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

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR:	5136
Date Complaint Filed:	October 30, 2000
Date of Notification:	November 6, 2000
Date Activated:	March 25, 2003
Expiration of Statute of Limitations:	October 11, 2005
Staff Member:	Mark A. Goodin

COMPLAINANT: National Legal and Policy Center, through Peter Flaherty, President

RESPONDENTS: American Federation of Labor-Congress of Industrial Organizations; American Federation of State, County and Municipal Employees; Gore/Lieberman, Inc. and Jose Villarreal as Treasurer

RELEVANT STATUTES AND REGULATIONS:[1]

2 U.S.C. § 431(9)(A)(i)
2 U.S.C. § 431(17)
2 U.S.C. § 437g(a)(2)
2 U.S.C. § 437g(a)(6)
2 U.S.C. § 441a(a)(7)(B)(i)
2 U.S.C. § 441b
2 U.S.C. § 441d(a)
2 U.S.C. § 441d(a) (2002)
26 U.S.C. § 9003(b)(2)
26 U.S.C. § 9012(b)
26 U.S.C. § 9012(f)
11 C.F.R. § 100.22
11 C.F.R. § 100.23
11 C.F.R. § 109 (2003)
11 C.F.R. § 109.1(a) (2000)
11 C.F.R. § 109.1(b)(4)(i) (2000)
11 C.F.R. § 111.4(d)

[1] All of the facts relevant to this matter occurred prior to the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002). Accordingly, unless specifically noted to the contrary, all citations to the Federal Election Campaign Act of 1971, as amended (the "Act" or "FECA") or statements of law regarding provisions of the Act contained in this report refer to the Act as it existed prior to the effective date of BCRA. Similarly, all citations to the Commission's regulations or statements of law regarding any specific regulation contained in this report refer to the 2002 edition of Title 11, Code of Federal Regulations, published prior to the Commission's promulgation of any regulations under BCRA.

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The complaint in this matter alleges that the American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") and the American Federation of State, County and Municipal Employees ("AFSCME") made an unlawful contribution to Gore/Lieberman, Inc. ("Gore/Lieberman") (collectively, "Respondents") through a coordinated newspaper advertisement. The complaint also alleges that the Respondents violated restrictions against expenditures made to further the election of a publicly funded candidate, and that they failed to include a proper disclaimer on a newspaper advertisement that expressly advocated the election of Al Gore. As analyzed below, this Office recommends that the Commission find no reason to believe that the Respondents violated the Act or the Presidential Election Campaign Fund Act (the "Fund Act") and that it close the file.

II. FACTUAL AND LEGAL ANALYSIS

A. Facts

This matter involves a full-page advertisement (the "Advertisement") that appeared in the Washington Post on October 11, 2000. Attachment 1. In response to the complaint, the AFL-CIO and AFSCME admitted that they paid for the Advertisement.[2] Gore/Lieberman denied

[2] *See* Letter from Larry P. Weinberg, Counsel for Respondent AFSCME, to Jeff S. Jordan, Federal Election Commission at 2 (Dec. 8, 2000) ("Weinberg Ltr."); Letter from Laurence E. Gold, Associate General Counsel for Respondent AFL-CIO, to Jeff S. Jordan, Federal Election Commission at 1 (Dec. 8, 2000) ("Gold Ltr.").

having "any communication with either the AFL-CIO or AFSCME" regarding the Advertisement.[3]

The Advertisement contains a statement opposing tax cuts and is captioned, "Under the George W. Bush Tax Plan, the Rich Get Richer." Attachment 1 at 1. It is signed by "Eight Nobel Laureates and Over 300 Economists," and declares that the signatories "oppose the large-scale tax cuts that are the centerpiece of presidential candidate George W. Bush's economic proposals." *Id.* In its discussion of the proposed tax plan, the Advertisement states that tax cuts, "combined with Bush's proposed spending increases, would more than exhaust the projected surplus." *Id.* It also states that "Bush's tax cuts would risk returning us to the era of running chronic deficits," and that "George W. Bush's tax cut would leave little room" for "investments in education" and other programs. *Id.* Moreover, the Advertisement notes that "[t]argeting the surplus to [middle- and low-income Americans] as proposed by Vice President Gore makes more sense." *Id.* The Advertisement closes by declaring that "Eight Nobel Laureates and Over 300 Economists Agree: The Bush Plan is Bad for America's Working Families." *Id.* At the bottom of the page, the Advertisement states that it is "Paid for by the working men and women of the American Federation of State, County and Municipal Employees and the AFL-CIO." *Id.*

B. Analysis

The complaint alleges violations of three statutory provisions:[4] (1) 2 U.S.C. § 441b (prohibiting union treasury money contributions in connection with federal elections);

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[3] Letter from Eric Kleinfeld and Lyn Utrecht, Counsel for Respondent Gore/Lieberman, to Lawrence M. Noble, General Counsel, Federal Election Commission at 2 (Dec. 12, 2000) ("Kleinfeld Ltr.").

[4] The complaint does not state specifically which Respondents violated which provisions, but instead alleges that "[t]he Advertisement [v]iolates" certain sections of the Act and Fund Act. Complaint at 5.

(2) 26 U.S.C. § 9012(f)(1) (limiting political committee expenditures made to further the election of a publicly funded candidate); and (3) 2 U.S.C. § 441d(a) (requiring disclaimers for express advocacy communications). In order to meet the standard for a reason to believe finding under 2 U.S.C. § 437g(a)(2), we bear in mind that, "absent personal knowledge, the complainant, at a minimum, should have made a sufficiently specific allegation ... so as to warrant a focused investigation that can prove or disprove the charge."[5] A complaint may provide a basis for reason to believe findings if it alleges "sufficient specific facts" that, if proven, would constitute a violation of the Act.[6] Moreover, "[u]nwarranted legal conclusions from asserted facts ... or mere speculation ... will not be accepted as true."[7] As discussed below, this Office recommends that the Commission find no reason to believe that the Respondents violated the Act or the Fund Act, as alleged in the complaint.

1. Coordinated Expenditures

An expenditure is generally defined as "any purchase, payment, distribution, loan, advance, deposit, or 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). In addition, "expenditures 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, shall be considered a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i). In other words, coordinated expenditures are considered to be contributions, which are subject to the prohibitions and

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5 MUR 4960, Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas; *see also* 11 C.F.R. § 111.4(d) (required contents of complaint).

6 MUR 5141, Statement of Reasons of Chairman David M. Mason, Vice Chairman Karl J. Sandstrom, and Commissioners Danny L. McDonald, Bradley A. Smith, Scott E. Thomas, and Darryl R. Wold.

7 *Id.*

limitations of the Act. *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 492 (1985) ("*NCPAC*"). *See also Buckley v. Valeo*, 424 U.S. 1, 46 (1976) ("controlled or coordinated expenditures are treated as contributions").

The Act prohibits labor organizations from using treasury money to make a contribution or expenditure in connection with any federal election. 2 U.S.C. § 441b. The Act also makes it unlawful for any candidate "knowingly to accept or receive any contribution" prohibited by this section. *Id.*

The Act and regulations indirectly define "coordination" in the context of defining what is *not* an "independent expenditure." 2 U.S.C. § 431(17).[8] Under the regulation in effect during the relevant time, an expenditure is not "independent" if it is "made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of such candidate."[9] 11 C.F.R. § 109.1(a) (2000). The regulation defined this phrase ("made with the cooperation...") to mean "any arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication." 11 C.F.R. § 109.1(b)(4)(i) (2000). It also provided that expenditures would be presumed to be coordinated when such expenditures were:

> (A) Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made; or
> (B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been,

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8 BCRA amended this provision, effective November 6, 2002.

9 The Commission promulgated a separate coordination regulation, 11 C.F.R. § 100.23, which became effective after the events at issue in this matter. This regulation applied to "expenditures for general public political communications paid for by persons other than candidates, authorized committees, and party committees." 11 C.F.R. § 100.23(a)(1). BCRA repealed 11 C.F.R. § 100.23 and directed the Commission to promulgate new coordination regulations. BCRA § 214. The Commission did so, and the new regulations became effective on February 3, 2003. 11 C.F.R. § 109 (2003).

> receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent[.]

Id.

The Commission has considered potential coordination that took place before the effective date of 11 C.F.R. § 100.23[10] under the standards set forth in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999). The court there defined as contributions "expressive coordinated expenditures made at the request or the suggestion of the candidate or an authorized agent." *Id.* at 91. In the absence of a "request or suggestion from the campaign," an expressive coordinated expenditure arises:

> where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (*e.g.*, choice between newspaper or radio advertisement); or (4) "volume" (*e.g.*, number of copies of printed materials or frequency of media spots).

Id.[11]

Application of the *Christian Coalition* standard does not support a finding of coordinated expenditures in the present matter. In sum, the allegations are based – fatally – on "mere speculation." The complaint simply asserts that "[t]he AFL-CIO has a lengthy history of working with Democratic candidates." Complaint at 4. Based on alleged contacts between the AFL-CIO and the Democratic Presidential candidate for one election cycle (the 1996 campaign), the complaint suggests that "[t]here is no reason to believe that such coordination does not exist between Gore-Lieberman and the AFL-CIO" during the subsequent election cycle (the 2000

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[10] As explained in footnote 9, the events at issue in this matter took place before the Commission promulgated Section 100.23 (a regulation that BCRA subsequently repealed).

[11] The court specifically limited its analysis to "coordination as it applies to expressive coordinated expenditures by *corporations*." *Christian Coalition*, 52 F. Supp. 2d at 91 (emphasis added). Nevertheless, the logic of its analysis would seem to apply, as in this matter, to expenditures made by labor organizations.

campaign). *Id.* The complaint makes no allegation whatsoever that one respondent (AFSCME) had any contacts with Gore/Lieberman.

This complaint therefore falls far short of making allegations showing any "arrangement, coordination or direction" between Gore/Lieberman and the AFL-CIO or AFSCME, or that any Gore/Lieberman agent provided information to these labor organization respondents. *See* 11 C.F.R. § 109.1(b)(4)(i) (2000). Neither is there any allegation that Gore/Lieberman made a request or suggestion to the AFL-CIO or AFSCME that they publish the Advertisement, or that the candidate could "exercise control over" or, much less, had any "discussion[s] or negotiation[s]" regarding the Advertisement's contents, timing, location, mode, intended audience or "volume." *See Christian Coalition*, 52 F. Supp. 2d at 91.

In addition to the inadequate allegations, all of the Respondents denied that there was any contact between either the AFL-CIO or AFSCME, on the one hand, and Gore/Lieberman, on the other, with respect to the publication of the Advertisement. The Public Affairs Director of AFSCME, who was responsible for the "planning and execution" of the Advertisement, declared that she "did not speak to, or otherwise consult or coordinate with, the Gore-Lieberman campaign ... or any political party" regarding its publication, nor was she aware of any other "official or representative of AFSCME" who did so. Declaration of Jean Nolan at ¶ 10 (Attachment to Weinberg Ltr.). The Assistant to the President for Public Affairs of the AFL-CIO, who obtained approval from the President of the AFL-CIO for "sharing the cost of publishing" the Advertisement, declared that she did not have "any contact whatsoever regarding the [A]dvertisement with any representative or agent of the Gore-Lieberman campaign ... or any political party," nor was she aware of "any other employee, representative or agent of the AFL-CIO" who had such contact. Declaration of Denise Mitchell at ¶ 5 (Attachment to Gold Ltr.).

The Political Director or the AFL-CIO made the same declaration. Declaration of Steve Rosenthal at ¶ 3 (Attachment to Gold Ltr.). Finally, counsel for Gore/Lieberman denied that this respondent had "any involvement with the design, drafting, or publication of, or payment for" the Advertisement, or that Gore/Lieberman had "any communication with either the AFL-CIO or AFSCME" regarding it. Kleinfeld Ltr. at 2.

In conclusion, this Office recommends that the Commission find no reason to believe that the American Federation of Labor-Congress of Industrial Organizations; or the American Federation of State, County and Municipal Employees; or Gore/Lieberman, Inc. and Jose Villarreal, as Treasurer, violated 2 U.S.C. § 441b.

2. Fund Act Provisions

The Complainant also alleges that the Respondents violated 26 U.S.C. § 9012(f)(1), a provision of the Fund Act that limits political committee expenditures that are made to further the election of a publicly funded Presidential candidate. The Supreme Court, however, invalidated Section 9012(f) of the Fund Act. *NCPAC*, 470 U.S. at 501. Although this section of the Fund Act is inapplicable, other sections of Title 26 prohibit publicly funded candidates from receiving contributions. *See* 26 U.S.C. §§ 9003(b)(2) (conditioning receipt of public funds on candidate's certification not to accept private contributions) and 9012(b) (prohibiting publicly funded candidates from receiving private contributions and providing criminal penalties for violations thereof). These sections "can be violated only by the candidate receiving federal funds." *Common Cause v. Schmitt*, 512 F. Supp. 489, 503 (D.D.C. 1980) (three-judge court), *aff'd by an equally divided court*, 455 U.S. 129 (1982). In addition, FECA governs Presidential campaigns, *id.* at 491, and its treatment of coordinated expenditures as contributions applies to the present matter. *Id.* at 492. Accordingly, if Gore/Lieberman received in-kind contributions in

the form of coordinated expenditures, then it potentially could be liable for a violation of the Fund Act.

The facts of this matter, however, do not support such a conclusion. As analyzed in the previous section, there is no basis for a reason to believe finding that Gore/Lieberman received a contribution in the form of a coordinated expenditure from the labor organization respondents. Therefore, this Office recommends that the Commission find no reason to believe that the American Federation of Labor-Congress of Industrial Organizations; the American Federation of State, County and Municipal Employees; or Gore/Lieberman, Inc. and Jose Villarreal, as Treasurer, violated 26 U.S.C. §§ 9003(b)(2), 9012(b), or 9012(f).

3. Express Advocacy

At the time of the Advertisement's publication, the Act required that any person making "an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate" must display a disclaimer.[12] 2 U.S.C. § 441d(a). The Complainant contends that "[t]he Advertisement [v]iolates" either Section 441d(a)(2) (communication authorized by a candidate, but paid for by other persons) or Section 441d(a)(3) (communication not authorized by a candidate).[13] Complaint at 5. Additionally, though not specifically alleged as a violation, if the Advertisement contains express advocacy, then the labor organization respondents, by definition, also violated the prohibition against labor organization "expenditure[s] in connection with any election." 2 U.S.C. § 441b(a); *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), 479 U.S. 238, 249 (1986) ("an expenditure must constitute 'express

[12] BCRA amended Section 441d so that, among other things, it no longer contains the "expressly advocating" requirement. 2 U.S.C. § 441d(a) (2002). This amendment took effect on November 6, 2002.

[13] The specific contents of the disclaimer depend on whether the communication was paid for and/or authorized by a candidate, an authorized political committee of a candidate, or its agents. 2 U.S.C. § 441d(a).

advocacy' in order to be subject to the prohibition of § 441b"). In other words, the Act prohibits labor organization expenditures on an express advocacy communication, regardless of the presence or absence of a proper disclaimer. Nevertheless, as analyzed below, this Office concludes that the Advertisement does not contain express advocacy and, therefore, it does not constitute an unlawful labor organization expenditure, nor does it require a disclaimer.

The Commission promulgated, at 11 C.F.R. § 100.22, a regulation that defines "expressly advocating."[14] The first part of this regulation, tracking *Buckley*, defines "expressly advocating" as a communication that uses phrases such as "vote for the President" or "support the Democratic nominee, ... which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s) ...." *Id.* at § 100.22(a). The second part of the regulation, following *FEC v. Furgatch*, 807 F.2d 857, 863-64 (9th Cir. 1987),[15] requires that the communication:

> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing

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[14] This regulation has been the subject of several Constitutional challenges, and the First and Fourth Circuits have invalidated 11 C.F.R. § 100.22(b). *Maine Right to Life v. FEC*, 98 F.3d 1, 1 (1st Cir. 1996); *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001). *See also Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248, 253-54 (S.D.N.Y. 1998); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969-70 (8th Cir. 1999) (affirming grant of preliminary injunction against enforcement of substantially similar state regulation). The constitutionality of 11 C.F.R. § 100.22(b) has not been challenged in the District of Columbia Circuit. Although the Advertisement (appearing in The Washington Post) was certainly distributed within the states of the Fourth Circuit, in any potential action against the labor organization respondents venue would be proper in the District of Columbia because each of these respondents maintains its headquarters there. 2 U.S.C. § 437g(a)(6)(A) (venue permitted where the defendant is "found, resides, or transacts business"). Accordingly, the Commission is not judicially foreclosed from relying on Section 100.22(b) in the appropriate case in the District of Columbia Circuit.

[15] In *Furgatch*, the Ninth Circuit held that "express advocacy" does not require the use of the "short list of words" included in the *Buckley* opinion, but that the communication "must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." 807 F.2d at 863-64. Recently, this court explained (in a passage not essential to its holding) that "express advocacy must contain some explicit *words* of advocacy." *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003) (emphasis in original). The court observed that *Furgatch* permitted consideration of the communication "as a whole," when determining express advocacy, but that "context" is an "ancillary" consideration, "peripheral to the words themselves." *Id.* (quoting *Furgatch*, 807 F.2d at 863).

> advocacy of the election or defeat of one or more clearly identified candidate(s) because—
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

Id. at § 100.22(b). The complaint limits its allegation to the second part of this regulation, asserting that the Advertisement constitutes "express advocacy as defined in 11 C.F.R. § 100.22(b)." Complaint at 3.

The Advertisement fails the express advocacy test under the relevant regulation because it does not contain an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning." *See* 11 C.F.R. § 100.22(b)(1).[16] In contrast to the electoral advocacy in *Furgatch* ("don't let him do it"), the Advertisement here simply does not contain an "express call to action" that asks the reader to do anything. 807 F.2d at 858, 865. Moreover, although the Advertisement's "proximity to the election" (less than four weeks) might be comparable to the publication in *Furgatch* (one week), this factor cannot transform into "express advocacy" a communication that lacks an "electoral portion," 11 C.F.R. § 100.22(b)(1), or a "clear plea for action." *Furgatch*, 807 F.2d at 864. Therefore, this Office recommends that the Commission find no reason to believe that the American Federation of Labor-Congress of Industrial Organizations; the American Federation of State, County and Municipal Employees; or Gore/Lieberman, Inc. and Jose Villarreal, as Treasurer, violated 2 U.S.C. § 441b or 2 U.S.C. § 441d(a).[17]

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[16] While this Office may analyze potential violations that are not specifically alleged in a complaint, the Advertisement here fails to satisfy 11 C.F.R. § 100.22(a) for similar reasons.

[17] A finding of no reason to believe that the Respondents' Advertisement constituted express advocacy would be consistent with the Commission's decision in MUR 4766 (Philip Morris), where it found no reason to believe that

III. RECOMMENDATIONS

1. Find no reason to believe that the American Federation of Labor-Congress of Industrial Organizations; the American Federation of State, County and Municipal Employees; or Gore/Lieberman, Inc. and Jose Villarreal, as Treasurer, violated 2 U.S.C. § 441b;

2. Find no reason to believe that the American Federation of Labor-Congress of Industrial Organizations; the American Federation of State, County and Municipal Employees; or Gore/Lieberman, Inc. and Jose Villarreal, as Treasurer, violated 26 U.S.C. §§ 9003(b)(2), 9012(b), or 9012(f);

3. Find no reason to believe that the American Federation of Labor-Congress of Industrial Organizations; the American Federation of State, County and Municipal Employees; or Gore/Lieberman, Inc. and Jose Villarreal, as Treasurer, violated 2 U.S.C. § 441d(a);

4. Approve the appropriate letter(s); and

5. Close the file.

8/21/03
Date

Lawrence H. Norton
General Counsel

Gregory R. Baker
Acting Associate General Counsel

Peter G. Blumberg
Acting Assistant General Counsel

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certain tobacco companies made prohibited corporate contributions. This Office recommended such a finding, in part, because of the "lack of express advocacy" in the various advertisements sponsored by those corporations. MUR 4766 First General Counsel's Report at 27. Although certain television and cable advertisements at issue mentioned "'election time,' 'Congress' and 'politicians,'" they contained no reference to any "election-related activity asked of the viewer." *Id.* at 23-24.

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4 Mark A. Goodin
5 Attorney
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