election Campaign Act. General public communications that reference Federal candidates clearly do not fall within one of the delineated exceptions to this general rule. In fact, the one exception -- generic voter drives -- that might arguably cover such activity expressly precludes from its coverage activity that mentions a federal candidate.

By taking the simple step of superseding Advisory Opinion 1995-25 in favor of a straightforward reading of our regulations, the Commission would be taking a major step towards ending spending practices about which a majority of Commissioners have expressed concern. In adopting Advisory Opinion 1995-25, individual Commissioners may have intended that it be given a narrow reading. Unfortunately, the text of the decision does not lend itself to such a narrow interpretation. Committees of both major political parties have read the decision to stand for the proposition that a party committee may pay for advertising that supports or criticizes a Federal candidate from funds not subject to the limitations and prohibitions of the law. This is not a strained reading of the opinion. To the contrary, it is precisely the proposition the opinion appears to stand for. Until the Commission acts to correct that perception, political parties will continue to presume that they are operating in accordance with the law in making such disbursements.

There is no doubt that our regulations take precedence over our advisory opinions. Nevertheless, our ability to enforce the law will be seriously impaired as long as an ill considered advisory opinion is left as our last statement of the applicable law. Therefore I would urge the Commission to publicly announce its position in this regard and in doing so, address the practices that have been at the heart of this investigation.

Date

Appendix

The Democratic party, including state party organizations financed by the national party, ran the following ads:[34]

Flight Date	Subject Matter
8/16/95 - 8/31/95	Medicare
10/3/95 - 10/17/95	Medicare
10/19/95 - 11/1/95	Medicare/Tax Cut Work not Welfare Reform/Balanced Budget
11/2/95 - 11/10/95	Medicare
11/10/95 - 11/30/95	Medicare/Balanced Budget
12/5/95 - 12/14/95	Medicare/Balanced Budget
12/17/95 - 12/22/95	Medicare/Balanced Budget/Health Care/Education Cuts
1/10/96 - 1/24/96	Medicare/Health Care Education Cuts/Balanced Budget
1/26/96 - 2/1/96	Medicare/Balanced Budget
2/13/96 - 2/19/96	Medicare/Balanced Budget
2/20/96 - 3/5/96	Medicare/Balanced Budget
3/7/96 - 3/27/96	Welfare Reform/Child Support Enforcement/Domestic Violence
3/29/96 - 4/3/96	Medicare/Balanced Budget/Child Healthcare/Education/Job Training
4/5/96 - 4/26/96	Medicare/Education Cuts/Balanced Budget/Health Insurance Plan/Tax Credits/Education Cuts/Brady Bill
4/27/96 - 5/3/96	Medicare/Education Cuts/Balanced Budget/Health Insurance Plan/Tax Credits/Education Cuts/Brady Bill/Family Medical Leave
5/5/96 - 5/31/96	Headstart/Student Loans/1996 Budget/Family Medical Leave
6/1/96 - 6/11/96	Assault Weapons Ban/Balanced Budget/Family Leave
6/12/96 - 6/25/96	Tuition Tax Cut Plan/Medicare
6/26/96 - 7/19/96	Medicare/Illegal Immigrants
7/24/96 - 8/6/96	GOP Bill/Unemployment Benefits/Jobs Training

[34] *See* Audit Referral 99-15, Attachments 10 and 11.