FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Mary Robert	)	**MUR 5321**
Janet Robert	)	
Minnesotans for Janet Robert and	)	
Rob LaFrentz, as treasurer	)	

STATEMENT OF REASONS OF COMMISSIONER DAVID M. MASON

On June 8, 2004, the Federal Election Commission ("Commission"), by a vote of 3 to 3,[1] rejected a motion to adopt the first recommendation in the Office of General Counsel's ("OGC") second report in this matter. The recommendation was that the Commission enter "into conciliation with Mary Robert, Janet Robert, Minnesotans for Janet Robert, and Rob LaFrentz, as treasurer, prior to a finding of probable cause to believe." *Robert* Gen. Counsel's Report #2 at 8 (May 14, 2004). Having declined to proceed with this matter, the Commission voted 5 to 1[2] to close the file.

The failure to proceed in this matter is in stark contrast to the Commission's position in a previous matter presenting materially indistinguishable facts: *Ferguson for Congress and William Morrison, as treasurer; Mike Ferguson for Congress and James Flannery, as treasurer; Representative Mike Ferguson; Thomas and Roberta Ferguson,* MUR 5138 ("*Ferguson*").

Because there is no substantial difference between the facts of *Ferguson* and the facts of *Robert,* it would have been preferable for the Commission to follow the *Ferguson* precedent. The similarity of the facts of *Ferguson* and *Robert* is illustrated below. Although the *Ferguson* matter has long since concluded, it is necessary to review the facts of *Ferguson,* and the law behind the result, to illustrate the similarity between the two matters.

I. *Ferguson*

A. Background

[1] Vice Chair Weintraub and Commissioners McDonald and Mason voted for the motion. Chairman Smith and Commissioners Thomas and Toner voted against it.

[2] Chairman Smith, Vice Chair Weintraub, and Commissioners Thomas, Mason, and Toner voted for the motion. Commissioner McDonald voted against it.

Ferguson involved Michael Ferguson, who was elected to the United States House of Representatives in 2000. *E.g., Ferguson* First Gen. Counsel's Report at 4 (Feb. 8, 2002). *Ferguson* also involves, *inter alia,* Michael Ferguson's parents, Thomas and Roberta Ferguson. *See Ferguson* Conciliation Agreement at 2 (May 13, 2003).

Thomas and Roberta Ferguson were financially generous to all of their children before September 2000. Having each suffered from life-threatening cancer, they established a trust that could ultimately benefit all four of their children equally. However, as of September 2000, only Michael Ferguson's trust interest had vested, *id.* at 3, because only he had met the terms under which each child's interest would vest. The terms involved age, marriage, and college education. *See Ferguson* Respondents' Br. at 11 (Oct. 11, 2002), *cited in Ferguson* Statement of Reasons of Comm'rs Smith and Toner at 3 (June 12, 2003). Only recently had Michael Ferguson met the terms. *See Ferguson* Statement of Reasons of Comm'rs Smith and Toner at 3. In fact, he met the terms of the trust shortly *before* the trust was established. *See id.; Ferguson* Gen. Counsel's Report #3 at 16 (Jan. 20, 2003).

Accordingly, Thomas and Roberta Ferguson gave $1 million to Michael Ferguson via the trust in September 2000. *Ferguson* Gen. Counsel's Report #3 at 6. Thereafter, and in the midst of his congressional campaign, Michael Ferguson loaned $525,000 – part of the money he received through the trust – to his campaign. *See Ferguson* Conciliation Agreement at 4.

A complaint filed by the New Jersey Democratic State Committee alleged, *inter alia,* that the transfer from Thomas and Roberta Ferguson to Michael Ferguson, and in turn to the campaign, amounted to a campaign contribution exceeding Federal Election Campaign Act ("FECA") limits. *See* 2 U.S.C. §§ 441a(a)(1)(A) (limiting contributions to a candidate and his authorized political committee), 441a(a)(3) (limiting aggregate contributions to candidates and their authorized committees), 441a(f) (prohibiting acceptance of excessive contributions), 432(e)(2) (establishing an agency relationship between a candidate and an authorized committee), 434(b)(2)(A) (establishing reporting requirements), 434(b)(3) (same), *cited in Ferguson* Conciliation Agreement at 2-3.

The Commission found probable cause to believe the respondents had violated FECA, *Ferguson* Conciliation Agreement at 4,[3] and the respondents agreed to pay a $210,000 penalty to close this matter. *Id.* at 5.

B. Discussion

The *Ferguson* respondents had made several contentions.[4]

[3] The Ferguson respondents' counsel advised them that the transfer did not violate FECA. Their actions in this matter were not knowing and willful. *Ferguson* Conciliation Agreement at 4.

[4] It is not necessary to consider here whether all of the contentions of the *Ferguson* or *Robert* respondents were persuasive, nor is it necessary to assess all of the contentions by OGC.

1. Gifts of Personal Nature Customarily Received Before Candidacy

First, they noted correctly that non-presidential candidates for federal office have a First Amendment right to make unlimited expenditures on their own campaigns from their own personal funds. *See Ferguson* Respondents' Br. at 3-4; *Buckley v. Valeo,* 424 U.S. 1, 52-53 (1976). They contended the money in question constituted personal funds from Michael Ferguson and not an excessive contribution from his parents. *See Ferguson* Respondents' Br. at 16-19. Turning first to the definition of "personal funds," Respondents noted that "personal funds" means:

> (1) Any assets which, under applicable state law, at the time he or she became a candidate, the candidate had legal right of access to or control over, and with respect to which the candidate had either:
>
> (i) Legal and rightful title, or
> (ii) An equitable interest.
>
> (2) Salary and other earned income from bona fide employment; dividends and proceeds from the sale of the candidate's stocks or other investments; bequests to the candidate; income from trusts established *before* candidacy; income from trusts established by *bequest* after candidacy of which the candidate is the beneficiary; *gifts of a personal nature which had been customarily received prior to candidacy;* proceeds from lotteries and similar legal games of chance.
>
> (3) A candidate may use a portion of assets jointly owned with his or her spouse as personal funds. The portion of the jointly owned assets that shall be considered as personal funds of the candidate shall be that portion which is the candidate's share under the instrument(s) of conveyance or ownership. If no specific share is indicated by an instrument of conveyance or ownership, the value of one-half of the property used shall be considered as personal funds of the candidate.

11 C.F.R. § 110.10(b) (1983) (emphasis added); *Ferguson* Respondents' Br. at 5.

Ferguson did not involve a trust established *before* candidacy, because Thomas and Roberta Ferguson established their trust after Michael Ferguson declared his candidacy in 2000. Nor did *Ferguson* involve a trust established by *bequest* after candidacy, because it was not established by bequest. This left Respondents with the italicized clause. Thus, Respondents asserted the gifts from Thomas and Roberta Ferguson to Michael Ferguson were made irrespective of the latter's candidacy. *See Ferguson* Respondents' Br. at 16. Moreover, they asserted the gifts were similar to what Michael Ferguson received before becoming a candidate and were similar to those customarily given to his three siblings. *Id.* at 16-17; *see also id.* at 17-18.

However, the principle of *inclusio unius est exclusio alterius* worked against Respondents here. By explicitly including in the definition of "personal funds" "income from trusts established *before* candidacy" and "income from trusts established by *bequest* after candidacy of which the candidate is the beneficiary ... ," 11 C.F.R. § 110.10(b)(2) (1983) (emphasis added), the regulation implicitly excluded income from other trusts.

In addition, the $1 million was not "customarily received prior to candidacy ... ." *Id.* There was custom in *other* financial transfers from the parents to Michael Ferguson. They gave him $257,000 in 1997; of that amount plus $20,000 they gave to his wife, Maureen Ferguson, $240,000 was to pay off Michael and Maureen Ferguson's home mortgage. Similarly, in 1999, the parents gave Michael Ferguson $319,035; of that amount plus another $20,000 they gave to Maureen Ferguson, $225,076 was to pay off a second home mortgage, and $52,508 was for a deposit on a third home. *Ferguson* Respondents' Br. at 11-12. Although the location of those homes allowed Michael Ferguson to reside in congressional districts in which he wanted to run in 1998 and 2000, *Ferguson* Gen. Counsel's Report #3 at 4-7, that does not diminish the custom that began before candidacy and continued into candidacy. *See id.* The remaining gift from Thomas and Roberta Ferguson to Michael Ferguson was $42,500 cash in 2000. *Ferguson* Respondents' Br. at 12.

There is room for honorable disagreement about how close the previous gifts would have had to come to $1 million to make the $1 million part of a custom that continued into the candidacy. However, none of the previous gifts came close to $1 million. Using Respondents' own numbers, the three previous gifts to Michael Ferguson, all given from 1997 to 2000, came to a total of $618,535, and the largest of those three was $319,035. *See Ferguson* Respondents' Br. at 11-12.

Although Respondents and OGC discussed gifts from Thomas and Roberta Ferguson to others – namely Michael Ferguson's siblings and his wife – in assessing what was "customarily received" under Section 110.10(b)(2), nothing in Section 110.10 suggests that it contemplates looking to what others received. The whole tenor of Section 110.10(b) suggests that what is material is what the candidate received,[5] and the Commission has implicitly recognized this. *See* 68 FED. REG. 3970, 3972 (Jan. 27, 2003).[6]

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[5] This is explicit under the statute as amended in 2002 and under the new regulation. *See* 2 U.S.C. § 431(26)(B)(vi) (2002) (referring to "gifts of a personal nature that had been customarily received *by the candidate* prior to the beginning of the election cycle" (emphasis added)); 11 C.F.R. § 100.33(b)(6) (2003) ("Gifts of a personal nature that had been customarily received *by the candidate* prior to the beginning of the election cycle ..." (emphasis added)).

[6] On January 27, 2003, the Commission contrasted the new definition of "personal funds" – under the statute as amended in 2002 – with the old definition in the 1983 regulation. In discussing the differences, the Commission did not mention the addition of the phrase "by the candidate" to "gifts of a personal nature that had been customarily received by the candidate prior to the beginning of the election cycle" in the amended statute. *See* 68 FED. REG. at 3972; 2 U.S.C. § 431(26)(B)(vi) (amended statute); *see also* 11 C.F.R. § 100.33(b)(6) (2003) (new regulation). The phrase "by the candidate" is not a substantive change. Rather, it is a clarification of what the law already required.

2. An Exhaustive List

Second, the *Ferguson* respondents contended that the list in Section 110.10(b)(2) was not an exhaustive list, and that the funds Michael Ferguson received also presented an instance of personal funds. *See Ferguson* Respondents' Br. at 17. However, nothing in the 1983 version of Section 110.10(b) suggests that it contemplates other definitions of personal funds. *See* 11 C.F.R. § 110.10(b)(2) (1983).

3. Definition of "Contribution"

Third, as the *Ferguson* respondents noted, the fact that particular money does not constitute "personal funds" does not mean it is a "contribution." The reason is straightforward: Not everything that falls outside the definition of "personal funds" falls within the definition of "contribution." *See Ferguson* Respondents' Br. at 7, 19.

With that in mind, Respondents quoted the definition of contribution and contended the money Michael Ferguson received was "not given with 'the purpose of influencing an election for federal office.'" *Id.* at 19 (quoting 2 U.S.C. § 431(8)(A)(i) (1980)). Instead, this money and other gifts to the Ferguson children were transferred for estate planning. *Id.; see also Ferguson* Gen. Counsel's Report #3 at 8. Although the estate-planning rationale had some credibility, because of Thomas and Roberta Ferguson's serious health problems, the rationale could not carry the day, in light of all the facts in *Ferguson*. It is possible for money to be transferred both for "the purpose of influencing an election for federal office" and for estate planning. These are not mutually exclusive goals. Indeed, had Michael Ferguson not loaned his campaign funds from the trust distribution, the trust and his receipt of funds from it would have raised no questions under FECA.

Nor does Thomas and Roberta Ferguson's having established a trust from which all of their children could eventually benefit mean there was no excessive contribution. That a family is able to give – and does give – large gifts to all of its children does not affect whether the gift to the candidate-child was "for the purpose of influencing [an] election ...." 2 U.S.C. § 431(8)(A)(i) (1980) (defining contribution).

II. *Robert*

Both *Ferguson* and *Robert* involve (1) well-to-do families (2) with a history of generosity (3) to their adult children. This generosity continued when (4) the parents decided to give (5) $1 million and $800,000, respectively, (6) to their candidate-children (7) during the campaign of

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The Commission acted similarly in defining salary and other earned income as "personal funds." The amended statute provides that the definition of "personal funds" includes "a salary and other earned income from bona fide employment ...." 2 U.S.C. § 431(26)(B)(i) (2002). In drafting the corresponding regulation, the Commission provided that the term "personal funds" includes "salary and other earned income *that the candidate earns* from bona fide employment ...." 11 C.F.R. § 100.33(b)(1) (2003). The reference to the candidate in the new regulation is not a substantive change from the statute. Rather, it is a clarification of what the law already required.

each (8) for the U.S. House of Representatives. In turn, each candidate (9) loaned (10) several hundred thousand dollars (11) to the campaign. In response to a complaint, the respondents assert (12) the money was "personal funds" and that (13) family reasons, including (14) estate planning, were the motivation for the gifts. The respondents (15) note all the children had an opportunity to receive equal amounts and (16) affirm there was no excessive campaign contribution. Nevertheless, the gifts (17) exceeded previous gifts, (18) arrived in September before the November election, (19) departed from whatever gift custom there may have been under Section 110.10(b)(2), and (20) allowed both candidates to loan substantial sums of money to their campaigns at crucial times without having to use other assets they owned.

Robert is not different enough from *Ferguson* to warrant a different result. Since the Commission was convinced enough in *Ferguson* to proceed against the respondents, it should have done the same in *Robert.* On the other hand, there are good arguments for the Commission's decision in *Robert.* If the Commission is right in *Robert,* then it erred in *Ferguson.*

A. Background

Robert arose from a complaint filed by the National Republican Congressional Committee and involved an $800,000 gift from Mary Robert to her daughter Janet Robert on September 3, 2002. *Robert* Gen. Counsel's Report #2 at 1; *Robert* Resp. of Mary Robert Exh. G at 4 (April 16, 2004) (letter from counsel). This was during Janet Robert's 2002 candidacy for the U.S. House of Representatives from Minnesota. Because Janet Robert loaned the money to her campaign, *Robert* Gen. Counsel's Report #2 at 5; *Robert* Aff. of Janet Robert at 1 (April 16, 2004), one issue is whether the money was personal funds. If it is not personal funds, then another issue is whether it is an excessive contribution in violation of FECA. *See Robert* Gen. Counsel's Report #2 at 1 (citing 2 U.S.C. § 441a(a)(1)(A); 2 U.S.C. § 441a(a)(3); 2 U.S.C. § 441a(f); 2 U.S.C. § 434(b); 11 C.F.R. § 110.10 [(1983)]); *Robert* First Gen. Counsel's Report at 1-2 (Feb. 27, 2004).

B. Discussion

1. Gifts of Personal Nature Customarily Received Before Candidacy

As in *Ferguson,* the inquiry under the 1983 regulation is whether the $800,000 is a gift "of a personal nature which had been customarily received prior to candidacy ...." 11 C.F.R. § 110.10(b)(2) (1983); *see Robert* Gen. Counsel's Report #2 at 2. As in *Ferguson,* none of the rest of the Section 110.10(b)(2) applies.

Respondents and OGC note that since 1968, Mary Robert[7] has made several gifts of stock and cash to her children, including gifts of $800,000 cash to each child on September 3, 2002.

[7] Along with her late husband, Bruce Robert, before he passed away.

Robert Resp. of Mary Robert Exh. G at 1-4 (April 16, 2004); *Robert* Gen. Counsel's Report #2 at 3-4. Yet what is material to establishing custom under Section 110(b)(2) are the previous gifts to Janet Robert, not the gifts to the other children. *See supra* at 4-5 & nn.5-6.

From February 1, 1968, to September 3, 2002, Mary Robert made 27 gifts of stock or cash to Janet Robert. Other than the $800,000 on September 3, 2002, the four largest gifts were shares in a family-owned corporation which were valued at:

- $138,317.40;
- $21,563.60;
- $21,622.00;
- $33,100.00; and
- $669,067.00.

The rest of the gifts were valued at $16,000 or less. *Robert* Resp. of Mary Robert Exh. G at 1-4 (April 16, 2004). Thus, the $800,000 that Mary Robert gave to Janet Robert – like the $1 million Michael Ferguson received from his parents – was not an amount Janet Robert had "customarily received prior to candidacy ...." 11 C.F.R. § 110.10(b)(2) (1983).

As in *Ferguson,* there is room for honorable disagreement about how close the previous gifts would have had to come to $800,000 to make the $800,000 part of a custom that continued into the candidacy. Nevertheless, the only one plausibly close to $800,000 was the one valued at $669,067. The remaining 25 gifts since 1968 had a total value of $376,497.91. *See Robert* Resp. of Mary Robert Exh. G at 1-4 (April 16, 2004).

Moreover, a gift of stock in a closely held corporation is materially different from a cash gift. Although Mary Robert has asserted that the stock in the Roberts' family-owned business was readily marketable, because the "custom and practice in this family owned business had been to allow corporate redemption of shares on demand on an as-needed basis ... ," *Robert* Resp. of Mary Robert at 2 (April 16, 2004) (stating that redemption is "at a predetermined price per share"); *see also Robert* Resp. of Mary Robert at 2 n.1 (Dec. 2, 2002) (letter from previous counsel) (stating that redemption is "at fair market value"), as a practical matter, stock in a closely held corporation is far less liquid than cash. Mary Robert admits as much when she refers to "custom," "practice," and "as-needed basis." In contrast, publicly traded stocks are marketable without reference to the corporation's internal practices. There would have been multiple issues raised by one family member's sale or redemption of a substantial amount of stock, including valuation questions, the effect on corporate capital (if any funds at all were available for an immediate stock redemption), the effect on the value of other family members' stock, and possibly other constraints.

2. Definition of "Contribution"

Mary Robert contended that the $800,000 was like all of the other gifts she has given to her children since 1968. Each "gift was either in recognition of the love and affection from Mary

Robert to her children and/or for Mary Robert's estate planning purposes." *Robert* Resp. of Mary Robert at 1 (April 16, 2004).

Again, this matter is similar to *Ferguson.* It is possible for money to be transferred for the purpose of influencing an election under Section 431(8)(A)(i) as well as for love of children and for estate planning. As in *Ferguson,* these goals are not mutually exclusive. Although the love rationale has some credibility at any time, and the estate-planning rationale has some credibility because Mary Robert was 83 years old, *Robert* Resp. of Mary Robert at 2 (Dec. 2, 2002), the rationale does not carry the day, in light of all the facts in *Robert.*

Mary Robert also notes that she gave $800,000 to all ten of her children on the same date, *Robert* Resp. of Mary Robert Exh. G at 4 (April 16, 2004),[8] and asserts that if the $800,000 she gave to Janet Robert were a campaign contribution, then she spent $12 million to make an $800,000 contribution: $8 million on $800,000 gifts to her ten children and approximately $4 million in gift taxes. This, she asserts, would make no sense, so the $800,000 gift to Janet Robert could not have been a contribution. *Robert* Resp. of Mary Robert at 5 & n.5 (Dec. 2, 2002); *see also Robert* Aff. of Janet Robert at 2.

There are two problems with this conclusory assertion.

First, it does not necessarily follow. The $12 million was the cost of giving the gifts, not the cost of making a contribution. Had Mary Robert given the same gifts after her daughter's candidacy, the cost may well have been the same or similar. Yet had she waited, there may well have been no credible allegation of an excessive contribution. As in *Ferguson,* there is no sufficient explanation for why the gift to the candidate-child arrived shortly before the general election.

Second, the assertion looks at what Mary Robert gave to people other than Janet Robert, which is not any more material under the definition of contribution, *see* 2 U.S.C. § 431(8)(A)(i) (1980), than it is under the definition of "personal funds." *See* 11 C.F.R. § 110.10(b)(2) (1983). That Mary Robert was able to give – and did give – large gifts to all of her children does not affect whether the gift to Janet Robert was "for the purpose of influencing [an] election ...." 2 U.S.C. 431(8)(A)(i) (1980) (defining "contribution"); *see supra* at 5.

Janet Robert's not knowing about the gift before she received it from her mother, *Robert* Aff. of Janet Robert at 2, is similarly immaterial.

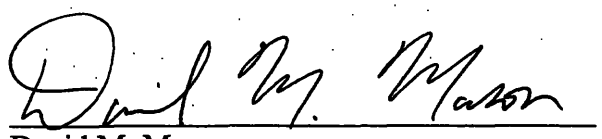
[8] Respondent Mary Robert's counsel advised her that the transfer did not violate FECA. Her actions in this matter were not knowing and willful. *See Robert* Gen. Counsel's Report #2 at 7. The same is true of the remaining respondents. *Cf. id.; supra* at 2 n.3.

III. Conclusion

Because of the similarity between the facts of *Ferguson* and *Robert*, the results should be similar. For the foregoing reasons, the preferable result in each matter would have been to find excessive contributions. Yet even if no excessive contribution were found in either matter, the results would have been consistent. That they are not consistent may suggest that the *Ferguson* respondents are owed at least an apology.

I appreciate Commissioner McDonald's sympathy and support for what he may view as my tardy conversion to the "sauce for the goose is sauce for the gander" philosophy of enforcement. While Commissioners legitimately disagree over the application of law to similar but not identical fact patterns, the dramatic difference in outcome in these two MURs which bear at least a family resemblance cannot but undermine the ability of the Commission to seek and obtain penalties as significant as that secured in *Ferguson*. If the Commission cannot muster a consensus to treat intra-family fund transfers as significant, then I will have no choice but to join my colleagues who argue, in essence, that the corruption potential of such transfers is so insignificant as to make penalties for them unnecessary.

July 13, 2004



David M. Mason
Commissioner