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BEFORE THE FEDERAL ELECTION COMMISSION

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FEDERAL ELECTION
COMMISSION

2001 AUG 14 P 3:51

In the Matter of)

) MURs 4568, 4633, 4634 and 4736

Robert Cone)

GENERAL COUNSEL'S REPORT

SENSITIVE

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I. **ACTIONS RECOMMENDED:** Find probable cause to believe that Robert Cone violated 2 U.S.C. §§ 441a(a)(1) and 441a(a)(3) by making excessive contributions to Carolyn Malenick d/b/a Triad Management Services ("Triad/CSM"), Triad Management Services Inc. ("Triad Inc."), Citizens for the Republic Education Fund ("CREF") and Citizens for Reform ("CR") during the 1996 election cycle

II. **BACKGROUND**

It is undisputed that Robert Cone contributed nearly \$2 million to the group of affiliated entities that included Triad/CSM, Triad Inc., CREF and CR during the 1996 election cycle. Further, information uncovered by the investigation in these matters demonstrates that these entities, acting both together and separately, constituted affiliated political committees that shared a single \$5,000 contribution limit under the Federal Election Campaign Act of 1971, as amended, ("the Act"). Accordingly, the General Counsel's Brief, dated July 18, 2001 ("GC Brief"), stated that this Office was prepared to recommend that the Commission find that Mr. Cone violated 2 U.S.C. §§ 441a(a)(1) and 441a(a)(3) the Act by making excessive contributions to this group of entities and by

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1 making contributions in excess of his own \$25,000 annual limit.¹ The GC Brief sets forth
2 evidence that strongly supports these recommendations, and is incorporated by reference
3 into this Report.²

4 On August 7, 2001, Mr. Cone responded to the GC Brief ("Cone Response"). The
5 Cone Response does not take issue with most of the essential facts set forth in the GC
6 Brief.³ Specifically, the Cone Response does not dispute that Robert Cone sent large
7 sums of money to Triad/CSM, Triad Inc., CREF and CR during 1995-1996. While
8 asserting that Ms. Malenick was interested in starting a business that would focus on

¹ As discussed in the GC Brief, Mr. Cone utilized his full \$25,000 limit during both 1995 and 1996 in making contributions to candidates and political committees other than Triad/CSM, Triad Inc., CREF and CR.

² On the same date on which Mr. Cone was served with the GC Brief, this Office also served a separate combined GC Brief on Triad/CSM, Triad Inc., Ms. Malenick, CREF and CR, all of which are represented by the same counsel as Mr. Cone.

1 advice to donors, not fundraising for any particular candidate or committee, the Cone
2 Response does not dispute the extensive evidence set forth in the GC Brief that
3 essentially all of the activities of Triad/CSM, Triad Inc., CREF and CR during the 1996
4 election cycle were geared toward supporting the election or re-election of conservative
5 Republican candidates for Congress. Further, the Cone Response does not dispute the
6 contention that Robert Cone was in nearly constant contact with Carolyn Malenick
7 regarding, and was aware of, the Triad/CSM, Triad Inc., CREF and CR activities and
8 publications for which he was providing funding. Finally, the Cone Response does not
9 dispute that numerous Triad/CSM and Triad Inc. publications expressly advocated
10 support of specific federal candidates and solicited contributions for their campaigns.

11 The Cone Response indicates that prior to 1995, and his association with Carolyn
12 Malenick, that Robert Cone did not participate actively in the political process, except for
13 voting. It argues that Triad/CSM and Triad Inc. were intended to be for-profit businesses.
14 According to the Response, the more than \$1 million that Mr. Cone provided to fund their
15 operation during 1995-1996 should be regarded as payment for services rendered, rather
16 than political contributions, since Mr. Cone wanted a "project" that would develop an
17 education or advice program for major donors for charitable and political purposes. In
18 this context, the Cone Response contends that Triad/CSM and Triad Inc.'s failure to
19 follow ordinary business practices in seeking payment from those who received Triad
20 services was part of a marketing effort relating to the startup nature of the venture. It also
21 argues that Mr. Cone's designation in his own records of the monies he gave to the Triad
22 entities as GI[Gift] was not inconsistent with them being fees for service. Further, the
23 Cone Response argues that the expenditure of significant resources provided by Mr. Cone

1 to the political audit process shows that Triad was a business, and not “only a vehicle to
2 transmit illegal political dollars.”

3 The Cone Response also argues that the \$900,000 that Mr. Cone provided to
4 CREF and CR during 1996 did not constitute political contributions, because Mr. Cone
5 donated those funds to pay for advertising programs regarding candidates for federal
6 office with the understanding that the advertising would not expressly advocate the
7 election or defeat of any candidate. Without indicating Mr. Cone’s understanding of how
8 CR and CREF actually operated, the Cone Response states that fundraising was
9 predicated on representations to donors that these entities were not political committees
10 and would undertake no activities that would subject them to filing disclosure reports
11 with the Commission. The Cone Response also argues that the activities of CR and
12 CREF do not establish that any of the advertising programs were coordinated under the
13 standard set forth in *FEC. v. Christian Coalition*, 52 F. Supp. 545, 85 (D.D.C. 1999) or
14 by the Commission’s recently adopted regulations on Coordinated General Public
15 Political Communications, 11 C.F.R. § 100.23, which became effective on May 9, 2001.

16 **III. ANALYSIS**

17 As set forth below, the Cone Response does not refute the evidence set forth in the
18 GC Brief which demonstrates that Triad/CSM, Triad Inc., CREF and CR constituted
19 affiliated political committees, or that Robert Cone made excessive contributions to them
20 during 1995-1996.

21 **A. Mr. Cone’s Contributions to Triad/CSM and Triad Inc.**

22 The Cone Response (at 1-2) states that prior to 1995, Mr. Cone had little interest
23 in active participation in the political process, except for voting, implying perhaps that

1 Mr. Cone lacked the experience and sophistication to play a principal role in political
2 organizations. This implication should not be credited. Mr. Cone was an experienced
3 businessman who had managed the operations of a multi-million dollar company, and
4 subsequent to selling it, started several smaller business ventures. Cone Dep. Tr. at 28-
5 37. When Mr. Cone became involved in a 1994 Eagle Forum advertising campaign, he
6 was not a passive contributor, but a hands-on participant, who met with vendors and
7 made decisions regarding the strategy to be employed. Cone Dep. Tr. at 88-107. In 1995,
8 Mr. Cone established a state PAC called the Paragon Project to support conservative
9 Republican candidates in Pennsylvania. In sum, Mr. Cone had ample political savvy
10 when he decided to fund Triad's operations.

11 Almost all of the evidence in the GC brief that shows that a, if not the, major
12 purpose of Triad was to influence political elections, comes from Triad itself, including
13 promotional and marketing communications and fax alerts and other publications, all of
14 which were received by Mr. Cone. These materials set forth Triad's electoral goals and
15 many contain express advocacy, including fundraising solicitations. The Cone Response
16 does not even mention the extensive evidence presented in the GC brief on this point.⁴
17 Mr. Cone was in constant telephone and facsimile contact with Ms. Malenick. GC Brief

⁴ See, e.g., Triad's statements that its purpose was to "protect the new class of conservatives [in Congress]" (GC Brief at 15, quoting January 1995 letter), "maintaining the House majority" (GC Brief at 16, quoting March 1995 letter), "laying the groundwork to re-elect conservative House freshmen and expand the House majority" (GC Brief at 17-18, quoting September 1995 newsletter), "working with [House members] to Raise \$\$\$ because Republicans will need it" (GC Brief at 19, quoting February 1996 newsletter), or the repeated assertion that Triad's 1996 Goals were to: 1) *Return Republican House Freshmen*; 2) *Increase by 30 the Republican House Majority*; [and] 3) *Increase Senate Republicans to a Filibuster-proof 60*. GC Brief at 15, quoting numerous Triad publications.

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1 at 20. Mr. Cone also attended meetings and participated in the decision-making for the
2 CREF and CR advertising campaigns. GC Brief at 23.

3 The Cone Response attempts to posit that Triad was intended to be a fee for
4 service business, presumably—as it is never clearly stated—to indicate that Triad’s major
5 purpose was commercial, not electoral. If Triad, as claimed, had any intent to operate as
6 a business, that intent was clearly subordinate to its efforts to elect and re-elect
7 conservative Republicans to Congress during the 1996 election cycle. Indeed, Triad’s
8 actions were wholly inconsistent with that of a bona fide commercial enterprise. In
9 contrast to its well-documented political goals, Triad had no specific business goals.
10 Mr. Cone acknowledged that Triad never had a business plan of any kind and that he
11 could not recall a single business strategy meeting in 1996. Cone Dep. Tr. at 146, 392.⁵
12 Moreover, although he was Triad’s primary source of funds, he testified that
13 Ms. Malenick never presented him with any written materials or research to show that
14 this was a new business that might have a future (*id.* at 147); he never received an
15 accounting of how his money was spent and he never reviewed Triad’s books (*id.* at 138,
16 139). Most significantly, as Mr. Cone was aware, Triad did not charge for its services
17 during the 1996 election cycle.

18 According to the Cone Response, “[m]arketing the [Triad] service required ‘free’
19 exposure to the service to determine if the service would eventually be able to be charged
20 for and at a profitable price.” Cone Response at 3. The Cone Response attempts to
21 portray this practice as a well-defined marketing strategy and as normal for a start-up

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1 business. However, there is a substantial difference between a new business providing an
2 initial discount or a finite free trial period and the unlimited free publications and
3 contribution advice that Triad provided to potential donors and PACs during 1995 and
4 1996. Although Triad eventually published a price list, it did not issue any invoices until
5 it was under investigation in mid-1997. Further, the evidence establishes that most of
6 these invoices were never paid, and that Triad never took any action to collect. GC Brief
7 at 31-33. And while it may be true, as the Cone Response asserts, that many startups fail
8 to make a profit, there is a difference between marketing a product for fees and not
9 finding a receptive audience, and not charging any fees at all.

10 The Cone Response also attempts to compare Mr. Cone's payment of Triad's
11 expenses with his investment in a yet-to-be profitable software company. Cone Response
12 at 3. This analogy is misplaced, because while Mr. Cone testified that he had made
13 capital and major loans to that company, he testified that he has no equity stake in Triad
14 and that the funds he provided to Triad were not loans. Cone Dep. Tr. at 144, 195, 196.
15 Indeed, he testified that his other business ventures would not be characterized in his
16 records as "gifts," because that category was for non-investment, non-tax deductible
17 items. In designating his transfers to Triad as "GI[Gift]: Political Indirect," he testified
18 that meant he had recorded this in his gift file, and "notated this as political indirect as
19 opposed to political direct, which would be hard dollars." He stated that other items in
20 that file included gifts to his children and Christmas gifts. Cone Dep. Tr. at 502-503.

⁵ Mr. Cone defined a strategy meeting with respect to a business organization to be "where responsible people within an organization get together and decide what the future development of the organization is going to be." Cone Dep. Tr. at 392.

1 That description is inconsistent with his claim that the transfers were fees for service,
2 rather than political contributions.

3 The Cone Response contends that Triad must have intended to be a business and
4 not just a vehicle to transmit illegal political dollars; otherwise it would not have
5 expended so much of Mr. Cone's money on Carlos Rodriguez's political audits. But the
6 political audits are not inconsistent with a political, rather than commercial, purpose.
7 Like many political committees, Triad had electoral goals, and it needed to attract outside
8 donors and PACs to support its candidates of choice. Providing tangible research to such
9 potential donors in order to convince them to support Triad's chosen candidates was one
10 function the audits served. In addition, the audits also permitted Triad to assist favored
11 campaigns. As discussed in the GC Brief, Mr. Rodriguez (whose services were costing
12 Triad more than \$1000/day) routinely assisted campaigns with fundraising and political
13 strategy. GC Brief at 40-48.⁶ Further, the audits enabled Triad to receive information
14 and make contacts that it could later use in its CR and CREF advertising campaigns.
15 GC Brief at 68.

16 Finally, while the Cone Response states that the "project" he was allegedly paying
17 for was the development of an education or advice program for major donors for
18 charitable and political purposes, that description tells only part of the story. It leaves out

⁶ For example, Mr. Rodriguez's own reports and Triad Fax Alerts reflect the fact that the audits helped raise money from the Triad network (GC Brief at 43-44, quoting Fax Alert in which Triad takes credit for raising \$21,450 to pay for a Joe Pitts campaign phone bank), develop political strategy (GC Brief at 44, quoting Fax Alert with thank you note from Bob Riley campaign), develop a fundraising plan (GC Brief at 45, quoting from audit report describing assistance given to Vince Snowbarger campaign), implementing a phone bank strategy (GC Brief at 46, quoting from audit report discussing assistance given to Ed Merritt campaign), and assist campaigns with donor relations (GC Brief at 46-47, discussing Triad efforts to help Bob Schaffer campaign get a fundraiser to honor a commitment).

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1 the ultimate reason that underlay the development of such a program.⁷ As set forth in the
2 GC Brief at 13, Mr. Cone testified that his understanding of the original concept of Triad
3 was that Carolyn Malenick “wanted to develop wealthy donors both for electing or
4 working on getting elected conservative Republican pro-life candidates.” He further
5 testified that “the objective of the whole Triad concept [was] to get major donors
6 involved so that the ideally conservative candidates could be elected....” Cone Dep. Tr.
7 at 418. Mr. Cone testified that he agreed with Triad’s stated electoral goals. Id. at 208-
8 09. Thus, Mr. Cone funded Triad as a vehicle to elect federal candidates who shared his
9 ideological views.

10 B. Cone Contributions to CREF and CR

11 The Cone Response states that “[t]he Commissioners will search in vain to find a
12 single reference in the General Counsel’s facts and analysis to any candidate or their
13 agent making a request or suggesting that CR or CREF do anything.” Cone Response at
14 5. However, the Commissioners need only to turn to pp. 62, 68-75, 93-94 in the GC Brief
15 to find the evidence that shows just this scenario. The Cone Response completely ignores
16 the evidence of discussions between Triad representative Jason Oliver and various
17 campaigns during which the campaigns requested or suggested topics for the CREF or
18 CR issue ads in their districts. Further, the Cone Response ignores the striking similarity
19 between the advertising topics that campaign representatives suggested or requested in
20 these conversations (as well as in discussions reflected in Mr. Rodriguez’ audit reports)

⁷ As set forth in the GC Brief, there is no evidence to indicate that Triad ever provided any assistance or services in connection with donations to any charitable group. GC Brief at 13 and FN 12. All the Triad promotional literature indicates that its purpose was only to help donors who supported ideologically conservative Republican candidates. GC Brief at 15-19.

1 and the topics actually used in the CREF and CR advertising programs. GC Brief at 68-
2 75.

3 As discussed in the GC Brief, Mr. Oliver testified that he contacted the campaigns
4 at the direction of Carolyn Malenick and Carlos Rodriquez and gave them his chart
5 reflecting the discussions. GC Brief at 68-69. During the time that the ads were Triad's
6 primary focus, from September 15 through November 5, 1996, Triad telephone records
7 show that Carolyn Malenick made 100 phone calls to Mr. Cone and sent him 15
8 facsimiles; these communications do not include possible phone calls and faxes from Mr.
9 Cone to Ms. Malenick or face-to-face meetings during this period.

10 Moreover, the Cone Response's reference to media vendors being directed not to
11 communicate with campaigns or party organizations distorts the way the coordination
12 operated. The evidence in the GC Brief shows that after discussions with the campaigns,
13 Triad identified the issues to be addressed in the ads with CR and CREF media vendors,
14 and provided them with research and information gathered by the Oliver phone calls and
15 the political audits. GC Brief at n. 50 and pp. 68-75. Given its control over, and status as
16 an agent of, CREF and CR, Triad's communications with both the congressional
17 campaigns and the vendors preparing the advertisements are no different than if such
18 communications had been directly with the sponsoring groups. GC Brief at 62-75. *See*
19 MUR 1503.

20 Finally, the Cone Response states that all the fundraising for CR and CREF was
21 predicated on representations to donors that these organizations were not political
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1 committees and that they would undertake no activities that would cause them to have to
2 file disclosure reports with the Commission. Cone Response at 5. Again, whatever the
3 representations, if these organizations actually ran substantial amounts of coordinated
4 advertising, as the evidence shows they did, they were political committees. As the GC
5 Brief discusses, Mr. Cone testified that the ads were intended to influence voters and
6 benefit conservative Republican candidates. GC Brief at 97. Accordingly, the \$900,000
7 that Mr. Cone provided to CR and CREF, political committees affiliated with Triad, must
8 be regarded as contributions made for the purpose of influencing federal elections.

9 C. Conclusion

10 For all of the reasons set forth in the July 18, 2001 GC Brief, and as set forth
11 above, this Office recommends that the Commission find probable cause to believe that
12 Robert Cone violated 2 U.S.C. §§ 441a(a)(1) in connection with his contributions to
13 Triad/CSM, Triad Inc., CREF and CR during 1995 and 1996. This Office also
14 recommends that the Commission find probable cause to believe that Robert Cone
15 violated 2 U.S.C. §§ 441a(a)(3) during both 1995 and 1996.

16 IV. DISCUSSION OF CONCILIATION AND CIVIL PENALTY

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1 **V. RECOMMENDATIONS**

- 2 1. Find probable cause to believe that Robert Cone violated 2 U.S.C.
3 § 441a(a)(1).
4 2. Find probable cause to believe that Robert Cone violated 2 U.S.C.
5 § 441a(a)(3).
6 3.
7 4. Approve the appropriate letter.

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11 8/14/01
12 Date

Lois G. Lerner by AAS
Lois G. Lerner
Acting General Counsel

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18 **Attachments**

19 1.

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22 **Staff Assigned: Mark Shonkwiler**