



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Michigan Republican State Central Committee, and)
Richard M. Gabrys, in his official capacity as treasurer,)
Nader for President 2004, and)
Carl M. Mayer, in his official capacity as treasurer,)
and Greg McNeilly)

MUR 5533

**STATEMENT OF REASONS OF VICE CHAIRMAN MICHAEL E. TONER
AND COMMISSIONERS DAVID M. MASON, BRADLEY A. SMITH AND
ELLEN L. WEINTRAUB**

This matter involves allegations that the Michigan Republican State Central Committee, and Richard M. Gabrys, in his official capacity as treasurer ("MRSCC"), made an unreported and excessive contribution to Nader for President 2004 (the "Nader Committee") when it collected and submitted signatures on ballot access petitions as well as allegedly paid legal expenses in connection with the suit it filed in the Michigan state courts to require the state to accept the MRSCC ballot access petitions.

The Office of General Counsel originally recommended that the Commission find reason to believe that the MRSCC made an excessive contribution to the Nader Committee, initiate an investigation and take no action against the Nader Committee pending the results of the investigation.¹ Because the MRSCC reported \$4,717 in petition signature collection expenses as independent expenditures for Ralph Nader, which it paid out of its federal account, and given the apparent independence of the MRSCC's activity, the Commission, as a matter of prosecutorial discretion, in the proper ordering of its priorities and resources, voted 6-0 to dismiss the matter as to the MRSCC and the Nader Committee, and close the file. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

The First General Counsel's report recommended that the Commission characterize the petition gathering expenses as Contributions to the Nader Committee rather than as independent expenditures based partially on an argument that the definition of independent expenditure covers communications

¹ The Office of General Counsel also recommended that the Commission find no reason to believe that Greg McNeilly violated the Act in connection with this matter and the Commission approved that recommendation. First Gen. Counsel's Report at 40 (June 2, 2005)

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only, and that the petition efforts were not communications.² However, the critical distinction between independent efforts and contributions is the independence rather than the nature of the activity. For instance, it clearly is permissible for political committees to conduct partisan voter drives and get out the vote (GOTV) efforts on behalf of federal candidates, activities which could constitute expenditures. So long as such efforts, which would not normally be classified as communications (at least in their entirety),³ are independent of any federal campaign or political party they would constitute expenditures of the political committee conducting the drive rather than as contributions to the intended beneficiaries. The MRSCC's reporting of the efforts as independent expenditures arose in part from a desire to make clear that the efforts were to promote ballot access for Ralph Nader. Had the MRSCC simply reported federal petition expenditures, disclosure would have been more opaque.

There is no evidence (and indeed there are express disavowals) of any coordination between MRSCC and the Nader Committee in the collection and delivery of the signatures and petitions. No petitions or other goods or services were delivered or provided to the Nader Campaign. Instead, the petitions were delivered to a government official, evidently without any notice to or communication with the Nader campaign.⁴

Even if we were to characterize the MRSCC petition efforts as contributions, the amount at issue (\$4,717) would have been a permissible contribution, leaving only a minor reporting issue, on which the MRSCC sought guidance (without success) at the time it made and reported the expenditures.⁵

The complaint and the FGCR also argue that the MRSCC's legal expenses in defending the petitions against a challenge from the Michigan Democratic Party (also the complainant in the MUR) may have constituted contributions to the Nader campaign. As a simple matter of form, however, the MRSCC's legal efforts defending a candidate's ballot position are most appropriately classified as "defensive litigation," which, as the counsel properly points out, the Commission has consistently held not to constitute an expenditure. Under a long line of Commission precedents⁶ a payment by MRSCC (or any other person) to a legal defense fund of the Nader Committee for legal defense of the validity of the petitions would not constitute a contribution or an expenditure. It would be incoherent to treat the identical legal expense by MRSCC itself defending its own efforts as a contribution to the Nader campaign when a direct payment to a Nader-controlled fund for the same purpose would not constitute a contribution. Put slightly differently, since paying the legal bills of a candidate-controlled entity defending that candidate's ballot position is not a contribution, why would providing legal services (assuming we so characterize it) rather than money convert the expenses into a contribution?

Even if we were to look behind the form of MRSCC's legal expenses, however, we could not interpret the Commission's regulations in a manner which would convert a legally permissible activity

² *Id* at 36.

³ See 11 C.F.R. § 100.26 (2002) (defining "public communication"); *id* § 100.24(a)(2) (2002) (defining "voter registration activity"); *id*. § (a)(3) (defining "get-out-the-vote activity"), *id*. § (a)(4) (defining "voter identification"); *id*. § 100.111 (2002) (defining "expenditure"); *id*. § 100.113 (2002) (defining "independent expenditure").

⁴ See *id* at 34.

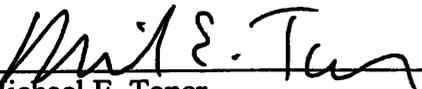
⁵ First Gen. Counsel's Report at 36-37 (citing 2 U.S.C. § 441a(a)(2)(A) (2002)).

⁶ See Advisory Op. 1996-39 (Fed. Election Comm'n Oct. 4, 1996), and opinions cited therein.

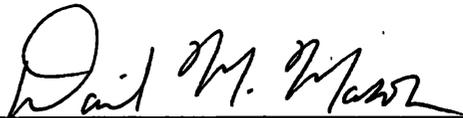
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(whether an independent petition effort or a contribution of less than \$5,000) into an impermissible one solely by virtue of a subsequent legal defense of that effort. Doing so effectively would make it illegal for a committee to spend funds (in excess of the applicable contribution limit) to respond to a legal challenge to an otherwise permissible activity. This would not be an appropriate interpretation of our own regulations, nor a tenable position for an agency charged with encouraging compliance with campaign finance laws.

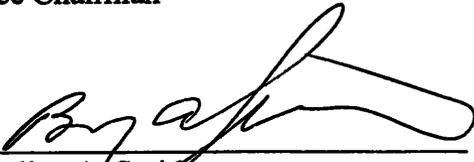
August 18, 2005



Michael E. Toner,
Vice Chairman



David M. Mason,
Commissioner



Bradley A. Smith,
Commissioner



Ellen L. Weintraub,
Commissioner

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