FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: The Commissioners
Staff Director
Deputy Staff Director
General Counsel

FROM: Office of the Commission Secretary

DATE: June 29, 2000

SUBJECT: Supplemental Statement Of Reasons for MURs 4553 and 4671, MURs 4407 and 4544, and MUR 4713

Attached is a copy of the Statement Of Reasons signed by Commissioner Scott E. Thomas. This was received in the Commission Secretary's Office on Wednesday, June 28, 2000 at 5:08 p.m.

cc: Vincent J. Convery, Jr.
Press Office
Public Information
Public Records

Attachment

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

In the Matter of

Dole for President, Inc. and Robert J. Dole, as treasurer; Dole/Kemp '96, Inc., and Robert J. Dole, as treasurer; Republican National Committee and Alec Poitevint, as treasurer; Senator Robert J. Dole	)	**MURs 4553 and 4671**
The Clinton/Gore '96 Primary Committee, Inc., and Joan Pollitt, as treasurer; The Democratic National Committee, and Carol Pensky, as treasurer; President William J. Clinton; and Harold M. Ickes, Esquire	)	**MUR 4713**
The Clinton/Gore '96 Primary Committee, Inc., and Joan Pollitt, as treasurer; The Democratic National Committee, and Carol Pensky, as treasurer; President William J. Clinton; Vice President Albert Gore, Jr.; and Clinton/Gore '96 General Committee, Inc., and Joan Pollitt, as treasurer	)	**MURs 4407 and 4544**

SUPPLEMENTAL STATEMENT OF REASONS
COMMISSIONER SCOTT E. THOMAS

I write this supplemental statement to address certain arguments proffered by my colleagues, Commissioners Sandstrom and Elliott. The underlying Matters Under Review ("MURs") were perhaps the FEC's greatest test to date. The FEC deadlocked 3-3 on the most significant issue—whether most of the RNC and DNC ads were in-kind contributions to the Dole/Kemp and Clinton/Gore campaigns.[1]

Because this question is now subject to judicial review, at least as to the DNC ads,[2] it is especially important that the legal analysis of those commissioners voting not to

[1] See Statement of Reasons of Commissioner Scott E. Thomas dated May 25, 2000 for a description of the various allegations, recommendations, and votes.

[2] One of the complainants filed a suit challenging the FEC's dismissal of the allegations relating to the DNC and Clinton/Gore campaign. *Fulani v. FEC*, Civ. Action No. 1:00CV01018 (WBB) (D.D.C., filed May 8, 2000).

proceed be carefully scrutinized. If found contrary to law or arbitrary and capricious, there is some possibility that the FEC's dismissal of these cases will be reversed.[3]

I. The significance of the prior votes in the audits regarding repayment of public funds

First, I must address the argument put forward by Commissioner Sandstrom that the FEC's earlier 6-0 vote in the public funding repayment context somehow should govern the result in these MURs.[4] In law and in fact, the two determinations were very different.

As I explained in my Statement for the Record in Audits of Clinton/Gore and Dole/Kemp Campaigns dated December 28, 1998 (attached), the vote in the repayment setting dealt **only** with recoupment of public funds, and reflected vastly different commissioner viewpoints. Most significantly, three of my colleagues had indicated by a preceding vote that they would not approve any repayment whatsoever stemming from excess candidate spending in the primary, no matter how clearly the spending involved activity coordinated with party operatives and no matter how clearly the ads were intended to promote a particular candidate's election or defeat.[5] Thus, before any actual repayment vote, there was simply **no way** to get the four votes needed to order any repayment of public funds associated with excess primary spending caused by the party ads.

As Acting Chairman at the time, I suggested that rather than waste days, perhaps weeks, analyzing each ad separately to allow for a string of futile votes on whether any particular ad would generate a repayment of public funds, commissioners should proceed to a single vote to reject the Audit Division's repayment recommendation which covered **all** the ads. Commissioners who believed none of the ads could generate a repayment under the public funding statute, like my three Republican colleagues, could vote to reject the recommendations for that reason. Commissioners like myself, who believed that **some but not all** of the ads should generate a repayment, likewise could vote to reject the auditors' recommendations because they lumped **all** the ads together. This approach was

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[3] *See* 2 U.S.C. § 437g(a)(8).

[4] In a Money & Politics (BNA) article dated June 5, 2000, Commissioner Sandstrom was quoted as saying my vote in the MURs was "inconsistent" with my earlier vote in the repayment context. In his Statement of Reasons issued June 21, 2000, at *footnote 19*, Commissioner Sandstrom wrote it was "self evident" that the commissioners' vote regarding the party ads in the repayment track presaged the treatment of the ads in the MUR track.

[5] This reflected the view of Commissioners Elliott, Mason, and Wold that the primary matching fund statute did not contemplate any repayment of public funds corresponding to excessive spending by the candidate. See Agenda Documents 98-92 and 98-92A. I noted in my Statement (attached) that this was the first time in six presidential cycles such an argument had surfaced, that it ran counter to long-standing Commission interpretation of the statute through regulation (11 C.F.R. § 9034.4(b) provides, "An expenditure which is in excess of any of the limitations under 11 C.F.R. Part 9035 shall not be considered a qualified campaign expense."), and that several courts had upheld the Commission's interpretation.

adopted by my colleagues, and it is the basis for the 6-0 vote rejecting the auditors' repayment recommendations.

The commissioners underscored their desire to leave any determination about whether the ads constituted in-kind contributions for the MUR track. Each audit report was revised to state: "[T]he Commission directed the Audit Division to revise the portion of the report relating to party ads to clarify that the Commission has not reached any conclusion regarding the Audit Division's in-kind contribution analysis, and to indicate that Commissioners may submit statements for the record." The bottom line, therefore, is that the voting in the audit track regarding repayment did not in fact govern whether the party ads constituted in-kind contributions, and should not be interpreted as having done so. The voting in the MUR track was the real deal.

II. The limited holding in Advisory Opinion 1995-25

Next, I wish to address Commissioner Sandstrom's argument that Advisory Opinion 95-25, 2 Fed. Elec. Camp. Fin. Guide (CCH), ¶ 6162, ruled definitively that ads similar to those at issue here were not attributable to any contribution or coordinated expenditure limit.[6] To the contrary, the commissioners involved went out of their way to caution that the opinion did not rule on that point. Because the request of the Republican National Committee was deliberately vague on whether any particular ad text proffered would in fact be used, the Commission was very particular in emphasizing that it was issuing no opinion about whether the planned activity of the RNC would constitute an "electioneering message"[7] and hence a coordinated expenditure by the RNC. The FEC's ruling was confined to the question of whether the RNC's activity, as generally described, would require allocation as partly federal and partly non-federal.[8]

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[6] Referring to one of the ad texts submitted by the advisory opinion requestor, the Republican National Committee (RNC), Commissioner Sandstrom states "the Commission *determined* [it] did not contain an electioneering message [emphasis added]." Statement of Reasons of Commissioner Karl J. Sandstrom at 6. He later characterizes the various texts submitted by the requestor as "approved." *Id.* at 7.

[7] The "electioneering message" phrase was a shorthand reference to the underlying statutory provisions governing whether a particular party communication should be treated as an in-kind contribution under the contribution limits (*see, e.g.*, 2 U.S.C. § 441a(a)(2)(A)) or as a coordinated expenditure under the party-specific limits at 2 U.S.C. § 441a(d). This phrasing was eliminated from the campaign finance lexicon by the June 24, 1999 Statement for the Record filed by Commissioners Sandstrom, Elliott, Mason, and Wold in connection with the Dole/Kemp and Clinton/Gore audit determinations. See Statement for the Record of Commissioners Thomas and McDonald dated July 6, 1999 (attached). At the time Advisory Opinion 1995-25 was issued, however, the legally correct way to describe whether an ad should count toward a particular limit was according to whether it mentioned a clearly identified candidate and contained an "electioneering message."

[8] The Commission was aware that the RNC and the Democratic National Committee (DNC) were playing a game of 'cat and mouse' regarding this advisory opinion request. Apparently, because the RNC wished to file a complaint regarding the DNC's use of purely 'soft money' to pay for some of its ads in the 1993-94 time frame, it sought an advisory opinion to ascertain whether the Commission would most likely treat the 1993-94 activity as a violation. Because the original request did not include any specific proposed text, the Commission asked for an example of an ad to facilitate analysis. Though the RNC provided three texts, it specifically represented that **none of the ads served as the basis for the advisory opinion request.**

The Commission expressly noted it was relying on the requestor's legal representation that no ads would contain an electioneering message and expressly advised it was not characterizing any particular ads as containing an electioneering message:

> The Commission *relies on your statement* that those advertisements that mention a Federal Candidate or officeholder will not contain any electioneering message. In view of this representation, the Commission *does not express any opinion* as to what is or is not an electioneering message by a political party committee.

2 Fed. Elec. Camp. Fin. Guide (CCH), ¶ 6162 at 12,108 (emphasis added).

To drive home the point that it was only addressing the general question of whether "legislative advocacy media advertisements that focus on national legislative activity and promote the [party] should be considered as made in connection with both Federal and non-federal elections," the Commission's affirmative conclusion ended with the proviso, "unless the ads would qualify as coordinated expenditures on behalf of any general election candidates of the Party under 2 U.S.C. § 441a(d)." *Id.* at 12,109. This clearly contrasted the central holding of the opinion with the unresolved question about the status of any particular ad as a contribution or coordinated expenditure.

The foregoing demonstrates that the FEC in no way "determined" or "approved" anything about any particular ad in Advisory Opinion 1995-25. Accordingly, no precedent regarding application of the contribution or coordinated expenditure limits should be gleaned from that opinion.

That said, Commissioner Sandstrom demonstrates a valid point: there probably were and are some election law attorneys and other political practitioners who missed the crucial distinctions the FEC built into Advisory Opinion 1995-25. While that perhaps justifies a 'reliance on counsel' defense or mitigation of some sort, it does not alter the true state of the law.

Because of this vagueness, and because of the importance of nonetheless giving some guidance on the overriding question of federal/non-federal allocation, the Commission carefully included language limiting the scope of its opinion. Incidentally, after receiving Advisory Opinion 1995-25, the RNC indeed filed a complaint regarding the DNC's 1993 activity, then sued the FEC when it failed to muster enough votes to settle the matter with a conciliation agreement, then withdrew its suit, and then filed a new suit claiming the FEC's regulations unconstitutionally deprived it of the opportunity to use exclusively 'soft money' to pay for what it characterized as "issue ads." *See* FEC Record, Vol. 23, Number 9, p. 1; Vol. 24, Number 6, p. 4; Vol. 24, Number 6, p. 1.

III. The courts have not required "express advocacy" for coordinated expenditures.

Last, I must address Commissioner Elliott's asserted belief that *Buckley v. Valeo* ("*Buckley*"),[9] *FEC v. Massachusetts Citizens for Life* ("*MCFL*"),[10] and a string of other cases cited in her June 23 Statement of Reasons[11] somehow hold that coordinated expenditures must rise to the level "express advocacy" to be validly limited. It is a view that does not withstand scrutiny.

The part of *Buckley* on which Commissioner Elliott relies, and all the other cases she cites except two, deal with **independent** or **non-coordinated** communications. Only in that realm has the "express advocacy" concept been imposed. *See* Statement for the Record in Audits of 1996 Clinton/Gore and Dole/Kemp Campaigns by Commissioners Thomas and McDonald dated July 1999 (attached) at 7, 8.[12]

In the only case cited by Commissioner Elliott where ads coordinated with a candidate were at issue, the court held emphatically that the "express advocacy" standard was **not** applicable. *FEC v. Christian Coalition Inc.*, 52 F. Supp.2d 45 (D.D.C. 1999). The court said: "[I]mporting the 'express advocacy' standard into § 441b's contribution prohibition would misread *Buckley* and collapse the distinction between contributions and independent expenditures in such a way as to give short shrift to the government's compelling interest in preventing real and perceived corruption that can flow from large campaign contributions." 52 F. Supp.2d at 88. The court referred to the position espoused herein by Commissioner Elliott as "untenable" and "fanciful." 52 F. Supp.2d at 87 and n. 50. I would not use such pejorative phrasing, but only note that the courts simply don't agree.

As for the other case cited by Commissioner Elliott where activity coordinated with a candidate was involved, *Orloski v. FEC*,[13] the court made clear that the apparent FEC policy of using the "express advocacy" test, among others, in the context of federal officeholder community events was neither statutorily nor constitutionally required. The fact that the FEC at one time chose to use the "express advocacy" test in that limited situation is of no relevance in the MURs at hand.[14]

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[9] 424 U.S. 1 (1976).

[10] 479 U.S. 238 (1986).

[11] See p. 3, footnote 10, of Commissioner Elliott Statement.

[12] In *Buckley*, the Court could not have been clearer: "[C]oordinated expenditures are treated as contributions rather than expenditures under the Act." 424 U.S. at 46, 47. In *MCFL*, the Court specified that its "express advocacy" construction need only apply to the provision in 2 U.S.C. § 441b "that directly regulates independent spending." 479 U.S. at 249.

[13] 759 F.2d 156 (D.C. Cir. 1986).

[14] Commissioner Elliott notes that the *Orloski* court said, "Under the Act this type of 'donation' is only a 'contribution' if it first qualifies as an 'expenditure' . . . . 759 F.2d at 163. This is inaccurate. The statute defines "contribution" as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). There is no dependence on the "expenditure" definition. That said, because the term "expenditure" is defined very similarly at 2 U.S.C. § 431(9)(A)(i), virtually every "contribution" would

Commissioner Elliott's stated view herein is at odds with some of her own votes. If her view is that even coordinated ads must rise to the level of "express advocacy" in order to be regulable, then her votes in MUR 3918 (law firm ads referencing Senate candidate Joel Hyatt with the phrase, "Hyatt Legal Services—serving the people of Ohio") and MUR 4116 (radio ads paid for by the National Council of Senior Citizens Political Action Committee challenging Senate candidate Ollie North's statement that Social Security should be scrapped) are inconsistent. In both of those cases she voted to find probable cause that the coordinated ads were illegal in-kind contributions even though no "express advocacy" was included.[15] I would argue that her votes in those MURs reflect a more accurate assessment of the law than her stated position herein.

IV. Conclusion

It is unusual for a commissioner to issue a supplemental statement commenting on the statement of another colleague. I have not taken any of the statements attributed to me personally, and I do not intend any of the comments herein to be taken personally. This is all purely legal argument, in my view. Only because it involves very high stakes interpretations of federal campaign finance law do I feel the need to further explicate the topic.

6/28/00
Date

Scott E. Thomas
Commissioner

Attachments: 12/23/98 Vice Chairman Thomas' Statement for the Record in Audits of Clinton/Gore and Dole/Kemp Campaigns

7/2/99 Chairman Thomas' and Commissioner McDonald's Statement for the Record in Audits of 1996 Clinton/Gore and Dole/Kemp Campaigns

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qualify as an "expenditure." There is further overlap because, as Commissioner Elliott notes, and as the Supreme Court has noted (*see* n. 12, *supra*), a coordinated "expenditure" is to be treated as a "contribution." *See* 2 U.S.C. § 441a(a)(7)(B)(i). But the term "expenditure" is much broader in that it includes mundane operating expenditures of political committees, as well as independent, non-coordinated outlays that would fall under the reporting provision at 2 U.S.C. § 434(c) or the ban at 2 U.S.C. § 441b only if they contain "express advocacy."

[15] See certifications of vote dated March 11, 1997 in MUR 3918 and December 9, 1997 in MUR 4116.

FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

OFFICE OF VICE CHAIRMAN

Statement for the Record in Audits of Clinton/Gore and Dole/Kemp Campaigns

Scott E. Thomas
Vice Chairman

On December 10, 1998, the Federal Election Commission ("FEC" or "Commission") approved a motion rejecting certain staff recommendations for repayment of public funds in the audits of the 1996 Clinton and Dole campaigns. The repayment recommendations in question stemmed from party ads that would cause excessive spending if attributed to the candidates' campaigns.

This vote, although unanimous, reflected several different rationales among the six voting commissioners. The media reports and editorials following the vote did not capture the distinctions and nuances involved. It is for that reason I offer the following preliminary statement explaining my vote and my avid dissent from the legal theory underlying the vote of three of my colleagues.

I clearly indicated during the previous two days of discussion my agreement that certain of the ads in question should be attributed to the candidates' campaigns, and should generate a repayment to the extent excessive expenditures resulted. I further indicated, however, that some of the ads fell short of being attributable to the candidates' campaigns. Moreover, I believed the national parties were legally free to use their available coordinated expenditure allowances for any of the ads. Where the parties so chose, the ads should not be attributable to the candidates' campaigns. Thus, on the motion proffered, I voted in the affirmative because the motion was to reject the staff's repayment recommendation that encompassed all the ads in question.

It would have been an exercise in futility to attempt separate votes on whether to seek repayment with regard to each of the ads in question. The previous day, December 9, three commissioners (Mason, Wold and Elliott) indicated they would not vote to seek repayment relating to excessive spending by a primary campaign under any circumstances. Thus, even if at least four commissioners believed certain ads should count toward a candidate's spending ceiling, there would be no repayment because, according to these three

commissioners, any repayment order for excessive primary campaign spending would be beyond the FEC's authority. See Agenda Docs. 98-92 and 98-92A.

Faced with the reality of no repayment at all regarding excessive spending generated by the party ads, the question remained whether to debate further for hours—perhaps days—about "determining" some or all of the ads to be in-kind contributions for purposes of the audit report. See, e.g., Report of the Audit Division on Clinton/Gore Primary Committee, Inc. at 43. In view of the need to complete the audits in time to meet the three-year statute of limitations,[1] and in view of the awkwardness of publicly discussing matters that would now only have relevance to potential confidential compliance determinations,[2] commissioners opted to instead direct the Audit Division to revise the report to simply clarify that the factual and legal analysis therein regarding the party ads does not reflect any commissioner determinations.[3]

The net result of the votes taken on December 9 and 10 is that any repayment stemming from the party ads is off the table, and any further action regarding the ads will occur, if at all, in the context of a compliance action. Without presaging whether any findings of civil violation will be made, it is theoretically possible the FEC will press forward in the enforcement track and obtain civil penalties or some other form of monetary or injunctive relief. The doom and gloom described by commentators is perhaps premature.

Regardless, several important points should be made about the view taken by three commissioners that no repayment whatsoever may be required for excessive spending by a primary candidate. I find this approach plainly contrary to public policy, in flat violation of majority-passed FEC regulations, and far less justified by the statute than the agency's long-held interpretation.

It is hardly compatible with the presidential public funding program to allow a candidate who spends above the spending ceiling to escape repayment of the public funds that were constructively involved. This is just as true in the primary matching fund program as it is in the general election program where major party candidates have been given a full grant. In both situations, public funds should be recovered where they were used to get to the spending ceiling but not needed. In other words, a campaign should be forced to return to the Treasury the amount of public funds used getting to the limit that corresponds to the amount of private funds otherwise spent to go above the ceiling. Where

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[1] 26 U.S.C. §§ 9007(c); 9038(c)

[2] See 2 U.S.C. § 437g(a)(12)(A)

[3] The FEC also voted on December 9 to treat any RNC ads run before the convention nomination as primary-related, rather than general-related. This was to afford equal treatment with the DNC whose ads were subjected by the staff to an FEC regulation allocating to the primary any communications not exclusively general-related. Common sense dictates that the RNC ads run before the nomination were no more exclusively general-related than those of the DNC.

campaigns cheat on the spending ceilings, they should disgorge any public funds not needed to get to the ceiling in the first place.[4]

The so-called "mixed pool theory" in the matching fund context properly addresses this public policy. By treating all available resources as fungible—just as all the expenditures making up the spending total are fungible—the Commission properly requires repayment of the portion of any excess spending that corresponds to the public funds ratio. Importantly, the "mixed pool theory" only works if all resources—public funds, private contributions deposited, and in kind contributions—are included. Just as in kind contributions must be counted as part of the expenditure total, they must be counted as part of the receipt total. Only this way does the ratio accurately reflect the overall financial support provided to a campaign and the relative importance of public funding to an impermissible expense. It wouldn't make sense to have a repayment ratio generate a larger repayment than actually was justified.[5]

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[4] All expenditures should be deemed equally responsible for causing the overage; without the early spending, the later spending would not cause a problem. In the general election context, where it is obvious that funding other than the full grant was used to cause excessive expenditures, it is likewise obvious that the campaign had enough funding to reach the spending limit without the full public grant. That is the rationale for recouping an amount of public funds equal to the overspending. It is as if the spending from private sources took the campaign to the limit, and the campaign then used public funds to go over the limit. Similarly, in the primary election context, it is as if purely private funding equal to the amount of the overage was used to get to the limit and the mix of private and public funding was used for the overage. Thus, the FEC recoups the public funding portion.

[5] Commissioners who relied on Kennedy for President v. FEC, 734 F.2d 1558 (D.C. Cir. 1984), for the proposition that the mixed pool theory only applies where expenditures made from committee accounts are involved are way off base. Though the case hammered home the proposition that only an amount representing public funds can be recouped for non-qualified expenses in the matching fund context, it in no way suggested in-kind contributions are not to be included in the mixed pool. Indeed, as the General Counsel noted at n. 2 of Agenda Document 98-95, the D.C. Circuit indicated clearly that such contributions are to be included. 734 F.2d at 1562 n. 5.

Nor do the FEC's regulations using the term "deposits" to explain the ratio calculation, 11 C.F.R. § 9038.2(b)(2)(iii), mandate exclusion of in-kind contributions. In kind contributions are treated as though they were standard contributions of money that were simultaneously used for an expenditure. See 11 C.F.R. § 104.13(a) Thus, where the regulations refer to "deposits to all candidate accounts" when calculating the repayment ratio, in kind contributions must be included. If there were any doubt about the Commission's intent, it is resolved by the example in the Commission-approved Financial Control and Compliance Manual (1996) at pp. 67 and 68 where in kind contributions are expressly included in total deposits when calculating the repayment ratio.

To conclude that in kind contributions should be excluded from the mixed pool theory would encourage candidates to urge potential donors to subsidize with in kind contributions non-qualified expenses of all sorts (e.g., traffic fines, cell phones that will 'disappear,' etc.). This would automatically free the campaign of any obligation to make any restitution of public funds, even though the in kind donor could just as well have been paying for the cost of any qualified campaign expense and standard contribution deposits could just as well have been paying for the non-qualified costs. To avoid such chicanery, to prevent mind-numbing calculations separating out all reportable in-kind contributions, and to reflect the fact that such contributions indeed are

Apart from undermining the public policy rationale for seeking repayment of primary matching funds constructively used for excessive spending, my three colleagues side-stepped a Commission regulation explicitly treating excessive spending as a non-qualified expense that generates repayment.[6] Commissioners cannot simply disobey a duly-promulgated regulation interpreting the statute. See 2 U.S.C. §§ 437c(b), 437d(8), 438(a)(8). Even if a commissioner believes the majority that passed the regulation misinterpreted the statute, the regulation is still the law of the land until rescinded by a majority vote.[7] Thus, in the audits at hand, my colleagues were badly in error in when arguing that the agency has no authority to order repayments from primary campaigns that exceed the spending limit.

This error was compounded by a statutory construction that is less plausible than the statutory construction reflected for years in the FEC's regulation. The mere fact that the primary-related provisions[8] do not contain a distinct repayment clause regarding excessive spending like that found in the general-related provisions[9] suggests only that in the few years after the general-related provisions were enacted the drafters realized that excessive spending was itself a non-qualified expense already covered by a separate repayment clause.[10] Moreover, one could argue the qualified campaign expense limitation

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but one component of the financial support provided, they should be included in the mixed pool theory.

[6] 11 C.F.R. § 9034.4(b) provides: "*Non qualified campaign expenses*—(1) *General.* The following are examples of disbursements that are not qualified campaign expenses. (2) *Excessive expenditures.* An expenditure which is in excess of any of the limitations under 11 CFR. Part 9035 shall not be considered a qualified campaign expense." The regulations further specify that repayment determinations for excessive spending are contemplated. 11 C.F.R. § 9038.2(b)(2)(ii)(A).

[7] Validly adopted regulations have the force and effect of law. Accardi v. Shaughnessy, 347 U.S. 260 (1954). Accord United States v. Nixon, 418 U.S. 683, 695 (1974)("So long as this regulation is extant it has the force of law."). Put another way:

> It is elementary that an agency must adhere to its own rules and regulations. Ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned, Teleprompter Cable Systems v. FCC, 543 F.2d 1379, 1387 (D.C.Cir. 1976), for therein lies [sic] the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those to whom Congress has entrusted the regulatory missions of modern life

Reuters Ltd. v. FCC, 781 F2d 946, 950-952 (D.C.Cir. 1986)(opinion of J. Starr).

[8] 26 U.S.C. § 9038(b)(2).

[9] 26 U.S.C. §9007(b)(2) and (4)

[10] By requiring repayment for non-qualified expenses, 26 U.S.C. § 9038(b)(2), by clarifying that qualified campaign expenses do not include expenses incurred or paid in violation of any federal law, 26 U.S.C. §9032(9)(B), and by specifying at 2 U.S.C. § 441a(b)(1) that "expenditures" in excess of the limit are prohibited, Congress provided explicit statutory authority for repayment stemming from excessive spending in the primary process.

at 26 U.S.C. § 9035, which says "[n]o candidate shall knowingly incur qualified campaign expenses in excess of the expenditure limitation" at 2 U.S.C. § 441a(b)(1)(A), suggests on its face that anything incurred beyond that amount would not be deemed "qualified."[11] To adopt a tortured construction that would leave the FEC with authority to seek repayments for general election overspending, but not for primary election overspending, is far less logical than these simple interpretations.

The approach adopted by my three colleagues has caused a serious breach in the public funding program. Recouping public funds that were constructively used in excessive spending is the most basic of principles. While it is true that the FEC can attempt to secure some form of relief in the compliance track, the burden of proof, standard of review, and procedural posture would be different. Moreover, there is no good reason to simply 'pass' on the excessive expenditure repayment process in the 1996 election cycle when it has been followed in previous cycles with judicial approval.[12] It makes the FEC look somewhat lawless.

12/23/98
Date

Scott E. Thomas, Vice Chairman

[11] My colleagues argue that the use of the phrase "qualified campaign expenses in excess of the expenditure limitation" in § 9035 is a sign that Congress did not contemplate treating excess spending as non-qualified. Yet, that simply writes off other parts of the law. Congress meant what it said when it excluded from the definition of "qualified campaign expense" any expenses paid in violation of federal law. Why ascribe to Congress an extremely unlikely approach: depriving the FEC of authority to recoup public dollars that were constructively misused?

The drafters needed to clarify that only those expenses related to the presidential nomination campaign would count toward the expenditure limit, yet they also needed to ensure that anything above the limit would generate a repayment. Saying a candidate shall not make "qualified campaign expenses" above the limit served the first purpose, while saying anything above the limit was not a "qualified campaign expense" served the second purpose. Hence the awkward combination of §§ 9032(9), 9035(a), and 9038(b)(2). Perhaps the drafters felt this approach was better because in the general-election provisions enacted several years earlier there was no separate provision setting a spending limit the exceeding of which would be a violation of law and hence a non-qualified expense. See Pub. L. 92-178, 85 Stat. 497, Title VIII (1971), reprinted in Legal History of the Presidential Election Campaign Fund Act (GPO 1984), Vol. II at 2596. In the 1974 Amendments which added the primary election provisions, a spending limit was included not just once, but twice, at what is now 2 U.S.C. § 441a(b) and at 26 U.S.C. § 9035(a). See Pub. L. 93-433, 885 Stat. 1263, §§ 101(a), 408(c), reprinted in Legislative History of Federal Election Campaign Act Amendments of 1974 (GPO 1977) at 1135, 1169.

[12] Kennedy for President v. FEC, 734 F.2d 1558 (D.C.Cir. 1984), approved recouping matching funds for spending in excess of the state-by-state limits for a 1980 cycle campaign. Accord, John Glenn Presidential Committee v. FEC, 822 F.2d 1097 (D.C.Cir. 1987), vis a vis a 1984 campaign; Robertson v. FEC, 45 F.3d 486 (D.C.Cir. 1995), vis a vis a 1988 campaign.

FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

Statement for the Record in Audits of 1996 Clinton/Gore and Dole/Kemp Campaigns

Chairman Scott E. Thomas
Commissioner Danny L. McDonald

Our colleagues, Commissioners Sandstrom, Wold, Elliott and Mason, recently joined in what must be seen as a very odd Statement of Reasons regarding the audits of the 1996 Clinton and Dole campaigns.[1] Little is written of the audits. Instead, the thrust of their statement is a tirade against an innocuous shorthand reference the Commission coined in Advisory Opinion 1985-14[2] to analyze whether party communications are subject to the statutory limits on support of particular candidates. The energy expended by our colleagues to savage the Commission's own advisory opinion process is surprising. The strangest aspect of the Sandstrom *et al.* Statement, though, is that it claims to abhor vagueness but, in the end, is itself very confusing.

We write this Statement to explain the state of the law in this area, and to clarify that the Sandstrom *et al.* Statement does not effect a 'sea change' when analyzing which party communications should be subjected to the statutory limits on coordinated expenditures. In particular, we wish to emphasize that 'express advocacy' is not required.

I.

The limits on coordinated expenditures by party committees on behalf of their candidates have been on the books for over 24 years. They were part of the Federal Election Campaign Act Amendments of 1974.[3] In addition to the

[1] Statement of Reasons of Vice Chairman Wold and Commissioners Elliott, Mason and Sandstrom issued June 24, 1999 (hereinafter "Sandstrom *et al.* Statement").
[2] Fed. Elec. Camp. Fin. Guide (CCH Transfer Binder), ¶ 5819.
[3] Pub. L. 93-443, 88 Stat. 1263, § 101.

$5,000 per election contribution limit available to all political committees,[4] parties have coordinated expenditure allowances permitting additional spending in *connection with the general election campaigns of their candidates.*[5]

The party coordinated expenditure limits serve an important role in preventing party donors from having an indirect way of effecting a 'quid pro quo' arrangement with candidates for federal office– the link between money and official government action the statute is designed to prevent. If a party committee is able to undertake only a limited amount of coordinated expenditure activity on behalf of a particular candidate, donors or groups of donors will not be able to expect large-scale donations to the party to result in large-scale spending by the party on behalf of such candidate. For example, ten banking industry PACs who donate $15,000 each to a party's House campaign committee and *who are close to a particular House committee chairman running for reelection* would not be able to expect $150,000 in coordinated expenditures by the party on behalf such candidate because the coordinated expenditure limit would prevent it.

The direct payment of funds to a candidate's campaign has been treated as a "contribution"[6] subject to the contribution limit. A party's coordinated payment to a third party on behalf of a candidate has been treated as either an in-kind "contribution" or a coordinated "expenditure,"[7] at the option of the expending committee.[8] If treated as a coordinated expenditure, the party has to

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[4] Currently codified at 2 U.S.C. § 441a(a)(2)(A).

[5] 11 C.F.R. § 110.7(a)(3), (b)(3). Codified at 2 U.S.C. § 441a(d), the coordinated expenditure allowance provides:

> Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

Subsections (2) and (3) set forth formulas that in the last presidential election permitted a national party committee to spend over $12 *million on behalf of its presidential candidate,* and that in the 1998 congressional elections permitted a national and state party committee **each** to spend *$32,550 for a House candidate and **each** to spend amounts ranging from* $65,100 in small states like Wyoming to over $1.5 million in California for a Senate candidate.

[6] 2 U.S.C. § 431(8).

[7] 2 U.S.C. § 431(9).

[8] FEC Campaign Guide for Party Committees (1996) at 16. The FEC for many years operated with a presumption that all party spending was coordinated with the parties' eventual nominees. 11 C.F.R. § 110.7(a)(5), (b)(4) (1996). The Supreme Court invalidated that presumption in Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996) (hereinafter "Colorado I"). As a result, only party spending that can be shown to meet the legal test of 'coordination' can be subjected to the *limits at 2 U.S.C. § 441a(a)(2)(A) and (d). The legal test for* coordination is set forth at 2 U.S.C. § § 431(17) and 441a(a)(7)(B) and at 11 C.F.R. § 109.1(b)(4) and (d)(1).

keep within the coordinated expenditure limit, but only the party need report the transaction.[9]

Because party committees are primarily in the business of electing candidates, the Commission has required virtually all party-building activity to be at least allocated so that indirect federal candidate support is not paid for with funds not permitted under federal law.[10] At the same time, recognizing party committees sometimes undertake generic party-building activities that may help their candidates only in a general way– a way that should not result in a contribution to or coordinated expenditure on behalf of a particular candidate– the Commission has tried to clarify when a party activity need not be subjected to a candidate-specific limitation. Thus, the Commission has specified at 11 C.F.R. § 106.1(c) that an expenditure for rent, personnel, overhead, general administrative costs, educational campaign seminars, training of campaign workers, or registration or get-out-the-vote drives need not be attributed to individual candidates unless the expenditure is "made on behalf of a clearly identified candidate, and the expenditure can be directly attributed to that candidate."

When identifying which party activities fall under the candidate-specific limits, though, the Commission must deal first and foremost with the underlying statutory terms. A "contribution" is a payment or gift of value made "for the purpose of influencing any election for Federal office."[11] A coordinated "expenditure" is a payment, advance or gift of anything of value made "for the purpose of influencing any election for Federal office" and "in connection with the general election campaign" of a candidate for Federal office.[12]

Over the years, the Commission has grappled with the difficult factual distinctions that make a party communication a generic party-building expenditure on the one hand, or an in-kind contribution or coordinated expenditure on the other. The best-known instances were Advisory Opinion 1984-15[13] and the aforementioned Advisory Opinion 1985-14. In each of those opinions, the Commission analyzed the facts according to the basic underlying statutory provisions cited above.

In Advisory Opinion 1985-14, the Commission developed a shorthand reference to the legal analysis to be used. Instead of repeating the statutory phrases, "for the purpose of influencing" and "in connection with," the Commission described the process as a search for whether the communication

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[9] 11 C.F.R. § 104.3(a)(3)(iii).
[10] 11 C.F.R. § 106.5.
[11] 2 U.S.C. § 431(8).
[12] 2 U.S.C. §§ 431(9) and 441a(d).
[13] Fed. Elec. Camp. Fin. Guide (CCH Transfer Binder), ¶ 5766

contained an "electioneering message."[14] The Commission then cited a Supreme Court decision for further guidance as to what was meant by "electioneering message."[15] There, the Court simply described its view of the reach of the corporate and union prohibition at 2 U.S.C. § 441b: whether a communication is "designed to urge the public to elect a certain candidate or party."[16] This phrasing, of course, is virtually indistinguishable from the "for the purpose of influencing any election for Federal office" language at the heart of any "contribution" or "expenditure" inquiry. Thus, at most, the Commission in Advisory Opinion 1985-14 was paraphrasing the statutory language underlying any coordinated party expenditure analysis.

II.

Our colleagues grossly overstate the significance of the "electioneering message" phrase and then gyrate into an inappropriate constitutional hypothesis regarding the vagueness of that phrase and other phrases used in Advisory Opinions 1984-15 and 1985-14. Along the way, they grumble about perceived improper rulemaking through the advisory opinion process.

A.

Dealing with the last 'red herring' first, to our knowledge no commissioner has been confused about the legal effect of advisory opinions. While advisory opinions clearly have binding consequences, the statute is clear that general rules of law have to emanate from the statute or from regulations of the Commission.[17] Nonetheless, our colleagues seem convinced that the Commission's use in Advisory Opinions 1984-15 and 1985-14 of paraphrases and synonyms for the statutory test was, in fact, the creation of a new substantive rule of law.[18] The reality, of course, is that there are only so many words in the English language, and after citing the underlying statutory provisions, the Commission simply attempted to explain the legal test in other helpful ways.[19]

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[14] Fed. Elec. Camp. Fin. Guide (CCH Transfer Binder), ¶5819 at 11,185.

[15] United States v. United Auto Workers, 352 U.S. 567 (1957) (hereinafter "UAW").

[16] Id. At 587.

[17] 2 U.S.C. §437f(b).

[18] At one point our colleagues call the phrases used a "test" and at other times they refer to them as an "amalgam." Sandstrom *et al.* Statement at 2 and 4.

[19] Lest our colleagues be struck down by a bolt of lightning for insinuating they would never stoop to helpful descriptions of the underlying statutory and regulatory provisions, they should concede that only recently in Advisory Opinion 1999-11, they engineered a description of the statute's reach that depended on whether there was "any campaign activity" at the event in question. See Memorandum from Commissioner Sandstrom, Agenda Doc. No. 99-61-A; Advisory Opinion 1999-11 (unpublished) at 3.

Thus, our colleagues have felled a demon they didn't need to imagine in the first place. The regulated community has had notice of the underlying statutory provisions at 2 U.S.C. §§ 431(8) and (9) and 441a(d) all along. Advisory Opinions 1984-15 and 1985-14 neither expanded nor diminished those underlying rules of law.

Interestingly, our colleagues do not purport to supersede Advisory Opinions 1985-14 and 1984-15, but rather disagree with the phrasing of the legal analysis therein. We take that to mean the Commission's conclusions regarding specific proposed ads in those opinions still serve as valid legal precedent in terms of the underlying statute. For example, a party committee that ran ads under materially indistinguishable circumstances could 'rely upon' the conclusions reached by a majority of commissioners in those opinions in determining whether the ads would be a coordinated expenditure or not.[20] This rightly diminishes the negative impact of our colleagues' statement and suggests only that the Commission cease using the pesky "electioneering message" phrase when explaining its interpretations under the statute.

We must address our colleagues' suggestion that an advisory opinion may not be used as a "sword of enforcement." Sandstrom *et al.* Statement at 3. Apparently, they disregard the statutory language quoted in the previous footnote. Someone who receives an advisory opinion that certain conduct would be illegal, as well as anyone in materially indistinguishable circumstances, surely may 'rely on' that legal conclusion to file a complaint against someone else engaging that conduct. Essentially, that is what happened when Democratic Party representatives received a response in Advisory Opinion 1985-14 that certain targeted communications attacking a likely opponent would be coordinated expenditures subject to limit. Other Democratic Party representatives then filed a complaint against the Colorado Republican Party regarding certain ads that attacked the likely Senate nominee, Tim Wirth. That enforcement case became the subject of the Supreme Court's decision in Colorado I, supra.

Our colleagues may have missed the fact that the 10th Circuit in that case upheld the FEC's use of Advisory Opinion 1985-14 (even its "electioneering message" phrase) to bolster its claim.[21] Although the Supreme Court vacated the 10th Circuit's opinion on other grounds, Colorado I, this is a strong indication advisory opinions can be used as a "sword."

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[20] The statute provides that any advisory opinion rendered by the Commission "may be relied upon" by the person to whom the opinion is issued or by "any person involved in any specific transaction or activity which is indistinguishable in all its material aspects . . . ." 2 U.S.C. § 437f(c)(1).

[21] FEC v. Colorado Republican Federal Campaign Committee, 59 F. 3d 1015 (10th Cir. 1995).

This proposition is supported by a 9th Circuit decision, a case our colleagues cite but misconstrue.[22] There, in a successful enforcement action against a committee that accepted excessive contributions, the FEC used its advisory opinion precedent as a "sword," and the court specifically sanctioned this approach.[23]

The courts have strongly indicated the Commission is bound to apply its advisory opinion precedent consistently.[24] We caution our colleagues not to get so agitated over the use of paraphrases and shorthand references in prior advisory opinions that they issue statements undermining the ability of the agency to enforce the law.

B.

Our colleagues go well beyond their role as commissioners by opining about the possible unconstitutional vagueness and overbreadth of the words "electioneering message."[25] First, as just explained, everyone should agree that "electioneering message" is not a rule of law and, hence, it is not the proper focus of any constitutional debate. Second, even if it were, Commissioners are not members of the judiciary entitled to render their own rules unconstitutional.[26] It is one thing to interpret the statute in an advisory opinion, or to interpret the

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[22] FEC v. Ted Haley Congressional Committee, 852 F.2d 1111, 1115 (9th Cir. 1988) (hereinafter "Haley") ("interpretation of FECA by the FEC through its regulation and advisory opinions is entitled to due deference and is to be accepted by the court unless demonstrably irrational or clearly contrary to the plain meaning of the statute").

[23] We cannot fathom our colleagues' attempt to distinguish Haley. They appear to argue the court's reliance on advisory opinions is insignificant because there happened to be a relevant regulation to apply as well. Sandstrom *et al.* Statement at 4, n. 9. As our colleagues well know, the existence of a regulation is not essential to the legal value of an advisory opinion. The law, 2 U.S.C. § 437f(a), specifically contemplates advisory opinions applying the **statute** as well– just as was the case in Advisory Opinions 1984-15 and 1985-14. As precedent, such opinions may be "relied upon" just as much as advisory opinions applying a regulation. 2 U.S.C. § 437f(c).

[24] See Common Cause v. FEC, 676 F. Supp. 286 (D.D.C. 1986) (certain FEC commissioners, including Commissioner Elliott, ordered to issue statement of reasons in dismissed enforcement case where advisory opinion precedent seemingly inconsistent); Common Cause v. FEC, Fed. Elec. Camp. Fin. Guide (CCH Transfer Binder), ¶ 9263 (D.D.C. 1988) (related case noting, "The importance of respect for the Rule of Law . . . requires that courts be vigilant to ensure that in the process 'prior policies and standards are being deliberately changed, not casually ignored.'").

[25] Sandstrom *et al.* Statement at 4.

[26] Commissioners have an obligation to seek compliance with the statute passed by Congress. 2 U.S.C. § 437c(b)(1). The D.C. Circuit has stated, "[A]dministrative agencies . . . cannot resolve constitutional issues." American Coalition for Competitive Trade v. Clinton, 128 F.3d 761, 766 n. 6 (D.C. Cir. 1997). See also, Gilbert v. National Transportation Safety Board, 80 F.3d 364, 366-67 (9th Cir. 1996) ("challenges to the constitutionality of a statute or a regulation promulgated by an agency are beyond the power or the jurisdiction of an agency").

statute through a clarifying regulation.[27] It is altogether different to opine that a mere shorthand reference used to paraphrase the statute is unconstitutional.[28]

That said, we believe it important to note a fundamental flaw in our colleagues' 'judicial detour.' Their reliance on Supreme Court analysis of independent spending provisions is simply inapposite. In the area of **coordinated** expenditures, there is no basis for applying the "express advocacy" standard created in Buckley[29] and FEC v. Massachusetts Citizens for Life[30] where **independent** disbursements were at issue. Indeed, Buckley could not have been clearer that its "express advocacy" test did not apply to coordinated expenditures. When analyzing former 18 U.S.C. § 608(e), the independent expenditure limit struck down by the Court, the *per curiam* opinion noted:

> The parties defending § 608(e)(1) contend that it is necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of **paying directly for media advertisements or for other portions of the candidate's campaign activities**. They argue that expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. Yet **such controlled or coordinated expenditures are treated as contributions** rather than expenditures under the Act. [footnote omitted] Section

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[27] The D.C. Circuit has noted that the advisory opinion process provides an opportunity "to reduce uncertainty or narrow the statute's reach" and that "the susceptibility of the [Federal Election Campaign Act] to challenge on the grounds of vagueness has consequently been reduced." Martin Tractor Co. v. FEC, 627 F.2d 375, 386 (D.C. Cir.), cert. denied, 449 U.S. 954 (1980).

[28] This would apply, as well, to our colleagues' constitutional analysis of other phrases used at one time or another by the Commission to explain the application of the underlying statutes, such as whether the communication would "tend to diminish support for one candidate and garner support for another candidate." Sandstrom *et al.* Statement at 4, n. 11, discussing Advisory Opinion 1984-15.

We are baffled by our colleagues' suggestion that the Supreme Court's phrase in UAW ("designed to urge the public to elect a certain candidate or party") is but "charming" and of little "practical use" because it dates back to the days of a '57 Chevy. Sandstrom *et al.* Statement at 5, n. 13. That might explain why the old case of Marbury v. Madison, 5 U.S. 137, 178 (1803) (It is for Article III judges to consider constitutional disputes and "say what the law is."), is of little value to them. More importantly, because the phrasing used in UAW is so close to the current language of the statute governing coordinated expenditures ("for the purpose of influencing any election for Federal office"), we hope our colleagues are not suggesting the latter is unconstitutionally vague. In Buckley v. Valeo, 424 U.S. 1(1976), the Court made crystal clear that it viewed the phrase "for the purpose of influencing" in the context of coordinated expenditures to be free of constitutional vagueness concerns ("We construed [the term 'contribution' which relies on a 'for the purpose of influencing' test] to include . . . expenditures placed in cooperation with or with the consent of a candidate. . . . So defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign."). 424 U.S. at 78, referring back to n. 24 at 23.

[29] 424 U.S. at 42-44, 76-82.

[30] *479 U.S. 238, 249-50 (1986) (hereinafter "MCFL").*

> 608(b)'s contribution ceilings . . . prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions. **By contrast, § 608(e)(1) limits expenditures for express advocacy of candidates made totally independently of the candidate and his campaign.**[31]

Similarly, in MCFL, the Court made clear that its "express advocacy" construction need only apply to the provision in 2 U.S.C. § 441b "that directly regulates independent spending."[32]

III.

We can only hope our colleagues' statement does not get misconstrued by the regulated community and the courts. We note with interest, for example, that one business day after our colleagues' statement was circulated at the Commission, counsel for the defendant in FEC v. Christian Coalition[33] filed a pleading suggesting its relevance to the issue in that case: whether a corporation made in-kind contributions or independent expenditures prohibited under 2 U.S.C. § 441b. In fact, no allegation in that case involves a claim that depends on the phrase "electioneering message."[34]

[31] 424 U.S. at 46,47. See also Buckley at 78-80 (defining coordinated expenditures as "contributions" and defining non-coordinated "expenditures" covered by former 2 U.S.C. § 434(e) to reach only communications containing 'express advocacy').

[32] 479 U.S. at 249.

[33] No. 96-1781 (D.D.C., filed 1996).

[34] Interestingly, the Commission passed a regulation in 1995 that implements 2 U.S.C. § 441b as it relates to certain voter guides. It uses the phrase "electioneering message." Specifically, for voter guides prepared with the candidates' cooperation and participation, the regulation specifies that such guides "shall not score or rate the candidates' responses in such way as to convey an electioneering message." 11 C.F.R. § 114.4(c)(5)(ii)(E). As it post-dates the activities at issue in FEC v. Christian Coalition, supra, it should not enter the debate there, but that has not stopped the defendant's counsel. For activities properly subject to this regulation, we can only ponder what our colleagues will say.

The confusion generated by our colleagues is regrettable. While the Commission's efforts to apply the in-kind contribution and coordinated expenditure provisions in the statute must focus, as always, on the words of the statute, surely a great deal of energy now will be expended on what to make of the banning of the innocuous "electioneering message" phrase. The answer is, "not much." Sadly, a lot of explaining will be required to get there.

7/2/99
Date

Scott E. Thomas, Chairman

7/6/99
Date

Danny L. McDonald, Commissioner