BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Missouri Democratic State Committee and 
Michael Kelley, as Treasurer

Nixon Campaign Fund and
John C. Lanham, as Treasurer

MUR 4831
MUR 5274

STATEMENT OF REASONS

VICE CHAIRMAN BRADLEY A. SMITH AND
COMMISSIONER MICHAEL E. TONER

We supported finding probable cause to believe that the Nixon Campaign Fund
violated 2 U.S.C. 441a(f) by accepting excessive contributions and 11 C.F.R. 110.6(c)(2)
by failing to report receipt of earmarked contributions, and finding probable cause to
believe that the Missouri Democratic State Committee (“MDSC”) violated 2 U.S.C.
441a(a)(8) and 11 C.F.R. 102.8(a), 110.6(b)(2)(iii) and 110.6(c)(1) by receiving
contributions earmarked for the Nixon campaign, failing to report those contributions as
earmarked for that campaign, and failing to forward them to the campaign.1 However,
we could not agree with the General Counsel’s recommendation that we apply our
earmarking rules to most of the contributions identified by the Counsel.2 We write
separately to explain our reasons for rejecting the General Counsel’s broad earmarking
analysis.

The Act addresses earmarking in the section of the law containing contribution
limits. Section 441a(a)(8) states that for the purposes of these limits:

all contributions made by a person, either directly or indirectly, on behalf of a
particular candidate, including contributions which are in any way earmarked or
otherwise directed through an intermediary or conduit to such candidate, shall be
treated as contributions from such person to such candidate. The intermediary or

1 Federal Election Commission, Minutes of an Executive Session, Sept. 8, 2003, at 6,7 (5-0)
(Commissioners Mason, McDonald, Smith, Thomas, and Toner voted affirmatively, Commissioner
Weintraub recused).
2 Id. at 7,8 (5-0) (Commissioners Mason, McDonald, Smith, Thomas, and Toner voted affirmatively,
Commissioner Weintraub recused) (approving conciliation agreements, but requiring that only “express
earmarking” be found in violation).
conduit shall report the original source and the intended recipient of such
contribution to the Commission and to the intended recipient.

Our regulations define “earmarked” as “a designation, instruction, or encumbrance,
whether direct or indirect, express or implied, oral or written, which results in all or any
part of a contribution or expenditure being made to, or expended on behalf of, a clearly
identified candidate or a candidate’s authorized committee.” 11 C.F.R. 110.6(b)(1).
Accordingly, for a contribution to be “earmarked” there must be a designation,
instruction or encumbrance by the donor (the “person” mentioned in 441a(a)(8)), that
results in a contribution being made to the designee.

The General Counsel’s earmarking analysis in MURs 4831 and 5274 is broader
than the statute or our regulations allow. To be sure, several of the contributions at issue
bore explicit indicia of earmarking by contributors, in the form of memo line annotations,
letters accompanying the contributions, and checks for the Nixon Campaign Fund (but
deposited by the MDSC). We concur that these contributions should be treated as
earmarked by the donor.

Yet the General Counsel’s Brief included as “earmarked contributions” receipts
solicited by the Missouri Democratic State Committee, made payable to the party, to
assist the party in its efforts on Nixon’s behalf. The Brief argued that the absence of a
disclaimer to cast the solicitation as anything other than a request for earmarked funds
indicated that the funds raised by the solicitation were earmarked.3 MDSC deposits with
notations from party staff referring to “Nixon” were also part of the earmarked total.4
The General Counsel presents as additional evidence of “indirect” earmarking the fact
that MDSC used funds in coordinated expenditures on behalf of Nixon in amounts
“corresponding” to the totals raised by Nixon.5

This approach would appear to sweep within the classification of “earmarked”
contribution party fundraising that invokes candidates or urges support for their
campaigns, when instead that activity should be (and is) regulated and disclosed as
ordinary political party activity. The Supreme Court has observed:

Donations are made to a party by contributors who favor a party’s
candidates in races that affect them; donors are (of course) permitted to
express their views and preferences to party officials; and the party is
permitted (as we have held it must be) to spend money in its own right.

unless the donor specifically earmarks his gift, we do not impose the original donor’s
limit on party spending, even thought the donor believed that by giving to the party he
could assist the party’s nominees.

3 General Counsel’s Brief, MURs 4851 & 5274 (Aug. 1, 2003) at 8.
4 Brief at 10.
5 Brief at 12.
The General Counsel’s argument imputes a “designation, instruction or encumbrance” in cases where there was no evidence that any such designation, instruction or encumbrance was made by the donor. We believe this is an improper extension of our regulation, and of the Act. We agree that some contributions such as those accompanied by letters stating the funds were “to aid in [Nixon’s] campaign” were earmarked. However, post hoc notations on deposit slips by party staff are not earmarking, nor is the mere fact that party funds were solicited to assist Nixon. Under the Act, a contribution subject to our earmarking rules must in fact be earmarked by the person making the contribution. The General Counsel’s analysis includes contributions bearing no donor designations into the earmarking analysis, and for that reason we supported a conciliation agreement that addressed only those contributions that showed the donor intended to contribute the funds for the Nixon campaign.

December 1, 2003

_____________________
Bradley A. Smith
Vice Chairman

_____________________
Michael E. Toner
Commissioner