



# FEDERAL ELECTION COMMISSION

Washington, DC 20463

## MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel *KCJ*

DATE: January 12, 2000

SUBJECT: Audit Referral 9913-First General Counsel's Report

The attached is submitted as an Agenda document for the Commission Meeting of \_\_\_\_\_

Open Session \_\_\_\_\_

Closed Session \_\_\_\_\_

### CIRCULATIONS

SENSITIVE

☒

NON-SENSITIVE

☐

72 Hour TALLY VOTE ☒

24 Hour TALLY VOTE ☐

24 Hour NO OBJECTION ☐

INFORMATION ☐

~~96 hour Tally Vote~~ ☒

### DISTRIBUTION

COMPLIANCE

☒

Open/Closed Letters ☐

MUR ☐

DSP ☐

STATUS SHEETS ☐

Enforcement ☐

Litigation ☐

PFESP ☐

RATING SHEETS ☐

AUDIT MATTERS ☐

LITIGATION ☐

ADVISORY OPINIONS ☐

REGULATIONS ☐

OTHER ☐

FEDERAL ELECTION COMMISSION  
999 E Street, N.W.  
Washington, D.C. 20463

JAN 12 2000  
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FEDERAL ELECTION  
COMMISSION  
SECRETARIAT

JAN 12 A 11: 22

FIRST GENERAL COUNSEL'S REPORT

**SENSITIVE**

AUDIT REFERRAL: 99-13  
DATE ACTIVATED: October 8, 1999

EXPIRATION OF STATUTE OF  
LIMITATIONS: April 3, 2001<sup>1</sup>  
STAFF: Peter G. Blumberg

SOURCE: Internally Generated

RESPONDENTS: Dole for President, Inc., and Robert J. Dole, as treasurer  
  
The Republican National Committee, and Alec Poitevint, as treasurer

Senator Robert J. Dole

RELEVANT STATUTES: 2 U.S.C. § 431(8)(A)(i)  
2 U.S.C. § 431(9)(A)(i)  
2 U.S.C. § 431(18)  
2 U.S.C. § 434(a)(1)  
2 U.S.C. § 434(b)(2)-(3)  
2 U.S.C. § 434(b)(4)(G)-(H)  
2 U.S.C. § 441a(a)(1)(A)  
2 U.S.C. § 441a(a)(2)(A)  
2 U.S.C. § 441a(a)(7)(B)(i)-(ii)  
2 U.S.C. § 441a(b)-(c)  
2 U.S.C. § 441a(d)(1)-(2)  
2 U.S.C. § 441a(f)  
2 U.S.C. § 441b(a)  
26 U.S.C. § 9003(b)  
26 U.S.C. § 9033(a)  
26 U.S.C. § 9035(a)  
26 U.S.C. § 9036(a)  
26 U.S.C. § 9038(a)

<sup>1</sup> The statute of limitations date for the earliest violative activity in this matter is April 4, 2001, the date of the Republican National Committee's first payment to an advertising placement firm for an advertisement flight to be broadcast in the following days. Such payments occurred throughout the period of time from April of 1996 through August of 1996, with the majority of the expenditures incurred in May and June 1996.

11 C.F.R. § 100.7(a)(1)(iii)  
11 C.F.R. § 100.8(a)(1)(iv)(A)  
11 C.F.R. § 102.5(a)-(b)  
11 C.F.R. § 102.9(e)  
11 C.F.R. § 104.10(b)(1)  
11 C.F.R. § 104.13(a)(1)-(2)  
11 C.F.R. § 106.1(d)  
11 C.F.R. § 106.5(a)-(b)  
11 C.F.R. § 109.1(b)(4)  
11 C.F.R. § 110.2(b)(2)(ii)  
11 C.F.R. § 110.7(a)(1)(iii)  
11 C.F.R. § 110.8(a)(1)(iv)(A)  
11 C.F.R. § 114.2(a)-(b)  
11 C.F.R. § 9007.2(c)(3)  
11 C.F.R. § 9034.4(e)(6)  
11 C.F.R. § 9038.2(c)(3)

**INTERNAL REPORTS CHECKED:** Disclosure Reports; MURs 4553/4671 investigative file.

**FEDERAL AGENCIES CHECKED:** United States Senate Committee on Governmental Affairs Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns

## **I. GENERATION OF MATTER**

On June 11, 1999, the Audit Division made a referral to the Office of General Counsel generated from an audit of Dole for President, Inc. ("Primary Committee") undertaken in accordance with 26 U.S.C. § 9038(a). On September 22, 1999, the Commission severed the portions that related to the issue whether the cost associated with the production and broadcast of certain advertisements funded by the Republican National Committee ("RNC") were in-kind contributions to the Primary Committee. This issue was placed in AR 99-13.<sup>2</sup>

<sup>2</sup> In the actual referral document, media expenditures are discussed in summary fashion, incorporating by reference section III.A. of the Report of the Audit Division for the Primary Committee. Attachment 2.

The Primary Committee is the authorized committee of Senator Robert J. Dole for his campaign for the Republican nomination in the 1996 Presidential election. The Primary Committee registered with the Commission on January 12, 1995 and received \$13,545,771 in public funds for the purpose of seeking the Republican Party nomination. See 26 U.S.C. §§ 9033(a) and 9036(a).

This Report is based on materials referred to this Office from the Audit Division. Additionally, other publicly-available information such as disclosure reports and newspaper articles were used in preparing the Report. Finally, the Report makes use of materials gathered in the investigation of MURs 4553 and 4671. MURs 4553 and 4671 relate to the same issues addressed in AR 99-13, namely the apparent excessive contributions made by the RNC to the Primary Committee through the in-kind contribution of the production and broadcast of television advertisements. In MURs 4553 and 4671, the Commission found reason to believe on February 10, 1998, that, *inter alia*, the RNC made, and the Primary Committee received, excessive contributions in violation of 2 U.S.C. § 441a. On the same date, the Commission authorized subpoenas for documents and deposition testimony and orders to answer questions.<sup>3</sup> In response to this compulsory process, this Office received documents and answers to interrogatories. In addition, depositions of individuals were conducted from June through August 1998. Since the

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<sup>3</sup> The Commission also found reason to believe that the Primary Committee exceeded the overall expenditure limitation in MURs 4553 and 4671.

The Commission adopted an alternative finding in MURs 4553 and 4671 that Dole/Kemp '96, Inc. ("the General Committee"), Senator Dole's principal campaign committee in the general election, also received an in-kind contribution from the RNC. The alternative finding was made pending the receipt of additional information that would help determine whether the Primary Committee or General Committee actually received the contribution. The issue of attribution was addressed during the Commission's consideration of the Primary Committee's and General Committee's audit reports. This report addresses the issue of where the contribution should be attributed in the analysis section.

Commission has this material in its possession, this Report relies on documents and sworn testimony provided pursuant to subpoena in MURs 4553 and 4671.<sup>4</sup>

The Office of General Counsel completed its investigation of MURs 4533 and 4671 and was prepared to move the case to the probable cause stage. Therefore, this Office recommended that, in light of the overlapping media expenditure issues in AR 99-13 and MURs 4553 and 4671, the various matters be processed as one assignment. However, on September 22, 1999, the Commission rejected this Office's recommendation and directed this Office to hold in abeyance the briefing of MURs 4553 and 4671 pending Commission action on the current Report. If the Commission finds reason to believe that any violations of the Act occurred based on this Report, this Office recommends that AR 99-13 be processed with MURs 4553 and 4671.

## **II. LAW**

### **A. In-kind Contributions Through Media Expenditures**

A contribution includes any gift, subscription, loan, advance, deposit of money or anything of value made by any person for the purpose of influencing any election for federal office.

2 U.S.C. § 431(8)(A)(i). "Anything of value" includes all in-kind contributions. 11 C.F.R.

§ 100.7(a)(1)(iii). An expenditure includes any purchase, payment, distribution, loan, advance, deposit, gift of money or anything of value, made by any person for the purpose of influencing any election for federal office. 2 U.S.C. § 431(9)(A)(i). "Anything of value" includes in-kind contributions. 11 C.F.R. § 100.8(a)(1)(iv)(A).

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<sup>4</sup> Some of the MURs 4553 and 4671 investigative material was also used in the Audit Report submitted for Commission consideration, although the Commission-approved Audit Report was stricken of this material.

In this case, there are two bases on which to conclude that the RNC made a contribution to the Primary Committee. First, an expenditure made in coordination with the candidate and for the purpose of influencing a federal election is an in-kind contribution to the candidate. 2 U.S.C. § 441a(a)(7)(B)(i). Secondly, advertisements are contributions when an advertisement broadcast by one entity is a republication, in whole or in part, of another committee's advertisement. 2 U.S.C. § 441a(a)(7)(B)(ii).

**1. An Expenditure Made In Coordination With A Candidate For Federal Office And For The Purpose Of Influencing An Election For Federal Office Is An In-kind Contribution To The Candidate**

An expenditure "made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents" is a contribution to such candidate. 2 U.S.C. § 441a(a)(7)(B)(i); *Buckley v. Valeo*, 424 U.S. 1, 78 (1976) (the term "contribution" includes "all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate"); see 11 C.F.R. § 109.1(b)(4).<sup>5</sup> The United States Supreme Court held that there was no coordination in a situation where uncontroverted direct evidence (submitted in connection with a motion for summary judgment) demonstrated that an "advertisement campaign was developed by [a state

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<sup>5</sup> Commission regulations provide additional guidance on the activities that constitute coordination. See, e.g., 11 C.F.R. § 114.2(c) (any coordinated communications may negate the independence of any subsequent communications); 11 C.F.R. § 114.4(c)(5) (concerning voter guides that include express advocacy: any contact or other cooperation, coordination, consultation, request, or suggestion will result in a contribution; concerning voter guides that do not include electioneering messages: any contact other than written exchanges about the candidate's positions on issues will result in a contribution); but see *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997), cert. denied, 118 S. Ct. 1036 (1998) (declaring 11 C.F.R. § 114.4(c)(5) invalid under First Amendment insofar as it limited contact with candidates to written inquiries and replies); cf. 62 Fed. Reg. 24,367 (May 5, 1997) (notice of proposed rulemaking regarding the definition of coordination to be codified at 11 C.F.R. § 100.23) and 63 Fed. Reg. 69524 (Dec. 16, 1998) (notice of proposed rulemaking regarding publicly-financed Presidential primary and general election candidates, including issues concerning coordination between party committees and their respective Presidential candidates).

party committee] independently and not pursuant to any general or particular understanding with a candidate.” *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 614 (1996)(plurality op.).<sup>6</sup> The Supreme Court held that evidence that the general practice of the state committee was to coordinate campaign strategy with its candidates did not specifically relate to the particular advertisements at issue, and therefore did not raise a triable issue on the question of coordination. *Id.*

The United States District Court for the District of Columbia recently examined the degree of coordination required to impair the independence of expenditures for speech-related activities, and held that “considerable coordination will convert an expressive expenditure into a contribution but . . . the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some consultations or coordination with a federal candidate.” *FEC v. The Christian Coalition*, Civil Action No. 96-1781 (JHG) (Opinion and Order August 2, 1999) at 99. Addressing only “coordination as it applies to expressive coordinated expenditures<sup>7</sup> by corporations . . .,” *id.*, the District Court set out the following test to assess when such expenditures become contributions:

In the absence of a request or suggestion from the campaign, an expressive expenditure becomes “coordinated,” where the candidate or her agents can

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<sup>6</sup> In *Colorado Republican*, the Supreme Court also held that the First Amendment prohibits the presumption that a national party committee’s expenditures are coordinated with its congressional candidates. *Colorado Republican*, 518 U.S. at 608. The Supreme Court expressly limited this holding, stating: “Since this case involves only the provision concerning congressional races, we do not address issues that might grow out of the public funding of Presidential campaigns.” *Id.*, 518 U.S. 604, 612; cf. *RNC v. FEC*, 487 F. Supp. 280, 284-87 (S.D.N.Y.) (Congress may condition public funding eligibility upon candidate’s voluntary acceptance of expenditure limits), *aff’d mem.* 445 U.S. 955 (1980). However, the Supreme Court did not specify to which public financing issues it was referring, and no presumption of coordination is being made in this matter. *Colorado Republican*, 518 U.S. 604, 612.

<sup>7</sup> As used in the *Christian Coalition* opinion, the term “expressive coordinated expenditure” was defined as “a communication made for the purpose of influencing a federal election in which the spender is responsible for a substantial portion of the speech and for which the spender’s choice of speech has been arrived at after coordination with the campaign.” *Christian Coalition*, Opinion and Order at 86 n.45.

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.

*Id.* at 101.

A majority of the Commission voted not to appeal the *Christian Coalition* decision. In addition, this Office notes that the Commission is at present engaged in rulemaking on this issue.

**2. An Expenditure Made In Coordination With A Candidate For Federal Office And For The Purpose Of Influencing An Election For Federal Office Is An In-kind Contribution To The Candidate Regardless Whether The Communication Contains "Express Advocacy," Or Contains An "Electioneering Message" And Refers To A "Clearly Identified Candidate"**

In the case of expenditures for advertising or other communications which are made in coordination with the candidate, there is no additional requirement that the communication contain "express advocacy," or that the communication contain an "electioneering message" and refer to a "clearly identified candidate" for the expenditure to be treated as an in-kind contribution. See *Christian Coalition*, Opinion and Order at 89-94 (expressive coordinated expenditures are not limited to express advocacy).

**a. Express Advocacy**

In order to protect rights guaranteed by the First Amendment, the Supreme Court has limited the regulation of independent expenditures for speech-related activity to expenditures for communications containing "express advocacy." *Buckley*, 424 U.S. at 44, 46-47. However, the Court made clear that communications that are authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate are to be treated as expenditures of the candidate and contributions by the person or group making the expenditure.



*Buckley*, 424 U.S. at 46-47 n.53. The Court stated that coordinated expenditures are treated as in-kind contributions subject to the contribution limitations in order to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." 424 U.S. at 46-47.<sup>8</sup> Thus, if expenditures for communications are made in cooperation with, or at the direction of, a candidate or campaign staff, the communication need not contain "express advocacy" for the expenditure to be subject to federal regulation.<sup>9</sup>

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<sup>8</sup> The Supreme Court held that the absence of prearrangement or coordination of an expenditure "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

<sup>9</sup> Subsequent cases have reiterated these basic principles. In *FEC v. Massachusetts Citizens for Life, Inc.*, the Supreme Court stated that expenditures by corporations that are made independent of any coordination with a candidate are prohibited by 2 U.S.C. § 441b only if they "expressly advocate the election or defeat of a clearly identified candidate." 479 U.S. 238, 248-49, 256 (1986)(quoting *Buckley*, 424 U.S. at 80). In *Colorado Republican Campaign Committee v. FEC*, the Supreme Court held that political parties may make independent expenditures on behalf of their congressional candidates without limitation. 518 U.S. 604 (1996). In *Colorado*, the Supreme Court reiterated the *Buckley* distinction between independent expenditures and coordinated contributions, and focused on whether the expenditures in that case were in fact coordinated. The Supreme Court noted that in previous cases, it had found constitutional "limits that apply both when an individual or political committee contributes money directly to a candidate and also when they indirectly contribute by making expenditures that they coordinate with the candidate, § 441a(a)(7)(B)(i)." 518 U.S. at 610. The Supreme Court's plurality opinion expressly declined to address the issue of whether limitations on coordinated expenditures by political parties are constitutionally permissible. 518 U.S. at 612. The opinion notes the similarities between coordinated expenditures and contributions: "many such expenditures are also virtually indistinguishable from simple contributions (compare, for example, a donation of money with direct payment of a candidate's media bills. . .)." 518 U.S. at 624.

The United States District Court for the District of Columbia recently rejected arguments to apply the express advocacy standard to coordinated expenditures for communications. *FEC v. The Christian Coalition*, Civil Action No. 96-1781 (JHG) (Opinion and Order August 2, 1999) at 89-94. Citing *Buckley*, the District Court emphasized that "with regard to 'coordinated expenditures' there is no constitutional need to narrow the definition of the term 'expenditure' given by Congress." *Id.* at 90 n.50. Similarly, in a case involving state election statutes similar to FECA, the Court of Appeals of Wisconsin held that the First Amendment did not prohibit the State of Wisconsin Elections Board from investigating expenditures by a non-profit corporation for postcards which discussed two candidates, but did not expressly advocate the election or defeat of either, where it was alleged that the non-profit corporation made the expenditures following consultation with one of the candidates. *Wisconsin Coalition for Voter Participation, Inc. v. State of Wisconsin Elections Board*, No. 99-2574 (Wis. Ct. App. Nov. 26, 1999).

**b. Electioneering Message/Clearly Identified Candidate**

The electioneering message/clearly identified candidate test was articulated by the Commission in AO 1985-14. Advisory Opinion 1985-14 involved television, radio and print advertisements, and mailers, which the Democratic Congressional Campaign Committee (DCCC) proposed to publish, and which purported to describe Republican policies. The Commission concluded that amounts used to fund the communications would be expenditures subject to the limitation set forth at 2 U.S.C. § 441a(d) if the communication depicted a clearly identified candidate and conveyed an electioneering message:

In Advisory Opinion 1984-15, the Commission considered the application of the limitations of 2 U.S.C. § 441a(d) to expenditures for political advertising similar to DCCC's proposed communications. There, the Commission concluded that the limitations of § 441a(d) would apply where the communication both (1) depicted a clearly identified candidate and (2) conveyed an electioneering message. See also Advisory Opinion 1978-46. Under the Act and regulations, a candidate is clearly identified if his or her name or likeness appears or if his or her identity is apparent by unambiguous reference. 2 U.S.C. § 431(18); 11 CFR § 106.1(d). Electioneering messages include statements "designed to urge the public to elect a certain candidate or party." *United States v. United Auto Workers*, 352 U.S. 567, 587 (1957); see Advisory Opinion 1984-62.

AO 1985-14 at 7.<sup>10</sup>

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<sup>10</sup> Advisory Opinion 1984-15 involved two television advertisements which the RNC proposed to broadcast. The Commission determined that the advertisements had "[t]he clear import and purpose . . . to diminish support for any Democratic Party presidential nominee and to garner support for whoever may be the eventual Republican Party nominee . . . ." The Commission further stated that the advertisements "effectively advocate the defeat of a clearly identified candidate." Based on these determinations, the Commission explained that "expenditures for these advertisements benefit the eventual Republican presidential candidate and are made with respect to the presidential general election and in connection with the presidential general election campaign." The Commission concluded that expenditures for the advertisements therefore would be reportable either as contributions subject to the limitation set forth at 2 U.S.C. § 441a(a)(2)(A), or as coordinated party expenditures subject to the limitation set forth at 2 U.S.C. § 441a(d).

The Commission continued to apply the electioneering message/clearly identified candidate test in Advisory Opinions as recent as AO 1998-9.<sup>11</sup> Furthermore, the electioneering message/clearly identified candidate test appears to have gained some acceptance from the courts. In *FEC v. Colorado Republican Federal Campaign Committee*, 59 F.3d 1015 (10th Cir. 1995) *rev'd on other grounds*, 518 U.S. 604 (1996), the Tenth Circuit reversed the District Court's holding that party-funded advertisements had to contain "express advocacy" for the amounts spent for the advertisements to be limited by 2 U.S.C. § 441a(d). Rather, the Court of Appeals expressly deferred to the Commission's "construction of § 441a(d) as regulating political committee expenditures depicting a clearly identified candidate and conveying an electioneering message . . . ." 59 F.3d at 1022, citing Advisory Opinion 1984-15. Applying this test, the Tenth Circuit held that the Colorado Republican Party's 1988 advertisements in opposition to then Senator Timothy Wirth's record "unquestionably contained an electioneering message." According to the court, these advertisements had left "the reader (or listener) with the impression that the Republican Party sought to 'diminish' public support for Wirth and 'garner support' for the unnamed Republican nominee." *Id.* Thereafter, the Supreme Court vacated the Court of

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<sup>11</sup> In AO 1998-9 the Commission stated that:

A disbursement for a communication that depicts a clearly identified candidate and conveys an electioneering message will be an expenditure subject to the limits of 2 U.S.C. 441a(d) if the communication results from coordination between RPNM and the Republican candidate. Advisory Opinion 1985-14; see also Advisory Opinion 1984-15 and *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, \_\_\_ U.S. \_\_\_, 116 S. Ct. 2309, 2315-2319 (1996) (where the Court concluded that expenditures by a political party are not presumed to be coordinated with the party's candidate, and that the limitations of 2 U.S.C. 441a(d) would apply only to expenditures that are coordinated with the candidate).

Appeals' opinion in *Colorado Republican* on other grounds. 518 U.S. 604 (1996). However, on the issue of "electioneering message" as the standard for content, the Supreme Court was silent.

The electioneering message/clearly identified candidate test was addressed in the context of the Commission's consideration of the reports submitted by the Audit staff in connection with the primary and general election campaigns of the 1996 Presidential campaign committees of the two major party candidates. The Audit Division relied on the electioneering message/clearly identified candidate test in concluding that the advertisement campaigns funded by the DNC and the RNC were in-kind contributions to the Primary Committee and the Dole/Kemp '96, Inc. (General) Committee, and that these committees therefore exceeded the applicable expenditure limitations. The Audit Division therefore recommended that Commission make a repayment determination with respect to these committees. In rejecting this recommendation, a majority of the Commission issued a Statement of Reasons<sup>12</sup> explicitly repudiating the electioneering message/clearly identified candidate test. *Statement of Reasons of Vice Chairman Darryl R. Wold and Commissioners Lee Ann Elliott, David M. Mason and, Karl J. Sandstrom On The Audits of "Dole for President Committee, Inc." (Primary), "Clinton/Gore '96 Primary Committee, Inc.," "Dole/Kemp '96, Inc." (General), "Clinton/Gore '96 General Committee, Inc.," and "Clinton/Gore '96 General Election Legal and Compliance Fund" (June 24, 1999)(("Statement of Reasons"))*.

In rejecting the test, the Statement of Reasons states that "the threshold problem with the 'electioneering message' standard . . . is that it is not a rule. It is only a shorthand phrase that purports to describe the Commission's reasoning in two advisory opinions." Statement of

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<sup>12</sup> While this document was entitled a "Statement of Reasons," it is distinguishable from a statement of reasons issued pursuant to 11 C.F.R. §§ 9007.2(c)(3) or 9038.2(c)(3) since it was not issued after the administrative review stage and was not issued in support for a repayment determination.

Reasons at 3. The Statement of Reasons explains that “the Commission may not use advisory opinions as a substitute for rulemaking.” *Id.* According to the Statement of Reasons, the electioneering message standard is not a duly promulgated rule, but only a reference to an interpretation of certain advisory opinions, and therefore cannot be imposed on the regulated community. *Id.* at 2-4. Likewise, the only persons within the regulated community entitled to rely on the standard are the persons involved in the matters discussed in the opinion or in any materially indistinguishable activity. *Id.* at 3. The Statement of Reasons further declares that, in the absence of controlling regulations or authoritative interpretations of the courts, the appropriate enforcement standard is “the natural dictate of the language of the statute itself.” *Id.* at 2 (footnote omitted); *cf.* Concurrence in Advisory Opinion 1999-11 [Commissioners Elliott, Mason and Wold] (August 16, 1999).<sup>13</sup> In light of this Statement of Reasons, it appears that the electioneering message/clearly identified candidate test has no application in evaluating whether the advertisements at issue should be treated as contributions to the Primary Committee.

Accordingly, if a disbursement for communications is made for the purpose of influencing the election of a candidate, and is made in cooperation with, or at the direction of, that candidate or that candidate’s campaign staff, the disbursement is an expenditure by the person making the disbursement and an in-kind contribution to the candidate.

### **3. The Republication of Campaign Materials is a Contribution from the “Republisher” to the Original “Publisher”**

“The financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic or other form of campaign materials prepared

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<sup>13</sup> Beyond the “threshold problem” that the electioneering message test is not a properly enacted rule, the Commission also found that the standard suffers from substantive infirmities of vagueness and overbreadth. Statement of Reasons at 4-6.

by the candidate, his campaign committees, or their authorized agents shall be considered to be to be an expenditure for purposes of this paragraph” (i.e. a coordinated expenditure and a contribution to the relevant candidate). 2 U.S.C. § 441a(a)(7)(B)(ii).<sup>14</sup>

### **B. Excessive And Prohibited Contributions**

The Act prohibits multi-candidate political committees from making contributions to any candidate and his or her authorized political committees with respect to any election for federal office which, in the aggregate, exceed \$5,000. 2 U.S.C. § 441a(a)(2)(A). No candidate or political committee shall knowingly accept any contribution that violates the contribution limitations. 2 U.S.C. § 441a(f).

Corporations and labor unions cannot make contributions in connection with federal elections. 2 U.S.C. § 441b(a); 11 C.F.R. §§ 114.2(a), (b). A political committee that accepts contributions from corporations and/or labor unions for permissible purposes must establish separate accounts or committees for the receipt of federal and non-federal funds. 11 C.F.R. § 102.5(a). A political committee that maintains both federal and non-federal accounts shall make disbursements for federal elections from its federal account only. 11 C.F.R. § 102.5(a)(1)(i); see also *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 616 (1996)

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<sup>14</sup> In MUR 445, the Commission found reason to believe that an individual contributor and the Friends for Reagan Committee violated 2 U.S.C. § 441a(a)(1)(A) when they allegedly coordinated on the republication of a Reagan Committee campaign advertisement. In AO 1981-60, the Commission determined that, under the facts presented in that request, if an individual forwards a candidate’s campaign solicitation to other individuals that he believes may be interested in receiving the solicitation, this act would constitute a republication of campaign materials and an expenditure and a contribution from the forwarding person to the candidate, notwithstanding the candidate’s lack of knowledge of the act. AO 1981-60. Courts have also referenced this statute, although no court has specifically dealt with the matter. See, e.g., *Republican National Committee v. FEC*, 487 F.Supp. 280, 288-89 (S.D.N.Y.), affirmed 445 U.S. 955 (1980) (upholding constitutionality of certain provisions of the FECA and the Presidential Election Campaign Fund Act and stating that alleged expenditures “financed out of the union treasury, on communications ... including campaign material prepared or suggested by a candidate for President” is regulated by the Commission pursuant to 2 U.S.C. §§ 441a(a)(7) and 441b).

(plurality op.) (“Unregulated soft money contributions may not be used to influence a federal campaign”).

An expenditure is made on behalf of a publicly-funded candidate, and thus subject to the expenditure limitation, if it is made by: (1) an authorized committee or any other agent of the candidate for purpose of making any expenditure; or (2) any person authorized or requested by the candidate, an authorized committee of the candidate or an agent of the candidate to make the expenditure. 2 U.S.C. § 441a(b)(2)(B).

### **C. Reporting Requirements**

Each treasurer of a political committee shall file reports of its receipts and disbursements. 2 U.S.C. § 434(a)(1). Each report shall disclose for the appropriate reporting period all receipts, including all contributions received from political party committees. 2 U.S.C. § 434(b)(2)(C). Political committees other than authorized committees shall also disclose for the appropriate reporting period all disbursements, including contributions made to other political committees, as well as expenditures by national committees in connection with the general election campaigns of candidates for federal office. 2 U.S.C. §§ 434(b)(4)(H)(i) and (iv). Each in-kind contribution shall be reported as both a contribution and an expenditure. 11 C.F.R. §§ 104.13(a)(1) and (2); 2 U.S.C. § 434(b)(4)(G). Moreover, if a political committee is required to allocate disbursements between federal and non-federal funds, the treasurer must report the appropriate allocation ratios. 11 C.F.R. § 104.10(b)(1).

### **D. Attribution Of Expenditures Between The Primary And The General Election**

The Commission promulgated 11 C.F.R. § 9034.4(e) to establish a “bright line” cut-off date between primary and general election expenses “with regard to certain specific types of expenditures that may benefit both the primary and the general election.” Explanation and

Justification for 11 C.F.R. § 9034.4(e), 60 Fed. Reg. 31,867 (June 16, 1995). The general rule is that goods or services used exclusively for the primary or general election campaign are allocable to that election. 11 C.F.R. § 9034.4(e)(1). Expenditures for media and other communications used for both the primary and general elections are attributed between the primary and general elections based upon whether the date of broadcast or publication is before or after the candidate's date of nomination. 11 C.F.R. § 9034.4(e)(6).<sup>15</sup>

### **E. Allocation**

A political committee that finances political activity in connection with both federal and non-federal elections shall segregate funds used for federal elections from funds used for non-federal elections. 11 C.F.R. § 102.5(a)(1). If a political committee makes disbursements in connection with both federal and non-federal elections, it must allocate those disbursements between federal and non-federal funds. 11 C.F.R. § 106.5(a). Allocable disbursements include administrative expenses not attributable to a clearly identified candidate, and generic activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate. 11 C.F.R. §§ 106.5(a)(2)(i) and 106.5(a)(2)(iv).

In presidential election years, national party committees shall allocate at least 65% of their administrative and generic voter drive expenses to their federal accounts. 11 C.F.R.

§ 106.5(b)(2)(i). This allocation is "intended to reflect the national party committees' primary

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<sup>15</sup> In adopting the rule, the Commission recognized that the application of the rules could result in the attribution of some primary-related expenditures to the general election expenditure limitations and *vice versa*, but reasoned that "these differences should balance themselves out over the course of a lengthy campaign." 60 Fed. Reg. 31,867 (June 16, 1995). The Commission has promulgated regulations based on the timing of the contribution in other contexts, such as the designation of contributions to the primary or general election. See, e.g., 11 C.F.R. §§ 110.2(b)(2)(ii) and 102.9(e). While 11 C.F.R. § 9034.4(e) does not explicitly discuss national party committees, the regulation applies to a publicly financed candidate's expenditures, which include expenditures in the form of in-kind contributions.



focus on presidential and other federal candidates and elections, while still recognizing that such committees also participate in party-building activities at state and local levels . . . .” Explanation and Justification for 11 C.F.R. § 106.5(b), 55 *Fed. Reg.* 26,063, 26,063 (June 26, 1990). In non-presidential election years, national party committees shall allocate at least 60% of their administrative and generic voter drive expenses to their federal accounts. 11 C.F.R.

§ 106.5(b)(2)(ii).

#### **IV. FACTS AND ANALYSIS**

##### **A. Overview**

In March 1996, the RNC launched an advertising campaign that was commonly referred to as the “Summer Media Program.” The RNC expended \$18,453,619 on the media program. The advertisements at issue were entitled: “The Story,” “More Talk,” “Even More Talk,” “Surprise,” “The Pledge,” “More,” “Who,” “Stripes,” and “Case Study.” All of the advertisements were broadcast except for “Stripes.” “Stripes” is included in this list since costs were incurred by the RNC in the production of the advertisement. The Office of General Counsel believes that the RNC and Primary Committee coordinated on the planning, fundraising, budgeting, targeting and content of the advertisements. Furthermore, it appears that the advertisements were for the purpose of influencing Senator Dole’s nomination. Therefore, the amount spent on the advertisements is a contribution from the RNC to the Primary Committee.

During the audit process, the Primary Committee submitted a response to the Exit Conference Memorandum where it addressed this issue. Generally, the Primary Committee argued that it did not “direct or control” the creation, production or distribution of the RNC-funded advertisements, and that the Primary Committee’s only role was to view the

advertisements after they were already finalized and made public. Attachment 5 at 9-10.<sup>16</sup>

**B. The Expenditures For The Advertisements Were Made In Coordination And Consultation With Senator Dole And The Primary Committee**

**1. Planning, Fundraising, Budgeting, Targeting**

According to Haley Barbour, the advertising plan was first contemplated in 1995 when the RNC took notice of DNC and labor union advertising that was broadcast beginning in the summer of 1995. Barbour transcript at 44.<sup>17</sup> Barbour instructed his staff to prepare for a response advertising campaign. *Id.* The first documented reference to this plan was contained in the minutes of a January 17, 1996 RNC Executive Council and Budget Committee meeting. According to the minutes, the RNC had "issued a request for proposal to Republican consultants for how we can insulate our nominee-to-be during the April-August interregnum. Paid advertising will be the necessary component of our message management during this period, supplementing our bracketing and press efforts." Attachment 6 at 8.

The RNC also recognized that Senator Dole's inability to spend funds without violating his expenditure limitation was a reason to create an RNC-funded advertising campaign. On March 5, 1996, Barbour issued a "Memorandum for Republican Leaders" regarding "Independent Expenditure Campaigns" where he noted that "our nominee is likely to be broke and to have reached the spending limit allowed by law [by the end of March] ... Assuming our nominee has reached the limit, he will not be able to air radio and TV spots or conduct much in

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<sup>16</sup> The advertisements addressed in this matter were also at issue in the audit of the Primary Committee, where the Commission voted to reject the repayment determinations relating to these advertisements. However, as we noted at that time, that determination related to repayments, and not violations of the Federal Election Campaign Act, as amended. See *Reagan Bush Committee v. FEC*, 525 F. Supp. 1330, 1337 (D.D.C. 1981) (audit process is on track that is different from enforcement process); see also *Kennedy for President v. FEC*, 734 F.2d 1558, 1560 n.1 (D.C. Cir. 1984).

<sup>17</sup> The transcripts of all the depositions conducted in this matter are available in the Commission's Secretary Office.

the way of campaign activity until the convention in August. Clinton, on the other hand, will have millions to spend attacking us, for he has raised the limit but has not had to spend it to win the Democrat[ic] nomination. We cannot give Clinton and his liberal allies a free shot at us for four months.” Attachment 7. Barbour later testified that he felt the RNC would “have to carry the Republican message during the interregnum” while Senator Dole could not broadcast advertising due to his expenditure limitation constraints. Barbour transcript at 44.

In planning the advertising campaign, the RNC believed that it could coordinate with the Primary Committee in conducting its media program. Barbour’s March 5, 1996 memorandum warns against independent expenditures made by groups not affiliated with the RNC and states that the RNC is best positioned to prepare media since “the party can coordinate our generic advertising with anybody” while other groups would “not [be] allowed to coordinate or consult with the nominee’s campaign.” Attachment 7. The memo concludes that the recipients should be aware of all the aforementioned facts in deciding “where your money and [your friends’] money should go, if the goal is to elect a Republican president.” *Id.*

Another step in the process of planning the Summer Media Program was the contracting of a media vendor to run the program. The minutes of the January 17, 1996 RNC Executive Council and Budget Committee Meeting references outreach to media vendors that was performed in preparation for an RNC media program. Attachment 6 at 8. In his deposition, Haley Barbour confirmed that outreach occurred at this time and that many vendors were contacted. Barbour transcript at 46. Following the outreach, Don Sipple was ultimately selected to run the program. Barbour indicated that Sipple’s work with the Primary Committee was a factor in selecting Sipple for the RNC position. Barbour testified that it is “advantageous if you end up with the person who is the media consultant for the candidate because it helps you – you

know, for the ultimate nominee -- it helps you thematically down the road ... .”<sup>18</sup> Barbour transcript at 48. Barbour acknowledged that Greg Stevens, another media vendor, had done much of the RNC’s previous work and that he had not hired Sipple for any assignments previously, although he was familiar with Sipple’s work for other clients and had once leased office space to Sipple. *Id.* at 70, 147-48.

Prior to his selection to run the RNC media program, Don Sipple was the Primary Committee’s chief strategist and had control over its advertising message and strategy. Sipple says that his contribution to the Dole primary campaign, which he joined in his senior role in February 1996, was a “shift in tone” of the advertising to a “more positive, upbeat message. What’s good about Bob Dole instead of what’s bad about Steve Forbes.” Sipple transcript at 54. Sipple noted that to be successful in his business you have to “sustain an advertising campaign over a period of time to have it have a cumulative effect.” *Id.* at 92. In addition, Sipple continued to be employed by the Dole campaign even after he began working for the RNC. Thus, Sipple had a dual role in crafting the message for the RNC and the Dole campaign at the same time.<sup>19</sup> Along with the sharing of media advisers, the RNC also used footage in some of the advertisements that had appeared in earlier Primary Committee advertisements and that had been

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<sup>18</sup> Barbour’s statement continued, but was somewhat vague. He seemingly attempted to revisit this issue later in the deposition when he testified: “I think I may have mentioned this earlier, it is very advantageous to the party that while the party controls the message, during the period the party controls the message, which is what we’re talking about here, that you infect the candidates’ advertising people with what you think are the big party ideas that float all the boats, because that’s my job.” Barbour transcript at 70.

<sup>19</sup> This dual role seems to have led to confusion among certain vendors to the RNC media campaign. Several invoices paid by the RNC as part of the campaign reference the Dole candidacy, and it appears that the vendors submitting those invoices assumed that they were doing work for Dole, not the RNC. *See, e.g.*, Attachment 8. In seeking Don Sipple’s services, the RNC actually hired New Century Media, a corporation owned by Sipple and which he created just prior to contracting with the RNC. He established the corporation “partly [at] the suggestion of the Dole campaign, partly [as part of] a tradition in the Republic[an] party.” Sipple transcript at 97. NCM was set up “mechanically” by Adam Stoll, a Primary Committee employee who had no relationship to Sipple prior to their work for the Primary Committee. *Id.* at 98.

used for a film called "the American Hero" which was played at certain Primary Committee fundraisers.

Based on a review of invoices and disclosure reports, the media program cost \$18,453,619. This total includes payments of \$16,502,826 to Multi-Media Services Corporation ("MMSC"), a vendor that places advertising on television stations on a national basis, and who was hired for this purpose by the RNC. Another advertising placement firm, Target Advertising, was also employed to place RNC advertising. Target Advertising was paid \$1,678,296 for its work in placing advertisements between April 8, 1996 through June 25, 1996.<sup>20</sup> The RNC also paid \$272,497 to New Century Media, Inc. ("NCM") for its work on the Summer Media Program. NCM was a corporation founded by Don Sipple.<sup>21</sup> NCM billed the RNC for Sipple's work.

To fund its operations during the 1996 cycle, the RNC created a Victory '96 fundraising campaign whose goal was "to elect Bob Dole as the next president of the United States." Attachment 9. The document setting forth this goal noted that \$50,000,000 was needed "to elect Bob Dole president." *Id.* The memo notes that \$50,000,000 of the RNC's budget is "for the presidential campaign" while the overall RNC budget is \$136,000,000.<sup>22</sup> It is not clear that all of the \$50,000,000 was used for media, and the available records indicate that the cost of the

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<sup>20</sup> The RNC paid Target a total of \$9,344,804 of which \$7,666,508 was reported under 2 U.S.C. § 441a(d) as coordinated party expenditures, and thus, is not included in this Office's calculation of Summer Media Program costs since coordinated party expenditures are placed under a separate expenditure limitation and are reported as coordinated with a campaign. 2 U.S.C. § 441a(d).

<sup>21</sup> The RNC paid NCM a total of \$668,946, of which \$396,449 was reported under 2 U.S.C. § 441a(d) as coordinated party expenditures, and thus, is not included in this Office's calculation of Summer Media Program costs since coordinated party expenditures are placed under a separate expenditure limitation and are reported as coordinated with a campaign. 2 U.S.C. § 441a(d).

<sup>22</sup> Haley Barbour testified that the talking points were erroneous and that he did not share these views and that Victory '96 was for "everybody." Barbour transcript at 82.

program was significantly less than that (e.g. \$18,453,619). According to a May 16, 1996 RNC press release, the initial advertising campaign was expected to cost \$20,000,000. Attachment 10.

To assist in raising Victory '96 funding, the RNC hired Jo-Anne Coe, who had been the Primary Committee's chief fund-raiser prior to her work for the RNC and worked for Senator Dole in some capacity for almost 30 years. Coe transcript at 14. Coe joined the RNC effort as Deputy Finance Chairman on April 1, 1996, the period during which that the Primary Committee was approaching its expenditure limitation, and thus, theoretically, no longer needed to raise funds. *Id.* at 42.

With respect to her RNC fundraising obligations, Coe acknowledged that the Dole supporters that she was soliciting "understood that my being [at the RNC]" provided "some indirect benefit to Dole." Coe transcript at 64. Haley Barbour explained that Coe was an obvious person to recruit for RNC fundraising since she was successful at it for the Primary Committee and could secure contributions from Primary Committee donors for the RNC. Barbour transcript at 87. Barbour thought that Coe could appeal to the Dole donors and explain how their contributions to the RNC would assist Senator Dole.<sup>23</sup> Nevertheless, Coe never worked as an RNC fundraiser prior to the 1996 election and she acknowledged that her hiring by the RNC was related to the fact that Senator Dole was the presumptive nominee and speculated that she probably would not have been invited to work for the RNC had another candidate won the Republican nomination. Coe transcript at 49-50.

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<sup>23</sup> Haley Barbour noted that RNC fundraising appeals to Dole donors referenced the RNC's ability to make expenditures for the Dole campaign pursuant to 2 U.S.C. § 441a(d). Barbour transcript at 87. JoAnne Coe also discussed her fundraising's relation to the 441a(d) limits in her deposition. Coe transcript at 108. Nevertheless, the RNC did not limit Coe's fundraising to replenishing funds to be used for coordinated expenditures under section 441a(d), and she appears to have raised significantly more than the \$11,994,007 that section 441a(d) permits a national committee to spend on a general election presidential candidate.

JoAnne Coe states that she raised \$53,000,000 for the RNC. Coe transcript at 58. Haley Barbour and Coe denied that Coe's fundraising was earmarked for a media campaign on behalf of Senator Dole. Barbour transcript at 94 and 98, Coe transcript at 67-70. However, Scott Reed and Anthony Fabrizio acknowledged some form of earmarking at a post-election campaign advisers forum. Reed noted that "we went out in April and May and raised \$25 million for the party, of which about \$17, \$18, or \$19 million was put into the party building ads, which were Bob Dole in nature." The Institute of Politics, Campaign for President, 117-18 (1997). Reed confirmed this statement in his deposition, adding that the advertisement he was specifically referring to was the Dole biographical film, "the Story." Reed transcript at 85-86.

In addition to JoAnne Coe's personal efforts, the entire Primary Committee fundraising team, except for one person, were transferred over to the RNC payroll and "had the same roles" that they had performed for the Primary Committee. Coe transcript at 45, 52. This transfer was done as a group and at least two individuals "didn't want to move over there" but did so anyway. *Id.* at 53. For the fundraisers involved, however, the jobs at the RNC were exactly the same as their earlier Dole jobs. The only things that changed were the offices they worked from and the name on the payee line on the checks they were soliciting. *Id.* at 53.

Senator Dole was also personally involved in RNC fundraising and participated in at least 67 Victory '96 events during the 1996 election raising money for the RNC Victory '96 campaign. In addition to appearing at RNC fundraisers, Senator Dole also signed written fundraising solicitations that were mailed out to potential contributors. Coe transcript at 107, Attachment 11. Moreover, Primary Committee mailing lists and fundraising data were used by the RNC for its written and telephone solicitations. An April 12, 1996 memorandum from Chip [Gately] to Jo-Anne [Coe] indicates that solicitations will be sent to individuals on the "DFP

masterfile.” Attachment 12. The memorandum also discusses the use of commercial mailing lists and references “lists that netted money for DFP in three or more tests.” *Id.* Thus, the RNC had access to the Primary Committee’s internal data and evaluations of commercial mailing list services.

Even after the money was raised, there still were questions about how much of it should be spent on media and who would control the funds. One memorandum demonstrates confusion between the RNC and the Primary Committee on this issue. In a June 5, 1996 memorandum from Haley Barbour to RNC staffers Curt Anderson and Ruthie Kistler regarding their request for \$800,000 to stage Unity Events/GOP Rallies that Senator Dole would attend, Barbour rejected the request and said he “will reach out to Scott Reed [Dole campaign manager] to ask him to consider whether the Dole campaign” wants the RNC to, among other options, “reduce other spending, such as the issue advocacy television advertising, by \$800,000” in order to finance the events. Attachment 13.<sup>24</sup>

In addition to the issue of how much money would be spent on media overall, another critical issue was how to allocate the funds that were already committed to the media campaign. Haley Barbour testified that the targeting and placement of the advertisements was “very, very important” and that he had a personal role in this aspect of the media program. Barbour transcript at 175. Nevertheless, it appears that the Primary Committee also had a significant role in these decisions. A July 11, 1996 memorandum from Curt Anderson to Barbour, copied to, *inter alia*, media contractors Adam Stoll and Dwight Sterling, states that “we agreed on the initial

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<sup>24</sup> Haley Barbour testified that the purpose of his memorandum was to convince the Dole campaign that no more money could be devoted to Unity Events and that Senator Dole needed to provide the RNC with more advance warning on his availability for these events. Barbour transcript at 75. Scott Reed does not remember this occurrence. Reed transcript at 79-84.



markets for the Florida media buy. This buy satisfies the [Dole] campaign, the Florida party, me, Ed [Gillespie (RNC employee)], and Senator [Connie] Mack [of Florida]." Attachment 14.

Other documents indicate that Don Sipple and Anthony Fabrizio, dual Dole/RNC employees, made recommendations on the media buys. For instance, a July 10, 1996 memorandum from Stoll to RNC senior staff notes that Sipple and Fabrizio want to stop broadcast during the summer Olympics and to expand the media buy into August in certain states. Attachment 15. The memorandum also contains recommendations on which specific advertisements would be broadcast. *Id.* The timing of the advertising campaign also was very beneficial to Senator Dole since it began after Senator Dole reached his expenditure limitation and ended when he received his general election grant of public funds.

Moreover, while by design the RNC was to have final decisionmaking authority over placement of advertisements, some documents indicate that the Primary Committee may have exercised authority over the advertisement placement as well. A July 5, 1996 memorandum from Haley Barbour to Dwight Sterling ordered him to "delay the buy that was supposed to start on Monday" and that "those instructions are unchanged and you have no authority to deviate from them" notwithstanding "'conversations' to contrary." Attachment 16. This memorandum suggests that Sterling, in fact, may have been receiving direction from other sources. A June 3, 1996 memorandum to Don Sipple from Haley Barbour reminds Sipple that the RNC retains authority over the media program. Attachment 17.<sup>25</sup> However, this reminder was sent several weeks into the program when most of the money had already been spent.

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<sup>25</sup> Sipple could not recall what precipitated the memorandum. Sipple transcript at 249. Barbour testified that the memorandum was related to the question of whether the "final final had been actually signed off on ...". Barbour transcript at 161.

While the RNC claims to have control over the choice of broadcast markets, the advertisements were, in fact, broadcast in states that were known as "battleground states" where Senator Dole and President Clinton were competing for electoral votes and where it was thought that the presidential race was close. Based on a review of invoices and "traffic instructions," MMSC and Target Advertising placed advertisements for the RNC in eighteen states over broadcast network stations and ran certain advertising on local cable TV in eight states and New York City and on national cable TV on CNN. MMSC concentrated on advertising placement on broadcast network television in the states, including: California, Colorado, Florida, Georgia, Iowa, Illinois, Kentucky, Louisiana, Michigan, Missouri, Montana, Nevada, New Hampshire, New Mexico, Ohio, Pennsylvania, Tennessee, and Washington. Target Advertising was tasked with making the cable TV arrangements. A limited amount of advertising was placed in Washington, D.C. over broadcast television.

Polling data supports the assertion that the media placement focused on presidential "battleground states." Included in the polling performed by the RNC and shared with the Primary Committee were polls testing the relative popularity of Senator Dole and President Clinton in the "battleground states" and evaluations of the effectiveness of the media program in the "target" states. Attachment 18. Another document referencing "target" states was a memorandum prepared by Curt Anderson wherein he laid out certain cost figures in the "target" states. Attachment 19.

The polling appears to have been done, in part, to keep track of Senator Dole's prospects for the general election and a count of the electoral college. A July 11, 1996 memorandum prepared for the RNC, but shared with the Primary Committee, summarized changes in "Dole's ballot score" in response to the Summer Media Program and concluded that the "ballot test

movement improves our outlook on the electoral college dramatically.” Attachment 20. This document polled Senator Dole’s and President Clinton’s popularity in 20 states in the period between May and June 1996 and even included a count of electoral votes in the margin.

Focus group studies also suggest that the Primary Committee played a large role in conducting the RNC media program. Focus group results were used to create strategy for the media program and the Primary Committee appears to have been involved in this strategizing. A May 24, 1996 memorandum from Primary Committee/RNC pollster Bob Ward to Tony Fabrizio discusses that the media program’s goals should be to “define Bob Dole, both personally and what he stand[s] for, and 2) reinforce the doubts people have about Bill Clinton” and that the way to accomplish these goals is to “put a straight negative up like “Stripes” or “Balanced Budget” that uses Clinton to whack himself, and simultaneously air a straight Dole issue-oriented positive, or the Dole story.” Attachment 21.

In a noteworthy similarity to the situation with Don Sipple, the RNC had much of its commissioned polling work performed by Tony Fabrizio, a vendor who previously worked for the Primary Committee during the primary season, and who remained contracted to the Dole campaign as a strategic adviser during the period following the primaries through the end of the general election. Additionally, MMSC, the advertising placement agency that placed over \$16 million worth of advertising for the RNC was owned by Fabrizio. MMSC had not previously performed this service for the RNC prior to the Summer Media Program contract, although MMSC was the principal placement agent for the Primary Committee during the period that it was able to finance advertising within the overall expenditure limitation.

## 2. Communications on the content of advertisements

The available evidence indicates that the RNC and the Dole campaign engaged in written communications and conversations regarding the development of advertising concepts for the Summer Media Program. While working for the RNC, Don Sipple proposed advertising concepts to Scott Reed and sought his advice regarding these concepts. In a memorandum from Sipple addressed to Haley Barbour and Scott Reed, Sipple refers to a conversation they had engaged in earlier that week and reiterates his position as to what type of advertisement should be aired by the RNC.<sup>26</sup> See Attachment 22. Specifically, he proposes an advertisement that addresses the “constellation of ethics problems facing Clinton and his administration.” *Id.* Barbour, in his deposition testimony, acknowledged the likelihood of his having discussed this advertising concept with Reed. Barbour transcript at 111. Scott Reed testified that Reed did not recall seeing Sipple’s memo, but that he commented on it and gave “advice” to the RNC about the advertisement once it started running.<sup>27</sup> Reed transcript at 152. Further, although he states that advertising was not discussed, Barbour acknowledges discussing issues “quite a bit” with Senator Dole.<sup>28</sup> Barbour transcript at 113. Barbour indicated that the RNC and the Dole campaign were

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<sup>26</sup> This Office notes that this memorandum is not dated, but the contents of the memorandum indicate that it was written during the course of the RNC Summer Media Program and sometime before July 1996.

<sup>27</sup> Reed initially said that he gave advice about it. His attorney stated “advice or comments,” and Reed then modified his testimony to state that “it was more comments, displeasure.” Reed transcript at 152.

<sup>28</sup> Senator Dole also seems to have been involved in the summer advertising campaign in other ways. For instance, in a televised interview in Orlando, Florida on June 6, 1996, Senator Dole addressed the strategy of using RNC funds for Dole advertising. In a satellite appearance before ABC television affiliates, Senator Dole was asked how he expected to get through the campaign in light of the fact that the campaign was reaching its spending limits. He responded by saying: “We had to spend a lot of money to win the nomination...But we can, through the Republican National Committee...run television ads and other advertising. It’s called generic. It’s not Bob Dole for president. In fact, there’s an ad running now, hopefully in Orlando, a 60-second spot about the Bob Dole story: Who is Bob Dole? What’s he all about?” Federal News Service, *Remarks of GOP Presidential Candidate Senator Bob Dole Speaking to ABC Television Affiliates via Satellite at their Meeting in Orlando, Florida*, June 6, 1996; see Adam Clymer, *System Governing Election Spending Found in Shambles*, N.Y. TIMES, June 16, 1996.

in contact daily and the Dole campaign expressed opinions about everything, but final authority for advertising ideas rested with him. *Id.* at 119-120. However, Barbour acknowledges that it was not uncommon for him to delegate approval responsibilities to others when he was out of town, *see id.* at 167, and it would not have been unusual for Sipple or Anthony Fabrizio to suggest concepts for advertisements. *Id.* at 185. Although Barbour describes a hierarchy of command at the RNC resting with him, a FAX dated May 13, 1996 from Ed Gillespie to Sipple requesting Sipple's approval of two scripts indicates otherwise. *See* Attachment 24. This document indicates that Sipple, who had been chief media consultant for the Dole primary campaign, had some control and decision making authority over the advertisements that were to be produced and aired by the RNC. In his deposition, Sipple acknowledged that it "appear[ed]" that Gillespie was seeking his approval for the scripts, and that he generally was provided scripts written by others for review. Sipple transcript at 131 and 137. However, Barbour testified that Sipple would have to seek approval from Gillespie in general, but that perhaps Gillespie was seeking Sipple's approval for "artistic reasons." Barbour transcript at 159.

In addition to written communications and informal conversations between the RNC and the Dole Campaign regarding advertising concepts, formal meetings attended by officials at the RNC and the Dole campaign were held to discuss plans including the Summer Media Program. In April 1996, soon after Senator Dole became the presumptive nominee by having enough delegates pledged to his candidacy for the nomination to guarantee the nomination,<sup>29</sup> an RNC field meeting

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Senator Dole revealed his intended goal in broadcasting this advertisement by further stating: "It never says that I'm running for president, though I hope that it's fairly obvious, since I'm the only one in the picture." *Id.* These statements indicate that Senator Dole had knowledge of the advertising campaign's existence and also apparently knew which areas of the country the RNC was targeting for broadcast.

<sup>29</sup> Senator Dole became the presumptive nominee on March 26, 1996. *See, e.g.,* R. Cook, Dole's Nomination Clinch Fits Reagan, Bush Molds, *Congressional Quarterly*, 897 (Mar. 30, 1996).

attended by Jill Hanson and other members of the Dole campaign was held to discuss strategy for the summer and fall. Hanson transcript at 13-14.

During the course of the campaign, RNC officials and Dole campaign staff met regularly on Wednesday nights in Haley Barbour's office to discuss Party strategy and the ongoing campaign. See Attachment 25 at 5; see also Barbour transcript at 103-111. The Summer Media Program was discussed at these meetings. Discussions included ideas for advertisements, timing for airing the advertisements and targeting. See Attachment 25 at 5. Attendees at these meetings usually included Haley Barbour, Ed Gillespie, Don Fierce, Joe Gaylord, Newt Gingrich, Tony Fabrizio, Fred Steeper, Don Sipple and Scott Reed. *Id.* In his deposition testimony, Barbour indicated that Reed actively participated in these meetings. See Barbour transcript at 109. According to Barbour, Reed contributed ideas about every aspect of the advertising campaign. *Id.* With regard to these meetings, Reed recalls "talk[ing] in thematic terms about advertising" and advising Barbour of the need for a "party-wide advertising campaign." Reed transcript at 150-51. However, he does not remember providing specific advice on advertisements at the meetings. *Id.* at 151.

Additional evidence reveals a series of Thursday lunch meetings organized by Anthony Fabrizio in order to establish greater communication between the RNC and the Dole campaign. Attachments 26-27. According to Jill Hanson, Fabrizio was not satisfied with the research at the RNC and these meetings were likely intended to make Dole campaign research available to the RNC staff. Hanson transcript at 75-82. Beginning in May, weekly meetings attended by Mike Murphy and Don Sipple were held at Dole campaign headquarters to discuss political strategy for the general election. At this time, Murphy and Sipple were working out of NCM offices located in the same building and on the same floor as Dole campaign staff. Murphy transcript at 34. At

these meetings, Murphy indicated that he provided political strategic advice related to advertising. *Id* at 39. At the same time Murphy was an advisor for the Dole general election campaign, he also worked on some advertisements for the RNC Summer Media Program. Murphy Transcript at 45-46. Of course, Sipple was providing similar strategic advice to the Dole campaign staff while actually running the RNC Summer Media Program.

The available evidence includes several documents indicating that the RNC provided draft scripts of the Summer Media Program advertisements to the Dole campaign staff. On May 23, Adam Stoll, who was working for NCM, provided a first draft script of "The Story" to Scott Reed, Jill Hanson and Tony Fabrizio. In the memorandum attached to the draft script, Stoll indicates that the script "is currently being reviewed by the RNC" and he requests that any comments be given to "Don by tomorrow morning, Friday May, 24." Attachment 28. On June 18, 1996, Stoll and Sipple provided a first draft script of "More" to campaign staff including Reed, Hanson, Fabrizio, John Buckley, Gary Koops and Jill Jackson. The memorandum attached to the script requests that these individuals contact Stoll or Sipple to discuss the script. *See* Attachment 29. On July 5, 1996 and July 8, 1996, Stoll provided the Dole campaign staff with a first draft and a revised draft of "Pledge," respectively. Attachment 30-31.

The above documents indicate that the opinions and comments of the Dole staff were elicited. However, this Office notes that Scott Reed submitted an affidavit in the context of the investigation of MURs 4553 and 4671 in which he states that "[n]either Senator Dole nor any campaign staff of DFP or Dole/Kemp, including myself, was involved in the production, development, or airing of any of the advertisements at issue in this proceeding." Attachment 32. He further states in this affidavit that "[a]s a matter of courtesy, the Republican National Committee showed its advertisements to the campaign only after they were finalized and made

public." *Id.* Reed's latter statement contradicts the memoranda requesting that the Primary Committee staff comment on draft scripts. However, no available evidence indicates that the Primary Committee staff provided the RNC with requests for changes to any of the advertisements. Both Jill Hanson and Scott Reed testified that they do not remember whether they reviewed draft scripts. *See* Hanson Transcript at 61; *See* Reed Transcript at 154-160.<sup>30</sup>

### 3. Discussion on Coordination

The Office of General Counsel believes that the RNC's expenditures for the advertisements were "made . . . in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents." 2 U.S.C. § 441a(a)(7)(B)(i). The Office of General Counsel is not presuming coordination based on the RNC's status as a national party or the Primary Committee's status as a principal campaign committee of the national party's presumptive nominee for the Office of President. Rather, the record includes evidence of substantial communication between the RNC and the Dole campaign on every facet of the media campaign. The evidence of coordination is such that it is difficult to distinguish between the activities of the RNC and the Primary Committee with respect to the creation and publication of the media advertisements at issue.

Even before the first Republican Party primary of the 1996 presidential election cycle took place, the RNC recognized that its chosen nominee would face a formidable challenge from his opponent in the ability to expend funds for media. Since the Republican Party was holding a contested primary which had no incumbent as front-runner, the RNC understood that its eventual nominee would probably reach his expenditure limitation by the end of the primaries in March

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<sup>30</sup> During his deposition, Reed made it clear that he was not denying seeing the scripts, only that he did not recall seeing the scripts. Reed transcript at 164.



1996, several months before the August 1996 nominating convention. Moreover, the RNC's counterparts at the Democratic National Committee ("the DNC") were raising and spending money on media in the fall of 1995 to advance the election of their likely nominee, President Clinton, and it was believed that this assault also could not go unanswered. Thus, the RNC began to lay the groundwork for an advertising campaign to run in response to the DNC effort and to assist a nominee who could no longer incur expenses and stay within his overall expenditure limitation.

During the early primaries, the RNC consulted with media vendors on the media strategy and met in its Budget Meeting to put together a media plan and a budget. In March 1996, when a Republican Party presumptive nominee, Senator Robert Dole, was in place, the RNC earnestly began to work to actualize its media plan. The first steps required the hiring of a media vendor who would be in charge of operations and to raise funds to finance the project. The RNC commissioned two Primary Committee employees for these tasks: Don Sipple for media and JoAnne Coe for fundraising.

Sipple was familiar with Senator Dole's platform and what was needed to elect him. Since the Primary Committee had, as the RNC correctly prognosticated, reached its expenditure limitation, Sipple was available to work for the RNC since the Primary Committee could no longer pay him and not violate expenditure limitations. Moreover, Sipple had access to the Primary Committee's media strategy, polling information and other campaign materials such as

film footage and photographs. Thus, the RNC advertisements looked indistinguishable from Dole campaign advertisements.<sup>31</sup>

Additionally, Sipple and the RNC recruited many Dole campaign veterans to help him in the new project, including Anthony Fabrizio, a pollster, Bob Ward, another pollster, Adam Stoll, Sipple's chief assistant and administrator, and Michael Murphy and Stuart Stevens, Dole media vendors. Essentially, the entire Dole media division shifted to the RNC and continued its work of producing advertisements in support of Senator Dole's campaign. They functioned so similarly that many vendors continued to invoice expenses and fill out forms with the understanding that they were working for Dole, not the RNC. Additionally, since former and current Dole employees such as Sipple and Stoll were working on the RNC media program, the Dole campaign had access to information about the RNC media operations. The Dole campaign received advance copies of scripts of advertisements, received polling data that described the effect of the media campaign, and participated in scheduled meetings to discuss the advertising campaign in every aspect, among other things.

It appears that Sipple had a vision for the Dole advertising message which he began to shape while he worked for the Primary Committee and continued to shape while at the RNC. As Sipple testified, an advertising campaign must be sustained over time to have an effect and his vision of presenting an upbeat image of Senator Dole seems to have been continued with many of the RNC funded advertisements. This knowledge of a campaign's overall media strategy is precisely the sort of knowledge of different campaigns that the Commission appears to have been

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<sup>31</sup> In response to the Exit Conference Memorandum, the Primary Committee addressed the fact that its former employee, Don Sipple, produced the RNC-funded advertisements. The Primary Committee claimed that Sipple was contracted to the RNC during the period that the advertisements were produced. Attachment 5 at 10. However, he was also contracted at this same time to the General Committee and was sharing information regarding the RNC-funded advertisements with the Primary Committee.

concerned with when it adopted 11 C.F.R. § 109.1(b)(4) and concluded that the use of common vendors for media expenditures may place the committee purchasing the subject advertisements in a position of coordination with the committees of individual candidates. 11 C.F.R. § 109.1(b)(4) (establishing a regulatory presumption of coordination under such circumstances in the context of independent expenditures). The facts indicate that Sipple was hired by the RNC to finish the job he had started with the Primary Committee, but which he could not finish due to expenditure limitation constraints.

Similarly, the hiring of JoAnne Coe also enabled the RNC to raise as much as 50 million dollars to use for Victory '96, the program whose stated goal was to elect Senator Dole president. Coe was able to tap the Primary Committee's donors for more donations to be used for Victory '96, availing herself to resources such as Primary Committee mailing lists, Primary Committee fundraising staff, Senator Dole's signature on solicitations, and appearances by the Senator at numerous events.

The Primary Committee agreed to abide by an expenditure limitation as a condition precedent to receiving matching funds. 26 U.S.C. § 9033(b)(1). By coordinating with another entity to have it make expenditures on behalf of the Primary Committee, the Primary Committee received the benefit of the expenditure without the expenditure being subject to the expenditure limitation. This activity undermines the purpose of the expenditure limitations. This is the type of activity that the *Buckley* court warned against when it concluded that coordinated expenditures could result in opportunities for real or apparent corruption. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

Based on the foregoing, there is reason to believe that the RNC expenditures for these advertisements were made "in cooperation, consultation, or concert, with, or at the request or

suggestion of . . .” Senator Dole and the Primary Committee, within the meaning of 2 U.S.C. § 441(a)(7)(B)(i).<sup>32</sup>

**C. The Expenditures For The Advertisements Were Made For The Purpose Of Influencing The Nomination And Election Of Senator Dole**

The advertisements in question feature Senator Dole, or in some cases, President Clinton, both candidates at the time the advertisements ran. Based on the texts of the advertisements, the Office of General Counsel believes that the advertisements were made for the purpose of influencing the election of Senator Dole. The following chart lists the other advertisements and describes the text and visual images of the advertisements.

Name of Ad	Producer	Date Produced	Candidate Image	Text/Images/Message
More Talk	Greg Stevens & Co.	5/15/96	Clinton image	Several clips of President Clinton, where in each one he is stating a different number of years that it will take to balance budget. Visual of White House. Narrator states: “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.” Similar to advertisements broadcast and paid for by Primary Committee that focused on balanced budget and attacked Senator Dole’s primary nomination opponent Malcolm Forbes for his positions on the Balanced Budget Amendment and welfare.

<sup>32</sup> Although the recent *Christian Coalition* decision only addresses “coordination as it applies to expressive coordinated expenditures by corporations . . .,” Opinion and Order at 99-100, it appears that the coordination in these matters meets the standard set out in that decision. First, the facts adduced in these matters show that there is reason to believe that the expenditures for media in these matters were made at the “request or suggestion” of the Primary Committee especially in considering Don Sipple’s and Tony Fabrizio’s roles as both Primary Committee and RNC employees. *Id.* at 101. In the alternative, the facts also show that there is reason to believe that there was substantial discussion and negotiation between the RNC and the Primary Committee with respect to the contents, timing and location of the media campaign. *See id.*

Even More Talk		7/10/96	Clinton image	Similar to "More Talk," but ends with: "Tell Mr. Clinton to end his wasteful Washington spending."
Surprise		5/7/96	Features Dole and Clinton	Narrator begins, "Bill Clinton gave us the largest tax increase in history." This is followed with footage of Senator Dole behind a microphone waving/campaigning. This is the same footage used in "The Story" and in Dole primary ads. Narrator ends with, "support Senator Dole's plan to repeal your gas tax."
The Pledge	Don Sipple	7/9/96	Clinton image	Begins with clip of President Clinton promising not to raise middle class taxes. Narrator: "Six months later he gave us the largest tax increase in history...average American family pays over \$1,500 more in Federal taxes. Tell President Clinton you can't afford higher taxes for more wasteful Washington spending." Visual: "Tell President Clinton don't veto Republican tax cuts again."
More		6/19/96	Clinton named	Visuals of boats bringing people to U.S. Narrator: "Under President Clinton spending on illegals has gone up, while wages for the typical American worker have gone down. When efforts were made to stop giving benefits to illegal immigrants Bill Clinton opposed them. Tell President Clinton stop giving benefits to illegals. End wasteful Washington spending."
Who	Don Sipple	5/22/96	Clinton image	Advertisement suggests that the viewer was fooled when Clinton was elected, but should not be fooled again. Narrator: "Compare the Clinton rhetoric with the Clinton record...vetoed welfare reform twice. Vetoed work requirements for the able bodied. Vetoed putting time limits on welfare. Clinton still supports giving welfare benefits to illegal immigrants...Clinton rhetoric has not matched the Clinton record." Clip of Clinton stating "fool me

				once, shame on you. Fool me twice, shame on me." Narrator concludes: "Tell President Clinton you won't be fooled again."
Stripes	Don Sipple	5/23/96	Clinton image	Attempts to create negative impression of President Clinton's character. Images of Clinton jogging, hunting, golfing, biking while narrator states "Mr. Clinton claims...as commander in Chief he is covered by the Soldiers and Sailors Relief Act of 1940 which grants automatic delays in law suits against military personnel until their active duty is over." Narrator concludes, "Active Duty? Bill Clinton, he's really something." Final visual of Clinton in sunglasses with arms folded grinning. Ad about Clinton's personal position in private lawsuit and not conceivably related to any legislation. Ad apparently not aired, but shown at press conference.
Case Study	Stuart Stevens	4/3/96	Clinton image	Possibly a predecessor to "Who." Narrator: "Bill Clinton, what he says and what he does are two different things." Followed by clip of Clinton saying "we will end welfare as we know it." Narrator: "But he offered no serious plan or legislation. In fact he vetoed welfare reform. Not once, but twice....Actions do speak louder than words. Americans want real welfare reform, not more promises."
The Story	Don Sipple	5/28/96	Dole image/Dole speaks	Biography of Senator Dole presented with voice-overs by narrator, Senator Dole and Elizabeth Dole. Contains footage of Dole visiting factory workers, standing on podium before microphone waving/campaigning before crowd; footage of Dole's war/medical history; footage of Dole visiting with woman wearing Bob Dole button. (All the footage described above used in Dole primary ads). Final visual text: Work for Welfare/Criminal Justice Reform/End Wasteful Washington Spending/Call your Elected Officials.

The advertisement, "the Story," is unique in that it provides biographical facts about the candidate and describes his commendable personal characteristics in a manner that appears to provide electoral support for the candidate. It is also based on film footage prepared by the Primary Committee.

The audio track of "the Story" reads as follows:

**DOLE:** "We have a moral obligation to give our children an America with the opportunity and values of the nation we grew up in."

**ANNOUNCER:** "Bob Dole grew up in Russell, Kansas. From his parents he learned the value of hard work, honesty and responsibility. So when his country called, he answered, He was seriously wounded in combat. Paralyzed, he underwent nine operations."

**DOLE:** "I went around looking for a miracle that would make me whole again."

**ANNOUNCER:** "The doctors said he'd never walk again. But after 39 months, he proved them wrong."

**ELIZABETH DOLE:** "He persevered, he never gave up. He fought his way back from total paralysis."

**ANNOUNCER:** "Like many Americans, his life experience and values serve as a strong moral compass. The principle of work to replace welfare. The principle of accountability to strengthen our criminal justice system. The principle of discipline to end wasteful Washington spending."

**DOLE:** "It all comes down to values; what you believe in, what you sacrifice for, and what you stand for."

The video portion of the commercial shows Senator Dole in various situations such as standing by the Capitol in Washington D.C. and in his hometown of Russell, Kansas. The video also depicts him with his spouse and displays pictures of him from various times in his life including when he was hospitalized after suffering war wounds. The video concludes with a

caption that reads: "Americans take a stand. Work for Welfare. Criminal Justice Reform. End Wasteful Washington Spending. Call your elected officials."

"The Story" presents a chronological depiction of Senator Dole's life and stresses his personal qualities. The biographical information provided in the advertisement includes: the candidate's hometown, his relationship to his parents, and his decision to serve in the military. The advertisement depicts the candidate's participation in combat situations while in the military, and his subsequent suffering from a severe disability resulting from his military service. The advertisement portrays the candidate's courage in recovering from that injury in spite of medical professionals' negative predictions.

"The Story" does not use the terms such as "elect" or "vote for" Senator Dole. However, the advertisement focuses on the electability of Senator Dole. The facts about the candidate's background and the outline of his commendable personal characteristics serve the purpose of influencing the election of Senator Dole. For instance, the advertisement's focus on Senator Dole's military service is consistent with the campaign strategy to highlight his military record. See Katharine Q. Seelye, *Dole Says Veterans Are Better Americans*, N.Y. TIMES, August 15, 1996. Senator Dole's military service was presented to promote him as a candidate. It has been reported that Senator Dole's military record was used to favorably compare him to President Clinton who never served in the military. *Id.* Moreover, the advertisement's focus on Senator Dole's value system was also consistent with the Senator's reported campaign strategy of making "character" an issue. See Robert Shogan, *GOP Mounts Broad Attack on President's Character*, L.A. TIMES, June 18, 1996. An essential component of Senator Dole's campaign strategy was to compare Senator Dole's values favorably to President Clinton's values. *Id.* Thus, the producers of "The Story" advertised Senator Dole's value system and presented favorable



biographical information for the purpose of electing him to the Office of President. "The Story" contains very little mention of anything that could be understood to be on the legislative agenda. Although the advertisement references "Work for Welfare," "Criminal Justice Reform" and "Wasteful Washington Spending," there is no representation that these items are part of a legislative agenda. The primary focus of the advertisements appears to be to present Senator Dole in a favorable light.

Additionally, the advertising campaign's purpose as can be determined outside the actual text of the advertisement also appears to be designed to assist the Dole campaign and elect Senator Dole. One memorandum refers to broadcasting advertisements in "target presidential states," and poll results track the advertising's effectiveness by measuring Senator Dole's popularity versus President Clinton.

Senator Dole, himself, felt obliged to acknowledge the purpose of "the Story" in an interview. In a satellite appearance before ABC television affiliates, Senator Dole described the Story as "a 60-second spot about the Bob Dole story: Who is Bob Dole? What's he all about?" It never says that I'm running for president, though I hope that it's fairly obvious, since I'm the only one in the picture." Federal News Service, *Remarks of GOP Presidential Candidate Senator Bob Dole Speaking to ABC Television Affiliates via Satellite at their Meeting in Orlando, Florida*, June 6, 1996; see Adam Clymer, *System Governing Election Spending Found in Shambles*, N.Y. TIMES, June 16, 1996. Additionally, Scott Reed testified that "the Story" was a Dole-oriented advertisement and that funds raised by Primary Committee affiliates, including Senator Dole and JoAnne Coe, on behalf of the RNC was used to pay for the broadcast of the advertisement. Don Sipple, in his deposition, acknowledged that he had a conversation with Senator Dole wherein the Senator expressed that he liked "the Story." Sipple transcript at 247. The text of the Story and

the circumstances surrounding its development and use by the RNC indicate that the purpose of the advertisement was to influence the election of Senator Dole to the Office of President.

The other advertisements also have messages that are for the purpose of influencing the election of Senator Dole. The texts contain phrases such as "Tell President Clinton you won't be fooled again" in "Who" and "Bill Clinton, he's really something" in "Stripes." These phrases are calls to action on the part of the electorate and are a method to influence the nomination of Senator Dole. The advertisements feature Senator Dole and President Clinton, sometimes together and sometimes separately, and juxtapose their positions on certain controversial political issues like the gas tax or on matters relating to personal behavior.

This Office believes that the advertisements were made for the purpose of influencing the election of Senator Dole.

#### **D. Campaign Materials**

The available evidence indicates that the RNC advertisements at issue contain film footage originally used in Primary Committee advertisements. Specifically, the RNC advertisements, "The Story", "Surprise" and "The Plan" include footage that was either sold by the Primary Committee to or otherwise acquired by the RNC or NCM. The Primary Committee concedes that the RNC purchased the film footage for "The Story" from the Primary Committee. See Attachment 5.<sup>33</sup>

In addition, Stuart Stevens, the Primary Committee media consultant responsible for producing Primary Committee advertisements, agrees that the footage used to produce "The

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<sup>33</sup> The transaction is described by the Primary Committee as having been at "arms length" at industry standard rates. Attachment 5. Whether the footage was purchased or given free of charge is not material. Section 441a(a)(7)(B)(ii) does not exempt certain activity from the definition of a contribution if it is at arm's length. The fact remains that the RNC used campaign materials in the production of the advertisements for the Summer Media Program.

Story" appears to include much of the footage he shot to produce a sixty second advertisement for the Primary presenting the life and values of Bob Dole. Stevens stated " "The Story" is a recut version of a spot that [h]e had made in the Primary." See S. Stevens Transcript at 13. He referred to this Primary advertisement as the "bio spot of Dole." See *id* at 29. In looking at the storyboard that lays out all of the footage used in "The Story," Stevens stated, "[w]e shot everything but the stills... and the American flag." *Id.* at 33. Moreover, portions of the audio track of "The Story" were used in both a thirteen minute film and the "bio spot of Dole" produced by Stevens for the Primary Committee. The thirteen minute film was entitled "Bob Dole: An American Hero" and the advertisement was entitled "An American Hero." The film was produced by the Primary Committee and used at Primary Committee fundraisers. At events such as state conventions and fundraisers featuring Elizabeth Dole as speaker, the "American Hero" would be broadcast prior to Ms. Dole's speech. Stevens also indicated that the footage used in these productions included family photographs of Bob Dole with his family as a young boy and Bob Dole recovering from war wounds. Similar family photographs appear in "The Story." According to Stevens, the footage used in these productions was likely sent to Don Sipple at NCM.

Several other Primary Committee advertisements also include footage that appears in RNC advertisements. For example, a clip of Bob Dole in a crowd standing next to a woman carrying a baby and wearing a button saying "Vote for Dole" appears in the Primary advertisements "Midwestern Values", "Leadership", and "Jobs and Economic Growth." This same clip appears in the RNC advertisements "The Story" and "The Plan." A clip of Bob Dole speaking on a podium before a crowd and waving with J.C. Watts in the background appears in several primary advertisements including "Historic Conservative Reforms," "Conservative

Agenda for Change," and "A Balanced Budget for Tax Payers" and also appears in RNC advertisements "The Story" and "Surprise." <sup>34</sup>

In addition, it appears that scripts that were used in Primary advertisements were republished in altered forms in RNC advertisements. Stuart Stevens recalls language he used in producing advertisements for the Primary appearing in RNC advertisements. For example, he recognized the text of the RNC advertisement "Who" as similar to an advertisement he produced for the Primary. S. Stevens transcript at 46.

Thus, there is reason to believe that several Dole for President advertisements that constitute campaign materials were republished, in part, by the RNC. This republication constitutes a contribution, completely separate from the issue of whether the republication was coordinated and whether the advertisements contained a message with the purpose of influencing the election of Senator Dole.

**E. Attribution Of Expenditures To The Primary or General Committee**

To the extent that the RNC-funded advertisements were made in consultation with Senator Dole and his campaign organization, and were made for the purpose of influencing his election, the issue remains whether the expenditures for the advertisements should be treated as contributions to the Primary Committee, coordinated party expenditures subject to limitation under 2 U.S.C. § 441a(d)(2), contributions to the General Committee, or some combination of these.

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<sup>34</sup> With regard to the RNC's use of Primary Committee film footage in the production of the advertisements, the Primary Committee argued that it had sold the footage to the RNC at the "standard industry 'clip rate' of \$.40 per second" and that the RNC decided independently to use the footage. Attachment 5 at 10. However, at this time, there is no evidence that this sale, in fact, took place. Secondly, the advertisements still constitute a republication even if the footage was sold.

The RNC media campaign had an overall mixed purpose to influence both the primary and general elections in favor of Senator Dole. It further appears that the RNC does not claim that the funds used for the advertisements, or any part of those funds, should be attributed to its coordinated party expenditure limit under 2 U.S.C. § 441a(d), nor does it appear that any part of that limit is unused and available to the RNC. Finally, the advertisements were broadcast prior to Senator Dole's date of nomination. The media expenditures therefore were subject to the Primary Committee's expenditure limitations under the Commission's "bright-line" rules at 11 C.F.R. § 9034.4(e). Thus, under 11 C.F.R. § 9034.4(e)(6), the expenditures are subject to the Primary Committee's expenditure limitations.

The "bright line" regulation applies because in-kind contributions are also expenditures by the recipient candidate. See 11 C.F.R. §§ 104.13(a)(1) and (2); 109.1(c). By coordinating with the Primary Committee, rebroadcasting portions of Primary Committee advertisements, and paying for media expenditures in order to influence the election of Senator Dole, the RNC made in-kind contributions to the candidate which were simultaneously expenditures by his campaign committees. See 2 U.S.C. §§ 431(8)(A)(i) and (9)(A)(i); 11 C.F.R. §§ 110.7(a)(1)(iii) and 110.8(a)(1)(iv)(A). The Commission should treat in-kind contributions like any other expenditures by a publicly financed candidate. Thus, all of a publicly financed candidate's expenditures, including expenditures in the form of in-kind contributions received, are considered commingled in the mixed pool of expenditures subject to the expenditure limitations. See 2 U.S.C. §§ 441a(b) and (c); 26 U.S.C. § 9035(a). All of the advertisements in question were

broadcast before the date of Senator Dole's nomination. Therefore, the expenditures are subject to the Primary Committee's expenditure limitations. 11 C.F.R. § 9034.4(e)(6).

#### **F. Allocation**

This Office believes that the RNC's expenditures for the advertisements were not subject to national party allocation under 11 C.F.R. § 106.5. Allocation is not required when a contribution is made to a specific candidate. 11 C.F.R. §§ 106.5(a)(2)(i) and 106.5(a)(2)(iv). The evidence shows that the advertisements were contributions to a specific candidate. Thus, it appears that the RNC improperly reported the disbursements when it allocated its direct disbursements to its media vendors.

The advertising invoices from the vendors were actually paid by the respective state Republican Party committees in the respective broadcast states, although the funds originated at the RNC. Haley Barbour, the chairman of the RNC during the 1996 election cycle, explained that with respect to financing the broadcast of the advertisements, "the RNC made the decision" to "transfer to a state or to not transfer to a state" and that the RNC "transferred the amount that the buy would cost." Barbour transcript at 226-27. Prior to a transfer of funds being made from the RNC to the state parties "there were conversations with them about ... what we wanted to do." *Id.* at 227. The reason the funds were transferred to the state party committees to be used to pay for the advertising was that this procedure allowed for a more favorable allocation ratio enabling more "soft money" to pay for the advertising. *Id.* at 227-28. The RNC decided to finance the advertising this way because they saw that the Democratic National Committee was using similar

approaches. *Id.* at 228. With respect to advertisement production issues, the "command decision [was] made in Washington [the location of RNC headquarters]." *Id.* at 183.

This evidence demonstrates that the RNC retained control over the amounts paid for the advertisement campaign, even though most of the payments from the RNC to the media vendors were made through intermediate transfers through state committee accounts, in order to claim a more favorable allocation ratio. However, the Primary Committee's use of state committees as a method of payment to claim a more favorable allocation ratio does not change the fact that the advertisements were contributions to a specific candidate from the RNC. Thus, it appears that the RNC improperly reported the expenditures when it allocated its expenditures to its media vendors. Accordingly, this Office recommends that the Commission find reason to believe that the RNC violated 2 U.S.C. § 434(b)(4). If the Commission concludes that the expenditures for the advertisements were not contributions, and therefore were allocable, it should then consider the issue whether the RNC was entitled to rely on the more favorable state allocation ratios in connection with the payments which it made through the state committee accounts.<sup>36</sup>

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<sup>36</sup> In MUR 4215 the DNC transferred funds to state democratic committees for certain generic voter drive activity. It appeared that the purpose of the DNC transferring the funds to the state committees, rather than simply paying the costs out of its own accounts, was to take advantage of the more favorable federal/non-federal allocation ratio. The Commission found nothing improper in such transfers, noting, among other things, that the state committees "clearly retained ultimate control over the disbursements, not the DNC." Statement of Reasons in MUR 4215 (March 26, 1998) at 3. In this matter it appears that the RNC did retain total control over the amounts transferred through the state committee accounts, and that, even if the expenditures were allocable, the RNC improperly applied state allocation ratios to reduce the federal portion paid. See 11 C.F.R. § 106.5(a).

During the course of audit of the Michigan Republican State Committee, the Audit Division identified this state party committee as a potential conduit for the RNC expenditures at issue in this matter. In this Office's comments to the Interim Audit Report of the Michigan Republican State Committee, we noted that potential violations by the state committee could be considered in the context of MURs 4553 and 4671. Memorandum from Lawrence M. Noble to Robert J. Costa, regarding Interim Audit Report on Michigan Republican State Committee, June 24, 1999. However, this Office is not recommending that the Commission pursue any state party committees for any violations of the Act in this Report. This decision is based partly on the conservation of resources and the desirability of focusing the case on the major actors.

**V. APPARENT VIOLATIONS**

As a multicandidate committee, the RNC was permitted to contribute \$5,000 to the Primary Committee and Senator Dole. 2 U.S.C. § 441a(a)(2)(A). Because it appears that the RNC, acting in cooperation, consultation, or concert, with, or at the request or suggestion of, the Senator and agents of his Primary Committee, expended \$18,553,619 for advertisements, each of which had the purpose of influencing the election of Senator Dole, the Office of General Counsel recommends that the Commission find reason to believe that the RNC made excessive in-kind contributions to the Primary Committee and Senator Dole in violation of 2 U.S.C.

§ 441a(a)(2)(A). Moreover, the Office of General Counsel recommends that the Commission find reason to believe that the RNC made excessive in-kind contributions to the Primary Committee and Senator Dole in violation of 2 U.S.C. § 441a(a)(2)(A) by republishing Primary Committee campaign materials.

It also appears that the RNC used funds from its non-federal accounts to pay for these advertisements, and the Office of General Counsel therefore recommends that the Commission find reason to believe that the RNC made prohibited contributions to the Primary Committee and Senator Dole in violation of 2 U.S.C. § 441b(a) and 11 C.F.R. § 102.5(a).

The RNC did not report the disbursements for the advertisements as contributions to the Primary Committee. *See* 2 U.S.C. § 434 (b)(4)(H)(i). Further, the expenditures were not allocable, therefore, this Office recommends that the Commission find reason to believe that the RNC violated 2 U.S.C. § 434(b)(4).

The Primary Committee and Senator Dole were prohibited from accepting any RNC contributions which exceeded the \$5,000 contribution limit for multicandidate committees set forth at 2 U.S.C. § 441a(a)(2)(A). 2 U.S.C. § 441a(f). Because it appears that the RNC, acting



in cooperation, consultation, or concert, with, or at the request or suggestion of, Senator Dole and agents of his Primary Committee, expended \$18,553,619 for advertisements, each of which had the purpose of influencing the election of Senator Dole, the Office of General Counsel recommends that the Commission find reason to believe that the Primary Committee and Senator Dole violated 2 U.S.C. § 441a(f) by accepting excessive in-kind contributions from the RNC. Moreover, the Office of General Counsel recommends that the Commission find reason to believe that the Primary Committee and Senator Dole violated 2 U.S.C. § 441a(f) by accepting excessive in-kind contributions from the RNC under the theory that the RNC republished Primary Committee campaign materials.

It also appears that the RNC used funds from its non-federal accounts to pay for these advertisements, and the Office of General Counsel therefore recommends that the Commission find reason to believe that the Primary Committee and Senator Dole accepted prohibited contributions in violation of 2 U.S.C. § 441b(a).

It further appears that the amount of the Primary Committee's reported expenditures and the amount of the funding for the advertisement campaign together exceed the Primary Committee expenditure limitation, and the Office of General Counsel therefore recommends that the Commission find reason to believe that the Primary Committee and Senator Dole exceeded the overall expenditure limitation in violation of 2 U.S.C. §§ 441a(b)(1)(A) and 441a(f), and 26 U.S.C. § 9035(a). Finally, the in-kind contributions were not properly reported, and therefore the Office of General Counsel recommends that the Commission find reason to believe that the Primary Committee violated 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).

Even if the Commission concludes that the RNC expenditures for the advertisements were not in-kind contributions to the Primary Committee, it appears that RNC did control the expenditures and it therefore was not entitled to rely on more favorable state allocation ratios. Therefore, this Office recommends, in the alternative, that the Commission find reason to believe that the RNC violated 11 C.F.R. § 106.5(a) and 2 U.S.C. § 434(b)(4).

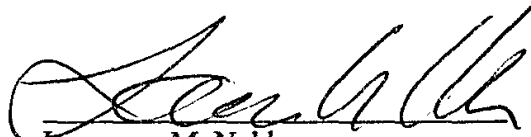
## VI. RECOMMENDATIONS

1. Open a MUR;
2. Find reason to believe that the Republican National Committee, and Alec Poitevint, as treasurer, violated 2 U.S.C. § 441a(a)(2)(A);
3. Find reason to believe that the Republican National Committee, and Alec Poitevint, as treasurer, violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 102.5(b);
4. Find reason to believe that the Republican National Committee, and Alec Poitevint, as treasurer, violated 2 U.S.C. § 434(b)(4);
5. Find reason to believe that the Dole for President, Inc., and Robert J. Dole, as treasurer, violated 2 U.S.C. § 441a(f);
6. Find reason to believe that the Dole for President, Inc., and Robert J. Dole, as treasurer, violated 2 U.S.C. § 441b(a);
7. Find reason to believe that the Dole for President, Inc., and Robert J. Dole, as treasurer, violated 2 U.S.C. §§ 441a(b)(1)(A) and 441a(f), and 26 U.S.C. § 9035(a);
8. Find reason to believe that the Dole for President, Inc., and Robert J. Dole, as treasurer, violated 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);
9. Find reason to believe that Senator Robert J. Dole violated 2 U.S.C. § 441a(f);
10. Find reason to believe that Senator Robert J. Dole violated 2 U.S.C. § 441b(a);
11. Find reason to believe that Senator Robert J. Dole violated 2 U.S.C. §§ 441a(b)(1)(A) and 441a(f), and 26 U.S.C. § 9035(a);
12. In the alternative, find reason to believe that that the Republican National Committee, and Alec Poitevint, as treasurer, violated 11 C.F.R. § 106.5(a) and 2 U.S.C. § 434(b)(4);

13. Approve the attached Factual and Legal Analyses;
14. Approve the appropriate letters; and
15. Process this MUR with MURs 4553 and 4671.

Date

1/11/00



Lawrence M. Noble  
General Counsel

Attachments:

1. Audit Referral (media section only)
2. Dole for President, Inc. Audit Report (media section only)
3. omitted
4. Exit Conference Memorandum to Dole for President, Inc.
5. Dole for President, Inc. Response to Exit Conference Memorandum
6. Minutes of Republican National Committee Executive Council and Budget Meeting, January 17, 1996
7. Memorandum dated March 5, 1996 to "Republican Leaders" from Haley Barbour
8. Memorandum from Elise Reeder to Don Sipple, June 25, 1996
9. Team 100 Conference Call "talking points," for April 18, 1996
10. Republican National Committee press release, May 16, 1996
11. Memorandum from Jo-Anne Coe to Haley Barbour, April 11, 1996
12. Memorandum from Chip Gately to Jo-Anne Coe and Mark (unknown surname), April 12, 1996
13. Memorandum from Haley Barbour to Curt Anderson and Ruthie Kistler, June 5, 1996
14. Memorandum from Curt Anderson to Haley Barbour, July 11, 1996
15. Memorandum from Adam Stoll to Haley Barbour, et al., July 10, 1996
16. Memorandum from Haley Barbour to Dwight Sterling, July 5, 1996
17. Memorandum from Haley Barbour to Don Sipple, June 3, 1996
18. Memorandum from Wes Anderson et al. to Haley Barbour, July 16, 1996
19. Memorandum from Curt Anderson to Haley Barbour, March 18, 1996
20. Memorandum from Bob Ward, et al. to Haley Barbour, July 11, 1996
21. Memorandum from Bob Ward to Tony Fabrizio, May 24, 1996
22. Memorandum from Don Sipple to Haley Barbour and Scott Reed, (undated)
23. omitted
24. Facsimile Transmission from Ed Gillespie to Don Sipple, May 13, 1996
25. Don Sipple's response to interrogatories issued in MURs 4553 and 4671
26. Memorandum from Tony Fabrizio and Enu Mainigi to Ed Gillespie et al., undated
27. Memorandum from Tony Fabrizio and Enu Mainigi to Haley Barbour, undated
28. Memorandum from Adam Stoll to Scott Reed, et al., May 23, 1996


29. Memorandum from Don Sipple and Adam Stoll to Scott Reed, et al., June 18, 1996
30. Memorandum from Adam Stoll to Scott Reed, et al., July 5, 1996
31. Memorandum from Adam Stoll to Scott Reed, et al., July 8, 1996
32. Affidavit submitted by Scott Reed in MURs 4553 and 4671
33. Dole for President, Inc. response to reason-to-believe notification letter in MURs 4553 and 4671.
34. Factual and Legal Analysis for Dole for President, Inc. and Robert J. Dole, as treasurer.
35. Factual and Legal Analysis for the Republican National Committee and Alec Poitevint, as treasurer.
36. Factual and Legal Analysis for Senator Robert J. Dole.



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

MEMORANDUM

TO: Lawrence M. Noble  
General Counsel

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

DATE: January 19, 2000

SUBJECT: Audit Referral #99-13 - First General Counsel's Report  
dated January 11, 2000.

The above-captioned document was circulated to the Commission  
on Wednesday, January 12, 2000.

Objection(s) have been received from the Commissioner(s) as  
indicated by the name(s) checked below:

Commissioner Elliott	<u>XXX FOR THE RECORD</u>
Commissioner Mason	<u>XXX</u>
Commissioner McDonald	—
Commissioner Sandstrom	—
Commissioner Thomas	<u>XXX</u>
Commissioner Wold	—

This matter will be placed on the meeting agenda for

Tuesday, January 25, 2000.

Please notify us who will represent your Division before the Commission on this matter.