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

SECRETARIAT

SENSITIVE

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# FIRST GENERAL COUNSEL'S REPORT

MUR: 5591
DATE COMPLAINT FILED: October 29, 2004
DATE OF NOTIFICATION: Nov. 5, 2004
LAST RESPONSE RECEIVED: Nov. 25, 2005
DATE ACTIVATED: October 13, 2005

EXPIRATION OF SOL: February 7, 2007

**COMPLAINANT:** Rowena Ann Reno

**RESPONDENTS:** Michael Turner
Turner for Congress and Michael Berning, in his official capacity as treasurer
The Montgomery County Republican Party

**RELEVANT STATUTES AND REGULATIONS:**
2 U.S.C. § 434(b)
2 U.S.C. § 441a (pre-BCRA)
2 U.S.C. § 441b
11 C.F.R. § 102.5 (pre-BCRA)
11 C.F.R. § 102.5 (post-BCRA)
11 C.F.R. § 106.5(a)(2) (pre-BCRA)
11 C.F.R. § 106.5(d) (pre-BCRA)
11 C.F.R. § 106.6 (post-BCRA)
11 C.F.R. § 106.7 (post-BCRA)

**INTERNAL REPORTS CHECKED:** None

**FEDERAL AGENCIES CHECKED:** None

## I. INTRODUCTION

Based on three news articles attached to the complaint, complainant alleges that Representative Michael Turner and Turner for Congress and Michael Berning, in his official capacity as treasurer, violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by unlawfully accepting and failing to report an in-kind contribution from the

Montgomery County Republican Party ("MCRP") for payments made to political consultant James Nathanson for work allegedly done to benefit Turner's bid to win the 2002 primary election in Ohio's 3rd Congressional District. According to complainant, "admissions" contained in media reports show that "in-kind services to Turner for Congress" were "paid for out of the Operating Account of the Montgomery County Republican Party, triggering a duty of 'Turner for Congress' and Michael Turner to report [such as] contributions." Complaint at 2. The Commission has no record of Turner for Congress reporting an in-kind contribution from the MCRP during the 2002 primary election. The MCRP itself is not registered with and does not report to the Commission.

As discussed in more detail below, this Office recommends that the Commission find no reason to believe that Turner or his authorized campaign committee violated the Act in connection with the allegations in MUR 5591. This Office further recommends that the Commission find reason to believe the Montgomery County Republican Party violated the Act by improperly allocating its administrative expenses during the 2002 and 2004 election cycles, but take no further action and send it an admonishment letter. Finally, we recommend that the Commission close the file in this matter.

## II. FACTS

Ohio campaign finance law contains limitations and prohibitions on contributions and expenditures in Ohio elections similar, although not identical, to the limitations and prohibitions the Act contains with respect to Federal elections. *See* Ohio R.C. §§ 3517.102 (setting contribution limits) and 3599.03 (prohibiting corporate contributions). However, at the time of the transaction at issue, Ohio law permitted state and local political party committees to maintain so-called "operating accounts," intended for the payment of overhead and administrative costs.

These accounts could accept unlimited amounts of money from any source at all, and committees were not required to report receipts to or disbursements from these accounts. *See* Jim Siegel, *Political Funds Face Scrutiny*, CINCINNATI ENQUIRER, July 29, 2004 (attached to Complaint).

In 2004, allegations of misuse of the local party committees' operating accounts arose in the State of Ohio. Relevant to this matter, the MCRP's former party chairman, State Senator Jeff Jacobson, was accused of, among other things, improperly using the party's operating account to pay political consultants, including James Nathanson, to advance his own bid to become Senate president in 2005. *See* Jon Craig and Lee Leonard, *Montgomery County Board to Open Fund-Raising Probe*, THE COLUMBUS DISPATCH, August 25, 2004, at B3. Jacobson's alleged use of the local party's operating account for his own political advancement was highly controversial and caused a political opponent of Jacobson to ask the Montgomery County Board of Elections to investigate whether Jacobson had used the operating account to launder money. *Id.* The Ohio Secretary of State also launched an investigation into Jacobson's use of the party's operating accounts. *Id.*

According to a *Dayton Daily News* article dated August 25, 2004, attached to the complaint, Jacobson defended himself against the charges in a letter to Senate colleagues, saying he had paid Nathanson not for work on his own 2005 leadership bid, but for "working on the contentious 2002 GOP primary between U.S. Rep. Mike Turner, R-Centerville, and Roy Brown." Jim Bebbington, *Elections Board Subpoenas Records of GOP*, DAYTON DAILY NEWS, August 25, 2004, at B1. The article further states "Jacobson has defended that spending in the primary as defending the party against attacks from Brown." These and similar statements appear to be the primary basis for complainant's allegations that Nathanson was paid for working on Turner's behalf during the 2002 primary.

In December 2003, Jacobson paid Nathanson, a political consultant and then-member of the Montgomery County Board of Elections, $76,400 out of the MCRP "operating account," for consulting work done for the MCRP from 2001 through 2003.[1] *See* Turner Response at 5. All of the respondents now assert that Nathanson's work for the MCRP was focused on a variety of matters related to the party and the 2002 election. The MCRP states that Nathanson's consulting work was done "on behalf of the Party" and that during the pertinent time period, Nathanson "was serving as an interim chairman or quasi-chair while the then Chairman was involved in Ohio Senate activities." MCRP Response at 2. The MCRP response further states that "Nathanson's services ranged from strategic planning for the benefit of the Party, [to] oversight of Party headquarters' operations, polling and budgetary services for the Party." *Id.* In that role, "Nathanson performed the functions of a Party officer, albeit on a contract basis, and was never engaged by Turner for Congress." *Id.*

The response submitted by Turner and Turner for Congress, which attached affidavits from Nathanson and Jacobson, likewise asserts that "Nathanson assisted the MCRP in strategic planning and oversight of the party's headquarters operations. The work Nathanson did for the MCRP in the 2002 Primary Election was done solely at the request of the MCRP and related exclusively to actions taken by the MCRP." Turner Response at 5. Nathanson himself states that he "was never paid to provide consulting services" to Turner in the 2002 primary election campaign. *See* Affidavit of James S. Nathanson ("Nathanson Aff.") (attached to Turner Response as Exhibit A) at ¶ 1. Jacobson, likewise, states that "[n]o payments were made from the [MCRP] Operating Account as compensation to James Nathanson for work provided to

[1] As part of his work for the MCRP, Nathanson reportedly hired and paid two other political consultants who were allegedly under investigation by state and federal authorities for "heavy-handed fundraising tactics" to assist Jacobson in his efforts to become Senate president. Craig and Leonard, *supra*, at 1. Amid these reports and allegations, Jacobson withdrew as candidate for Senate president. *Id.*

Michael Turner or the Turner for Congress Committee." *See* Affidavit of Jeff Jacobson ("Jacobson Aff.") (attached to Turner Response as Exhibit B) at ¶ 5.[2]

In early 2005, the Ohio Secretary of State concluded his investigation, finding that the MCRP's payment to Nathanson did not violate Ohio law. The only document related to the Secretary's investigation that was made public was a letter sent by the Secretary to the MCRP. That letter explains that, after interviews and a review of financial records, the Secretary concluded that there had been "no use of Montgomery County operating account funds for the purpose of influencing an election as interpreted by the Ohio Elections Commission in *Common Cause v. U.S. Chamber of Commerce*." *See* January 28, 2005 Letter from J. Kenneth Blackwell to John White (attached to MCRP Response) at 1. That case, in turn, while interpreting the phrase "for the purpose of influencing an election" in Ohio law as limited to "express advocacy," also interpreted "express advocacy" as going beyond the so-called "magic words" to reach almost a "promote, support, attack or oppose" standard.[3] *See Common Cause v. U.S. Chamber of Commerce*, Case No. 2000E-58 (2003) at 3 (Attachment 1).[4]



[2] Nathanson was hired and paid $30,000 by Turner for Congress only for work done during Turner's 2002 general election campaign, as well as Turner's 2004 primary and general election campaigns. Nathanson Aff. at ¶¶ 4 and 5.

[3] The Ohio Elections Commission found that the advertisements in question violated Ohio's law because the "nature, timing, tone and content" of the advertisements "were patently 'in aid of'" certain candidates and "'in opposition to'" others. According to that Commission, such messages "advocate on behalf of the preferred candidates and oppose those candidates asserted to be unacceptable." *See Common Cause v. U.S. Chamber of Commerce*, Case No. 2000E-58 (2003) at 3.

[4] The Secretary also based his findings on an Ohio Elections Commission advisory opinion, in which that Commission opined that "an expenditure by a political party for a poll or survey which cannot be associated with a particular candidate is not an expenditure." Ohio Elections Commission Opinion 98ELC-06 at 3 (Attachment 2).

## III. LEGAL ANALYSIS

Based on the current record, whatever work Nathanson did for the MCRP does not appear to have been limited to work done in connection with Turner's 2002 congressional campaign. The interpretation of Ohio law described above would indicate that the payment to Nathanson was not for work associated with communications that "advocated on behalf of the preferred candidate and opposed those candidates asserted to be unacceptable," *see* footnote 4, *supra*, in that, or any particular, election. This would seem, in turn, to indicate that the services Nathanson provided to the MCRP were for work that was either different from, or more extensive than, work done in connection with Turner's election. Other than the news account of Jacobson's letter to his Senate colleagues, we have no other available information indicating that Nathanson was retained by MCRP to do work connected to Turner's election. But additional contemporary press accounts also quote Jacobson as saying that Nathanson did additional work for the party, including "serving as an adviser for several years," "fill[ing] in for [Jacobson] as a 'quasi-chairman' [of the MCRP], [doing] extensive work on Sheriff David Vore's campaign and provid[ing] strategic advice on other campaigns." *See* Jim Bebbington, *Elections Board Subpoenas Records of GOP*, DAYTON DAILY NEWS, August 25, 2004, at B1; *see also* Lynn Hulsey, *Jacobson Says He Regrets Activity During Campaign*, DAYTON DAILY NEWS, August 1, 2004, at A1 (attached to complaint).

Accordingly, the weight of the evidence at this point indicates that the MCRP's payment to Nathanson was for a wide enough variety of political consulting services that payment to him should be considered among the party's administrative expenses, and hence, allocable activity. Without more, it does not appear that the payments from the MCRP to Nathanson constituted in-kind contributions from the MCRP to Turner made with impermissible funds. Accordingly, this

Office recommends that the Commission find no reason to believe that Turner for Congress and Michael Berning, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b), 441a and 441b. As we have no evidence that the candidate had any involvement in the payments to Nathanson by the MCRP, we also recommend that the Commission find no reason to believe that Michael Turner violated the Act or the Commission's regulations.

Taking the respondents at their word about Nathanson's activities, however, raises questions concerning the appropriate treatment, for Federal purposes, of MCRP's $76,400 payment to him in December 2003. As this appears to properly be classified as administrative expenses, allocable activity, we turn now to those questions in that context.

Both before and since BCRA, 11 C.F.R. § 102.5(b) has provided that an unregistered political organization, including an unregistered state and local party organization, must be able to demonstrate through reasonable accounting methods that, whenever it makes a contribution, expenditure, or payment for exempt activity, it has on hand sufficient funds subject to the limitations and prohibitions of the Act from which to make the payments. Post-BCRA, in addition to the provision of 11 C.F.R. § 102.5(b), the provision at 11 C.F.R. § 106.7(b) states that "organizations that are not political committees but have established separate Federal and non-Federal accounts, or that make Federal and non-Federal disbursements from a single account, shall also allocate their Federal and non-Federal expenses" according to formulas set forth in § 106.7(c) and (d), or "may choose to use a reasonable accounting method approved by the Commission." Pre-BCRA, a similar provision at 11 C.F.R. § 106.5(a)(1) required the same of unregistered organizations that conducted both Federal and non-Federal activity. Therefore, though the MCRP was not registered with the Commission and may not have qualified as a

political committee under the Act, it nonetheless was responsible for allocating its disbursements that benefitted both Federal and non-Federal activities.

Complicating this issue is the fact that, at least according to Jacobson, Nathanson was paid in December 2003 – more than a year after the effective date of BCRA – for work done both before and after BCRA's effective date of November 6, 2002. Jacobson Aff. at ¶ 2.

Respondents do not dispute that the MCRP's payment to Nathanson was made from the party's operating account and was to cover three years' worth of consulting services. Although the party paid Nathanson in December 2003, that payment appears to have retired a debt incurred both prior to and after BCRA's effective date. BCRA and the Commission's regulations implementing it contain no explicit direction about how to treat debts for allocable activity incurred prior to BCRA's effective date. There are transition rules at 11 C.F.R. § 300.12 for national party committees, but they contain no specifically delineated transition rules for state, district or local party committees and organizations. The rules did, however, explicitly state that they did not apply to runoff elections, recounts, or election contests occurring after November 6, 2002, but arising from elections held prior to that date. 11 C.F.R. § 300.1(b)(1). These provisions reflect the apparent intent behind Congress's choice of November 6, 2002, the day after the 2002 general election, as BCRA's effective date – that is, that BCRA was not to apply to activity that took place in connection with the 2002, or any earlier, Federal election. Further, according to the Commission's Reports Analysis Division, it applies pre-BCRA regulations to payments made to cover activity before November 6, 2002, even when those payments are not disbursed until after that date. Accordingly, we treat that portion of MCRP's debt to Nathanson incurred prior to November 6, 2002 as subject to the pre-BCRA regulations, and that portion incurred afterward as subject to BCRA.

It is, of course, unknown how much of the $76,400 payment to Turner was for services performed during the 2002 election cycle. If, as discussed previously, we treat the December 2003 payment as being for services incurred from 2001-2003, and we assume it was intended to cover all three years equally, the MCRP paid Nathanson $25,467 per year, or $50,934 for the two-year 2002 election cycle.

With respect to the post-BCRA period, effective November 6, 2002, the Commission promulgated a new post-BCRA rule at 11 C.F.R. §106.7(d)(2)(ii), pursuant to 2 U.S.C. § 438(a), requiring state, district and local party committees to allocate at least 36% of administrative expenses to their Federal accounts in "any even year in which a Presidential candidate and a Senate candidate appear on the ballot." The 2004 general election in Ohio included both Presidential and Senatorial candidates. Because Nathanson's political consulting services in 2003 were provided in the 2004 election cycle, 36% -- or $9,168 -- of the MCRP's $25,467 payment to him for 2003 should have been allocated as Federal.



For the 2002 election cycle, however, all but a small portion of Nathanson's services preceded the enactment of BCRA and the promulgation of several new regulations by the Commission. Prior to BCRA, mixed Federal and non-Federal administrative expenses required allocation based on the applicable state ballot composition ratio formula. *See* former 11 C.F.R. § 106.5(d). Using the applicable ballot allocation ratio for that cycle, 11.1% -- or $5,654 -- of the MCRP's $50,934 payment to Nathanson for the two-year 2002 election cycle had to be paid from funds subject to the limitations and prohibitions of the Act.

As discussed above, pre-BCRA regulations required organizations that were not political committees and state and local parties that made allocable expenditures to either establish a separate Federal account to pay the Federal portion or demonstrate through reasonable

accounting methods that the organization received sufficient Federally-compliant funds to make the expenditures. The content of the MCRP's operating account during the pertinent time-period has not been made publicly available.[5] However, because under Ohio law the operating accounts could receive contributions of any amount from any source, we assume that it consisted largely of funds that would not have been permissible under Federal election laws. Moreover, during the time period in issue, Ohio law had higher limitations on individuals' contributions than the Act did.[6] Thus, it is unlikely that the MCRP will be able to show that it received sufficient permissible funds to cover the Federal portion of Nathanson's payments for the 2002 election cycle.

Secret operating accounts of local party committees are no longer lawful in Ohio. With the recent passage of Ohio H.B. 1, effective March 31, 2005, local party committees are required to disclose and report contributors and amounts contributed to operating accounts.

We recommend that the Commission find reason to believe the Montgomery County Republican Party violated 2 U.S.C. §§ 441a and 441b and 11 C.F.R. §§ 102.5(b), 106.5(d) (2002), and 106.7(d). However, because of the relatively small amounts likely to be in violation, the age of the underlying activity, and because the MCRP can no longer keep its operating account secret, this Office believes that it would not be a good use of the Commission's limited resources to pursue an investigation of the MCRP's receipts during 2001 and 2002. Accordingly,



[5] According to the *Dayton Daily News* article dated August 1, 2004, attached to the complaint, both Jacobson and the current chair of the MCRP refused "to make public all expenditures or the names of donors."

[6] For the years 2001 and 2002, the State of Ohio permitted individual campaign contributions to candidates and their authorized campaign committees up to $2,500. *See* Ohio R.C. § 3517.102. Federal law during 2001 and 2002 limited individual contributions to federal candidates and their authorized committees to $1,000. Although Ohio Law in 2001 and 2002 prohibited corporations and labor unions from using any funds "for or in aid of . . . a candidate for election or nomination to public office," *see* Ohio R.C. § 3599.03, and this limitation would have applied to other funds received by the MCRP, it apparently would not have applied to the operating account.

we recommend that the Commission take no further action, send the MCRP an admonishment letter and close the file.[7]

## V. RECOMMENDATIONS

1. Find no reason to believe that Turner for Congress and Michael Berning, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a, 441b or 434(b).

2. Find no reason to believe that Michael Turner violated the Federal Election Campaign Act of 1971, as amended, or the Commission's regulations.

3. Find reason to believe that the Montgomery County Republican Party violated 2 U.S.C. §§ 441a, 441b, and 11 C.F.R. §§ 102.5(b), 106.5(d) (2002), and 106.7(d), take no further action, and send an admonishment letter.

4. Close the file.

5. Approve the appropriate letters.

Lawrence H. Norton
General Counsel

Lawrence L. Calvert, Jr.
Deputy Associate General Counsel
for Enforcement

6/22/06
Date

Susan L. Lebeaux
Assistant General Counsel

Stacey L. Bennett
Attorney

[7] In a recent matter, the Commission voted to find no reason to believe violations occurred where, during the 2004 election cycle, the respondent's Federal share of itemized salaries and administrative costs alone would have pushed the organization's expenditures above the $1,000 mark. *See* MUR 5486 (Libertarian Party of Oregon). Based on that matter, we have not addressed herein the possibility that the MCRP became a political committee in 2001 as a result of its payments to Nathanson.

Attachments:

1. Copy of *Common Cause/Ohio v. U.S. Chamber of Commerce*, Case No. 2000E-058 (2003).

2. Copy of Ohio Elections Commission Opinion 98ELC-06 (1998).

# Ohio Elections Commission



Common Cause/Ohio, Complainant :

vs. : Case No. 2000E-058

United States Chamber of Commerce, Respondent :

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**Decision and Finding on Complainant's Motion for Partial Summary Judgment**

This cause was remanded to the Commission for a determination on the issues pursuant to a decision rendered by the 10th District Court of Appeals on October 31, 2002. Complainant, Common Cause/Ohio (Common Cause), then filed with the Ohio Elections Commission a Motion for Partial Summary Judgment on November 12, 2002, requesting that the Commission find, as a matter of law, that the United States Chamber of Commerce (U.S. Chamber) violated Ohio Revised Code §3599.03(A) by spending corporate funds on candidates to the Ohio Supreme Court when it purchased three television advertisements (the t.v. ads) during the 2000 general election. In an effort to narrow the focus of this case, the parties entered into and submitted a Stipulation and Joint Motion (the Stipulation), which the Commission accepted at its meeting of April 24, 2003. The Stipulation includes certain factual admissions, defenses and assertions relating to the case.

Respondent, the U.S. Chamber, admits that it is a non-profit corporation, exempt from taxation under the Internal Revenue Code. The U.S. Chamber declares that the t.v. ads were paid for with general treasury funds of the U.S. Chamber, but were not coordinated with the campaign spending of any candidate.

R.C. §3599.03(A) provides, in part, that "no non-profit corporation ... shall pay or use ... the corporation's money or property ... for or in aid of or opposition to a ... candidate for election or nomination to public office ..." The U.S. Chamber asserts that the t.v. ads were not "for or in aid of or opposition to a candidate." In support of this position, the U.S. Chamber primarily relies on the First Amendment to the United States Constitution and the decision of the United States Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). Their primary reliance on *Buckley* is that the holding by the U.S. Supreme Court in that case is that it is necessary for campaign materials to

contain words of "express advocacy" in order for any campaign materials to be considered political advertisements "for or in aid of or opposition to a candidate" and, therefore, subject to Ohio's campaign finance statutes. Further, the U.S. Chamber asserts that it is necessary to include words of "express advocacy" for the t.v. ads to have been made "... for or in aid of or opposition to a ... candidate ..." and subject to the provisions of R.C. §3599.03(A). The U.S. Chamber states that the t.v. ads for which they used general treasury funds did not contain any words of "express advocacy," and so it would be inappropriate to apply the provisions of R.C. §3599.03(A) to any of the t.v. ads. The *Buckley* court, in footnote 52, limited the application of the Federal Election Campaign Act to "...communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" The t.v. ads in this case do not contain any of these "magic words."

Common Cause, conversely, asserts that the provisions of R.C. §3599.03(A) must apply to the activities conducted by the U.S. Chamber. In support of this assertion, Common Cause proposes two arguments. Their first argument states that it is inappropriate for an administrative body, such as the Commission, to act on any type of Constitutional defense such as the *Buckley* "express advocacy" defense being propounded by the U.S. Chamber. According to Common Cause, the Constitutional defense of the U.S. Chamber is more properly addressed by the courts and not an administrative agency. Alternatively, Common Cause argues that, should the Commission interpret and apply R.C. §3599.03(A) based on the holding in *Buckley*, which Common Cause admits applies, the *Buckley* "express advocacy" standard includes not only the "magic words" test as noted in footnote 52, but should also include an "endorsement" or a "denunciation" test as propounded by Common Cause. As evidence that the Supreme Court acknowledged such a test, Common Cause points out the inclusion of the phrase "Smith for Congress" in footnote 52, along with the acknowledged "magic words" of "elect," "vote for," and "defeat."

At its meeting on April 24, 2003, the Commission reviewed one of the t.v. ads which was considered to be illustrative of all of the t.v.ads which are a part of the record, heard arguments from respective counsel for the parties and questioned all counsel on pertinent matters for deliberation. After due consideration of the factual circumstances and the arguments put forth, the Commission granted the complainant's Motion for Partial Summary Judgment. In so doing, the Commission found a violation of R.C. §3599.03(A) against the U.S. Chamber of Commerce and imposed a fine of $1000, which was then stayed pending appeal. In order to assist all parties involved with this matter, the Commission is issuing this Decision and Finding.

First, the Commission rejects the proposition that it would be improper for it to rely on the *Buckley* standard of express advocacy because it is an administrative agency. The Commission's reliance on the *Buckley* standard is an appropriate application of a stated legal principle that defines the manner in which R.C. §3599.03(A) must be

interpreted, which both parties admit. It is not an inappropriate reliance on a Constitutional argument. The Commission recognizes that the "express advocacy" standard of *Buckley* is a reliable definition for illustrating the concept of what is a political statement or a political advertisement "for or in aid of or opposition to" a specific candidate in the state of Ohio.

In making this decision, the Commission finds that the "express advocacy" standard articulated in *Buckley* applies. The Commission further finds that the t.v. ads that are the subject of these proceedings do expressly advocate for or against a candidate and were made "for or in aid of or opposition to a ...candidate for election ... to public office," as provided in R.C. §3599.03(A).

The Commission concludes that the context of the t.v. ads expressly urged the electorate toward a particular position and expressly advocated a particular position relative to the respective candidates that were involved in the 2000 general election. The statements in the t.v. ads were made "for or in aid of" or "in opposition to" a candidate.

The Commission acknowledges that the t.v. ads did not include any of the "magic words" that are listed in footnote 52 of the *Buckley* opinion. In its arguments, the U.S. Chamber contends that the inclusion of "magic words" was necessary for a proper application of the *Buckley* "express advocacy" standard. The Commission rejects this contention. The Commission holds that the t.v. ads at issue herein, do not need to include the "magic words" in order to expressly advocate an electoral action on any of the candidates. The nature, timing, tone and content of the t.v. ads were patently "in aid of" candidates Deborah Cook and Terrence O'Donnell, and "in opposition to" candidates Alice Robie Resnick and Timothy Black.

As stated by the Commission during its deliberations, since the *Buckley* decision was handed down over twenty-five years ago, political advertising has radically changed through the ensuing period. The sophistication of the advertising media has advanced to such an extent that the pretext that an advertisement "for or in aid of ... or opposition to" a candidate must include "magic words" to convey an electoral message cannot be accepted. The clear and unambiguous message portrayed in these advertisements was that candidates Resnick and Black were unqualified to hold the office, while candidates Cook and O'Donnell were the best choice for the viewer. Messages such as those made in the U.S. Chamber t.v. ads, which clearly and unambiguously lead the viewer to a specific conclusion as to each of the respective candidates, advocate on behalf of the preferred candidates and oppose those candidates asserted to be unacceptable.

It is overly simplistic in this modern age of political campaigns to limit the concept of express advocacy to the mere inclusion of a limited set of words and their synonyms by the court. The messages pertinent to each candidate, state in express terms the

preferences of the U.S. Chamber in this election. Upon viewing the t.v. ads, it is undeniable that the U.S. Chamber was advocating the election of candidates Cook and O'Donnell. It is equally undeniable that the U.S. Chamber was urging voters not to vote for candidates Resnick and Black.

Considering all of the factors stated herein, the Commission declares that by paying for the t.v. ads at issue in this complaint with its general corporate funds, the U.S. Chamber of Commerce has either "directly or indirectly ... pa(id) or use(d) ... the corporation's money or property, ... for or in aid of or opposition to a ... candidate for election or nomination to public office ...," in violation of Ohio Revised Code §3599.03(A). The Commission considers this Decision and Finding, approved and issued on the 15th day of May, 2003, its final appealable order in this matter and finds that there is no just reason for delay pursuant to Civil Rule 54(B).

Ohio Elections Commission

Benjamin F. Marsh
Chair

**Ohio Elections Commission**

21 West Broad Street, Suite 600
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October 27, 1998

# OHIO ELECTIONS COMMISSION

**Advisory Opinion**
**98ELC-06**

SYLLABUS: An expenditure for polls and surveys conducted by a state or county political party which are not for a specific candidate, may be paid from the operating account of the party, and not subject to reporting.

TO: Susan J. Kyte

You are requesting an advisory opinion on the following question:

> Can items, such as polls and surveys conducted by a state or county political party not for a specific candidate, be paid for from the operating account of the party, and not subject to reporting?

Political parties in today's political environment operate much like a corporation. They have a substantial staff, various funding sources, and a wide array of expenses. While their primary product is the election of their respective candidates, it is necessary for them to carry on additional tasks in order to efficiently and effectively operate. To properly allocate the monies received and expenses incurred for party activities, a political party will have numerous bank accounts at its disposal. While any fund used to influence the result of an election must be reported to either the Secretary of State or the county Board of Elections, and any monies received from the public or "tax check-off" fund is limited in its use by statute, not all funds available to a political party are required to be reported pursuant to statute.

Ohio Revised Code §§3517.10, 3517.101, and 3517.17 require that a political party file various reports with the appropriate filing office outlining certain contributions or expenditures that it makes. At issue in this opinion is R.C. §3517.10 which requires a political party to report the contributions or expenditures it makes "in connection with the nomination or election of any candidate ..." R.C. §3517.01(B)(6) defines an expenditure, in this context, as a "disbursement ... for the purpose of influencing the results of an election ..."

Both of these phrases are the essential elements of the definitions which are at issue in answering this question.

Some expenses are easily identifiable as expenses which would fit within the definition in R.C. §3517.01(B)(6). Making payment for specific literature which endorses a candidate or for a television advertisement which references a candidate are easily identified as both "in connection with the nomination or election of any candidate" and "influencing the results of an election." Other expenses, however, are not as easily identified but are still included in the list of expenditures in a campaign finance report. One such expense is a payment for a political poll or survey which would assist the party in determining the popularity of a candidate or an issue which is important to the party.

R.C. §3517.08 states certain exceptions, however, which might otherwise be considered an expenditure under R.C. §3517.01(B)(6). R.C. §3517.08(C) makes a specific exception to the definition of an expenditure which is pertinent to the issue under consideration in this advisory opinion. R.C. §3517.08(C) states in pertinent part that

> (a)n expenditure by a ... political party shall not be considered a contribution to any campaign committee or an expenditure by or on behalf of any campaign committee if the purpose of the expenditure is for ... a political poll, survey, index, or other type of measurement not on behalf of a specific candidate.

The submission of a campaign finance report by a political party is a public disclosure of expenditures that are made in connection with the nomination or election of any candidate. The funds which a political party are required to report have significant public policy implications as well as information which citizens may review in order to be aware of the influence of a political party on the results of elections. The funds that the party uses to make contributions to candidates must be scrutinized to insure that all expenditures are proper and that no contributions are received from inappropriate sources. It is also necessary for a party to disclose the receipts and uses for the tax check-off funds, which cannot be used for partisan purposes, as well as the "building fund" which may receive corporate contributions but may only be used for the office space of the party.

Under the definition in R.C. §3517.01(B)(6), a poll or survey when authorized by a political party would be a recognizable contribution from the party to the candidate (or candidates) identified in the poll. Using the exception in R.C.

§3517.08(C), however, when a political party makes an expenditure for a survey or poll which does not identify a particular candidate, the expenditure is not to be considered a contribution to the candidate or an expenditure by the political party on behalf of a candidate. Because of this statutory exclusion, an expenditure by a political party for a poll or survey which cannot be associated with a particular candidate is not an expenditure on behalf of a candidate and, therefor, need not be reported by a campaign committee as an in-kind contribution or by the political party in a campaign finance report which reports partisan political expenditures.

Accordingly, it is the opinion of the Ohio Elections Commission, and you are so advised, that an expenditure for polls and surveys conducted by a state or county political party which are not for a specific candidate, may be paid from the operating account of the party, and not subject to reporting.

Sincerely,

Alphonse P. Cincione

Alphonse P. Cincione
Chairman