THE FEDERAL ELECTION COMMISSION
Washington, DC 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Brady Campaign to Prevent Gun Violence	)	**MUR 5883**
Mark Ingram, in his official capacity as treasurer	)	

STATEMENT OF REASONS OF CHAIRMAN ROBERT D. LENHARD, VICE CHAIRMAN DAVID M. MASON AND COMMISSIONER ELLEN L. WEINTRAUB

The Citizens Committee for the Right to Keep and Bear Arms filed the complaint in this matter alleging that Respondent Brady Campaign to Prevent Gun Violence violated the Federal Election Campaign Act, 2 U.S.C. § 431 *et seq.* ("FECA"), via certain press releases. Although the Office of General Counsel ("OGC") concluded there was no violation via the press releases, it recommended finding reason to believe ("RTB") that the Brady Campaign violated FECA via two press conferences. *See* 2 U.S.C. § 437g(a)(2) (2002). With two Commissioners favoring accepting OGC's recommendation[1] and three objecting,[2] the Commission voted unanimously to take no action and close the file.[3] We write separately to explain our reasons for objecting to the recommendation.

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[1] Commissioners von Spakovsky and Walther.

[2] Chairman Lenhard, Vice Chairman Mason, and Commissioner Weintraub.

[3] Voting affirmatively were Chairman Lenhard, Vice Chairman Mason, and Commissioners von Spakovsky and Walther. Commissioner Weintraub was absent from the executive session but objected to the OGC recommendation beforehand. The Commission has five members because one member has left the Commission.

Mark Ingram was once treasurer of the Brady Campaign. *In re Brady Campaign to Prevent Gun Violence,* Matter Under Review ("MUR") 5158, Conciliation Agreement at 11 (F.E.C. March 7, 2005), *available at* http://eqs.sdrdc.com/eqsdocs/0000370E.pdf (all Internet sites visited Aug. 28, 2007); *id.* Factual & Legal Analysis ("MUR 5158 FLA") at 1 (F.E.C. Nov. 20, 2003), *available at* http://eqs.sdrdc.com/eqsdocs/000036FB.pdf. However, it is not clear whether he continues as treasurer, and he was inadvertently generated as a respondent. *In re Brady Campaign to Prevent Gun Violence,* MUR 5883, First Gen. Counsel's Report ("GCR") at 2 n.1 (F.E.C. July 20, 2007).

I. BACKGROUND

The complaint alleges that the Brady Campaign, a nonprofit corporation, issued press releases in 2006 expressly advocating the election of federal candidates. The Brady Campaign distributed the press releases over a distribution service[4] that the campaign uses for releases that do not endorse candidates.[5] The complaint alleges that by distributing its press release beyond its membership, which is part of its restricted class, *see* 11 C.F.R. § 114.1(j) (2003), the Brady Campaign violated FECA.[6] The complaint does not allege the Brady Campaign coordinated the press releases themselves with candidates or their campaigns.[7]

An OGC review of the press releases revealed that officials of either the Brady Campaign or the Brady Campaign to Prevent Gun Violence – Voter Education Fund ("Brady Committee"), a separate segregated fund ("SSF") connected to the Brady Campaign, announced the Brady Campaign's endorsement of two 2006 congressional candidates – Tammy Duckworth and Joe Sestack – at press conferences with them.[8] Shortly thereafter, the Brady Committee reported in-kind contributions to the Duckworth and Sestack campaign committees, *see* 2 U.S.C. § 441a(a)(7)(B)(i) (2002), in amounts below contribution limits. *See id.* § (a).[9] However, the Brady Campaign did not respond to the complaint, so it is not certain whether these in-kind contributions were SSF payments for the costs of the press conferences,[10] or whether the corporation itself paid the costs by other means. *Compare id.* § 441b(b)(2)(C) (2002) *with id.* § 441b(a), (b)(2).

II. DISCUSSION

A. The Law

In general, corporations may not make contributions[11] or expenditures,[12] including independent expenditures.[13] 2 U.S.C. § 441b(a), (b)(2); *see Austin v. Michigan Chamber of*

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[4] *Brady Campaign,* MUR 5883 Compl. at 2 (Nov. 17, 2006).

[5] *Brady Campaign,* MUR 5883, Proposed Factual & Legal Analysis ("MUR 5883 FLA") at 5 (F.E.C. July 20, 2007).

[6] *Brady Campaign,* MUR 5883, Compl. at 2.

[7] *See id.* at 1-2.

[8] *See* MUR 5883 FLA at 2-3.

[9] *See id.* at 4.

[10] *Id.*

[11] *Defined in* 2 U.S.C. § 431(8)(A) (2002); *see generally FEC v. Survival Education Fund,* 65 F.3d 285, 295 (2d Cir. 1995).

[12] *Defined in* 2 U.S.C. § 431(9)(A); *see generally McConnell v. FEC,* 540 U.S. 93, 191-92 (2003), *cited in Anderson v. Spear,* 356 F.3d 651, 663-66 (6th Cir.), *cert. denied,* 543 U.S. 956 (2004); *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 248-49 (1986) (citing *Buckley v. Valeo,* 424 U.S. 1, 42, 44 n.52, 80 (1976)); *Center for*

Commerce, 494 U.S. 652, 657-66 (1990); *cf. First Nat'l Bank v. Bellotti,* 435 U.S. 765, 784-85 (1978). One exception involves endorsements of candidates to a corporation's restricted class. *See* 11 C.F.R. § 114.4(c)(6) (2003). Under Commission regulations, a corporation may publicly announce such endorsements through press releases and press conferences if the corporation:

- Distributes the press releases and press-conference notices only to press representatives whom the corporation customarily contacts when issuing nonpolitical press releases or holding nonpolitical press conferences, *id.* § (c)(6)(i), and
- Does not coordinate the announcement of its endorsement with the candidate, the candidate's agents, or the candidate's authorized committee. *Id.* § (c)(6)(ii).

The Commission adopted this regulation in 1995. *Corporate & Labor Organization Activity; Express Advocacy & Coordination with Candidates,* 60 FED. REG. 64260, 64278 (F.E.C. 1995). Thereafter, the Commission considered a coordinated 2000 Brady Campaign press conference announcing the Brady Campaign's endorsement of a Senate candidate Bill Nelson,[14] and another 2000 press conference – co-sponsored by the Brady Committee and by then-Senator Charles Robb's campaign committee – announcing the Brady Committee's endorsement of Robb.[15] The Commission found RTB that the Brady Campaign violated FECA not because of coordination itself but because the Brady Committee, *i.e.,* the SSF, had not reimbursed the Brady Campaign for a Brady Campaign official's salary for the time she spent at the coordinated press conference.[16]

Coordination with a candidate, the candidate's agents, or the candidate's authorized committee does not violate Section 114.4(c)(6)(ii) when the coordination is by a corporation's SSF, rather than the corporation itself. *See* 2 U.S.C. § 441b(b)(2)(C).[17] The costs are coordinated expenditures and therefore contributions to the candidate, *see id.* § 441a(7)(B)(i), which an SSF may make, *see id.* § 441b(b)(2)(C), subject to contribution limits. *See id.*

Individual Freedom v. Carmouche, 449 F.3d 655, 665 & n.7 (5th Cir. 2006) (citing *Anderson,* 356 F.3d at 664-65), *cert. denied,* ____ U.S. ____, 127 S.Ct. 938 (2007); *Political Committee Status,* 72 FED. REG. 5595, 5597 (F.E.C. 2007).

[13] *Defined in* 2 U.S.C. § 431(17).

[14] *See* MUR 5158 FLA at 4; *id.* Conciliation Agreement at 10.

[15] MUR 5158 FLA at 6-7. The Commission observed that the situation was analogous to a previous MUR in which a corporation's executive director attended a press conference to endorse a candidate on the corporation's behalf. Although the corporation's SSF had reported expenditures for the press conference, the Commission found RTB that the corporation itself violated FECA. *See id.* at 4, 7 (citing *In re National Council of Senior Citizens,* MUR 4116). However, in that previous MUR, the corporation as well as the SSF paid press-conference costs. *See, e.g., National Council of Senior Citizens,* FLA at 11 (F.E.C. June 3, 1996); *id.* GCR at 3 (F.E.C. Feb. 18, 1997).

[16] *Brady Campaign,* MUR 5158, GCR # 2 at 4, 6, 8-9 (F.E.C. Dec. 14, 2004), *available at* http://eqs.sdrdc.com/eqsdocs/00003705.pdf; *see generally id.,* First GCR at 4-5, 13-14 (F.E.C. Oct. 23, 2003), *available at* http://eqs.sdrdc.com/eqsdocs/000036F6.pdf.

[17] A corporation and its SSFs are separate entities. *California Med. Ass'n v. FEC,* 453 U.S. 182, 196 (1981).

§ 441a(a). If the SSF pays the costs and there is no coordination, then there is still no Section 441b violation, because the costs are expenditures, which an SSF may also make. *See id.* § 441b(b)(2)(C); *cf. id.* § 441a(7)(B)(i).

B. Press Releases

Because there is insufficient basis to conclude that the Brady Campaign ran afoul of Section 114.4(c)(6)(i) or (ii) via the 2006 press releases,[18] we would have supported finding no RTB as to the press releases. *See Statement of Policy Regarding Comm'n Action in Matters at the Initial Stage in the Enforcement Process,* 72 FED. REG. 12545, 12545 (F.E.C. 2007). While it appears that all Commissioners would have supported such a motion, the Commission, as a matter of administrative convenience, agreed that this could be addressed in a statement of reasons, rather than by voting to find no RTB. *Cf. In re Democratic Party of Hawaii,* MUR 5518, Additional Statement of Reasons of Vice Chairman Mason at 1 (F.E.C. July 24, 2007) ("We dismissed rather than find[] no RTB solely as a matter of convenience").

C. Press Conferences

Because of the coordination of the 2006 press conferences with Duckworth and Sestack, OGC recommended that the Commission find RTB that the Brady Campaign violated 11 C.F.R. § 114.4(c)(6)(ii). Further, because the Brady Campaign – as opposed to the Brady Committee – may have paid the costs of the press conferences, OGC also recommended that the Commission find RTB that the Brady Campaign violated Section 441b. *See* 2 U.S.C. § 441b(a), (b)(2).[19]

However, the available facts strongly suggest that any coordination was by the SSF, rather than the corporation. Moreover, based on the SSF's reported in-kind contributions to the Duckworth and Sestack campaign committees and the timing of these contributions, *supra* at ____, the corporation's SSF appears to have paid the costs of the coordinated press conferences and adhered to contribution limits. The conclusion that the SSF paid for the coordinated press conferences is reinforced by the fact that it is consistent with what the Commission previously held. *See supra* at ____. Because the corporation and its SSF appear to have followed what the Commission previously held, we would have supported exercising prosecutorial discretion under *Heckler v. Chaney,* 470 U.S. 821 (1985), and declining to expend further resources to determine for certain whether the corporation or its SSF paid for the press conferences. *See Statement of Policy Regarding Comm'n Action in Matters at the Initial Stage in the Enforcement Process,* 72 FED. REG. at 12546.

It would be odd indeed for the Commission to hold in one matter that a respondent violated the law, and then hold in a subsequent matter that the same respondent violated the law again when it appears to have done what the Commission told it to do the first time around.

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[18] *See* MUR 5883 FLA at 5. The complaint itself alleges nothing to support a conclusion that the Brady Campaign via the press releases themselves violated Section 114.4(c)(6)(i), *see id.*, or Section 114.4(c)(6)(ii). *See* Compl. at 1-2.

[19] MUR 5883 FLA at 5-6.

III. CONCLUSION

Based on the foregoing, it was appropriate to take no action in this matter and close the file. *See id.*

December 31, 2007

Robert D. Lenhard
Chairman

David M. Mason
Vice Chairman

Ellen L. Weintraub
Commissioner

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