



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)

Rick Hill for Congress Committee and)

Gary F. Demaree, treasurer)

)

MUR 4568, 4633, 4634 and
4736

**STATEMENT OF REASONS
OF CHAIRMAN DAVID M. MASON, COMMISSIONER DARRYL R. WOLD,
AND COMMISSIONER BRADLEY A. SMITH**

On September 20, 2001, the Commission failed by a vote of 3-3 to approve the General Counsel's recommendation to find probable cause that Rick Hill for Congress Committee and Gary F. Demaree, as treasurer, violated 2 U.S.C. §§ 434(b), 441a(f), and 441b.¹

Rick Hill ran for the Montana Congressional at-large seat as a Republican candidate in 1996. One of the candidates seeking the Democratic nomination was Bill Yellowtail. During the Democratic primary season on May 11, 1996, the Associated Press reported that Yellowtail had been delinquent in unpaid child support.² A few days later on May 20, 1996, the newspaper reported that Yellowtail had slapped his former wife.³ The newspaper later reported that Yellowtail had been expelled from college because of burglary convictions during his college days.⁴ Hill was not in favor of using this information during the campaign, although it seemed that some of his supporters believed it would be an effective tactic. Hill and Yellowtail eventually became the Republican and Democratic candidates, respectively, in the general election. Hill won the general election with 52% of the vote.⁵

¹ We voted not to approve the General Counsel's Probable Cause findings. Commissioners Thomas, McDonald and Sandstrom voted to approve the findings.

² *Candidate's Wife Had His Salary Garnished for Back Child Support*, The Associate Press Political Service, May 11, 1996, available in 1996 WL 5381659.

³ *Yellowtail Addresses Rumor of Spousal Abuse*, The Associated Press Political Service, May 20, 1996, available in 1996 WL 5383300.

⁴ *Yellowtail Admits to College-Era Theft*, The Associated Press Political Service, May 25, 1996, available in 1996 WL 5384444; *Problem Past Haunts Montana Congressional Candidate*, The Associated Press Political Service, May 31, 1996, available in 1996 WL 4425865.

⁵ Rick Hill (R) won with 52.41% of the vote. Bill Yellowtail (D) garnered 43.15%. A third party candidate received 4.43%.

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Before the general election, the Hill campaign encountered Triad Management Services, Inc. ("Triad") for the first time. Triad was a conservative, for-profit business whose purpose was "to provide unbiased information and guidance so that clients may most effectively allocate donations to meet their needs, achieve their goals and advance their beliefs." 1996 Triad publication, Acting General Counsel's Report and Stipulation of Facts with Triad Services Inc. and Carolyn Malenick, dated Jan. 21, 2000, Attachment 1, p. 6-7. Triad's clients were mainly political donors who wanted to make more informed choices about their political donations. Triad's job was to research candidates and their campaigns, and then advise its clients as to which candidates had similar goals and were involved in competitive races with a chance for victory. *Id.*

The process generally worked as follows: Triad would contact Republican candidates' committees and ask to conduct a "political audit." Triad would then gather information about the campaign committee, including its weaknesses and strengths, budget, campaign fundraising goals, plans, and issues the candidate or his opponent promoted. Acting General Counsel's Report and Stipulation of Facts with Triad Services Inc. and Carolyn Malenick ("Stipulation of Facts") dated Jan. 21, 2000, Attachment 1, p. 14-16. Much of this was done through direct meetings with campaign officers and sometimes the candidate. *Id.* Triad also gathered background information from public sources such as newspapers. *Id.* Triad then used this pool of information to advise its clients which committees or organizations best suited their donation criteria. A Triad promotional brochure stated: "Triad tracks the activities of all recipient organizations, candidates and committees, and reports back, in writing, to the donors quarterly on the progress and record of each recipient of the donor's support." *Id.* at 10.

Carlos Rodriguez was Triad's political counsel who met with the Hill Committee to conduct an audit on or around September 23-24, 1996. Mr. Rodriguez's audit notes included the fact that an issue in the campaign was Yellowtail's past history. Rodriguez stated in deposition that this notation was his own conclusion and was not conveyed to him by the Committee. Deposition of Carlos Rodriguez, p.314.

In October 1996, the Committee watched with the rest of the public as a third-party group, Citizens for Reform ("CR"),⁶ ran two television issue ads focusing on Bill Yellowtail's character and personal history. The group also operated a phone bank focusing on the character issue. General Counsel's Probable Cause Brief, dated August, 15, 2001, p. 22. CR did not ask for the Committee's approval prior to beginning the ads nor did it contact the Committee about its activities. Deposition of Meredith O'Rourke for Triad, p. 491. On November 6, 1996, Charmaine D. Murphy, the Rick Hill for Congress Committee campaign manager, filed a complaint alleging that there was an

⁶ CR was incorporated in 1996 by Peter Flaherty. CR contracted with Triad for consulting services which included placing and producing ads for CR. In return, CR was to pay 20% of its raised funds to Triad. According to the Stipulation of Facts, Malenick, as president of Triad, and Rodriguez selected the media markets, approved scripts, and authorized production and placement of the CR ads.

unauthorized television advertisement expressly advocating the defeat of Bill Yellowtail.⁷ She also alleged that the communication did not contain a disclaimer and stated that the Rick Hill for Congress Committee was neither paying for nor had authorized the ads. In fact, CR was behind the funding for the advertisements. Stipulation of Facts, Attachment 2, p. 23-24. Ms. Murphy wrote in her complaint that the Committee "has demanded that Citizen's [sic] for Reform immediately cease and desist in making these communications" and asked the FEC to take action against CR. The Committee maintains that it did not ask for the anti-Yellowtail ad⁸ or have any previous information that CR was going to finance the ad.⁹ It was only through the FEC's enforcement process that the Committee learned that Triad provided consulting services for CR. Nevertheless, the Acting General Counsel's report concluded that there was probable cause that CR made a coordinated expenditure and the Committee accepted an in-kind contribution in violation of 2 U.S.C. §§ 434, 441a(f), and 441b.

We believe that the facts in this case do not support a finding that CR coordinated its ads with the Hill Committee.¹⁰ Coordination with candidates and party committees is defined in 11 CFR 100.23:

- (c) An expenditure for a general public political communication is considered to be coordinated with a candidate or party committee if the communication –
 - (1) Is paid for by any person other than the candidate, the candidate's authorized committee, or a party committee, and
 - (2) Is created, produced or distributed –
 - (i) At the request or suggestion of the candidate, the candidate's authorized committee, or a party committee, or the agent of any of the foregoing;
 - (ii) After the candidate or the candidate's agent, or a party committee or its agent, has exercised control or decision-making authority over the content, timing, location, mode, intended

⁷ Ms. Murphy's complaint was numbered as MUR 4568, which eventually was consolidated with other MURs concerning Triad and CR.

⁸ Respondent's Brief in Support of No Probable Cause, p. 20-21; "Ms. Murphy testified that the campaign thought the ads were in poor taste, that everyone was appalled by it, and that Larry Akey was not at all happy about the ads. Moreover she stated his reaction was 'absolutely not that he knew it was coming.'" *Id.* at n. 19.

⁹ "The Committee had never heard of Citizens for Reform and the Committee had no idea that these ads were going to be aired. . . . Nobody within the Hill organization ever knew that phone banks were done by Citizens for Reform until the Commission told them that this was so. *See e.g.* Hill Deposition at 166; Akey Deposition at 188." *Id.* at 7-8.

¹⁰ None of the activities engaged in by CR in this MUR involves express advocacy. Following the principles set for in his Statement of Reasons in MUR 4624, Commissioner Smith would hold that for an ad to constitute a contribution because of coordination, it must contain express advocacy. For different reasons, Commissioner Mason is in agreement that an express advocacy requirement is a permissible interpretation of the statute, and that which ought to be applied here. *See* Statement of Reasons of Chairman Mason and Commissioners Wold and Smith in MUR 4538. Because it is not established that the activities at issue in this MUR were coordinated, Commissioner Wold finds it unnecessary to address the issue in this MUR.

- audience, volume of distribution, or frequency of placement of that communication; or
- (iii) After substantial discussion or negotiation between the creator producer or distributor of the communication, or the person paying for the communication, and the candidate, the candidate's authorized committee, a party committee, or the agent of such candidate or committee, regarding the content, timing, location, mode, intended audience, volume of distribution or frequency of placement of that communication, the result of which is collaboration or agreement. Substantial discussion or negotiation may be evidenced by one or more meetings, conversations or conferences regarding the value or importance of the communication for a particular election.
- (d) *Exception.* A candidate's or political party's response to an inquiry regarding the candidate's or party's position on legislative or public policy issues does not alone make the communication coordinated.

This regulation draws support from the decision in *FEC v. Christian Coalition*, 52 F.Supp.2d 45 (D.C. Cir. 1999).¹¹ In that case, the court held that the Commission's prior "insider trading" standard, under which even the most minor and innocuous contacts could convert unlimited independent expenditures into limited coordinated expenditures, was unconstitutional. The Court held that:

In the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots. Substantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners.

The present case clearly does not meet either the *Christian Coalition* standard or that of 11 CFR 100.23.

Coordination requires that a campaign and a spender operate together through the campaign to the point that the spender's speech is controlled in part by the campaign. In

¹¹ *Christian Coalition* involved allegations of campaign coordination in the 1992 election. Because this MUR involves the 1996 election, the Rick Hill Committee did not have the guidance of the *Christian Coalition* opinion nor the Commission's coordination regulations, which were passed in 2000.

this MUR, there is no direct evidence that the campaign requested or suggested that anyone create the anti-Yellowtail advertisements, or that coordination otherwise occurred. Merely noting that opportunities for coordination existed, and surmising that it could therefore have occurred, is insufficient to find probable cause.

First, the Acting General Counsel's Probable Cause Brief focuses on the fact that Hill staffers were receptive to using anti-Yellowtail material because they handed out press clips on the opponent and had polls that supported their anti-Yellowtail stance. Although staffers individually may have had these sentiments, this is not sufficient to find that the Hill campaign coordinated ads with a third party. Indeed, gathering such information is a typical campaign activity and the fact that the campaign chose not to use it, but that an unrelated group did, proves little. The Acting General Counsel's Brief glosses over the fact that Yellowtail's personal history was "widely known and documented" and available to the public, largely as a result of the Democratic primary, where it was first revealed.¹² Instead, the Acting General Counsel summarily concludes that "[G]iven the evident dissatisfaction and possible frustration on part of Mr. Hill's campaign staff and advisors, *it is credible* that one or more of them *would specifically request or suggest* that outsiders, including Triad, run personal attack ads on Yellowtail." Acting General Counsel's Probable Cause Brief, p. 24 (emphasis added). The fact that something is a credible suspicion is hardly the same as saying that it is supported by evidence. It is little more than speculation.

Second, the Acting General Counsel places great weight on Rodriguez's audit for Triad as proof that the Committee had "requested or suggested" that it wanted a third party to run anti-Yellowtail ads. In particular, the Acting General Counsel relies on Rodriguez's notes that said "3rd party to expose Yellowtail." Rodriguez has testified that these were his notes to himself. However, the Acting General Counsel argues that the testimony was "self-serving" and "should not be credited," even though admitting in the next sentence that "there is no evidence that he shared his purported idea with the campaign or Triad." We believe that this would not even be sufficient evidence to survive a motion for summary judgment at trial. See *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) (a party opposing summary judgment may not merely rely on the fact that a jury may find the opposing witnesses not credible. The party must put forth evidence).

The Acting General Counsel continues to be skeptical that the idea for the ads would have come from anyone but the Committee, obliquely requesting the favor through Rodriguez/Triad. Although there is no testimony that proves the Committee asked for these advertisements, the Acting General Counsel finds it persuasive that the Committee *may* have possibly discussed the idea with Triad: "[I]t would not be surprising if discussions with Triad were had secretly, or that members of the campaign would not want to admit undercutting Mr. Hill's pledge.... In these circumstances, the physical and circumstantial evidence of coordination set forth above should be given strong weight." Acting General Counsel's Probable Cause Brief, p. 26. But opportunity is neither action nor evidence of action.

¹² See *supra* note 2, 3, 4.

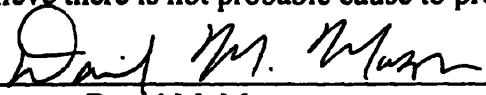
The facts show that the Committee filed a complaint in October when the ads began running and took steps to stop the ads by notifying CR's counsel personally, and asked the television station to stop airing the advertisements. It could be that the Hill campaign was too diabolical for the dupes at Triad – that they urged Triad to run the ads, then covered their tracks by filing a complaint. But no evidence supports this, and the respondents CR and Triad have not alleged this. Thus, if this is true, the folks at CR and Triad are loyal indeed, taking the fall for the Hill campaign's activities. To the conspiratorial mind, this may all seem obvious. To us, it seems a thin reed on which to rest a finding of probable cause, and we do not believe it would be successful in court.

Furthermore, for coordination to be found, "substantial discussion or negotiation" must exist, which the Commission has defined as enough discussion or negotiation about content, timing, mode, or volume that the parties are collaborating or in agreement. In this case, the Committee met with Triad formally only once. Any subsequent contact was minimal and infrequent before the ads ran. Thus, even if some Committee staffers appeared ready to exploit Yellowtail's past, and even if one or more of them hinted that Triad might run personal attack ads (though there is no evidence that this occurred), no evidence suggests that the contacts were sufficient to establish "substantial discussion or negotiation" over the communications. To the contrary, the evidence available indicates that the Committee was not a partner in this project and did not coordinate with anyone.

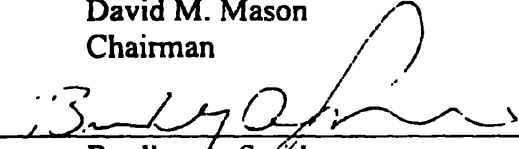
Adopting the Acting General Counsel's standard would take us back at least as far as the "insider trading" rule rejected in *Christian Coalition*. See also *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997), cert. denied 118 S.Ct. 1036 (1998). People in politics talk to each other. In particular, candidates and campaigns talk to allied interest groups. Thus, there will almost always be opportunities to coordinate and denials of coordination will always be "self-serving." Interest groups and candidate campaigns will often hit on the same themes; and independent expenditures will usually be damaging to the opponent. If this is enough to find coordination, no speaker is safe.

Because the investigation fails to show coordination under the standard of *Christian Coalition* or 11 CFR 100.23, we believe there is not probable cause to proceed.

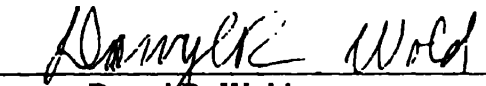
3/28/02
Date


David M. Mason
Chairman

3/28/02
Date


Bradley A. Smith
Commissioner

3/28/02
Date


Darryl R. Wold
Commissioner

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