FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Missouri Democratic State Committee and	)	
Michael Kelley, as Treasurer	)	MUR 4831
Nixon Campaign Fund and	)	MUR 5274
John C. Lanham, as Treasurer	)	

STATEMENT OF REASONS OF COMMISSIONER MICHAEL E. TONER

On September 8, 2003, by a vote of 4-1[1], the Commission accepted the Office of General Counsel's ("OGC") recommendation to find probable cause that the Missouri Democratic State Committee ("MDSC") and Michael Kelley, as treasurer, violated 2 U.S.C. § 441a(a)(2)(A) and 11 C.F.R. § 110.7(b)(2)[2] by making excessive coordinated expenditures on behalf of Jeremiah "Jay" Nixon's 1998 Senate Campaign in Missouri ("Nixon Campaign Fund" or "Nixon").

OGC recommended that that the Commission find probable cause that the MDSC exceeded the coordinated expenditure limit by $28,700 because the MSDC did not receive prior, written authorization from the Democratic Senatorial Campaign Committee ("DSCC") prior to making the expenditures in question.[3] However, the Commission's regulations in effect at the time did not require that assignments of coordinated expenditure authority between party committees be made in writing or be made before the expenditures took place. Accordingly, I did not think it was appropriate to find that the MDSC made excessive coordinated expenditures in this matter.

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[1] Commissioners Mason, McDonald, Smith, and Thomas voting affirmatively, Commissioner Toner voting against, and Chair Weintraub recused.

[2] The activity in question occurred before enactment of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002). Accordingly, the activity was governed by the Federal Election Campaign Act of 1971, as amended ("the Act"), and the Commission's regulations in effect at the time. Unless noted otherwise, all references to the Act and Commission regulations pertain to provisions that were in effect prior to BCRA.

[3] Under the Act and Commission regulations, the national party committee and state party committee of a political party have separate coordinated expenditure allowances, and each entity may assign their coordinated expenditure allotment to the other entity. See 11 C.F.R. § 110.7(a)(4) ("The national committee of a political party may make expenditures authorized by this section through any designated agent, including State and subordinate party committees.") Under the Act and Commission regulations, the MDSC and DSCC each were permitted to make up to $260,140 in coordinated expenditures on behalf of the Nixon Campaign Fund. The record indicated that prior to the 1998 election, the DSCC provided the MDSC with written authorization to make $79,000 in coordinated expenditures out of the DSCC's allotment which, when combined with the MDSC's own $260,140 coordinated expenditure allotment and $5,000 contribution limit under 2 U.S.C. § 441a(a)(2)(A), totaled $344,140. The record further indicated that the MDSC made a total of $372,840 of coordinated expenditures on behalf of Nixon.

OGC acknowledged that the Commission's regulations in operation at the time did not reach the activity at issue. *See* First general Counsel's Report at 22 ("It should be noted here that the Act and the Commission's regulations do not explicitly require that the authorization occur before the expenditures are made or that it be in writing"). OGC argued that notwithstanding the regulation, the Commission "has interpreted 'designation' to require a prior writing." *Id.* (citing the Commission's "long-standing practice" and the Commission's Campaign Guide for Political Party Committees). However, the Commission's campaign guides do not have the force of law and cannot create legal obligations or impose legal liabilities under the Act, especially where, as here, the campaign guide is contrary to the plain meaning of the Commission's regulations.

The Commission acknowledged as much when it revised its regulations governing the assignment of coordinated expenditure authority last year during the BCRA rulemakings. Under current 11 C.F.R. § 109.33(a), assignments of party committee coordinated expenditure authority "must be made in writing, must state the amount of the authority assigned, and must be received by the assignee committee before any coordinated expenditure is made pursuant to the assignment."

I believe that current 11 C.F.R. § 109.33(a) is not contrary to FECA and is otherwise sound from a policy perspective. However, by finding that the MDSC made excessive coordinated expenditures on behalf of the Nixon Campaign Fund, the Commission effectively applied the new legal requirements of current 11 C.F.R. § 109.33(a) retroactively to the MDSC.

In this case, there was no question that the DSCC sought to assign its coordinated spending authority to the MDSC to make the coordinated expenditures at issue.[4] Moreover, the amounts spent by the MDSC did not exceed the combined MDSC-DSCC coordinated expenditure limit for Nixon. Most importantly, the coordinated expenditures at issue did not contravene the plain meaning of the Act and the Commission's regulations in effect at the time.

In light of the foregoing, I declined to find probable cause that the MDSC made excessive coordinated expenditures on behalf of the Nixon Campaign Fund in this matter.

December 4, 2003

Michael E. Toner, Commissioner

[4] *See* First General Counsel's Report at 21 (noting that on May 25, 1999, the DSCC provided written authorization for the MDSC to spend an additional $40,000 on behalf of Nixon and that "[t]his sum was more than sufficient to cover the $28,700 in excessive coordinated expenditures.")