

STATEMENT OF COMMISSIONER ELLEN L. WEINTRAUB
ON THE REPORT OF THE AUDIT DIVISION ON BUSH-CHENEY '04, INC.

March 22, 2007

Today, the Federal Election Commission (the "FEC" or the "Commission") has before it the audit of Bush-Cheney '04, Inc., the 2004 general election committee of President George Bush and Vice President Dick Cheney ("Bush-Cheney '04" or the "General Committee"). I cannot vote to approve this audit report because I disagree with its most important finding, that Bush-Cheney '04 complied with the expenditure limit for publicly funded presidential campaigns. To the contrary, I believe that Bush-Cheney '04 exceeded the expenditure limit by over \$42 million, and that the Commission should order the General Committee to repay that amount to the U.S. Treasury.

Bush-Cheney '04 sought and accepted almost \$75 million in taxpayer funds to run its general election campaign. But the Government does not hand out such a large public grant without strings attached. In return for the Government's largesse, the candidate must agree not to use additional funds (26 U.S.C. § 9003(b)(2)), beyond the roughly \$16 million in coordinated expenditures that the candidate's national party committee was permitted to make (2 U.S.C. § 441a(d)). The Republican National Committee ("RNC") made those coordinated expenditures, but also split with Bush-Cheney '04 the cost of a series of ads, totaling over \$81 million (and paid another \$1.7 million in commissions). This enabled Bush-Cheney '04 to supplement the \$75 million in public funds with an additional \$42 million in private funds, in a way surely not contemplated by the architects of the public funding system. The result of this strategy was to increase by more than 55% the funds subject to the General Committee's direction and control.

Pursuant to its authority under 26 U.S.C. § 9007(a), the Commission conducted an audit of the General Committee. Finding 2 (summarized in Part III of the audit, at page 3), that Bush-Cheney '04 did not exceed the expenditure limit, is "[b]ased on the Commission's actions regarding the Findings and issues contained in this Report." Those mild words mask a fervent and unresolved dispute over the legal status of half of \$81 million in advertising run by and for the President in the final two months before the hotly contested 2004 Presidential election.

Along with two of my colleagues, I voted that the 50-50 split between Bush-Cheney '04 and the RNC for the cost of these "hybrid ads" was impermissible. As a result, I believe Bush-Cheney '04 failed to honor its commitment to abide by the expenditure limit. Moreover, both Bush-Cheney '04 and the RNC violated the coordinated contributions limit. Thus, I dissented from an earlier Commission vote approving the finding that the General Committee complied with the expenditure limit. And I will not approve a Final Audit Report that contains that finding.

The Hybrid Ads

President Bush accepted the Presidential Matching Grant of \$74,620,000 on August 30, 2004. From that date forward, his campaign could not collect additional private contributions and could not make expenditures with funds from any source other than the grant. In the fall of 2004, the RNC and the Bush Committee created a series of campaign ads (described in the audit as "hybrid ads") that referenced either President Bush or his opponent, Senator John Kerry. These ads also included vague

references to unnamed “liberals in Congress,” “leaders in Congress,” and “allies” of one candidate or the other. Only one of these ads contained a reference to the Democratic or Republican parties, and that ad ran only in Spanish. Transcripts of the English-language ads are attached. The RNC paid 50% of the costs associated with these ads, whose overall costs totaled \$81,418,812 (and the RNC paid an additional \$1.7 million in commissions).

As a general matter, these communications are governed under 11 CFR §§ 109.30 – 109.37, the Commission’s regulations on party coordinated communications. Under these regulations, ads that feature a clearly identified candidate, and are created following certain specific discussions between the campaign of the candidate and the organization that is paying for the communication, are treated as in-kind contributions to that campaign.

While the RNC did have a statutory right to make \$16,249,699 in coordinated communications on behalf of President Bush (2 U.S.C. § 441a(d)), the RNC reported using almost the entirety of those funds for a different series of advertisements and activities. Therefore, any funds that were spent by the RNC on these hybrid ads were excessive in-kind contributions made on behalf of the Bush campaign. Now, some have argued that the limit on party coordinated expenditures should be lifted, but in the absence of Congressional action, no party may opt for do-it-yourself statutory change. The FECA and Commission regulations require that a publicly funded campaign repay to the Treasury any private contributions received in excess of the party coordinated expenditure limits. 26 U.S.C. § 9007(b)(3). The Bush campaign owes the taxpayers \$42 million.

Commission Guidance

I will not repeat here the legal analysis set forth in the joint statement of Chairman Lenhard, Commissioner Walther, and me, but I do wish to emphasize a few points. It is ironic that Bush-Cheney ’04 relies on the party committee telephone bank regulation at 11 C.F.R. § 106.8 because that regulation was promulgated in response to overreaching by the Bush-Cheney 2000 Committee. That committee participated in phone banks that encouraged individuals to get out to vote to support George Bush “and the great Republican team.” The cost of the phone banks was split between the Bush Committee (who paid 25% of the costs) and various state parties (who covered 75% of the costs). When the Commission audited Bush-Cheney 2000, I found this allocation unsupportable, but, in a foreshadowing of audits to come, there were not four votes then to reject this allocation so no repayment was demanded. The Commission did subsequently amend its regulations to require that when a phone bank references a clearly identified candidate and makes a generic reference to other candidates *of the same party*, 50% of the costs are attributed to the named candidate (and therefore must either be paid for by the candidate or reported as coordinated or independent expenditures on behalf of the candidate). 11 C.F.R. § 106.8(b).

However, this regulation explicitly applied only to phone banks, and the Explanation and Justification for the rule clearly states that it was not intended to be applied to other forms of public communications: “The Commission has decided to limit the scope of new section 106.8 to phone banks at this time because each type of communication presents different issues that need to be considered in further detail before establishing new rules.” (Explanation and Justification, Party Committee Telephone Banks, 68 FR 64517.) Given that the Commission had explicitly stated that this was not a rule of general applicability but, rather, was a rule narrowly tailored to phone banks, Bush Cheney ’04 had no reason to be confident that this allocation ratio could be transplanted to an

entirely different context. And \$42 million is an awful lot of money to spend when your strongest authority is an analogy.¹

Similarly, Bush-Cheney '04 could not have relied on Advisory Opinion 2006-11, an opinion that the Commission did not issue until a year and a half after the 2004 election. In 2006, the Washington State Democratic Party asked the Commission how to allocate the cost of a mass mailing that identified a Federal candidate and urged generic support for other party candidates. The Commission determined the Federal candidate must pay *at least* 50% of the costs of the mailing, noting: “A mass mailing that expressly advocates the election of only one clearly identified Federal candidate, as well as the election of generically referenced, but not clearly identified, candidates, serves in large measure the purpose of influencing the election of the clearly identified Federal candidate, no matter how much of the space in the mailing is devoted to that candidate.” (AO 2006-11, page 4). That 50% is a floor, not a ceiling. If the named Federal candidate derives more than 50% of the benefit of the mailing (based on the proportion of the space in the mailing devoted to the candidate), the campaign is required to pay a proportionately higher percentage of the cost of the mailing.

Thus, both the phone bank regulation and the Advisory Opinion demonstrate that the Commission has considered that different forms of communication may require different allocation methods, and a committee may not simply borrow from one part of the Code of Federal Regulations to address a question about a different type of expenditure. Although I believe that applying the later-announced standards of Advisory Opinion 2006-11 would have been a generous approach to Bush-Cheney '04, when it was suggested that we ask our auditors to analyze the General Committee's spending under those standards, that motion, too, failed to garner the required four votes.

The text of the ads does not support allocation

I have attached to this statement transcripts of the audio portions of the English-language ads at issue because I believe the ads speak for themselves. Read the transcripts. I do not believe that any unbiased reviewer of those transcripts will determine that there was a group of unidentified candidates who derived just as much benefit from those ads as George Bush did.

The only justification for permitting cost-splitting between the Federal candidate and the party is that other candidates in the party are going to benefit from the generic reference to the party. The state party or national party is permitted to pay for some of the costs in the phone bank regulation and the Advisory Opinion because it is presumed that, when there is a reference to “the great Republican (or Democratic) team,” that party's slate of candidates is getting some benefit. In the Explanation and Justification for the phone bank regulation (11 C.F.R. § 106.8), the Commission made clear that “the communication must include another reference that generically refers to other *candidates*.” 68 FR 64517 at 64518 (emphasis added). This Explanation and Justification gives examples of what would satisfy the generic reference requirement to permit allocation: “Generic references to ‘our great Republican team’ or ‘our great Democratic ticket’ would satisfy the latter

1. Advisory Opinion 2004-1, issued to Bush-Cheney '04 and Alice Forgy-Kerr for Congress, is even less apt as it involved the attribution of coordinated communications between the authorized committees of *two clearly identified candidates*, not one clearly identified candidate and a vague reference to other persons. AO 2004-1 is perhaps most notable in that it shows that Bush-Cheney '04 was fully aware it could seek guidance from the Commission about ambiguities in the law.

requirement.” AO 2006-11 is applicable to similar generic messages: “One example of such a message would be: “Vote for John Doe and our great Democratic team.” AO 2006-11, at n.1.

The Commission has never allowed a candidate to allocate part of the cost of an ad to a party committee without at least a mention of the name of the party. Here, the party reference was almost entirely lacking. Looking at the text of the ads, it does not appear credible that any candidate other than George Bush is getting half the value (or indeed any value) from these ads. Voters know where to find Democrats and Republicans on a ballot, but where does one look on a ballot to find “leaders in Congress?” If no other candidates receive a benefit, then the entirety of the communication has served to benefit the named candidate, and that candidate should be required to pay for the advertisement.

A review of the actual ads run by the Bush campaign reveals that there was rarely, if ever, a reference to any unnamed groups of candidates who could receive a benefit from the generic message. At issue are 19 English-language ads and 8 Spanish-language ads that were created to run in 18 states. The two most common group references are to “leaders in Congress” and “liberals in Congress.” However, a reference to Congressional leaders does not convey a benefit to any candidate, except in the rare circumstance where the advertisement runs in a jurisdiction where the candidate for Senator or Representative happens to be a member of the Congressional leadership.

In ads run in Charleston, West Virginia, for example, where there was no Senate race and a House race for a third term Republican Congresswoman who was not part of the leadership, it is impossible to find a “leader in Congress” that is benefiting from the generic message or a “liberal in Congress” who is being attacked. In Nevada (one of the battleground states where the ads were concentrated), the only “leader in Congress” is Senate Democratic Leader Harry Reid – presumably not a candidate President Bush sought to promote.

Conclusion

As noted in the audit report (at page 11): “There were not the minimum four affirmative votes among the Commissioners required to make a finding as to whether or not the 50% allocation complied with the Act and Commission regulations.” In other words, we could not muster four votes to find a violation, but neither were there four votes to affirm that the General Committee complied with the law. We simply deadlocked.

The Commission works very hard to find consensus and avoid such deadlocks and recently has made numerous difficult decisions on unanimous votes. Here, however, there was no room for compromise. Either the allocation was permissible or it was not. Either Bush-Cheney ’04 complied with the expenditure limit, or it spent \$42 million in excessive funds and the same amount was owed back to the Treasury. There is no middle ground.

Bush-Cheney ’04 was not required to take public financing. However, once they chose to accept the funds, they agreed to abide by limitations that are integral to the public funding program. I believe the record supports the firm conclusion that Bush-Cheney ’04, Inc. accepted excessive in-kind contributions from the RNC of \$42,409,406 and should be required to repay that sum to the United States Treasury.

Bush-Cheney '04 Audit Text of English-language "Hybrid Ads"

Economic Agenda:

President Bush and our leaders in Congress have a plan. Strengthen our economy, lifelong learning, invest in education, new skills for better jobs, a fairer, simpler tax code, reduce dependence on foreign energy, freer, fairer trade, incentives to create jobs, comp and flex time for working families, strengthen social security, legal reform, permanent tax relief, an agenda for America.

Healthcare – Practical vs. Big Government:

On health care, President Bush and our leaders in Congress have a practical plan. Allow small businesses to join together to get low insurance rates big companies get. Stop frivolous lawsuits against doctors, health coverage you can take with you. Liberals in Congress and Kerry's plan, Washington bureaucrats in control, a government run health care plan, \$1.5 trillion price tag, big government in charge, not you, not your doctor.

Healthcare agenda:

President Bush and our leaders in Congress have a plan. Lower health care costs, allow small businesses to ban together to get insurance rates big companies can, tax free health savings accounts families own, stop junk lawsuits against doctors and hospitals, keep doctors in their communities, health centers in every poor county, every eligible child with health coverage. Learn more at agendaforamerica.com.

War on Terror Agenda:

President Bush and our leaders in Congress have a plan. Enhance border and port security, increase homeland security measures, reform and strengthen intelligence services, renew the Patriot Act giving law enforcement tools against terrorists, create a national counter-terrorism center, transform our military, give the military all its need, find terrorists where they train and hide. Learn more at agendaforamerica.com.

Economy – Common Sense vs. Higher Taxes:

President Bush and our leaders in Congress have a common sense plan to grow our economy and create jobs so small businesses can expand and hire more workers. Liberals in Congress and Kerry's plan raises taxes on small business. 900,000 small business owners would pay higher tax rates than most multi-national corporations. Tax increases would hurt jobs, hurt small businesses and hurt our economy.

Note: This ad ran with state-specific text in Michigan, Ohio, and West Virginia. In first line, replace "grow our economy" with "help [state X]'s economic recovery."

Peace and Security:

Historical lesson: strength builds peace, weakness invites those who would do us harm. Unfortunately, after the first World Trade Center attack, John Kerry and Congressional liberals tried to slash \$6 billion from intelligence budgets and tried to cut or eliminate over 40 weapons now fighting the war on terror, refused to support our troops in combat with the latest weapons and body armor.

Thinking Mom:

(Lady driving in minivan, thinking to herself as she listens to the radio)

Woman: 5:30. Have to get groceries. I'm going to be late.

Radio: John Kerry and the liberals in Congress have voted to raise gas taxes ten times.

Woman: Ten times! Gas prices are high enough already!

Radio: He wants to raise taxes on senior social security benefits and raised taxes on middle class parents eighteen times. No relief there from the marriage penalty.

Woman: More taxes because I'm married? What were they thinking!

Radio: Higher taxes from the liberals in Congress and John Kerry.

Med Mal:

For women's health, it's now an emergency. Our hospitals are closing, maternity wards, OB-GYNs forced out, three month waits for mammograms. The reason: frivolous lawsuits from out of control personal injury trial lawyers. And, John Kerry and liberals in Congress stand with those trial lawyers. They have voted to block medical lawsuit reform ten times. And, that's why our good doctors are leaving.

Note: This ad ran in Pennsylvania with state-specific text. The first line began: "For Pennsylvania women's health..."

Complicated Plan:

John Kerry and Liberals in Congress have a health care plan for you, a big government takeover. \$1.5 trillion, rationing, less access, fewer choices, longer waits, and Washington bureaucrats, not your doctors, making final decisions on your health. So, if you need treatment, all you have to do is... you get the picture. John Kerry and liberals in Congress. Big government run health care.

Risk:

After September 11, our world changed. Either we fight terrorists abroad, or face them here. John Kerry and liberals in Congress have a different view. They opposed Reagan as he won the cold war. Voted against the first Gulf War, voted to slash intelligence after the first Trade Center attack, repeatedly opposed weapons vital to winning the war on terror. John Kerry and his liberal allies. Are they a risk we can afford to take today?

The Choice:

When it's finally quiet, here's the choice. President Bush and his Congressional allies. Strong leadership to protect America, tax relief, common sense healthcare, strengthen and protect social security. John Kerry and his liberal allies. Higher taxes, voting to tax social security benefits, government run health care, a record of slashing intelligence, and reckless defense cuts. Alone in the booth, why take the risk?

Clockwork:

They voted to raise our gas taxes ten times and raise taxes on social security benefits, higher taxes on middle class parents eighteen times. John Kerry and the liberals in Congress, record on the economy: higher taxes, 350x, an average of once every three weeks for 20 years. Like clockwork. Kerry and the liberals in Congress on the economy – troubling.

Tort Reform:

There is a crisis in health care. There is a crisis in women's access to health care in this country. Maternity wards closing, OB-GYNs being forced out. The reason: frivolous lawsuits. John Kerry and the liberals in Congress side with the trial lawyers. They opposed legal reform ten times. If Mr. Kerry and his allies were elected, I don't think there would be any hope for tort reform in this country.

Wolves:

In an increasingly dangerous world, even after the first terrorist attack on America, John Kerry and the liberals in Congress voted to slash America's intelligence operations by \$6 billion. Cuts so deep they would have weakened American defenses and weakness attracts those who are waiting to do America harm.

Don't Take Chances:

You don't want to take chances with your health or your health care. But, John Kerry and liberals in Congress would. Their big government run health care plan. \$1.5 trillion. Washington bureaucrats, not doctors, in charge and the federal government, not your doctor, makes the final decisions on your health. Rationing, less access, fewer choices, long waits, more reasons we can't risk the liberals in Congress and John Kerry.