

MAR -5 2000

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
The Clinton/Gore '96 Primary) MUR 4970
Committee, Inc., and Joan Pollitt,)
as treasurer; The Democratic National)
Committee, and Carol Pensky,)
as treasurer; and President William J.)
Clinton)
)

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

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

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GENERAL COUNSEL'S REPORT

I. ACTIONS RECOMMENDED

Close the files and issue a Statement of Reasons.

II. BACKGROUND

Matter Under Review ("MUR") 4970¹ was generated from an audit of the Clinton/Gore '96 Primary Committee, Inc. ("Primary Committee") undertaken in accordance with 26 U.S.C. § 9038(a) and was referred by the Audit Division to the Office of General Counsel on June 15, 1999. MUR 4713 was generated by a complaint filed by Dr. Lenora B. Fulani. MUR 4544 was generated by a complaint filed by Dr. Rebecca Roczen Carley. MUR 4407 was generated by a complaint filed by Dole for President, Inc.

All four MURs raise the issue whether amounts spent by the Democratic National Committee to produce and broadcast a television advertisement campaign, which aired between August of 1995 and August of 1996, were an in-kind contribution to President Clinton's 1996 presidential election campaign.

In MURs 4407 and 4544, the Commission on February 10, 1998, found reason to believe that, because of the DNC-funded advertisement campaign, the DNC made, and the Primary Committee received, an in-kind contribution from the DNC. On the same date, the Commission adopted an alternative finding of reason to believe that the Clinton/Gore '96 General Committee ("General Committee") received an in-kind contribution from the DNC. Consistent with these determinations, the Commission also found reason to believe that the DNC, the Primary and General Committees, and President Clinton and Vice President Gore violated provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455 ("the Act"), the Presidential Primary Matching Payment Account Act, as amended, 26 U.S.C. §§ 9031-9042 and the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001-9013. The Commission

¹ MUR 4970 was previously Audit Referral ("AR") #99-15.

approved the issuance of subpoenas for documents and testimony as part of the investigation in these matters.²

Relying on information generated from the investigation in MURs 4407 and 4544 and the audit referral materials, on January 12, 2000, the Office of General Counsel submitted a First General Counsel's Report in MUR 4713 and AR #99-15. With respect to the same DNC-funded media campaign, this Office recommended that the Commission find reason to believe that, because of the DNC-funded advertisement campaign, the DNC made, and the Primary Committee received, an in-kind contribution from the DNC.³ Consistent with this

² The Office of General Counsel was prepared to move MURs 4407 and 4544 to the probable cause stage and recommended that, in light of the overlapping media expenditure issues, MURs 4407 and 4544 be processed together with AR #99-15/MUR 4970 and MUR 4713.

However, on September 22, 1999, the Commission rejected this Office's recommendations and directed this Office to hold in abeyance the briefing of MURs 4407 and 4544 pending Commission action in AR #99-15 and MUR 4713.

³ This Office's specific analysis and recommendations vary somewhat between the First General Counsel's Report in MURs 4407 and 4544 and the First General Counsel's Report in AR #99-15 and MUR 4713. This variance is the result of both the generation of additional information during the investigation in MURs 4407 and 4544, and intervening development of the applicable laws. For example, the Commission on December 9, 1998 directed the Audit Division to remove from its Report of the Audit Division on the Dole/Kemp '96 and Dole Kemp Compliance Committee, and insert into its Report of the Audit Division on the Dole for President Committee, Inc. (Primary) its analysis of a similar media issue arising in Senator Dole's 1996 campaign, concluding that the media expenses were related to the primary. Consistent with the Commission's action and analysis in those audits, the alternative finding in MURs 4407 and 4544 that the media campaign was an in-kind contribution for the general election was not included in the First General Counsel's Report in AR #99-15 and MUR 4713.

Similarly, on June 24, 1999, a majority of the Commission issued a Statement of Reasons 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"*). Thus, while the First General Counsel's Report in MURs 4407 and 4544 included a discussion of the applicability of this test, the First General Counsel's Report in AR #99-15 and MUR 4713 notes that the test has been rejected by the Commission, and relied, instead, on the language of the Act. 2 U.S.C. §§ 431(8)(A)(i); 431(9)(A)(i) (contribution and expenditure defined to include any loan, advance, deposit, gift or other thing of value "made by any person for the purpose of influencing any election for federal office").

recommendation, this Office further recommended that the Commission open a MUR and find reason to believe that:

- The DNC violated 2 U.S.C. § 441a(a)(2)(A) (making excessive contributions); 2 U.S.C. § 441b(a) and 11 C.F.R. § 102.5(b) (making prohibited contributions); and 2 U.S.C. § 434(b)(4) (improper reporting);
- The Primary Committee violated 2 U.S.C. § 441a(f) (knowingly accepting excessive contributions); 2 U.S.C. § 441b(a) (knowingly accepting prohibited contributions); 2 U.S.C. §§ 441a(b)(1)(A) and 441a(f), and 26 U.S.C. § 9035(a) (exceeding the overall expenditure limitation); and 2 U.S.C. §§ 434(b)(2)(C) and 434(b)(4), and 11 C.F.R. §§ 104.13(a)(1) and 104.13(a)(2) (improper reporting); and
- President Clinton violated 2 U.S.C. § 441a(f) (knowingly accepting excessive contributions); 2 U.S.C. § 441b(a) (knowingly accepting prohibited contributions); and 2 U.S.C. §§ 441a(b)(1)(A) and 441a(f), and 26 U.S.C. § 9035(a) (exceeding the overall expenditure limitation).

In addition, this Office recommended that, if the Commission concluded that the expenditures for the advertisements were not contributions, it should then consider the issue whether the DNC was entitled to rely on the more favorable state allocation ratios in connection with certain payments for the advertisements which were made through the accounts of state Democratic committees. With respect to certain other allegations, unrelated to the issue of the DNC-funded advertisements, which were set forth in the complaint in MUR 4713, this Office recommended that the Commission find no reason to believe that the respondents violated any statute or regulation within the jurisdiction of the Federal Election Commission. See AR #99-15 and MUR 4713, First General Counsel's Report at 58-60.

On February 2, 2000, the Commission voted on this Office's recommendations in AR #99-15 and MUR 4713 with respect to the issue whether, because of the DNC-funded advertisement campaign, the DNC made, and the Primary Committee received, an in-kind campaign contribution from the DNC. The Commission, by a 3 to 3 vote, failed to pass a motion to adopt the recommended reason to believe findings related to this issue --

i.e., recommendations 2 through 11 set forth in the First General Counsel's Report. By unanimous vote, the Commission next opened MUR 4970 with respect to AR #99-15. The Commission then considered motions to adopt recommendations 2 through 11 with respect to each individual advertisement which was part of the DNC-funded advertisement campaign. These motions failed by a 2 to 4 vote in connection with the ten advertisements that aired in 1995, and by a 3 to 3 vote in connection with the 22 advertisements that aired in 1996.

On February 8, 2000, the Commission considered this Office's alternative recommendation to find reason to believe that the DNC improperly relied on more favorable state allocation ratios when funding the advertisement campaign, and therefore violated 11 C.F.R. § 106.5(a) and 2 U.S.C. § 434(b)(4). A motion to adopt that recommendation failed by a 2 to 3 vote.

The Commission has not acted on the remaining recommendations (recommendations 13 through 17) set forth in the First General Counsel's Report in AR #99-15 and MUR 4713. Those recommendations are that the Commission:

- Process MUR 4970 and MUR 4713 with MURs 4407 and 4544 (recommendation 13);
- Find no reason to believe that the Primary Committee, President Clinton and Harold M. Ickes, Esquire violated any statute or regulation within the jurisdiction of the Federal Election Commission with respect to the other allegations, unrelated to the DNC-funded advertisement campaign, in MUR 4713 (recommendation 14);

- Find no reason to believe that Harold M. Ickes violated any statute or regulation within the jurisdiction of the Federal Election Commission (recommendation 15);
- Approve the Factual and Legal Analyses attached to the First General Counsels' Report (recommendation 16); and
- Approve the appropriate letters (recommendation 17).

III. DISCUSSION

The Commission has not acted on recommendations, set forth in the First General Counsel's Report in AR #99-15 and MUR 4713, which address the allegations in MUR 4713 related to issues other than the DNC-funded advertisement campaign (recommendations 14 and 15). This Office's analysis and recommendations related to these allegations, as set forth in the First General Counsel's Report in AR #99-15 and MUR 4713 and 4970 at pages 25-27 and 59, remain unchanged. Accordingly, this Office continues to recommend, with respect to MUR 4713, that the Commission find no reason to believe that the Primary Committee, President Clinton and Harold M. Ickes, Esquire violated any statute or regulation within the jurisdiction of the Federal Election Commission with respect to the allegations unrelated to the DNC-funded advertisement campaign, and that the Commission find no reason to believe that Harold M. Ickes violated any statute or regulation within the jurisdiction of the Federal Election Commission.

As noted above, the reason to believe findings in MURs 4407 and 4544 are based on the same activities, arising from the production and broadcast of the DNC-funded media campaign, upon which reason to believe recommendations 2 through 12 in the First General Counsel's Report in AR #99-15/MUR 4970 and MUR 4713 are based. The Commission's actions in MURs 4713 and 4970, by which it did not adopt recommendations 2 through 12, therefore should control further proceedings in MURs 4407 and 4544. Accordingly, this Office

recommends that the Commission, in conformance to its decisions in AR #99-15/MUR 4970 and MUR 4713, take no further action in MURs 4407 and 4544, and close the files.

Despite this Office's recommendation that the Commission take no further action in MURs 4407 and 4544, we believe that the Commissioners who voted against the recommendations of this Office in AR#99-15/MUR 4970 and MUR 4713 should issue a Statement of Reasons for MURs 4407, 4544 and 4713, all complaint-generated matters. *See Democratic Congressional Campaign Committee v. Federal Election Commission*, 831 F.2d 1131, 1132 (D.C. Cir. 1987)("when . . . the FEC does not act in conformity with its General Counsel's reading of Commission precedent, it is incumbent upon the Commissioners to state their reasons why. Absent an explanation by the Commissioners for the FEC's stance, we cannot intelligently determine whether the Commission is acting 'contrary to law'" (citation omitted)).⁴

This Office's general practice is to submit a draft Statement of Reasons to the Commission in complaint-generated matters in which the recommended reason to believe findings are rejected by a majority vote, but not to submit such a draft in matters in which the recommended reason to believe findings fail on a tie vote. In AR #99-15/MUR 4970 and MUR 4713, recommendations 2 through 12 were rejected on 3 to 3 votes. In addition, separate motions to adopt recommendations 2 through 11 with respect to each individual DNC-funded advertisement broadcast in 1996 also failed on 3 to 3 votes. Separate motions to adopt recommendations 2 through 11 with respect to the each individual advertisement broadcast in 1995 failed on 2 to 4 votes. However, it does not appear to this Office that the four votes against

⁴ The Commissioners voting to approve this Office's recommendations are not required to issue a Statement of Reasons, but may do so. Likewise, Commissioners are neither required to issue, nor prohibited from issuing, a Statement of Reasons for AR #99-15/MUR 4970, because the matter was generated from an audit referral, not a complaint.

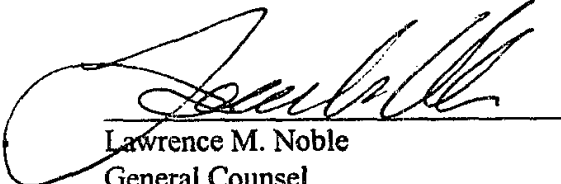
these motions are based upon the same reasoning. Under these circumstances, we believe that the Commission should prepare a Statement of Reasons in MURs 4407, 4544 and 4713.

IV. RECOMMENDATIONS

1. In MUR 4713, find no reason to believe that the Clinton/Gore '96 Primary Committee, Inc., and Joan Pollitt, as treasurer; the Democratic National Committee, and Carol Pensky, as treasurer; President William J. Clinton and Harold M. Ickes, Esquire violated any statute or regulation within the jurisdiction of the Federal Election Commission with respect to the allegations unrelated to the advertisements funded by the Democratic National Committee;
2. In MUR 4713, find no reason to believe that Harold M. Ickes violated any statute or regulation within the jurisdiction of the Federal Election Commission;
3. In MURs 4407 and 4544, take no further action and close the files;
4. In MURs 4713 and 4970, close the files;
5. Issue a Statement of Reasons for MURs 4407, 4544 and 4713; and
6. Approve the appropriate letters.

Date

3/3/00


Lawrence M. Noble
General Counsel

Staff Assigned: Joel J. Roessner