

DEC 07 2004

BEFORE FEDERAL ELECTION COMMISSION

010957A 13A

In the Matter of:

2004 DEC -7 P 4:31

Brady Campaign to Prevent Gun Violence
f/k/a/ Handgun Control, Inc.

Brady Voter Education Fund f/k/a/
Handgun Control Voter Education
Fund, and Mark A. Ingram, as
treasurer

James S. Brady

Sarah Brady

Bill Nelson for U.S. Senate and Peggy
Gagnon, as treasurer

Robb for Senate and Thomas J. Lehner, as
treasurer

Handguncontrol.org a/k/a
bradycampaign.org

SENSITIVE

MUR 5158

GENERAL COUNSEL'S REPORT #2

I. ACTIONS RECOMMENDED

Deny Respondents' request that the Commission take no further action in this matter;
authorize the Office of General Counsel to enter into pre-probable cause conciliation with the
Brady Campaign to Prevent Handgun Violence f/k/a/ Handgun Control, Inc. ("the Brady
Campaign"), the Brady Voter Education Fund f/k/a/ Handgun Control Voter Education Fund
("Brady Committee"), and Mark A. Ingram, as treasurer (collectively the "Brady Respondents");
and approve the attached Conciliation Agreement. Take no further action as to Bill Nelson for
U.S. Senate and Peggy Gagnon, as treasurer, other than to send a letter of admonishment. Take

1 no further action as to Robb for Senate and Thomas J. Lehner, as treasurer; Handguncontrol.org
2 a/k/a bradycampaign.org; and James S. Brady.

3 **II. BACKGROUND**

4 The Brady Campaign is a 501(c)(4) non-profit corporation chaired by Sarah Brady. Ms.
5 Brady is paid \$150,000 annually for her work as Chair of the Brady Campaign. The Brady
6 Committee is a separate segregated fund connected to the Brady Campaign.² During the 1999-2000
7 election cycle, the Brady Committee reported over three million dollars of combined receipts and
8 disbursements. Included among its disbursements are over one million dollars for independent
9 expenditures, a number of which were made in connection with U.S. Senate campaigns in Florida,
10 Virginia, and Missouri.

11 On November 4, 2003, the Commission found reason to believe that the Brady Campaign
12 violated 2 U.S.C. § 441b by making corporate expenditures in connection with endorsements of
13 Florida Senate candidate, Bill Nelson, and Virginia Senate candidate, Charles Robb, at press
14 conferences held in Miami and Virginia, respectively.³ The Commission also found reason to
15 believe that the Brady Campaign violated 2 U.S.C. §§ 441b, 441d, and 434(c) by making
16 unreported expenditures in excess of \$250 for a website that included a pop-up web page
17 available to the general public that expressly advocated the defeat of George W. Bush, but
18 contained no disclaimer; that the Brady Committee violated 2 U.S.C. § 441d in connection with

² In its Statement of Organization, the Brady Committee describes the Brady Campaign as a membership organization.

³ The Commission also made corresponding reason to believe findings against the Bill Nelson for U.S. Senate Committee ("Nelson Committee") and Robb for Senate Committee ("Robb Committee") for violations of 2 U.S.C. §§ 441b and 434(b) in connection with the acceptance and reporting of contributions that may have resulted from the Brady Campaign's activities.

1 an anti-Ashcroft television advertisement, an anti-Ashcroft website, and an anti-McCollum
2 website; and that the Brady Campaign violated 2 U.S.C. § 434(b) by not properly reporting
3 addresses of certain contributors. Each of these findings will be discussed in this Report.

4 The investigation in this matter has included informal requests for information,
5 Interrogatories, Requests for the Production of Documents, and a meeting with Respondent
6 Ingram, Brady Campaign Senior Vice President, and their counsel. Throughout the investigative
7 process, Respondents have not been fully cooperative with the investigation, having established a
8 pattern of ignoring deadlines for compliance with subpoenas and failing to produce information
9 that they had made a commitment to produce.⁴ They have, however, requested pre-probable
10 cause conciliation. Therefore, in the interest of moving this matter towards resolution, this
11 Office is requesting that the Commission grant us the authority to engage in pre-probable cause
12 conciliation with the Brady Respondents in conjunction with our attempts to secure further
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⁴ This pattern of delay and non-responsiveness began at the inception of this matter and has remained consistent throughout the investigation. Respondents initially submitted what they described as a "partial response" to the reason to believe findings in November 2003. This response addressed only one of the findings against them and indicated that further substantive response to the remaining findings would be forwarded to this Office the following week. However, it was not until November 9, 2004 that Respondents made a submission that appears to be a supplementation of their response to the reason to believe findings in this matter. Attachment 1

Furthermore, during the initial stage of the investigation, we attempted to secure information through informal means. This period of informal discovery was characterized by commitments from Respondents to produce certain information by a particular date, followed by multiple requests for extensions and/or by Respondents ignoring the agreed upon deadlines altogether. As a result, on April 16, 2004, several months after the informal discovery process began, we concluded that, in order to move the investigation forward, it was necessary to serve respondents with formal discovery, including Requests for the Production of Documents and Interrogatories. Upon receipt of the formal discovery, Respondents immediately requested an extension of time to submit their responses. Because the formal discovery merely requested information that Respondents had already been given the opportunity to produce informally, we concluded that good cause did not exist for an extension and denied Respondents' request. Despite the denial, Respondents contacted this Office on the due date for the return of the discovery responses and indicated that they would be taking ten additional days to respond. Respondents eventually returned responses to the discovery, albeit after the deadline that they imposed upon themselves had already passed.

1 information.⁵

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7 **III. ANALYSIS**

8 **A. Nelson Press Conference**

9 Sarah Brady, Jim Brady, and Florida Senate candidate Bill Nelson participated in a press
10 conference on October 16, 2000, during which Jim and Sarah Brady endorsed Nelson. The Brady
11 Committee paid for Jim and Sarah Brady's travel expenses, which were reported as an in-kind
12 contribution to Nelson. The complaint alleged that the Brady Campaign incurred additional
13 expenses in connection with this press conference, and that those expenses constituted prohibited
14 corporate contributions to the Nelson Committee.

15 The Commission found reason to believe that the Brady Campaign had violated
16 2 U.S.C. § 441b based on the Brady Committee's failure to reimburse the Brady Campaign for a
17 portion of Sarah Brady's salary, reflecting a pro-rata share based on the amount of time that she
18 spent in connection with the press conference. The Brady Respondents argue that Ms. Brady
19 endorsed Bill Nelson in a personal capacity, not on behalf of the Brady Campaign, and therefore, no

⁵ Specifically, we have requested, and not yet received information regarding the following: details about the activities engaged in by James and Sarah Brady in Miami on October 16, 2004, *see infra*, footnote 10; details about the circumstances surrounding the addition of express advocacy communication to the websites at issue; a confirmation that the trip to Miami was the only trip that Sarah Brady took during the 2004 election cycle to promote a federal candidate; and complete credit card and bank statements for the Brady Campaign and the Brady Committee, respectively, for the time period covering the 2000 election cycle.

violations resulted from the Committee's failure to reimburse the Campaign for a portion of Ms. Brady's salary and report the amount as an in-kind contribution to the Nelson Committee.⁶

The balance of evidence gathered during the investigation, however, suggests that Ms. Brady's endorsement was not made in a personal capacity, but on behalf of the Brady Campaign. First, a portion of the travel expenses incurred in connection with the Bradys' appearance was paid by the Brady Campaign's separate segregated fund, the Brady Committee. Second, an e-mail produced by the Brady Campaign in response to discovery requests shows that Brady Campaign resources, including employee time, were used to plan and coordinate the logistics of this event.⁷ Third, although Sarah Brady is employed full-time by the Brady Campaign, the trip took place during the week and there is no evidence that Ms. Brady took any personal leave time in order to make this trip. Fourth, the investigation has revealed that Ms. Brady's assistant, an employee of the Brady Campaign, traveled to Miami with the Bradys to facilitate the appearance. Finally, while the transcript of the remarks made by Sarah Brady do not specifically state she was endorsing Nelson on behalf of the Brady Campaign, nor do they specifically state that her endorsement was personal in nature.⁸

To support their position that Ms. Brady's endorsement was personal, Respondents argue that the language of Sarah Brady's remarks, *see supra*, footnote 8, demonstrates the personal nature

⁶ The Nelson Committee also makes this assertion in its response to the reason to believe findings, although it concedes that its own press release announced that James and Sarah Brady endorsed Nelson on behalf of the Brady Campaign.

⁷ In an e-mail produced by the Brady Respondents, Courtney Gardner, Sarah Brady's assistant, a Brady Campaign employee, writes to Sarah Brady, "Marie, Joe and I have gone over a couple of campaign requests and would like to get your input on them." Attachment 3. Among those requests listed in the e-mail is a request to do an event with the Nelson campaign. These individuals appear to be Joseph Sudby, Political Director and Division Director for State Legislation and Public Outreach of the Brady Campaign during the relevant time period, and Marie Carbone, Director of Congressional Relations and Director of the Brady Committee during the relevant time period. *See* Brady Campaign Interrog. Resp. #1.

⁸ The remarks begin "Jim and I are here to wholeheartedly endorse Bill Nelson as Florida's next United States Senator," and make no mention of the Brady Campaign. Brady Respondents argue that this statement conclusively proves that James and Sarah Brady were not there on behalf of the Brady Campaign.

1 of her endorsement. *See also* Sarah Brady Personal Statement, dated October 1, 2004 at ¶ 4,
2 Attachment 1. Furthermore, Respondents argue that the Campaign's actual employment
3 arrangement with Ms. Brady did not require Ms. Brady to maintain a regular presence in the office
4 or keep time records during the relevant period of time. Rather, they assert that Ms. Brady was
5 compensated for the use of her name and for sporadic appearances at events, although they argue
6 that this press conference was not one of the events for which she spoke on behalf of the Brady
7 Campaign.

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16 However, the investigation did reveal that the Brady Campaign made additional
17 expenditures in connection with the trip to Miami that were paid by the Brady Campaign, and
18 not reimbursed by the Brady Committee, thereby resulting in impermissible corporate
19 contributions pursuant to 2 U.S.C. § 441b. First, as discussed above, Sarah Brady's assistant, a
20 Brady Campaign employee, accompanied Jim and Sarah Brady on the trip. Second,
21 assistant for Mr. Brady also accompanied the Bradys to Miami and his travel expenses were also
22 paid by the Brady Campaign. Therefore, since they were incurred solely to facilitate the

1 endorsement, the travel expenses for these two individuals, approximately \$3,300, were
2 corporate contributions made in violation of 2 U.S.C. § 441b.⁹

3 Respondents argue that Ms. Brady's assistant accompanied the Bradys on the trip to
4 coordinate any official Brady Campaign business that may occur on the trip. Respondents point
5 to Sarah Brady's Statement asserting that "As a general matter, [Handgun Control, Inc.] is aware
6 of my travel plans (including personal and non-[Handgun Control, Inc.] related trips) and
7 regularly attempts to schedule [Handgun Control Inc.]-related business in connection with my
8 travel (such as meetings with actual and potential donors, meetings with grass roots activists and
9 press interviews)." See also Sarah Brady Personal Statement, dated October 1, 2004 at ¶ 9,
10 Attachment 1. Therefore, they argue, because the assistant's presence was not for the purpose of
11 facilitating the Bradys' endorsement of Nelson, her travel expenses were properly paid for by the
12 Brady Campaign.

13 However, the Brady Respondents have produced no evidence to support their assertion
14 that the Bradys engaged in any business in Miami that was not in connection with the press
15 conference appearance.¹⁰ On the contrary, the one piece of documentary evidence Respondents
16 did produce regarding the Miami trip—the trip itinerary—indicates that no other events or

⁹ In AO 1998-16 (Amway) the Commission determined that Amway, Inc., did not make impermissible corporate contributions by paying for a security guard to accompany Amway's president as he travels on business for the federal political committee for which he also serves as Chairman, where Amway's corporate policy is to provide such security for each of its executives no matter where, or in what capacity, the executive is traveling. In making this finding, the Commission assumed that the security guard would not provide any assistance to the executive in connection with his performance of the committee's business. However, AO 1998-16 does not shield the Brady Campaign's payments for the costs associated with the travel for Ms. Brady's assistant, because the purpose of Ms. Brady's assistant accompanying her was so that she could provide assistance in facilitating Ms. Brady's endorsement. See discussion *infra* at 7. Similarly, AO 1998-16 is not instructive with regard to Mr. Brady

¹⁰ Although Respondents stated their intention to contact Ms. Brady's former personal assistant in an attempt to provide further information in this regard, they have not yet done so. Respondents' November 9, 2004 submission indicates that they continue to be "unable to provide [us] with specific information regarding other meetings, press interviews or other activities related to the Bradys' Miami trip." Attachment 1 at 3.

meetings, aside from the press conference appearance, were scheduled in Miami. Attachment 4.

Furthermore, because the Nelson Committee coordinated with the Brady Campaign in connection with the Bradys' appearance at the press conference and issued a press release stating that the endorsement was made on behalf of the Brady Campaign, the Nelson Committee had indications that Sarah Brady was there on corporate time. However, with regard to the actual travel expenses, the Nelson Committee relied on information provided to it by the Brady Committee in determining the reported amount of the in-kind contribution from the Brady Committee.¹¹ Accordingly, although the Nelson Committee did not report the full travel costs incurred in connection with the Bradys' appearance at the Nelson press conference, this Office recommends that the Commission send an admonishment letter and take no further action against Bill Nelson for U.S. Senate and Peggy Gagnon, as treasurer.

B. Robb Press Conference

Sarah Brady, Jim Brady and Virginia Senate candidate Charles Robb participated in a press conference on September 12, 2000, in which Jim and Sarah Brady endorsed Robb. The complaint alleged that the expenditures incurred in connection with this press conference constituted prohibited corporate contribution by the Brady Campaign. As with the Nelson press conference, the Commission found reason to believe that the Brady Campaign had violated 2 U.S.C. § 441b, based on the Brady Committee's failure to reimburse the Brady Campaign for a

¹¹ In a letter to the Nelson Committee, Marie Carbone, Director of the Brady Committee, writes, "On October 16, 2000, Jim and Sarah Brady travelled [sic] to Florida to endorse the candidacy of Mr. Nelson for the United States Senate. The costs of air fare and accommodations for that portion of their trip to Florida amounted to \$2,078.13 (\$1,792.50 for air fare and \$285.63 for hotel)." In its Amended 2000 Pre-General Report, the Nelson Committee reported receiving an in-kind contribution from the Brady Committee in the amount of \$2,078.13 on October 16, 2000.

1 pro-rated amount of Sarah Brady's salary, equal to the amount of official work time that she
2 spent on the press conference.

3 Although Respondents now contend it was a personal endorsement, the factual record
4 supports the conclusion that the endorsement was made on behalf of the Brady Campaign
5 separate segregated fund, the Brady Committee. Specifically, the Brady Respondents concede
6 that the Brady Campaign issued a press release on the day of the conference which stated:
7 "Today, on behalf of the Handgun Control Voter Education Fund, Jim and Sarah Brady endorsed
8 Chuck Robb for re-election to the United States Senate." Brady Committee Interrog. Resp. #6.
9 Nevertheless, the Brady Respondents now claim that this press release was erroneous, and that
10 Ms. Brady was not there on behalf of the Brady Committee.¹²

11 The investigation does show that the press conference occurred during a typical lunch
12 hour, and that it took place at the county courthouse in Arlington, Virginia, which is available for
13 use by the public without cost and in close proximity to the offices of the Brady Campaign.
14 Therefore, it is possible that Ms. Brady did not attend the press conference on corporate time and
15 that no additional expenditures were incurred by the Brady Campaign. In addition, although the
16 investigation shows that other Brady Campaign employees coordinated and planned the Bradys'
17 appearance as part of their duties at the Campaign, *see* Attachment 3, this Office concludes that
18 such time was most likely *de minimus* due to lack of logistical details involved in the event. As a
19 result, this Office recommends that the Commission not pursue the finding that there is reason to
20 believe that the Brady Respondents violated 2 U.S.C. § 441b in connection with the Robb press
21 conference.

¹² As of the date of this report, the press release that Respondents claim is erroneous is still posted on the Brady Campaign's website. See <http://www.bradycampaign.org/press/release.php?release=13>. Similarly, the Nelson Committee now claims that this statement was erroneous and that James and Sarah were actually at the press conference to announce their personal endorsement of Robb

1 Similarly, this Office also recommends that the Commission
2 take no further action against Robb for Senate and Thomas J. Lehner, as treasurer, regarding the
3 press conference.

4 C. Media

5 1. Anti-Bush Pop-up Page

6 The Commission found reason to believe that the Brady Campaign violated 2 U.S.C.
7 §§ 441b, 441d, and 434(c) in connection with the anti-Bush pop-up webpage based on evidence that
8 the Brady Campaign had made unreported expenditures in excess of \$250 for including on its
9 official corporate website, www.bradycampaign.org, a pop-up web page available to the general
10 public that expressly advocated the defeat of George W. Bush, but contained no disclaimer. The
11 discovery responses from the Brady Campaign substantiate these findings.

12 In their discovery responses, the Brady Campaign admits the website domain was registered
13 to the corporation, that it did not contain any disclaimer, and that the website was available to the
14 general public. *See* Brady Campaign Interrog. Resp. #11. Furthermore, the Brady Campaign states
15 that between January 1999 and December 2000, it expended \$2,750 in consulting fees for the site,
16 in addition to a \$700 a month hosting fee and a \$35 per year domain registration fee, none of which
17 was reported to the Commission. *Id.* Respondents assert, without providing any substantiation
18 whatsoever, that the specific costs associated with this pop-up webpage were less than \$250.¹³

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¹³ In addition, Respondents argue that the statement contained in the pop-up page did not constitute express advocacy. This issue was addressed in the First Counsel's Report at 26-7, prior to the Commission's reason to believe finding that the communication did constitute express advocacy.

2. Websites and Television Advertisement

The Commission found reason to believe that the Brady Committee violated 2 U.S.C. § 441d in connection with an anti-Ashcroft television advertisement, an anti-Ashcroft website, and an anti-McCollum website based on the Committee's failure to place a proper disclaimer, or any disclaimer at all, on the respective media. The Brady Committee confirms in their responses to the discovery served on them that the websites have incomplete disclaimers, and the television advertisement had no disclaimer.

With regard to the websites, Respondents argue that the express advocacy communications were inadvertently placed on the websites which, they claim, were designed merely to raise awareness of McCollum's and Ashcroft's positions on gun control. Attachment 1 at 3-4. However, Respondents admittedly are unable to explain how these express advocacy communications came to be placed on the websites. *Id.*, see also Brady Campaign Resp. to Interrogs. ##9-10. Nevertheless, Respondents argue that the Commission should take no further action on these violations since the Brady Committee paid the expenses related to the websites upon learning of the inclusion of the express advocacy communications of the websites. Respondents have not produced evidence that the Brady Committee reimbursed the Brady Campaign for all of the expenses related to the websites, nor is there any evidence to contravene the allegation that the Brady Campaign made corporate expenditures in connection with these sites prior to that time.

With regard to the television advertisement, Respondents argue that the vendor hired to

1 produce and place the advertisement was responsible for including the proper disclaimer.¹⁴
2 However, as discussed in the First General Counsel's Report in this matter, committees, not
3 vendors, are responsible for ensuring that proper disclaimers appear on its communications. *See*,
4 *e.g.*, MURs 4759 (Maloof), 4741 (Mary Bono Committee), 3682 (Fox for Congress Committee).¹⁵
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6 *D. Reporting of Addresses*

7 The Commission found reason to believe that the Committee violated 2 U.S.C. § 434(b) by
8 not properly reporting addresses of eight itemized contributors in its 2000 April Quarterly Report
9 was based on the Brady Committee reporting the addresses of those eight contributors as the Brady
10 Committee's own address.¹⁶ The "Occupation/Employer" information was also missing for these
11 eight individuals.¹⁷ *See* 11 C.F.R. § 104.8(a). In their response to the reason to believe finding, the

¹⁴ Respondents cite the following provision of the contract between Respondents and the vendor to support this conclusion: "The parties agree that all services under this Agreement shall be performed in accordance with applicable laws, and, in particular, Federal Election Commission regulations concerning 'independent expenditures.'" Attachment 1 at 5. Respondents have also submitted a statement from the vendor that produced the advertisement, acknowledging that the disclaimer was incomplete and stating that the error was inadvertent Attachment 5 at ¶¶ 3 and 4.

¹⁵ In each of these matters, the Commission found reason to believe that the respective respondents had violated 2 U.S.C. § 441d(a) by failing to include disclaimers on the respective communications at issue. Each Respondent claimed that a vendor or printer had inadvertently omitted the disclaimers. Each of these matters concluded with a conciliation agreement that contained an admission that 2 U.S.C. § 441d(a) had been violated and provided for the payment of a civil penalty.

In its November 9, 2004 submission, Respondents cite two MURs (MURs 4145 and 3179) to support its contention that the Commission has declined to pursue matters against federal committees where a required disclaimer was omitted due to the fault of a third party vendor. Attachment 1 at 5. However, neither of these MURs involved any allegations regarding disclaimers whatsoever. In fact, MUR 4145 (Manfre) regarded allegations of reporting violations including the late filing of a pre-election report, and the failure to report certain in-kind contributions, MUR 3179 (Neal) regarded the allegation that the committee failed to file 48-hour Reports for seven contributions.

¹⁶ The individuals are: Roscoe Dellums, Mary Lewis Grow, Victoria Reggie Kennedy, Richard Parise, Nancy Schoenke, Phyllis Segal, Jerry Ter Horst and Ray Schoenke.

¹⁷ On June 17, 2000, the Brady Committee submitted an amended 2000 April Quarterly Report which provided new information about the "Occupation/Employer" of four of the eight contributors. The addresses for all eight remained the same. Later, on July 7, 2000, the Brady Committee submitted a second amendment of its 2000 April Quarterly Report. This amendment addressed the contributor identification issue by attaching its materials requesting further information from the contributors and a copy of a follow-up letter sent to the individuals who had not responded to the first correspondence.

1 Brady Respondents state that all eight individuals held positions of the Board of Directors of the
2 Brady Campaign at the time the contributions were made, and the Brady Campaign headquarters
3 was a valid business address for those individuals.¹⁸ Since the regulation does not specify that it
4 must be a home address, it is acceptable that the address of the Brady Campaign was used for
5 individuals who were members of the corporation's board. As a result, the Office of General
6 recommends that the Commission not pursue this allegation further

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8 IV. CONCILIATION

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¹⁸ The Brady Campaign produced a copy of the minutes of the Brady Campaign's January 31, 2000 board meeting to support this assertion. The minutes do substantiate that each of the eight individuals was on the Board of Directors at that time.

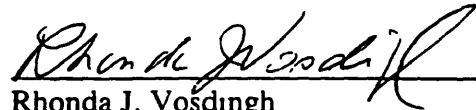
V. RECOMMENDATIONS


1. Deny Respondents' request that the Commission take no further action in this matter.
2. Authorize this Office to enter into pre-probable cause conciliation with the Brady Campaign to Prevent Handgun Violence, the Brady Voter Education Fund, and Mark A. Ingram, as treasurer.
3. Approve the attached Conciliation Agreement.
4. Take no further action as to Bill Nelson for U.S. Senate and Peggy Gagnon, as treasurer, other than to send a letter of admonishment
5. Take no further action as to Robb for Senate and Thomas J. Lehner, as treasurer; Handguncontrol.org; and James S. Brady.


Lawrence H. Norton
General Counsel

12/14/04
Date

By:


Rhonda J. Vosdinger
Associate General Counsel for Enforcement


Mark D. Shonkwiler
Assistant General Counsel


Kathleen M. Guith
Attorney

Attachments:

1. Brady Respondents' Submission dated November 9, 2004
2. Conciliation Agreement
3. Undated e-mail from Courtney Gardner to Sarah Brady
4. Brady Itinerary for Florida, October 15-17, 2000
5. Statement of Peter Fenn and Tom King, dated November 23, 2004