FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: The Commissioners
Staff Director
Deputy Staff Director
General Counsel

FROM: Office of the Commission Secretary

DATE: December 19, 2001

SUBJECT: Statement Of Reasons for MUR 4994

Attached is a copy of the Statement Of Reasons for MUR 4994 signed by Commissioner Karl J. Sandstrom.

This was received in the Commission Secretary's Office on Tuesday, December 18, 2001 at 4:45 p.m.

cc: Vincent J. Convery, Jr.
OGC Docket
Information Division
Press Office
Public Disclosure

Attachment

FEDERAL ELECTION COMMISSION
Washington, DC 20463

In the Matter of

New York Senate 2000	)	MUR 4994
and Andrew Grossman, as treasurer, *et al.*	)	

STATEMENT OF REASONS
COMMISSIONER KARL J. SANDSTROM

I. Background

On September 25, 2001, the Commission met in Executive Session to consider the First General Counsel's Report, dated September 11, 2001, in MUR 4994. By a vote of 2-4, the Commission did not approve a motion to adopt the recommendation of the Acting General Counsel ("AGC") to find reason to believe several party committees and candidate committees violated the coordinated expenditure limits and related provisions, but to take no further action and close the file.[1] Then, by a vote of 5-1, Commissioner Thomas dissenting, the Commission affirmatively rejected the Acting General Counsel's recommendation to make those same reason to believe findings.[2] The Commission

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[1] Commissioners Thomas and McDonald voted for the motion, and Commissioners Mason, Sandstrom, Smith, and Wold voted against. Although two Commissioners voted to adopt the AGC's recommendation, neither the AGC nor any Commissioner proposed pursuing any of these matters further, notwithstanding the magnitude of the alleged violations.

[2] Specifically, the Commission rejected recommendations that it find reason to believe that:

*the New York State Democratic Committee and David Alpert, as treasurer, violated 2 U.S.C. §§ 434(b), 441a(a), 441a(f), and 441b(a), and 11 C.F.R. § 102.5;

*Hillary Rodham Clinton for U.S. Senate Committee, Inc. and William J. Cunningham, III, as treasurer, violated 2 U.S.C. §§ 434(b), 441a(f) and 441b(a);

*the Democratic Senatorial Campaign Committee and James M. Jordan, as treasurer, violated 2 U.S.C. §§ 434(b), 441a(f), 441a(h), and 441b(a), and 11 C.F.R. § 102.5;

unanimously approved the AGC's recommendation that it find no reason to believe a number of other respondents had violated any provision of the Federal Election Campaign Act of 1971, as amended, in connection with this matter.[3] Finally, given the preceding votes, the Commission voted unanimously to take no action with respect to all remaining respondents (i.e., those not the subject of the "no reason to believe" findings) and close the file.

The AGC concluded that certain television advertisements, which were paid for by state and/or national party committees, may have been coordinated with the parties' nominees for United States Senator, or their authorized committees. She also interpreted the advertisements as being "for the purpose of influencing" or "in connection with" the candidates' election campaigns. *See* 2 U.S.C. §§ 431(8)(A)(i), 441a(d), 441b(a). In her view,

> [i]f such coordination did take place, the expenditures for the . . . party communications would have become coordinated party expenditures

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*the Michigan Democratic State Central Committee/Federal Account and Roger Winkleman, as treasurer, violated 2 U.S.C §§ 434(b), 441a(a), and 441a(f), and 11 C.F.R. § 102.5;

*Stabenow for U.S. Senate and Angela M. Autera, as treasurer, violated 2 U.S.C. §§ 434(b) and 441a(f);

*the Missouri Republican State Committee and Harvey M. Tettlebaum, as treasurer, violated 2 U.S.C. §§ 434(b), 441a(a), 441a(f), and 441b(a), and 11 C.F.R. § 102.5;

*Ashcroft 2000 and Garrett M. Lott, as treasurer, violated 2 U.S.C. §§ 434(b), 441a(f) and 441b(a); and

*the National Republican Senatorial Committee and Stan Huckaby, as treasurer, violated 2 U.S.C. §§ 434(b), 441a(f), 441a(h), and 441b(a), and 11 C.F.R. § 102.5.

By a vote of 4-2, Commissioners Thomas and McDonald dissenting, the Commission also rejected the AGC's recommendation that it approve the appropriate factual and legal analyses.

This Statement refers to the "Acting General Counsel's" recommendations because the former AGC or her designee signed the report; the current General Counsel appeared at the Commission's Executive Session.

[3] These were Rudolph Giuliani; the Friends of Giuliani Exploratory Committee and John H. Gross, as treasurer; the Giuliani Victory Committee and D. Jan McBride, as treasurer; the Santorum Victory Committee and D. Jan McBride, as treasurer; and New York Democratic Victory 2000 and Andrew Tobias, as treasurer.

> subject to the limitations and prohibitions of 2 U.S.C. §§ 441a(a), 441a(d), and 441b. Moreover, the . . . parties would have been required to pay for the advertisements entirely with federal funds, pursuant to 11 C.F.R. § 102.5.

MUR 4994, First General Counsel's Report at 4. Accordingly, the AGC recommended that the Commission find reason to believe and begin an investigation. *Id.* at 53-54.

Since mid-1999, the Commission has considered a number of enforcement matters that, with variations in the underlying fact patterns, presented essentially the same legal issue. *E.g.*, MURs 4378 (National Republican Senatorial Committee, Montanans for Rehberg, *et al.*); 4553 and 4671 (Republican National Committee, Dole for President, *et al.*); 4713 (Democratic National Committee, Clinton-Gore '96 Primary Committee, *et al.*); 4507 and 4544 (Democratic National Committee, Clinton-Gore '96 Primary Committee, *et al.*); and 4476 (Wyoming Democratic State Central Committee, Karpan for Congress *et al.*). In all of these matters, the Commission either failed to achieve a majority to find reason to believe or probable cause to believe that respondents violated the Act, or, in the instance of pre-1996 advertisements in the Dole and Clinton matters, found no reason to believe that respondents violated the Act. *See also* MUR 4503 (South Dakota Democratic Party, Tim Johnson for South Dakota, *et al.*) where the Commission pursued the party committee involved only with respect to certain communications, not others.

II. Discussion

In light of the Commission's failure to formally supersede Advisory Opinion 1995-25, I voted not to proceed against the respondents in this MUR because of the same concerns about due process I have consistently raised in enforcement matters relating to media advertisements alleged to be coordinated between candidates and party committees. *See Statement of Reasons of Commissioner Karl J. Sandstrom in MURs 4553, 4671, 4407, 4544 and 4713 (June 21, 2000).* I write this statement to once again urge the Commission to provide clarity to party committees and candidates about how, in the next federal election less than a year away, the Commission intends to enforce the

coordinated expenditure limits of 2 U.S.C. § 441a(d), which were recently upheld by the Supreme Court in *Colorado Republican II*.[4]

In the five years since the Court held in *Colorado Republican I*[5] that the Commission's presumption of coordination between candidates and party committees was unconstitutional, the Commission has done nothing to clarify how to draw the line between coordinated and independent activity for these key participants in the political process. Since coordinated expenditures are treated as in-kind contributions and are limited in amount, but independent expenditures have no such limit at all, it is important that competitors in any given federal race have a clear idea of where the law draws the line between the two.[6] Elections are competitions and the participants should not be left to speculate about the rules.[7] Nonetheless, party committees' attempts to obtain clearer guidance from the Commission about whether specific activities should be categorized as coordinated expenditures or independent expenditures have been in vain. *See* Advisory Opinion Request 1996-30 and *Rulemaking Petition: Democratic Senatorial Campaign Committee and Democratic Congressional Campaign Committee, Notice of Availability*, 61 FR 41036 (Aug. 7, 1996).

In the absence of further guidance from the Commission, party committees who participated in the 1996, 1998 and 2000 elections cannot be faulted for treating coordinated ads that referenced clearly identified federal candidates but that did not

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[4] *FEC v. Colorado Republican Federal Campaign Comm.*, 121 S. Ct. 2351 (2001).

[5] *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604 (1996).

[6] *See* 2 U.S.C. §§ 431(17), 441a(a)(7)(B)(i), and 441a(d). The statute's different treatment of in-kind contributions and independent expenditures reflects the different constitutional standards for restrictions on contributions and expenditures. *See Colorado Republican II*, 121 S. Ct. at 2359-60 ("Congress drew a functional, not a formal, line between contributions and expenditures when it provided that coordinated expenditures by individuals and nonparty groups are subject to the Act's contribution limits, 2 U.S.C. § 441a(a)(7)(B)(i); *Colorado I*, 518 U.S., at 611. In *Buckley*, the Court acknowledged Congress's functional classification, 424 U.S., at 46-47, and n.53, and observed that treating coordinated expenditures as contributions 'prevent[s] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions,' *id.*, at 47. *Buckley*, in fact, enhanced the significance of this functional treatment by striking down independent expenditure limits on First Amendment grounds while upholding limitations on contributions (by individuals and nonparty groups), as defined to include coordinated expenditures, *id.*, at 23-59." (footnote omitted))

[7] A political party should not be put at a competitive disadvantage because in the face of uncertainty, it guessed wrongly about how the Commission would enforce the law. If the Commission allows candidates to receive a far greater amount of contributions than the statute allows, the Commission should make this policy known to all, so that those who naively follow the statute will not be at a disadvantage.

contain express advocacy[8] as "administrative/voter drive" expenses rather than coordinated expenditures, since Advisory Opinion 1995-25 has yet to be formally superseded.[9] Indeed, the Attorney General of the United States echoed this interpretation: "With respect to coordinated media advertisements by political parties . . . the proper characterization of a particular expenditure depends not on the degree of coordination, but rather on the content and the message." Letter from Janet Reno to Orrin Hatch, at 7 (April 14, 1997). The Attorney General's letter accurately reflected the state of the law at the time. If the law has changed since then and the votes of a majority of the Commission in various enforcement matters indicate it has, it is incumbent upon this Commission to announce the standard that it is now applying.

I have consistently voted against holding respondents to a different legal standard than what was discernible at the time they engaged in the political speech for which the Commission seeks to penalize them. Accordingly, I have only been willing to pursue allegations of coordination when the coordinated communication at issue contained express advocacy, since even the inconsistent and incoherent approach in Advisory Opinion 1995-25 puts a party committee on notice that coordinated communications containing express advocacy may be treated as coordinated expenditures by the Commission.

I do not wish to suggest, however, that I in any way endorse clarifying what constitutes coordination by means of an express advocacy test; in fact, quite the contrary. The presence or absence of express advocacy sheds no light on whether an expenditure has been coordinated. Since independent expenditures, by definition, contain express advocacy, I recognize that it makes no sense to treat express advocacy as a distinguishing characteristic of coordinated expenditures. I am also mindful of the fact that neither Congress nor the Supreme Court has restricted the definition of coordinated expenditures

[8] Advisory Opinion 1995-25 also referred to an "electioneering message" standard, which was subsequently rejected by a majority of the Commission. *See Statement of Reasons of Commissioners Darryl R. Wold, Lee Ann Elliott, David M. Mason and Karl J. Sandstrom on the Audits of Dole for President Committee, Inc., et al.* (June 24, 1999).

[9] Advisory Opinion 1992-25 permitted a category of media advertisements to be paid for with a mixture of federal and non-federal money and treated as either "administrative" or "generic voter drive" expenses, despite the fact that there is no statutory or regulatory authority for allowing party committees to pay for

to only those which contain express advocacy.[10] For the Commission to adopt a policy of pursuing section 441a(d) violations only in cases where the general public political communication at issue contains express advocacy would exclude a large number of in-kind contributions from the section 441a(d) limit, amounting to a de facto repeal of 2 U.S.C. § 441a(d). If 2 U.S.C. § 441a(d) is to be repealed, that is a decision for Congress, not this agency, to make.

The proper way to determine what constitutes a coordinated expenditure is to look to the language of the statute. 2 U.S.C. § 441a(a)(7)(B)(i) states that an expenditure made "in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate" is to be treated as a "contribution." While the reach of these words may be uncertain, pending Commission elaboration, the Commission has no basis for nullifying their meaning, since the Supreme Court has not found 2 U.S.C. § 441a(a)(7)(B)(i) to be unconstitutionally vague or overbroad. Moreover, the Commission has shown that it is possible to define more precisely what these words mean, as it has done for cases of coordination other than those between a party committee and a candidate. *See* 11 CFR § 100.23. The naturally frequent exchange of information between party committees and candidates, and the role that candidates play within the governing structure of national party committees and their affiliates, undoubtedly pose greater administrative challenges for the Commission in regulating coordinated activity between candidates and party committees. But having been charged with regulating coordinated expenditures between party committees and candidates, and having been ordered by the Supreme Court to treat independent expenditures by party committees as a category separate and distinct from coordinated expenditures, the Commission must give the regulated community the necessary guidance to know what constitutes coordination for purposes of 2 U.S.C. §§ 441a(a)(7)(B)(i) and 441a(d).

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media advertisements that reference a federal candidate in such a manner. *See Statement of Reasons of Commissioner Karl J. Sandstrom in MURs 4553, 4671, 4407, 4544 and 4713* (June 21, 2000), at III.

[10] The reluctance of Congress and the Supreme Court to impose such a requirement is quite understandable. A media campaign that is fully coordinated between a candidate and a group supporting the candidate would provide a greater opportunity for corruption than a limited financial contribution, and would not be diminished in its electoral efficacy merely by eschewing express words of advocacy.

Now that nearly six months have passed since *Colorado Republican II* upheld the constitutionality of section 441a(d) and another federal election year is rapidly approaching, it is incumbent upon this Commission to announce how it intends to enforce 2 U.S.C. § 441a(d) in time for the 2002 election. The Commission's duty under 2 U.S.C. § 437c(b)(1) is to ". . . seek to obtain compliance with, and formulate policy with respect to, [the Federal Election Campaign Act of 1971, as amended]." So long as the fate of the section 441a(d) limit was called into question by *Colorado Republican I* and hung in the balance after the 10th Circuit's decision in *Colorado Republican II*[11], the Commission's failure to formulate a policy for distinguishing coordinated and independent expenditures could perhaps be explained, if not excused. If, however, even in the aftermath of *Colorado Republican II*, the Commission proves itself incapable of seeking to obtain compliance with, and formulating policy with respect to, 2 U.S.C. §§ 441a(a)(7)(B)(i) and 441a(d), I believe the Commission will indeed be acting "contrary to law" under 2 U.S.C. § 437g(a)(8).

12/18/2001
Date

Karl J. Sandstrom
Commissioner

[11] *FEC v. Colorado Republican Federal Campaign Comm.*, 213 F.3d 1221 (10 Cir. 2000), *rev'd by* 121 S. Ct. 2351 (2001).