



THE FEDERAL ELECTION COMMISSION
Washington, DC 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In re)	
)	
Alaska Democratic Party and Jayson Smart, in his)	
official capacity as treasurer)	MUR 5564
Tony Knowles for U. S. Senate and Leslie Riddle, in)	
her official capacity as treasurer)	

**STATEMENT OF REASONS OF VICE CHAIRMAN DAVID M. MASON AND
COMMISSIONER HANS A. von SPAKOVSKY**

Wiley Brooks of Anchorage, Alaska, filed the complaint in this matter alleging that Respondents

- Alaska Democratic Party and its treasurer ("ADP"),
- Tony Knowles for U. S. Senate and its treasurer ("Knowles campaign"), and the
- Democratic Senatorial Campaign Committee ("DSCC")

violated the Federal Election Campaign Act, 2 U.S.C. § 431 *et seq.* ("FECA"). The Commission previously voted 6 to 0 to accept the recommendation of the Office of General Counsel ("OGC") to find:

- reason to believe ("RTB") that ADP violated FECA,
- RTB that the Knowles campaign violated FECA with respect to part of the complaint and no RTB with respect to the rest, and
- no RTB that the DSCC violated FECA.

See id. § 437g(a)(2) (2002).¹ A subsequent vote to enter into conciliation with ADP and the Knowles campaign before finding probable cause to believe they violated FECA failed by a vote of 3 to 1, *cf. id.* § 437g(a)(4)(A)(i),² so the Commission voted 4 to 0 to close the file.³

¹ Voting affirmatively were then-Chairman Toner, then-Vice Chairman Lenhard, and Commissioners Mason, von Spakovsky, Walther, and Weintraub.

² The Commission enters into pre-probable cause conciliation only when there are four votes in favor. *Cf.* 2 U.S.C. § 437g(a)(4)(A)(i). When the Commission proceeds only with four affirmative votes, *see, e.g., id.* § 437g(a)(2), (a)(4)(A)(i); *id.* § 437c(c) (1997), and only four Commissioners are available, the vote must be unanimous. Only four Commissioners were available for the vote to enter into pre-probable cause conciliation. Voting affirmatively

28044191266

In this matter, a state-party committee received money from a national-party entity and used federal money to open field offices and hire hundreds of staff members throughout the state. From these offices, the state party, in full coordination with a federal candidate's campaign, worked almost exclusively on the candidate's behalf. The efforts included voter identification and get-out-the-vote ("GOTV") activity through phone banks, door-to-door canvassing, and other outreach that for the most part identified only the single federal candidate. While these activities may somehow have also benefited the party's other candidates, the party would not have undertaken most of these activities but for the federal candidacy. The federal candidate's campaign reviewed scripts for phone calls, door-to-door canvassing, and rural outreach; and provided input to a vendor for the party's phone banks. Meanwhile, party staff -- most of whom spent more than three-fourths of their time, and some of whom spent all their time, working for the single federal candidate's campaign -- scheduled appearances for the candidate, distributed campaign literature, wrote letters to the editor, collected press coverage for the campaign, and drove the candidate's supporters to the polls. There were no restrictions on communications between the campaign and the party or its vendors. Daily and extensive collaboration occurred. Since the party contended this program was for state-party building, we assume that the state-party committee or at least the federal candidate's campaign shared the voter-identification data the program generated with subordinate-state committees and the party's other candidates who ran for office in the same year, although the record does not indicate whether this occurred.

The expenses for the program far exceeded the limits of 2 U.S.C. § 441a(a) and (d). The federal candidate's campaign paid only about 10 percent of the total program costs. Nevertheless, the Commission has dismissed this matter. Indeed, it is not clear that the Commission would have proceeded against Respondents even if the federal candidate's campaign had paid none of the costs.

Because the Commission did not proceed against Respondents, it should not proceed against similarly situated respondents unless the public has notice through a rulemaking. See *Shays v. FEC*, 424 F. Supp.2d 100, 113-14 (D.D.C. 2006) ("[B]ecause rulemaking is prospective in operation and general in scope, rather than retroactive and condemnatory in effect, interested parties are given advance notice of the standards to which they will be expected to conform in the future, and uniformity of result is achieved." (quoting *Trans-Pacific Freight Conference of Japan/Korea v. Fed. Mar. Comm'n*, 650 F.2d 1235, 1244-45 (D.C. Cir. 1980))), quoted in *In re Graf for Congress*, Matter Under Review ("MUR") 5526, Statement of Reasons ("SOR") of Chairman Toner, Vice Chairman Lenhard & Comm'rs Mason, von Spakovsky, Walther & Weintraub at 3 n.8 (F.E.C. Nov. 27, 2006).⁴ Proceeding against similarly situated respondents would mean that the Commission is not treating like respondents alike, which would be unacceptable.

to proceed were Vice Chairman Mason and Commissioners von Spakovsky and Walther. Chairman Lenhard dissented. Since the vote to find RTB, Commissioner Toner has left the Commission, and Commissioner Weintraub has recused herself.

³ Voting affirmatively were Chairman Lenhard, Vice Chairman Mason, and Commissioners von Spakovsky and Walther.

⁴ Available at <http://eqs.sdrdc.com/eqsdocs/0000588D.pdf> (all Internet sites visited Dec. 11, 2007).

28044191267

After all, it is important that the Commission enforce FECA fairly, rather than reach different results in matters with materially indistinguishable facts. *See, e.g., In re Robert*, MUR 5321, SOR of Comm'r Mason at 1 (F.E.C. July 13, 2004) (contrasting *In re Ferguson for Congress*, MUR 5138 (F.E.C.));⁵ *see also id.* at 5-6.

In re Gallagher, MUR 5651, SOR of Chairman Toner & Comm'rs Mason & von Spakovsky at 8 (F.E.C. Sept. 25, 2006) (ellipsis omitted).⁶ Justice must be blind.

"Similarly situated respondents" at least encompasses state-party committees, including subordinate-state-party committees, and federal-candidate campaigns, meaning not only House and Senate campaigns, but also presidential campaigns, because there is no material difference between the applicable regulations for congressional and presidential campaigns. *See, e.g., 11 C.F.R. § 109.37(a)(2)(iii)(A)-(B)* (2006); *id.* § 109.21(c)(4)(i)-(ii) (2006).

This is not the result that we would have preferred the Commission reach, yet these are the consequences of the result it did reach in this matter. The Commission must now treat like respondents alike. Fairness commands no less.

I. BACKGROUND

As the 2004 election approached, ADP opened, and hired hundreds of paid staff for, offices in several Alaska communities.⁷ ADP asserts it geared its efforts – including voter registration, voter identification, voter-database maintenance, volunteer recruitment, and a GOTV drive alleged to be generic – toward state-party building.⁸ However, for the most part, ADP's activities, including phone banks⁹ by staff and a vendor during the requisite time, *see infra* at 8 & n.37, door-to-door canvassing, literature distribution, and other outreach, identified only Knowles, ADP's 2004 United States Senate candidate.¹⁰ Most employees spent more than three-fourths of their time, and some spent all their time, working for him and his election.¹¹ These efforts almost never mentioned other Democrats running for federal or state office in Alaska in 2004.¹²

⁵ Available at <http://eqs.sdrdc.com/eqsdocs/00001791.pdf>.

⁶ Available at <http://eqs.sdrdc.com/eqsdocs/0000573A.pdf>.

⁷ See General Counsel's Report # 2 ("GCR2") at 14, 17 (Oct. 2, 2007).

⁸ *Id.* at 2.

⁹ Defined in 11 C.F.R. § 100.28 (2002).

¹⁰ GCR2 at 3, 15 (quoting ADP subpoena response), 19, 20-21, 21-22, 24-27.

¹¹ *Id.* at 30.

¹² *Id.* at 3, 13, 16, 21-22, 25, 26, 27, 29. A separate program supported state candidates. *Id.* at 13.

As OGC notes, this ADP "field program" and

the Knowles campaign were to function as a single, joint operation, blurring the distinction between ADP's efforts and those of the Knowles campaign:

["]This is the Knowles [c]ampaign's [f]ield [p]rogram. Separation between the party staff and campaign staff is a legal distinction only.["]¹³

So committed was the program to Knowles that the 17 field offices in essence functioned as regional Knowles campaign offices.¹⁴

One staffer recalled "Tony Knowles campaign office" signs on the door and window of the office where she worked; others stated that the office phones were answered with the greeting "Knowles campaign" and that only Knowles posters and literature were found in the offices. However, a few staffers recalled posters and signs for state candidates in a few of the offices.¹⁵

ADP extensively coordinated its expenditures with the Knowles campaign.¹⁶ There were no restrictions on communications between the Knowles campaign and ADP or its vendors.¹⁷ Daily discussions occurred between the field program's senior staff and the Knowles campaign, which had offices in the same building.¹⁸ As for individual aspects of the ADP field program, the Knowles campaign reviewed scripts for phone calls,¹⁹ door-to-door canvassing,²⁰ and rural outreach,²¹ and provided input to a vendor for ADP phone banks.²² Meanwhile, ADP staffers scheduled appearances for Knowles, distributed campaign literature, wrote letters to the editor, collected press coverage for the Knowles staff, and drove Knowles supporters to the polls.²³

¹³ *Id.* at 14 (quoting ADP field manual).

¹⁴ *Id.* at 17.

¹⁵ *Id.* at 18-19.

¹⁶ *See id.* at 12-13, 21, 22, 25, 26-27, 28.

¹⁷ *See id.* at 15.

¹⁸ *Id.* at 14-15.

¹⁹ *Id.* at 21.

²⁰ *Id.* at 25.

²¹ *Id.* at 27.

²² *Id.* at 22.

²³ *Id.* at 28.

Not long after the 2004 election, ADP closed the regional offices.²⁴ Nevertheless, since ADP contended that this program was for state-party building, we assume that ADP or at least the Knowles campaign shared the voter-identification data the program generated for the Knowles campaign with subordinate-state committees and the party's other candidates who ran for office in 2004, although the record does not indicate whether this occurred.

This field program cost approximately \$3 million. OGC calculates the cost of the coordinated program to be approximately \$2 million, having conservatively and very generously assumed in calculating the amount in violation that only two-thirds of the program benefited the Knowles campaign. For these efforts, the Knowles campaign paid about \$340,000, or only about 10 percent of what the field program cost and only about 15 percent of the coordinated program's cost, using OGC's assumption. The total coordinated activities that ADP reported to the Commission, using both its coordinated-party-expenditure limit and the limit of the national-party committee, *see infra* at 7-8, was about \$135,000.²⁵ ADP did use federal money – *i.e.*, money subject to FECA limits, prohibitions, and reporting requirements, 11 C.F.R. § 300.2(g) (2006); *cf. id.* § (k) – for this field program,²⁶ having received money from, *inter alia*, the DSCC. *See* 2 U.S.C. § 441a(a)(4).²⁷

II. DISCUSSION

ADP contends it need allocate only 20 percent of its costs to the Knowles campaign, *see generally* 11 C.F.R. § 106.1(a) (2002),²⁸ and that it would be “highly unfair to the Knowles campaign to have to pay for stuff that we were doing anyway.”²⁹ However, ADP was not doing this “stuff” anyway. For the most part this “stuff” identified only Knowles. While it may somehow have also benefited ADP's other candidates, ADP would not have done most of this “stuff” but for the Knowles candidacy. The facts show that the ADP field program was in essence a branch of the Knowles campaign.

A. The Law

FECA and Commission regulations address:

- “coordinated-party communications,” 11 C.F.R. § 109.37 (2003), *amended*, 71 FED. REG. 33190, 33210-11 (F.E.C. 2006),

²⁴ *Id.* at 19.

²⁵ *Id.* at 30-31; Factual & Legal Analysis for ADP (“FLA”) at 8-9 n.18 (March 1, 2006). Respondents' contention that the Knowles campaign paid 20 percent of the cost, *see* GCR2 at 31-32 & n.66, is not persuasive.

²⁶ *Id.* at 13.

²⁷ *See* Compl. Exh. A (Oct. 3, 2004).

²⁸ *See* GCR2 at 31-32 & n.66.

²⁹ *Id.* at 32 (brackets omitted) (quoting a deposition).

- “coordinated communications,” 11 C.F.R. § 109.21 (2003), *amended*, 71 FED. REG. at 33208-10,
- “coordinated-party expenditures,” *see* 2 U.S.C. § 441a(d) (2002); 11 C.F.R. § 109.20 (2003), *amended*, 71 FED. REG. at 33208;³⁰ and
- “coordinated expenditures.” *See* 2 U.S.C. § 441a(a)(7)(B)(i)-(ii); 11 C.F.R. § 109.20; *McConnell v. FEC*, 540 U.S. 93, 215 (2003).

1. Coordinated-Party Communications

A political-party communication is coordinated with a candidate, a candidate’s authorized committee, or an agent of either, and is a “coordinated-party communication” when:

- a party committee pays for the communication, 11 C.F.R. § 109.37(a)(1),
- the communication is a public communication³¹ and otherwise satisfies at least one of the content standards, *see id.* § (a)(2), and
- the communication satisfies at least one of the conduct standards. *Id.* § (a)(3).

A party must treat such a communication, if it is not exempt, *see id.* § (b), as either:

- an in-kind contribution to the candidate, *id.* § (b)(1), or
- a coordinated-party expenditure in connection with the candidate’s general-election campaign. *Id.* § (b)(2).

However, the candidate receives or accepts an in-kind contribution only under particular circumstances. *See id.* § (a)(3) (citing *id.* § 109.21(d)).

2. Coordinated Communications

In addition to “coordinated-party communications,” parties may make “coordinated communications.” A party’s communication is coordinated with a candidate, an authorized committee, or an agent of either if:

- a person other than the candidate, authorized committee, or agent pays for it, *see id.* § 109.21(a)(1),
- it satisfies at least one of the content standards, *id.* § (a)(2), (c), and
- it satisfies at least one of the conduct standards. *Id.* § (a)(3), (d).

With some exceptions, a payment for a party’s coordinated communication is an in-kind contribution to, and an expenditure by, the candidate or authorized committee with whom or with which it is coordinated. *Id.* § (b)(1). However, the candidate receives or accepts an in-kind contribution only under particular circumstances. *See id.* § (b)(2) (citing *id.* § (d)).

³⁰ For reasons previously explained, the Commission does not apply such regulations retroactively. *Graf*, SOR of Chairman Toner, Vice Chairman Lenhard & Comm’rs Mason, von Spakovsky, Walther & Weintraub at 3 n.8.

³¹ Defined in 11 C.F.R. § 100.26 (2002), *amended*, 71 FED. REG. 18589, 18612-13 (F.E.C. 2006).

28044191271

3. Coordinated-Party Expenditures and Coordinated Expenditures

In addition, Commission regulations provide with some exemptions that a party expenditure that is coordinated, *see id.* § 109.20(a), with a candidate, a candidate's authorized committee, or an agent of either but which is *not* a coordinated communication under Section 109.21 or a coordinated-party communication under Section 109.37, is either an in-kind contribution to, or a coordinated-party expenditure with, the candidate with whom it is coordinated. *See id.* § (b);³² *see also* 2 U.S.C. § 441a(a)(7)(B)(i).

It is worth observing that Section 109.20 and its supporting explanation and justification create a tension in the law that OGC sensibly resolved for this matter. Sections 109.21 and 109.37 address "coordinated communications" and "coordinated-party communications," respectively. On the one hand, the text of Section 109.20 does *not* limit itself to expenditures other than communications. The text captures communications as well. However, under this reading, Section 109.20 would capture all that Sections 109.21 and 109.37 capture and more. *Compare* 11 C.F.R. § 109.20 with *id.* § 109.21(a), (c), (d) and *id.* § 109.37(a)(1), (2), (3). This would render Sections 109.21 and 109.37 superfluous. On the other hand, the explanation and justification *does* limit Section 109.20 to expenditures that are not communications, *see Coordinated & Independent Expenditures*, 68 FED. REG. 421, 425 (F.E.C. 2003), but this presents the difficult task of determining what is and what is not a communication. OGC sensibly resolved this tension for this matter by applying Sections 109.21 and 109.37 only to *public* communications, *cf.* 11 C.F.R. §§ 109.21(c), 109.37(a)(2), and by applying Section 109.20 only to what is not a *public* communication.³³

4. Limits

FECA limits the coordinated-party expenditures and coordinated-party communications that

- a national-party committee, and
- a state-party committee, including subordinate-state-party³⁴ committees

may make in connection with the general-election campaign of the party's Senate candidate. 2 U.S.C. § 441a(d)(3)(A). The limit applies separately to the national committee and to state committees. The national committee may make coordinated-party expenditures and communications up to the limit, and state committees may do the same. *See* 11 C.F.R. § 109.32(b)(1) (2003). This limit is indexed for inflation, *see* 2 U.S.C. § 441a(c)(1)(B), and the committees may assign their limits to another party committee as regulations provide. *See* 11 C.F.R. § 109.33. Therefore, ADP was free to use the national-party committee's Section 441a(d)

³² Amendments to this regulation refer only to an agent. *See* 11 C.F.R. 109.20(a) (2006).

³³ *See* GCR2 at 20-29. With this understanding, labeling Section 109.20 a "catch-all" provision," *id.* at 31, was inaccurate.

³⁴ *Defined in* 11 C.F.R. 109.33(b) (2003).

28044191272

limit. In Alaska in 2004, the limit was \$74,620 for the national committee and \$74,620 for state committees, for a total of \$149,240.³⁵

FECA also limits coordinated expenditures and coordinated communications. They count as contributions, *see* 2 U.S.C. § 441a(a)(7)(B)(i)-(ii), so the contribution limit applies. The normal contribution limit for multicandidate-committee³⁶ contributions to a candidate or a candidate's authorized committee is \$5,000 per election, *id.* § (a)(2)(A), and is not indexed for inflation. *See id.* (c)(1)(B). There is an exception that *is* indexed for inflation. *See id.* The Republican or Democratic Senatorial Campaign committees, a party's national committee, or a combination thereof may contribute a higher amount to a Senate candidate during an election year when the candidate is running. *Id.* § (h). However, unlike with coordinated-party expenditures and coordinated-party communications, party committees may not assign their contribution limits to another party committee. *Cf.* 11 C.F.R. § 109.33. Therefore, ADP would not have been free to use any of the national-party committee's Section 441a(a) or (h) limit.

Section 441a also prohibits candidates and political committees from knowingly accepting contributions or making expenditures in violation of Section 441a. 2 U.S.C. § 441a(f).

B. Analysis

OGC correctly observes that the phone banks were coordinated-party communications, because:

- ADP paid for them, *see id.* § 109.37(a)(1),
- the phone banks were public communications, *see id.* § 100.26, referred to Knowles, took place in the 120 days before the election, and were directed to Alaska voters, *see id.* § 109.37(a)(2)(iii)(A)-(C), and
- the Knowles campaign was materially involved. *See id.* § (a)(3); *id.* § 109.21(d)(2).³⁷

For the same reasons, the phone banks were coordinated communications. *See id.* § 109.21(a), (c)(4)(i)-(iii), (d)(2). The costs of the phone banks should be attributed to Knowles, because for the most part they identified only him. *See id.* § 106.1(a)(1), (c)(2).³⁸

The analysis for door-to-door canvassing is different. Door-to-door canvassing is not "general public political advertising." *See Internet Communications*, 71 FED. REG. 18589, 18594-95 (F.E.C. 2006) (noting that "advertising" connotes a communication requiring payment, particularly in the context of campaigns, and that advertisers pay "for access to an established audience using a forum controlled by another person, rather than using a forum" they control to

³⁵ FLA at 2 n.1, 10 & n.19 (citing 11 C.F.R. § 109.32(b); 2004 Coordinated Party Expenditure Limits, THE RECORD at 15-16 (March 2004), available at <http://www.fec.gov/pdf/record/2004/mar04.pdf>).

³⁶ Defined in 11 C.F.R. § 100.5(e)(3) (2003).

³⁷ GCR2 at 22-24. The Commission has shortened the time window to 90 days for House and Senate campaigns. 11 C.F.R. § 109.37(a)(iii)(A) (2006); *id.* § 109.21(c)(4)(i) (2006).

³⁸ GCR2 at 24.

28044191273

establish their own audience (citations omitted)). Thus, door-to-door canvassing is neither a "public communication," *see* 11 C.F.R. § 100.26, nor a coordinated-party communication. *See id.* § 109.37(a)(2)(i)-(iii). Nor is door-to-door canvassing a coordinated communication; such canvassing is neither an electioneering communication³⁹ nor a public communication. *See id.* § 109.21(c)(1)-(4). Therefore, the analysis turns to Section 109.20. *Supra* at 7. Because of the coordination between ADP and the Knowles campaign on the door-to-door canvassing, and because no exemption applies, the costs of the canvassing are in-kind contributions or coordinated-party expenditures in this matter. *See* 11 C.F.R. § 109.20(b).⁴⁰

What is true for door-to-door canvassing also is true for scheduling appearances for Knowles, distributing campaign literature, writing letters to the editor, driving Knowles supporters to the polls, and collecting press coverage for the Knowles staff.⁴¹

As for ADP's expenditures for items listed in Section 106.1(c)(1)-(2),⁴² those expenditures must be attributed to a candidate only if they are on behalf of a clearly identified candidate and directly attributable to the candidate. *Id.* § 106.1(c)(1), (2). In this matter, ADP's activities were just that, because for the most part they identified only Knowles.⁴³ Therefore, these expenditures associated with candidate-specific activities supporting Knowles were in-kind contributions to Knowles or coordinated-party expenditures, *see id.* § 109.37(b)(1), (2); *id.* § 109.21(b)(1), (2); *id.* § 109.20(b), subject to FECA limits. *See, e.g.*, 2 U.S.C. § 441a(a)(2)(A), (d)(3)(A).⁴⁴

As OGC correctly concludes, ADP's expenditures taken together went well beyond the combined \$149,240 limit of Section 441a(d).⁴⁵ They also went well beyond the \$5,000 limit of

³⁹ Defined in 2 U.S.C. § 434(f)(3)(A)(i) (2002).

⁴⁰ *See* GCR2 at 27-28.

⁴¹ *See id.* at 28-29.

⁴²

(1) Expenditures for rent, personnel, overhead, general administrati[on], fund-raising, and other day-to-day costs of political committees need not be attributed to individual candidates, unless these expenditures are ... on behalf of a clearly identified candidate and ... directly attribut[able] to that candidate.

(2) Expenditures for educational campaign seminars, for training of campaign workers, and for registration or [GOTV] drives of committees need not be attributed to individual candidates unless these expenditures are ... on behalf of a clearly identified candidate, and ... directly attribut[able] to that candidate.

11 C.F.R. § 106.1(c). OGC refers to Section 106.1(c)(3). *See* GCR2 at 32 (quoting 11 C.F.R. § 106.1(c)(3)). However, by its terms, Section 106.1(c)(3), unlike Section 106.1(c)(2), limits itself to state- or local-party organizations' voter-registration or GOTV drives that are on behalf of presidential or vice-presidential candidates and perhaps also refer to House or Senate candidates.

⁴³ GCR2 at 32.

⁴⁴ *Id.*

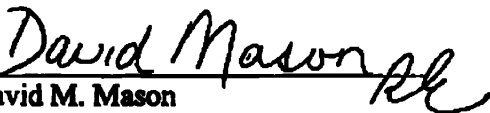
⁴⁵ *See id.* at 4, 30-31.

Section 441a(a). *See supra* at 5, 7-8. The Knowles campaign knowingly accepted resulting contributions. *See* 2 U.S.C. § 441a(f).⁴⁶ However, this analysis did not command four votes. *Cf. id.* § 437g(a)(4)(A)(i).

III. CONCLUSION

For the foregoing reasons, we supported proceeding in this matter. The violations of law by ADP and the Knowles campaign were clear and indisputable. However, because the Commission did not proceed against Respondents, it should not proceed against similarly situated respondents unless the public has notice through a rulemaking. *Supra* at 2-3.

December 21, 2007



David M. Mason
Vice Chairman



Hans A. von Spakovsky
Commissioner

⁴⁶ *E.g., id.* at 28.

28044191275