FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

February 11, 1988

TO: Fred Eiland
Chief, Press Office

FROM: Kim L. Bright-Coleman KBC
Special Assistant General Counsel

SUBJECT: Public Issuance of the Statement of Reasons for the Final Repayment Determination for Reagan-Bush '84 (Primary Committee)

Attached please find a copy of the above mentioned Statement of Reasons which the Commission approved on February 9, 1988. The attachments to this document are the same as those in Agenda Document #87-118 with the exception of Attachment 15 which is attached.

Informational copies of the Statement of Reasons have been received by all parties involved and the document may be released to the public.

Attachment as stated

cc: Audit Division
FEC Library
Public Disclosure ✓
Reports Analysis Division

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

February 10, 1988

John J. Duffy, Esquire
Pierson, Ball & Dowd
1200 18th Street, N.W.
Washington, D.C. 20036

Dear Mr. Duffy:

The Commission has considered the responses filed on behalf of the Reagan-Bush '84 Primary Committee to the Commission's initial repayment determination contained within the Report of the Audit Division on Reagan-Bush '84 issued on July 6, 1986. On February 9, 1988, the Commission made a final determination that President Ronald Reagan and Reagan-Bush '84 must repay an additional $58,193.25 to the United States Treasury.

Enclosed is a Statement of Reasons in support of the Commission's final determination as required by 11 C.F.R. § 9038.2(c)(4). Judical review of the Commission's determination is available pursuant to 26 U.S.C. § 9041.

Please note that, under 11 C.F.R. § 9038.2(d)(2), repayment must be made within thirty (30) days from the date of receipt of this notice. The payment should be sent to the Commission, but made payable to the United States Treasury.

Sincerely,

Thomas J. Josefiak
Chairman

Enclosure
Statement of Reasons

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)
	)
President Ronald Reagan and	)
Reagan-Bush '84	)
Final Repayment Determination	)

STATEMENT OF REASONS

On February 9, 1988, the Commission made a final determination that President Ronald Reagan and Reagan-Bush '84 ("Primary Committee") repay an additional $58,193.25 to the U.S. Treasury pursuant to 26 U.S.C. § 9038(b)(3), representing the pro-rata portion of the Committee's surplus of funds attributable to the public funds received. Therefore, the Committee is ordered to repay this amount within 30 days of receipt of this determination pursuant to 11 C.F.R. § 9038.2(d)(2). This Statement sets forth the legal and factual basis for the Commission's determination in accordance with 11 C.F.R. § 9038.2(c)(4).

I. **BACKGROUND**

Reagan-Bush '84 ("Primary Committee") is the principal campaign committee of President Ronald Reagan and Vice President George Bush, candidates for the Republican nomination for president and vice president in 1984. The Treasurer of the Committee is Angela M. Buchanan Jackson and the Deputy Treasurer is Scott B. Mackenzie. Reagan-Bush '84 General Election Committee ("GEC") is the principal campaign committee of President Reagan and Vice President Bush as candidates in the 1984 presidential general election. Mrs. Buchanan Jackson and Mr. Mackenzie also served as Treasurer and Deputy Treasurer of the GEC.

The Primary Committee received $10.1 million in public funds pursuant to the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042, ("Matching Payment Act") to defray President Reagan's "qualified campaign expenses," i.e., payments made "in connection with his campaign for nomination." 26 U.S.C. §9032(9). The Matching Payment Act directs that a candidate who ends the nomination campaign with a surplus of funds must repay to the Treasury the portion of the surplus attributable to the public funds received. 26 U.S.C. § 9038(b)(3).

The GEC received $40.4 million in public funds under the Presidential Election Campaign Fund Act, 26 U.S.C §§ 9001-9013, ("Fund Act") to defray expenses "incurred by the candidate of a political party for the office of President to further his election to such office." 26 U.S.C. §§ 9002(11)(A)(i); 9004(c)(1). In order to establish their eligibility for funds under the Fund Act, President Reagan and Vice President Bush both certified that their campaign for election would abide by a spending limit equal to the amount of the public funds grant. See 26 U.S.C. § 9003(b)(1).

The Matching Payment Act and the Fund Act require the Commission to "conduct a thorough examination and audit of the qualified campaign expenses" of publicly funded campaigns. 26 U.S.C. §§ 9038(a) and 9007(a). The Commission issued an Audit Report on the Primary Committee, Attachment 1, finding first that the Primary Committee had a surplus of funds, and second that

certain payments by the Primary Committee necessitated reallocation between the Primary Committee and the GEC with a corresponding payment by the GEC to the Primary Committee. The effect of this finding was to increase the amount of the Primary Committee's surplus, thus increasing the amount of the Committee's surplus repayment under 26 U.S.C. § 9038(b)(3).[1/] Pursuant to 11 C.F.R. § 9038.2(c)(1), the report contained an initial determination that the Primary Committee must repay $244,242.16, the unpaid pro-rata portion of the Committee's increased surplus of $1,569,320.32 representing the public funds received.[2/]

Under 11 C.F.R. § 9038.2(c)(2), the Committee submitted a response disputing this determination. Attachment 2. Further, on June 2, 1987, the Commission granted the Committee's request to make an oral presentation pursuant to 11 C.F.R. §9038.2(c)(3) as part of its response to the initial repayment determination. Prior to the presentation, the General Counsel's Office circulated to the Commission and to counsel for the Primary Committee a memorandum summarizing the issues presented.

1/ Corresponding findings were included in the Commission's Audit Report on the GEC issued on May 7, 1987. Attachment 3.

2/ The formula for calculation of the repayment ratio is set out at section 9038(b)(3) of the statute and at 11 C.F.R. § 9038.3(c). The Committee does not dispute the Audit Report's calculation that the ratio of matching funds received to the Committee's total deposits is .375408. See Attachment 1, at pp. 3, 9.

Attachment 4. Attached was the FEC Audit Division's analysis of the Primary Committee's response. Attachment 5.

On July 29, 1987, John J. Duffy, counsel to the Committee, appeared before the Commission urging reversal of the Commission's initial determination. The Commission prepared a transcript of this presentation and provided counsel with a copy. Attachment 6. At the conclusion of the meeting, counsel was advised that the Commission would consider any additional factual and legal materials he wished to submit. Counsel submitted additional information for Commission consideration in letters dated August 5, 1987, and August 12, 1987. Attachments 7 and 8. Counsel also responded to the related findings in the Audit Report on the GEC on August 7, 1987. Attachment 9. After consideration of counsel's various arguments, the Commission modifies its initial determination in three respects, and makes a final determination that the Primary Committee is required to make an additional surplus repayment in the amount of $58,193.25.

II. THE INITIAL DETERMINATION

The Commission's audit of the Primary Committee revealed that the Primary Committee and the GEC shared the services of a media consultant firm, Tuesday Team, Inc. ("TTI" or "Tuesday Team"), for commercials which aired during both the primary and general election campaigns. Specifically, the audit revealed that TTI had no existence prior to the 1984 election campaign and was not an ongoing business firm, but rather was formed for the purpose of providing services to the two Reagan-Bush '84

committees, 3/ TTI terminated its operations upon the conclusion of the general election campaign. As part of its services for the Primary Committee and the GEC, TTI developed the advertising campaign for President Reagan's reelection, produced the commercial advertisements, and arranged for their placement in the various television and radio markets.

The committees made separate payments to Tuesday Team for direct production costs, purchases of advertising time (i.e. time buys) and a fee for its services. It appears that the committees had intended that most if not all of the commercials produced for the primary would also be used in the general election period. Later, the committees decided to use only roughly half of the primary-produced commercials in the general election period. The Deputy Treasurer allocated the production costs of the shared advertisements between the two committees on a 50/50 basis. Finally, by separate contracts with Tuesday Team the committees allocated the fee for Tuesday Team's services between the primary and general election campaigns, $1 million and $1.3 million respectively.

The Commission's review raised questions concerning the allocation of the production costs for the advertisements between the campaign committees. Furthermore, the Commission questioned whether the fee paid for the media firm's services was allocated

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3/ Tuesday Team provided services to only one other client, the Republican National Committee, which used TTI's services only to film President Reagan and the White House for party building commercials.

properly between the Primary Committee and the GEC. As noted, the Primary Committee paid a fee to TTI of $1 million, while the GEC paid TTI $1.3 million. However, the GEC used approximately six (6) times as many commercials as did the Primary Committee, and spent more than eleven (11) times as much purchasing advertising time for the commercials as did the Primary Committee.4/ Since the media activity by the GEC appeared to greatly exceed that of the Primary Committee, the relationship of the amount of the fees paid by the two committees seemed disproportionate. The Commission auditors therefore questioned whether in effect the GEC's media expenses were subsidized by the Primary Committee.

As a consequence, the Commission initially determined that the Primary Committee was required to bill the GEC for the amount ($792,066.60) of the allocable portion of the fee paid by the Primary Committee, which it appeared should have been borne by the GEC. On verification of the Committee's allocation of direct production costs, the Commission also initially determined that the Primary Committee seek from the GEC an amount ($55,429.55) of allocable production costs still found owing.

4/ Tuesday Team produced nine commercials for the Primary Committee of which eight were actually used during the primary period. According to a schedule of commercials aired including additional commercials identified by the Audit staff, it appears that at least fifty commercials were produced by TTI for the general election campaign and that four additional commercials produced for the Primary were used in the general. While the Primary Committee paid Tuesday Team approximately $1.9 million for time buys during the primary period, the GEC paid approximately $22.6 million for time buys during the general election campaign.

The Audit Report details the Committee's Statement of Net Outstanding Campaign Obligations ("NOCO Statement"), showing the Committee to have been in a substantial surplus position as of the nomination date. The effect of the two allocations was to increase the Primary Committee's surplus. The Committee made an estimated repayment of the public funds portion, on its own calculation of the surplus, on September 21, 1984, in accordance with 11 C.F.R. § 9038.3(c)(1). Thus, the net effect of the Audit Report's findings was to require an additional surplus repayment of $244,242.16. The Audit Report accordingly contained the Commission's initial determination that the Primary Committee repay an additional $244,242.16 to the Treasury under 26 U.S.C. § 9038(b)(3).

III. DISCUSSION

A. Introduction

Under the Matching Payment Act and the Fund Act, candidates are limited to using public funds only to defray qualified campaign expenses. For purposes of a primary Presidential candidate, the Matching Payment Act defines the term "qualified campaign expense" as a purchase, payment, advance, or gift of money or anything of value incurred by a candidate or his authorized committee, in connection with his nomination for election. 26 U.S.C. § 9032(9). The Fund Act defines the term "qualified campaign expense" for a Presidential candidate in the general election as an expense incurred by an authorized committee of the candidates of a political party for the offices

of President and Vice President to further the election of either or both such candidates. 26 U.S.C. § 9002(11)(A)(iii). A candidate receiving funding under both statutes is thus subject to the specific provisions of each statute and must separate those expenses for the primary election from those for the general election campaign.

In this case, the candidate received public funds under two separate programs, the Matching Payment Act for conducting his campaign for the nomination, and the Fund Act for his campaign for reelection. However, according to the Audit Division's review, certain expenses related to the media campaign used in the general election campaign were paid by the Primary Committee. The Commission, thus, made an initial determination that the Primary Committee must seek reimbursement from the General Election Committee for these payments. Upon review of the Committee's responses to the initial determination, the Commission now modifies its initial determination and makes a final determination that the Primary Committee must seek reimbursement from the General Election Committee for the allocable amount of production costs for shared advertisements only and is not required to seek reimbursement for any amount of the media consultant fee paid to Tuesday Team.

B. Allocation of the Production Costs

The audit revealed that the Primary Committee had allocated an amount of production costs to the GEC, on an assumption that certain commercials were to be shared by both committees, calculating the total production costs for each commercial and using a

50/50 allocation basis. On September 7, 1984, the GEC originally reimbursed the Committee $304,389.50 as its share of the production costs for these advertisements. The Committee indicated that this amount represented 50% of total production costs associated with certain advertisements. The Committee's Deputy Treasurer stated that this allocation was based on the fact that the same commercials were produced for use in both the primary and general election campaigns and that the allocation percentage was developed in early 1984 based on planning and estimated usage of production pieces.

In February 1985, however, based on a new calculation of which advertisements were actually shared, the Primary Committee returned to the GEC the net amount of $161,955. Thus, the amount paid by the GEC for the commercials was $142,434.

Upon review of the bases for the committees' allocation of the production costs, the Commission's audit indicated that the committees had not allocated these expenses properly between them. The auditors verified the amount of direct production costs and the amount of production costs allocated to each committee was adjusted accordingly. The appropriate amount of production costs allocable to each committee was then calculated using the adjusted figures. First, the costs of those commercials used only by the Primary Committee were subtracted from the production costs of all the commercials as to which there was some question. The resulting net costs were divided

between the two committees on the 50/50 basis.[5/] To the resulting amount allocable to the GEC was added the amount of costs of the commercial produced by the Primary Committee, but used only in the general election campaign.

Also added to the production cost of the GEC was a mark-up representing a small portion of the Tuesday Team fee paid by the Primary Committee. In an informal response to the Audit staff's initial questioning of the fee, the Committee explained that the fee was in lieu of the ordinary media firm commission. This commission, according to the Committee, would ordinarily take the form of a percentage mark-up on the amount of time buys, production costs, and other creative costs. Attachment 14 at p. 1. Since a portion of the fee was in lieu of mark-up on costs related to specific commercials, the amount of production costs allocated to the GEC in the Audit Report included a portion of the Primary Committee's $1 million media fee.

Last, the amount already reimbursed by the GEC ($142,434) was subtracted from its share of the production costs, yielding a total still owed of $55,429.55. The Audit Report thus contained a finding that the Primary Committee seek a reimbursement of this amount from the GEC.

5/ On verification of the 50% allocation rate used by the Committee, the auditors examined the relative usage of the shared commercials between the primary and the general elections, and suggested an allocation weighted by the relative usage costs of the shared commercials. This would have resulted in an increased allocation to the GEC. Upon review, the Commission declined to follow the recommendation to use a weighted allocation, and approved the 50% allocation used by the Committee. Attachment 1 at p. 17.

The Committee accepts the Commission's initial determination relating to allocation of the production costs for shared commercials, with two exceptions. First, the Committee contends that a Spanish language version of the "Statue of Liberty" television commercial produced by the Primary Committee was not used by the GEC and that production costs of $34,193 were associated with that version. Therefore, the Committee asserts that this amount should be excluded from the total production costs required to be split between the Primary Committee and the GEC. Attachment 2 at p. 11.

Second, the Committee disagrees with the amount included in the production costs as a portion of the $1 million fee paid to TTI by the Primary Committee for creative and other costs associated with the shared commercials. Assuming that any portion of the fee should be included in these costs, the Committee asserts that a higher amount should be included than that set forth in the Audit Report. Attachment 2 at p. 11.

The Committee's factual assertion as to use of the Spanish language commercial is unsupported. The auditors reviewed both committees' advertising time charges, determined that the commercial in question was aired repeatedly during the general election campaign, and provided clear documentation of this fact to the Deputy Treasurer. Attachment 5 at p. 12. A sample invoice from a Spanish language television station showing the commercial was used in the general election campaign is attached. Attachment 11. At the oral presentation, counsel was asked to

clarify the basis for the Committee's assertion. Since none of counsel's post-presentation submissions addresses this issue, the Commission rejects the assertion that costs for the commercial should only be allocated to the primary campaign.

As to the portion of the consulting fee included in the production costs allocation, the Commission concludes that since the allocation of the media fee has been treated separately in this document, no additional portion of the fee need be included in the production costs allocation. Accordingly, the Commission has deleted the additional amount allocated to the GEC, and has reduced the additional reimbursement required by a corresponding amount. Thus, the Primary Committee is required to seek reimbursement from the GEC in the amount of $39,443.55. Attachment 5 at p. 13.

C. The Allocation of the Media Fee

The Audit Report concluded that the Primary Committee had paid more than its allocable share of the media fees. The Audit Report thus contained a separate finding allocating a portion of the media fee paid by the Primary Committee to the GEC, which would have required that the Committee seek a reimbursement from the GEC. The fee allocation question was initially raised when the Audit Division indicated that, under normal industry practice for advertising contracts, the client pays a fee to a media firm that is calculated by a particular percentage (e.g. 17.65%) of the cost of the time buys. (Attachment 14 at p.1) By this standard, the $1 million fee paid by the Primary Committee when compared with the total time buys during the primary period ($1.9

million) was excessive. In an informal response to the Audit staff, the Committee submitted a sample media firm contract and asserted that ordinarily media firms charge the mark-up not only on time buys, but also on production costs and other services in the creative area, and that the $1 million fee paid TTI was in lieu of mark-up on more than simply time buys. (Attachment 14).

The fee allocation question was further developed in the audit of the GEC, when the auditors examined the approximately $1.3 million fee the GEC paid Tuesday Team for the more than $22 million in time buys and more than $2 million in production costs. Using the explanation provided by the Primary Committee, the interim report on the GEC contained a finding that the GEC had apparently paid a disproportionally small fee based on the amount of time buys and production costs made on its behalf. The interim report on the GEC suggested the possibility of a prohibited in-kind contribution by TTI to the GEC.

In response to the interim report, the GEC argued that the fee fully compensated TTI for the market value of its services. Attachment 10 at pp. 5-7. Articles submitted in support of this contention stated that advertisers sometimes negotiated set fees in lieu of a standard commission on time buys. The articles indicated that advertising firms would accept less than the standard commission when budgets are large, the client is prestigious, and opportunity for growth is present, and that in appropriate situations advertising firms might accept a gross profit of only 7.5% to 10% of gross billings.

The auditors then evaluated the total media fee in view of the GEC's response. The auditors discovered that with the combined media activity of the two Reagan-Bush '84 committees, Tuesday Team's gross profit was 8.336%, an amount within the range cited in one of the articles. The Audit Report therefore concluded that TTI received a commercial return only when the media activities of the two committees were viewed as a whole. Using the 8.336% figure from the combined activity, the Audit Report calculated the fee amount each committee should have paid. First, the total gross billings, (i.e. production costs plus time buys) for each committee was determined using figures taken from TTI's financial statements.6/ Next, these totals were multiplied by 8.336% to determine TTI's return between the two committees. This calculation resulted in the Audit Report's conclusion that the GEC owed the Primary Committee an additional $792,066.60, further adding to the Primary Committee's surplus.

The Committee raises its most strenuous objections to the allocation to the GEC of a portion of the fee paid by the Primary Committee. In its responses to the initial determination on

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6/ The Audit Staff used the figures from TTI's financial reports to calculate the amount of production costs allocable to each committee. These figures differed from those verified by the Audit staff from bank records and other records. Counsel provided an explanation for this discrepancy in the response to the Audit Report on the GEC (Attachment 9 at pp. 13-14) and as explained infra, the Commission has modified its calculation and its initial determination accordingly.

allocation of the media fee, the Committee and its accounting firm argue that no reimbursement is due from the GEC to the Primary Committee for the media fee paid to TTI. Attachments 2,7, and 8. They contend first that section 106.1(a) of the Commission's regulations is inapplicable and does not require allocation in the situation presented. The Committee also makes the legal argument that the Primary Committee's payments to TTI for services rendered prior to the nomination would not be qualified campaign expenses of the GEC and, thus, the GEC cannot be required to reimburse the Committee for any of these expenses. Moreover, the Committee presents several challenges to the method used by the Commission's audit staff to determine the amount allocable to each committee.

Upon further consideration of the media fee allocation, the Commission determined that while there are valid arguments for both allocation methods, the Committee's allocation of the fee in this instance was reasonable. The Commission, thus, has made a final determination that the Primary Committee is not required to seek reimbursement from the GEC for an allocable amount of the media fee paid to Tuesday Team.

D. Revisions to NOCO Statement

The Commission has also modified the final repayment amount, based upon revisions to the Primary Committee's statement of net outstanding campaign obligations ("NOCO Statement").[7/]

7/ The Final Audit Report noted that since certain expenses were estimated in the NOCO Statement, the repayment amount could change based upon the Audit Division's review of the Committee's actual costs. Attachment 1 at p. 9 n.f.

Attachment 15. These revisions include the addition to the Committee's receivables of the amount of duplicate payments and contributions received after the candidate's date of ineligibility but dated prior to that date. The winding down costs stated in the NOCO Statement have also been updated to replace estimates with actual expenses. Finally, the amount of accounts payable has been reduced to deduct certain payments for which no documentation was provided. These revisions increase the Committee's surplus, requiring an additional pro-rata repayment.

IV. FINAL REPAYMENT DETERMINATION

Pursuant to 26 U.S.C.§ 9038(b)(1) and 11 C.F.R. § 9038.2(c)(4), the Commission has made a final determination that for the forgoing reasons President Ronald Reagan and Reagan-Bush '84 must repay an additional $58,193.25 to the United States Treasury pursuant to 26 U.S.C. § 9038(b)(3).

Attachments

1. Report of the Audit Division on Reagan-Bush '84.
2. Response of Reagan-Bush '84 to the Audit Report.
3. Report of the Audit Division on Reagan-Bush '84 General Election Committee.
4. Memorandum to the Commission Regarding Oral Presentation. (Attachments omitted)
5. Analysis of Reagan-Bush '84 response by the Audit Division.
6. Transcript of Oral Presentation
7. Letter dated August 5, 1987 from John Duffy.

8. Letter dated August 12, 1987 from John Duffy.

9. Response of Reagan-Bush '84 General Election Committee to the Audit Report.

10. Response of Reagan-Bush '84 to General Election Committee Interim Audit Report.

11. Sample Television Station Invoice (Statute of Liberty Commercial).

12. Audit Division Explanation of Modification of the Initial Determination.

13. Response of Reagan-Bush '84 to the Interim Audit Report.

14. Memorandum from Ron Robertson to Rick Halter RE: Reagan-Bush '84 Primary Campaign Media Costs.

15. Memorandum Re: NOCO update - Reagan-Bush '84 (Primary), and attached NOCO statement, dated January 28, 1988.

AR-88-6

RB84/012888

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

January 29, 1988

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

THROUGH: JOHN C. SURINA
STAFF DIRECTOR

FROM: ROBERT J. COSTA
ASSISTANT STAFF DIRECTOR
AUDIT DIVISION

SUBJECT: REAGAN-BUSH '84 (PRIMARY) -
REVISED NOCO STATEMENT

RECEIVED
FEDERAL ELECTION COMMISSION
SECRETARIAT
88 JAN 29 PM 12:32

On December 17, 1987, the Commission directed the Audit staff to prepare a revised NOCO statement after contacting Reagan-Bush '84 ("the Committee") to update figures regarding undocumented account payables and winding down expenses.

On December 31, 1987, a letter was sent to the Committee explaining the Commission's actions at the December 17, 1987 meeting. The letter provided the Committee until January 15, 1988 to submit documentation regarding undocumented payables and additional wind down costs which would support a reduction in the Committee's final repayment amount. On January 15, 1988, Mr. John Duffy, counsel for the Committee, provided invoices which documented four previously undocumented payables totaling $60,446.11. In a telephone conversation on January 21, 1988, with Ray Lisi of my staff, Mr. Duffy stated that he was confident that no other documentation would be forthcoming.

Based on the documentation provided and Mr. Duffy's comments, the Audit staff has prepared the attached revised NOCO for use in preparation of the Statement of Reasons. If you have any questions regarding this matter, please contact Ray Lisi at 376-5320.

Attachment as stated

ATTACHMENT 15

REAGAN-BUSH '84

Audit Analysis of Committee's NOCO Statement As of August 22, 1984 a/

ASSETS		
Cash in Bank	$2,656,049.92	
Accounts Receivable	924,953.01	
Contributions received post 8/22/84 b/	51,473.94	
Accrued Interest	21,975.12	
Reimbursements due from GEC -Allocable amount of production costs for shared commercials	39,443.55	
Duplicate Payments	2,942.63	
TOTAL ASSETS		$3,696,838.17
OBLIGATIONS		
Accounts Payable	$2,161,109.23	
Income Taxes	222,129.34	
[illegible]UAL WINDING DOWN [illegible]TS (1/15/85 - 9/30/87)	239,870.50	
TOTAL OBLIGATIONS		2,623,109.07
NET OUTSTANDING CAMPAIGN OBLIGATIONS - SURPLUS AS OF AUGUST 22, 1984		$ 1,073,729.10
AMOUNT REPAYABLE, (SURPLUS MULTIPLIED BY REPAYMENT RATIO)		$ 403,086.49
Less: 9/21/84 repayment made		(344,893.24)
Repayment Amount Due		$ 58,193.25

a/ August 22, 1984, is the date determined by the Commission to be the Candidate's date of ineligibility for purposes of incurring qualified campaign expenses.

b/ Includes contributions received after 8/22/84 but dated prior to 8/23/84.

AGENDA DOCUMENT #87-118

RECEIVED
FEDERAL ELECTION COMMISSION

87 DEC 10 PM 1:50

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 10, 1987

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

Kim L. Bright-Coleman KBC
Special Assistant General Counsel

Jonathan Bernstein JB
Attorney Advisor

SUBJECT: Final Repayment Determination-President Ronald Reagan and Reagan-Bush '84 (Primary Committee)

I. Introduction

On July 7, 1986, the Commission issued the Report of the Audit Division on Reagan-Bush '84 ("Primary Committee"). In that report, the Commission made an initial determination that the Primary Committee must make a surplus repayment of $244,242.16 to the United States Treasury pursuant to 26 U.S.C. § 9038(b)(3). The Committee submitted its response to the audit report on November 3, 1986. In addition, counsel for the Committee made an oral presentation to the Commission on July 29, 1987. Following this presentation, the Committee made subsequent submissions addressing points raised in the oral presentation.

Based on our review of the Committee's various submissions and consideration of the oral presentation testimony, the Office of General Counsel has prepared the attached draft Statement of Reasons supporting a final determination by the Commission that President Ronald Reagan and Reagan-Bush '84 must repay an additional $373,555.08 to the United States Treasury.*/

*/ The Committee made an estimated repayment of the public funds portion, on its own calculation of the surplus, on September 21, 1984, in accordance with 11 C.F.R. § 9038.3(c)(1).

AGENDA ITEM
For Meeting of: 12-17-87

Committee's surplus, requiring an additional pro-rata repayment of $66,077.78

RECOMMENDATIONS

The Office of General Counsel recommends that the Commission:

1. Determine that the Reagan-Bush '84 Primary Committee is required to bill the Reagan-Bush '84 General Election Committee for the amount, $792,066.60, of the allocable portion of the fee paid by the Primary committee which should have been borne by the General Election Committee;

2. Determine that the Reagan-Bush '84 Primary Committee seek reimbursement from the Reagan-Bush '84 General Election Committee for the amount of allocable production costs still found owing, $39,443.55;

3. Determine that pursuant to 26 U.S.C. § 9038(b)(3) and 11 C.F.R. § 9038.2(b)(4) President Ronald Reagan and Reagan-Bush '84 must repay an additional $373,555.08 to the United States Treasury in accordance with this final repayment determination;

4. Approve the attached draft Statement of Reasons in support of the final repayment determination; and

5. Approve the attached letter notifying the Committee of the Commission's decision.

Attachments

1. Proposed Statement of Reasons
2. Letter

II. Summary of Draft Statement of Reasons

The attached draft Statement of Reasons recommends that the Commission make a final determination that the Primary Committee must repay $373,555.08 to the United States Treasury. This amount was calculated using two allocations representing reimbursements due from the Reagan-Bush '84 General Election Committee for costs related to advertisements used by both the Primary Committee and the General Election Committee. Specifically, the draft concludes that the Primary Committee should seek from the General Election Committee the amount, $39,443.55, of allocable production costs owing for shared advertisements. The draft statement also concludes that the Primary Committee is required to bill the General Election Committee for the amount, $779,604.78, of the allocable portion of the fee paid by the Primary Committee which it appears should have been borne by the General Election Committee.

The final repayment amount contains modifications in three areas from the amount of the initial determination. First, the Commission's initial determination included a portion of the consulting fee in the production costs allocation. Since the media fee has been treated in a separate allocation, no additional portion of the fee need be included in the production costs allocation. Accordingly, the amount of the fee has been deducted from the allocable production costs and a corresponding amount deducted from the reimbursement due from the General Election Committee.

The second modification stems from a discrepancy in the production cost figures used to calculate the fee allocation. In determining the media fee allocation, the Audit staff used figures from TTI's financial statements. The Committee has now explained that those figures were early projections and not the final figures. Accordingly, the fee has been recalculated using the final figures resulting in a reduction in the amount due from the General Election Committee.

Finally the final repayment amount has been modified based upon revisions to the Primary Committee's statement of net outstanding campaign obligations (NOCO statement") made by the Audit Division. See Attachment 15 to draft Statement of Reasons. These revisions include the addition to the Committee's receivables of the amount of duplicate payments and contributions received after the candidate's date of ineligibility but dated prior to that date. The winding down costs stated in the NOCO statement have also been updated to replace estimates with actual expenses. The final revision to the NOCO statement reduces the accounts payable to deduct certain payments for which no documentation was provided. These revisions increase the

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
President Ronald Reagan and)
Reagan-Bush '84)
Final Repayment Determination)

STATEMENT OF REASONS

On , 1987, the Commission made a final determination that President Ronald Reagan and Reagan-Bush '84 ("Primary Committee") repay an additional $373,555.08 to the U.S. Treasury pursuant to 26 U.S.C. § 9038(b)(3), representing the pro-rata portion of the Committee's surplus of funds attributable to the public funds received. Therefore, the Committee is ordered to repay this amount within 30 days of receipt of this determination pursuant to 11 C.F.R. § 9038.2(d)(2). This Statement sets forth the legal and factual basis for the Commission's determination in accordance with 11 C.F.R. § 9038.2(c)(4).

I. BACKGROUND

Reagan-Bush '84 ("Primary Committee") is the principal campaign committee of President Ronald Reagan and Vice President George Bush, candidates for the Republican nomination for president and vice president in 1984. The Treasurer of the Committee is Angela M. Buchanan Jackson and the Deputy Treasurer is Scott B. Mackenzie. Reagan-Bush '84 General Election Committee ("GEC") is the principal campaign committee of President Reagan and Vice President Bush as candidates in the 1984 presidential general election. Mrs. Buchanan Jackson and Mr. Mackenzie also served as Treasurer and Deputy Treasurer of the GEC.

The Primary Committee received $10.1 million in public funds pursuant to the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042, ("Matching Payment Act") to defray President Reagan's "qualified campaign expenses," i.e., payments made "in connection with his campaign for nomination." 26 U.S.C. §9032(9). The Matching Payment Act directs that a candidate who ends the nomination campaign with a surplus of funds must repay to the Treasury the portion of the surplus attributable to the public funds received. 26 U.S.C. § 9038(b)(3).

The GEC received $40.4 million in public funds under the Presidential Election Campaign Fund Act, 26 U.S.C §§ 9001-9013, ("Fund Act") to defray expenses "incurred by the candidate of a political party for the office of President to further his election to such office." 26 U.S.C. §§ 9002(11)(A)(i); 9004(c)(1). In order to establish their eligibility for funds under the Fund Act, President Reagan and Vice President Bush both certified that their campaign for election would abide by a spending limit equal to the amount of the public funds grant. See 26 U.S.C. § 9003(b)(1).

The Matching Payment Act and the Fund Act require the Commission to "conduct a thorough examination and audit of the qualified campaign expenses" of publicly funded campaigns. 26 U.S.C. §§ 9038(a) and 9007(a). The Commission issued an Audit Report on the Primary Committee, Attachment 1, finding first that the Primary Committee had a surplus of funds, and second that

certain payments by the Primary Committee necessitated reallocation between the Primary Committee and the GEC with a corresponding payment by the GEC to the Primary Committee. The effect of this finding was to increase the amount of the Primary Committee's surplus, thus increasing the amount of the Committee's surplus repayment under 26 U.S.C. § 9038(b)(3).[1/] Pursuant to 11 C.F.R. § 9038.2(c)(1), the report contained an initial determination that the Primary Committee must repay $244,242.16, the unpaid pro-rata portion of the Committee's increased surplus of $1,569,320.32 representing the public funds received.[2/]

Under 11 C.F.R. § 9038.2(c)(2), the Committee submitted a response disputing this determination. Attachment 2. Further, on June 2, 1987, the Commission granted the Committee's request to make an oral presentation pursuant to 11 C.F.R. §9038.2(c)(3) as part of its response to the initial repayment determination. Prior to the presentation, the General Counsel's Office circulated to the Commission and to counsel for the Primary Committee a memorandum summarizing the issues presented. Attachment 4. Attached was the FEC Audit Division's analysis of the Primary Committee's response. Attachment 5.

1/ Corresponding findings were included in the Commission's Audit Report on the GEC issued on May 7, 1987. Attachment 3.

2/ The formula for calculation of the repayment ratio is set out at section 9038(b)(3) of the statute and at 11 C.F.R. § 9038.3(c). The Committee does not dispute the Audit Report's calculation that the ratio of matching funds received to the Committee's total deposits is .375408. See Attachment 1, at pp. 3, 9.

On July 29, 1987, John J. Duffy, counsel to the Committee, appeared before the Commission urging reversal of the Commission's initial determination. The Commission prepared a transcript of this presentation and provided counsel with a copy. Attachment 6. At the conclusion of the meeting, counsel was advised that the Commission would consider any additional factual and legal materials he wished to submit. Counsel submitted additional information for Commission consideration in letters dated August 5, 1987, and August 12, 1987. Attachments 7 and 8. Counsel also responded to the related findings in the Audit Report on the GEC on August 7, 1987. Attachment 9. After consideration of counsel's various arguments the Commission modifies its initial determination in three respects, but otherwise adheres to its preliminary view.

II. THE INITIAL DETERMINATION

The Commission's audit of the Primary Committee revealed that the Primary Committee and the GEC shared the services of a media consultant firm, Tuesday Team, Inc. ("TTI" or "Tuesday Team"), for commercials which aired during both the primary and general election campaigns. Specifically, the audit revealed that TTI had no existence prior to the 1984 election campaign and was not an ongoing business firm, but rather was formed for the purpose of providing services to the two Reagan-Bush '84 committees, 3/ TTI terminated its operations upon the

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3/ Tuesday Team provided services to only one other client, the Republican National Committee, which used TTI's services only to film President Reagan and the White House for party building commercials.

conclusion of the general election campaign. As part of its services for the Primary Committee and the GEC, TTI developed the advertising campaign for President Reagan's reelection, produced the commercial advertisements, and arranged for their placement in the various television and radio markets.

The committees made separate payments to Tuesday Team for direct production costs, purchases of advertising time (i.e. time buys) and a fee for its services. It appears that the committees had intended that most if not all of the commercials produced for the primary would also be used in the general election period. Later, the committees decided to use only roughly half of the primary-produced commercials in the general election period. The Deputy Treasurer allocated the production costs of the shared advertisements between the two committees on a 50/50 basis. Finally, by separate contracts with Tuesday Team the committees allocated the fee for Tuesday Team's services between the primary and general election campaigns, $1 million and $1.3 million respectively.

The Commission's review raised questions concerning the allocation of the production costs for the advertisements between the campaign committees. Furthermore, the Commission questioned whether the fee paid for the media firm's services was allocated properly between the Primary Committee and the GEC. As noted, the Primary Committee paid a fee to TTI of $1 million, while the GEC paid TTI $1.3 million. However, the GEC used approximately six (6) times as many commercials as did the Primary Committee, and spent more than eleven (11) times as much purchasing

advertising time for the commercials as did the Primary Committee.4/ Since the media activity by the GEC appeared to greatly exceed that of the Primary Committee, the relationship of the amount of the fees paid by the two committees seemed disproportionate. The Commission auditors therefore questioned whether in effect the GEC's media expenses were subsidized by the Primary Committee.

As a consequence, the Commission initially determined that the Primary Committee was required to bill the GEC for the amount ($792,066.60) of the allocable portion of the fee paid by the Primary Committee, which it appeared should have been borne by the GEC. On verification of the Committee's allocation of direct production costs, the Commission also initially determined that the Primary Committee seek from the GEC an amount ($55,429.55) of allocable production costs still found owing.

The Audit Report details the Committee's Statement of Net Outstanding Campaign Obligations ("NOCO Statement"), showing the Committee to have been in a substantial surplus position as of

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4/ Tuesday Team produced nine commercials for the Primary Committee of which eight were actually used during the primary period. According to a schedule of commercials aired including additional commercials identified by the Audit staff, it appears that at least fifty commercials were produced by TTI for the general election campaign and that four additional commercials produced for the Primary were used in the general. While the Primary Committee paid Tuesday Team approximately $1.9 million for time buys during the primary period, the GEC paid approximately $22.6 million for time buys during the general election campaign.

the nomination date. The effect of the two allocations was to increase the Primary Committee's surplus. The Committee made an estimated repayment of the public funds portion, on its own calculation of the surplus, on September 21, 1984, in accordance with 11 C.F.R. § 9038.3(c)(1). Thus, the net effect of the Audit Report's findings was to require an additional surplus repayment of $244,242.16. The Audit Report accordingly contained the Commission's initial determination that the Primary Committee repay an additional $244,242.16 to the Treasury under 26 U.S.C. § 9038(b)(3).

III. DISCUSSION

A. Introduction

Under the Matching Payment Act and the Fund Act candidates are limited to using public funds only to defray qualified campaign expenses. For purposes of a primary Presidential candidate, the Matching Payment Act defines the term "qualified campaign expense" as a purchase, payment, advance, or gift of money or anything of value incurred by a candidate or his authorized committee, in connection with his nomination for election. 26 U.S.C. § 9032(9). The Fund Act defines the term "qualified campaign expense" for a Presidential candidate in the general election as an expense incurred by an authorized committee of the candidates of a political party for the offices of President and Vice President to further the election of either or both such candidates. 26 U.S.C. § 9002(11)(A)(iii).

A candidate receiving funding under both statutes is thus subject to the specific provisions of each statute and must separate those expenses for the primary election from those for the general election campaign. Furthermore, such a candidate must allocate expenditures that benefit both campaigns pursuant to the Commission's regulations which require that expenditures made on behalf of more than one candidate be attributed to each candidate in proportion to the benefit reasonably expected to be derived. 11 C.F.R. § 106.1(a). See also Financial Control and Compliance Manual for General Election Candidates, pp. IV-51, 52 (1983).

In this case, the candidate received public funds under two separate programs, the Matching Payment Act for conducting his campaign for the nomination, and the Fund Act for his campaign for reelection. However, according to the Audit Division's review, his renomination campaign had no substantial opposition and thus the media campaign for both the primary election and the general election was developed during the primary campaign. See Attachment 5 pp 14-24. The Primary Committee's activities in this regard present novel issues relating to the administration of the separate public funding statutes. The Commission made an initial repayment determination on a finding that the Primary Committee's payments to the media firm which also provided services to the GEC blurred the statutorily mandated separation of the two campaigns. Since Primary Committee subsidization of the general election campaign is not a qualified campaign expense of the primary committee, the Commission affirms, with modifications, its initial determination.

B. Allocation of the Production Costs

The audit revealed that the Primary Committee had allocated an amount of production costs to the GEC, on an assumption that certain commercials were to be shared by both committees, calculating the total production costs for each commercial and using a 50/50 allocation basis. On September 7, 1984, the GEC originally reimbursed the Committee $304,389.50 as its share of the production costs for these advertisements. The Committee indicated that this amount represented 50% of total production costs associated with certain advertisements. The Committee's Deputy Treasurer stated that this allocation was based on the fact that the same commercials were produced for use in both the primary and general election campaigns and that the allocation percentage was developed in early 1984 based on planning and estimated usage of production pieces.

In February 1985, however, based on a new calculation of which advertisements were actually shared, the Primary Committee returned to the GEC the net amount of $161,955. Thus, the amount paid by the GEC for the commercials was $142,434.

Upon review of the bases for the committees' allocation of the production costs, the Commission's audit indicated that the committees had not allocated these expenses properly between them. The auditors verified the amount of direct production costs and the amount of production costs allocated to each committee was adjusted accordingly. The appropriate amount of

production costs allocable to each committee was then calculated using the adjusted figures. First, the costs of those commercials used only by the Primary Committee were subtracted from the production costs of all the commercials as to which there was some question. The resulting net costs were divided between the two committees on the 50/50 basis.[5/] To the resulting amount allocable to the GEC was added the amount of costs of the commercial produced by the Primary Committee, but used only in the general election campaign.

Also added to the production cost of the GEC was a mark-up representing a small portion of the Tuesday Team fee paid by the Primary Committee. In an informal response to the Audit staff's initial questioning of the fee, the Committee explained that the fee was in lieu of the ordinary media firm commission. This commission, according to the Committee, would ordinarily take the form of a percentage mark-up on the amount of time buys, production costs, and other creative costs. Attachment 14 at p. 1. Since a portion of the fee was in lieu of mark-up on costs related to specific commercials, the amount of production costs

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5/ On verification of the 50% allocation rate used by the Committee, the auditors examined the relative usage of the shared commercials between the primary and the general elections, and computed an allocation weighted by the relative usage costs of the shared commercials. This resulted in an increased allocation to the GEC. Upon review, the Commission declined to follow the recommendation to use such a weighted allocation, and approved the 50% allocation used by the Committee. Attachment 1 at p. 17.

allocated to the GEC in the Audit Report included a portion of the Primary Committee's $1 million media fee.

Last, the amount already reimbursed by the GEC ($142,434) was subtracted from its share of the production costs, yielding a total still owed of $55,429.55. The Audit Report thus contained a finding that the Primary Committee seek a reimbursement of this amount from the GEC.

The Committee accepts the Commission's initial determination relating to allocation of the production costs for shared commercials, with two exceptions. First, the Committee contends that a Spanish language version of the "Statue of Liberty" television commercial produced by the Primary Committee was not used by the GEC and that production costs of $34,193 were associated with that version. Therefore, the Committee asserts that this amount should be excluded from the total production costs required to be split between the Primary Committee and the GEC. Attachment 2 at p. 11.

Second, the Committee disagrees with the amount included in the production costs as a portion of the $1 million fee paid to TTI by the Primary Committee for creative and other costs associated with the shared commercials. Assuming that any portion of the fee should be included in these costs, the Committee asserts that a higher amount should be included than that set forth in the Audit Report. Attachment 2 at page 11.

The Committee's factual assertion as to use of the Spanish language commercial is unsupported. The auditors reviewed both committees' advertising time charges, determined that the commercial in question was aired repeatedly during the general election campaign, and provided clear documentation of this fact to the Deputy Treasurer. Attachment 5 at p. 12. A sample invoice from a Spanish language television station showing the commercial was used in the general election campaign is attached. Attachment 11. At the oral presentation, counsel was asked to clarify the basis for the Committee's assertion. Since none of counsel's post-presentation submissions addresses this issue, the Commission rejects the assertion that costs for the commercial should only be allocated to the primary campaign.

As to the portion of the consulting fee included in the production costs allocation, the Commission concludes that since the allocation of the media fee has been treated separately in this document, no additional portion of the fee need be included in the production costs allocation. Accordingly, the Commission has deleted the additional amount allocated to the GEC, and has reduced the additional reimbursement required by a corresponding amount. Thus, the Primary Committee is required to seek reimbursement from the GEC in the amount of $39,443.55. Attachment 5 at p. 13.

C. The Allocation of the Media Fee

The Audit Report concluded that the Primary Committee had paid more than its allocable share of the media fees. The Audit Report thus contained a separate finding allocating a portion of the media fee paid by the Primary Committee to the GEC, requiring that the Committee seek a reimbursement from the GEC. The fee allocation question was initially raised when the Audit Division indicated that, under normal industry practice for advertising contracts, the client pays a fee to a media firm that is calculated by a particular percentage (17.65%) of the cost of the time buys. (Attachment 14 p.1) By this standard, the $1 million fee paid by the Primary Committee when compared with the total time buys during the primary period ($1.9 million) was excessive. In an informal response to the Audit staff, the Committee submitted a sample media firm contract and asserted that ordinarily media firms charge the mark-up not only on time buys, but also on production costs and other services in the creative area, and that the $1 million fee paid TTI was in lieu of mark-up on more than simply time buys. (Attachment 14).

The fee allocation question was further developed in the audit of the GEC, when the auditors examined the approximately $1.3 million fee the GEC paid Tuesday Team for the more than $22 million in time buys and more than $2 million in production costs. Using the explanation provided by the Primary Committee, the interim report on the GEC contained a finding that the GEC had apparently paid a disproportionally small fee based on

the amount of time buys and production costs made on its behalf. The interim report on the GEC suggested the possibility of a prohibited in-kind contribution by TTI to the GEC.

In response to the interim report, the GEC argued that the fee fully compensated TTI for the market value of its services. Attachment 10 at pp. 5-7. Articles submitted in support of this contention stated that advertisers sometimes negotiated set fees in lieu of a standard commission on time buys. The articles indicated that advertising firms would accept less than the standard commission when budgets are large, the client is prestigious, and opportunity for growth is present, and that in appropriate situations advertising firms might accept a gross profit of only 7.5% to 10% of gross billings.

The auditors then evaluated the total media fee in view of the GEC's response. The auditors discovered that with the combined media activity of the two Reagan-Bush '84 committees, Tuesday Team's gross profit was 8.336%, an amount within the range cited in one of the articles. The Audit Report therefore concluded that TTI received a commercial return only when the media activities of the two committees were viewed as a whole. Using the 8.336% figure from the combined activity, the Audit Report calculated the fee amount each committee should have paid. First, the total gross billings, (i.e. production costs plus time buys) for each committee was determined using figures taken

from TTI's financial statements.[6/] Next, these totals were multiplied by 8.336% to determine TTI's return between the two committees. This calculation resulted in the Audit Report's conclusion that the GEC owed the Primary Committee an additional $792,066.60, further adding to the Primary Committee's surplus.

The Committee raises its most strenuous objections to the allocation to the GEC of a portion of the fee paid by the Primary Committee. In its responses to the initial determination on allocation of the media fee, the Committee and its accounting firm argue that no reimbursement is due from the GEC to the Primary Committee for the media fee paid to TTI. Attachments 2,7,8. They contend first that section 106.1(a) of the Commission's regulations is inapplicable and does not require allocation in the situation presented. The Committee also makes the legal argument that the Primary Committee's payments to TTI for services rendered prior to the nomination would not be qualified campaign expenses of the GEC and, thus, the GEC cannot be required to reimburse the Committee for any of these expenses. Moreover, the Committee presents several challenges to the method used by the Commission's audit staff to determine the amount allocable to each committee.

6/ The Audit Staff used the figures from TTI's financial reports to calculate the amount of production costs allocable to each committee. These figures differed from those verified by the Audit staff from bank records and other records. Counsel provided an explanation for this discrepancy in the response to the Audit Report on the GEC (Attachment 9, pp. 13-14) and as explained infra, the Commission has modified its calculation and its initial determination accordingly.

1. Application of section 106.1(a)

There are two bases for the Committee's criticism of the Commission's reliance on 11 C.F.R. § 106.1 which requires allocation of expenses between more than one candidate on the basis of the benefit derived. First, the Committee argues that the fee payment conferred no benefit on the GEC. The second argument the Committee raises is that section 106.1(a) does not apply to the facts involved here where there is one candidate running in two elections, but applies only when two candidates are running in separate elections.

The Committee's initial assertion that there has been no "threshold showing that any of the services rendered by TTI prior to nomination conferred any benefit on the general election campaign," Attachment 2 at 10 n.8, is contradicted by the facts involved in this matter. It is conceded that advertisements produced during the primary campaign were used by the GEC. Indeed, it appears that the media campaign for the entire campaign, primary and general, was developed by TTI during the primary campaign. The Audit Division's analysis notes that the "general election strategy was set in place" during the primary election phase of the campaign. Attachment 5 at 6.

The Committee's arguments concede as much. Specifically, the Committee's response states that Tuesday Team's development of the advertising campaign to help reelect President Reagan, with the associated market research, creative, and other costs, would involve a large amount of "up-front" or "start-up" costs,

thus justifying a comparatively larger fee paid by the Primary Committee. The Committee's response includes a letter from its accountant which states that "[a]n advertising campaign involves a large amount of initial fixed costs. Advertising textbooks note that much of an agency's work deals with assisting in the development of the advertising plan, market research, and creation of the advertisements." (footnote omitted). Attachment 2 at p. 13 (Touche Ross letter at 1). The Touche Ross letter also notes that "[t]he fact that Tuesday Team, Inc. was organized specifically to provide services to the Election Committees, and was charged with developing an advertising campaign, as well as overseeing production and media time acquisitions, would lead us to expect that start-up costs to develop an advertising campaign would be significant in relation to continuing costs to monitor the program." Attachment 2 at p. 15. (Touche Ross letter at 3).

Thus, since the Primary Committee paid for the most substantial start-up costs of developing the campaign and creating the advertisment themes, while the GEC evidently was required only to defray the "continuing costs to monitor the [media] program," id., the Primary Committee quite clearly and effectively subsidized the GEC's media campaign. Any argument, therefore, that the GEC did not benefit in a tangible and substantial way from this subsidy is simply untenable. Tuesday Team obviously treated its services to the two committees as part of a single advertising campaign, to reelect President Reagan.

In such a campaign it is not surprising that the majority of the creative and planning services in developing the media campaign for both the primary and general elections were rendered by TTI during the primary election.

Following the oral presentation, the Committee raised a second objection to the application of section 106.1, arguing that it was not required to allocate expenses providing significant and tangible benefit to the GEC under any circumstances since the cited regulation only applies in the case of more than one candidate running in separate elections. The Committee misapprehends the application of section 106.1, which applies to the separate candidacies of one individual as well as situations involving two or more candidates running in separate elections. Based upon the allocation principles set forth in that section, for example, the Commission has long required that assets transferred by publicly funded presidential primary committees to general election committees, and shared expenses of campaign workers in the transition period from primary to general election campaign be allocated between the two committees. Thus, the Commission's Financial Control and Compliance Manual for General Election Candidates Receiving Public Financing IV-51-52 (1983) anticipates, for example, the allocation for overhead expenses between primary and general election campaigns for shared office space and support.

The separate public funding schemes under which President Reagan received public funds first as a primary candidate, and then as a general election candidate, require the careful allocation of expenses benefitting both campaigns. Otherwise,

for example, a primary committee could in part obviate the spending limits the candidate has agreed to in order to receive full general election funding. Obviously, this problem is greatest in the situation presented here, where the candidate is running in a substantially uncontested nomination campaign, which has received the maximum amount of matching funds and has a substantial surplus. Therefore, the Primary Committee may not subsidize in a tangible and substantial way the GEC's commercial advertising campaign by alone absorbing the significant costs of putting that campaign into place. Rather, such expenses must be allocated between the committees.

2. Pre-nomination Expenses of the GEC

The Committee further argues that as a matter of law, payments to TTI by the Primary Committee for services rendered prior to the nomination would not be qualified campaign expenses of the GEC. Thus, the Committee contends that the GEC may not be required to reimburse the Primary Committee for any portion of the fee payments.

Contrary to the Committee's assertions, allocating a portion of the fee charged to the Primary Committee to the GEC would not be prohibited as a matter of law because the fee was for services rendered during the primary campaign. The Fund Act defines qualified campaign expenses of the general election campaign as expenses incurred by a Presidential candidate "to further his election to such office" and incurred "within the expenditure report period [i.e. after the nomination] . . . or incurred

before the beginning of such period to the extent such expense is for property, services, or facilities used during such period." 26 U.S.C. § 9002(11). The Commission's regulations flesh out the nature of permissible expenditures prior to the nomination, providing that "[e]xamples of such expenditures include but are not limited to: Expenditures for establishing financial accounting systems, expenditures for organizational planning and expenditures for polling." 11 C.F.R. § 9003.4(a)(1). Thus, the statute and regulations permit a general election candidate to incur a relatively narrow class of expenses prior to nomination that are in preparation for, and in anticipation of, campaign activity directly furthering his or her election.

Here the substantial start-up costs incurred by Tuesday Team, according to the Committee's response, represented the costs for such services as developing an advertising campaign and market research relative to planning a media campaign for not only the primary election, but the general election as well. These expenses seem to be the type of planning expenses that the statute and regulations intend to permit a general election candidate to make prior to his or her nomination. Furthermore, the Committee's argument in this regard is undercut by other activities of Tuesday Team concededly on behalf of the GEC. TTI commenced its work for the GEC before the start of the expenditure report period pursuant to a contract dated as of July 3, 1984. Under that contract, TTI had received payments toward the GEC's $1.3 million fee and expended funds on the GEC's

behalf prior to the candidate's August 22, 1984 nomination. 7/

3. Allocation Method

Finally, the Committee challenges the method used to allocate the media fee payments between the primary and general election campaigns. The Committee and its accounting firm explain that with the increase in advertising rates for network television, there is less connection between commissions based on the amount of air time purchased and the media firms' costs for the services provided. Articles in trade journals are cited for the assertion that the trend in the industry is away from high standard commissions based on time buys and toward negotiated fees for services rendered. Attachment 10 at p. 28. Further, it is contended that the Primary Committee negotiated such a set fee, of $1 million, with Tuesday Team in an arms length transaction. Accordingly, they assert that the allocation method utilizing in part the relative amount of time buys is arbitrary and unsupported, and that actual agreements between Tuesday Team and the Reagan-Bush '84 committees should have been used as the allocation basis.

7/ The Committee overstates the Commission's decision declining to further pursue in the Audit Report a finding that other pre-nomination expenses were not qualified campaign expenses of the Primary Committee. The Commission's decision established no general rule that payments for services rendered prior to the nomination are per se qualified campaign expenses of the Primary Committee as the Committee contends.

The use of time buys as part of the allocation formula was not a creation of the Commission. Rather, it reflects the practice of the advertising industry which generally bases the fees charged to the client on a commission basis. Even the materials submitted by the Committee indicate that while there is movement away from use of a standard commission, nearly two-thirds of major advertisers still use some form of a commission in determining the fee charged to a client. Attachment 10 at p. 28. Thus, the Committee's assertion of a trend toward flat fees as opposed to commissions on time buys does not negate that the Commission's allocation method involves use of the still dominant industry practice.

The Commission rejects the argument that the amounts paid TTI by the Primary Committee and the GEC are per se reasonable merely because the amounts are specified in separate written contracts the two committees had with Tuesday Team. First, where it is conceded that the Tuesday Team had no previous existence, but was formed to run the media campaign for the Reagan-Bush '84 committees, the Commission finds that TTI and the Committee did not have an arms length relationship which would justify such deference to the agreement of the parties. Second, the Committee essentially admits the disproportionate nature of the fees by asserting that the Primary Committee was paying up front the substantial start-up and creative costs of the advertising firm, while the GEC was only required to pay the "continuing costs to monitor the program". Attachment 2 at p. 15.

Thus, the Committee has perhaps explained why the payments were structured as they were, but it has also plainly demonstrated that this structure is a subsidy of the GEC. In absence of any reasonable allocation put forward by the Committee, the Commission relies on the only verifiable figures its auditors could uncover, which the industry traditionally uses as the base for media firm compensation.

The Commission concludes that the Primary Committee has failed to persuasively support the appropriateness of its fee payment compared to that of the GEC. Essentially, the Primary Committee argues that because the Commission's allocation is imprecise, it is unsupportable. Not only does this approach not help the Commission in its attempt to best resolve the issue, but it fails to satisfy the Committee's burden of showing its method is reasonable.8/ The Committee has not put forward an alternative allocation method which is more appropriate for this type of allocation. The Committee's accounting firm, Touche Ross, suggests that the provisions of the Cost Accounting Standards (CAS) 4 C.F.R. § 418.50 be applied in the instant situation. Attachments 2 at p.13. (Touche Ross Letter at 1) and 8 at p.4,

8/ Both the Matching Payment Act and the Fund Act require the candidate to agree in exchange for receiving public funds, to provide the Commission "with any evidence it may request of qualified campaign expenses." 26 U.S.C. § 9003(a)(1); 26 U.S.C. § 9033(a)(1). The candidate also has the burden of proving the campaign's disbursements are qualified campaign expenses. 11 C.F.R. §9033.11(a).

(Touche Ross Letter at 1.). While these standards are useful by analogy to the method utilized by the Audit staff to calculate the media fee allocation, they are not binding upon the Commission.9/ In any event, the allocation method applied in the instant matter is consistent with the standards set forth in 4 C.F.R. § 418.50(d) and (e). Specifically, the Audit Division's allocation is supported by section 418.50(d)(3)(i), which allocates based upon final cost objectives. In this instance, the media activities of the two campaigns were the final cost objectives. Section 418.50(d) applies to allocations which include a material amount of the costs of management or supervision of activities involving direct labor or direct material costs. This standard is analogous to the method used to determine the media fee allocation because there is evidence that the TTI fee included the costs of management and supervision. (Attachment 5 at p. 37.) Moreover, 4 C.F.R. § 418.509(e)(3) leads to the same result as the Audit Division's analysis of the media fee.10/ The approach contained in that section requires that the allocation be based upon a "surrogate." Rather than allocating

9/ The Cost Accounting Standards cited by Touche Ross govern defense contractors and do not even purport to apply to matters within the Commission's jurisdiction.

10/ Section 418.50(e) delineates various methods of allocation in descending order of preference. The first two types of allocation, based on resource consumption and output, cannot be applied in this case because there is insufficient information concerning TTI's operations.

based upon the output or resources of the entity supplying the services, this approach bases the allocation on the activity of the entity receiving the services. Application of this method in the instant case is analogous to allocating the fee based on the relative media and production activity of the campaign, which is essentially what was done as the media fee allocation is based on a percentage of total media and production expenditures.

Touche Ross also appears to rely upon the Financial Accounting Standards Board (FASB) Statement of Financial Accounting Concepts No. 3. Attachment 8 at p. 5-6. (Touche Ross Letter at 2-3). According to the FASB opinion, uncertain expenses, such as advertising costs, should not be allocated, but may be expensed based on the time when such costs are paid. Under this theory, certain initial start-up costs may be paid first and not allocated over time. This analysis is not applicable here because the FASB opinion assumes an ongoing business entity with continuing advertising expenses. Here, TTI was a finite entity that existed for a limited time period, which was based on the length of the campaign. Thus, the advertising campaign start-up costs, which might reasonably be expensed at an ongoing advertising agency, should be allocated because the time frame and results are definite, not uncertain. Moreover, the use of the FASB opinion relies upon Touche Ross' assertion that the primary and general campaigns were separate accounting periods, divided at the date of the convention, and that costs from one period could not be carried forward to the next. However, the

Reagan-Bush primary and general campaigns were actually separate accounting entities with overlapping accounting periods. Some of the activities of both entities occurred at the same time, and many of TTI's activities benefitted both entities simultaneously. Thus, Touche Ross' assertion that the costs could not be pooled because there were two separate, sequential accounting periods is flawed.

As noted, aside from the assertion that the Commission must simply accept "the agreement of the parties" Attachment 2, p.15, (Touche Ross letter, p.3), the only representation made to affirmatively support the Committees' view that TTI incurred substantial start-up costs to develop the advertising campaign cuts strongly against the Committee. Moreover, the Committee has not come forward with information that would be a basis for making a more refined allocation of the media fee. The Audit Division, for example, has indicated that access to TTI's corporate records and CPA workpapers may enable it to determine what portion of the fee paid to TTI relates to commercial production, media placement or indirect overhead and make a more sophisticated allocation of the fee between the Primary Committee and the GEC. It was also requested at the oral presentation that the Committee provide a description of the actual services that Tuesday Team provided to the campaign committees. See Attachment 6 at 55. The Committee, having neither facilitated access to these records nor provided a description of TTI's services, cannot now complain because the method used resulted in a less sophiscated allocation of the fee.

The Commission thus affirms its initial determination that the GEC must reimburse the Primary Committee for the allocable portion of the media fee paid by the Primary Committee that should have been borne by the GEC. The Commission does modify its initial determination in one respect, however. An explanation for the discrepancy in the production cost figures used to calculate the fee allocation has been provided. See Attachment 9 at 13-14. The Commission accepts the new figures provided and has recalculated the amount owed by the GEC to the Primary Committee. See Attachment 12. The net effect of this recalculation is to reduce the amount of the reimbursement due from the GEC by $12,461.78 to $779,604.78.

D. Revisions to NOCO Statement

The Commission has modified the final repayment amount, based upon revisions to the Primary Committee's statement of net outstanding campaign obligations (NOCO statement").[11/] Attachment 15. These revisions include the addition to the Committee's receivables of the amount of duplicate payments and contributions received after the candidate's date of ineligibility but dated prior to that date. The winding down costs stated in the NOCO statement have also been updated to replace estimates with actual expenses. Finally, the amount of accounts payable has been reduced to deduct certain payments for which no documentation was provided. These revisions increase the Committee's surplus,

11/ The Final Audit Report noted that since certain expenses were estimated in the NOCO statement, the repayment amount could change based upon the Audit Division's review of the Committee's actual costs. Attachment 1 at p. 9 n.f.

requiring an additional pro-rata repayment of $66,077.78.

IV. FINAL REPAYMENT DETERMINATION

Pursuant to 26 U.S.C.§ 9038(b)(1) and 11 C.F.R. § 9038.2(c)(4) the Commission has made a final determination that for the forgoing reasons President Ronald Reagan and Reagan-Bush '84 must repay an additional $373,555.08 to the United States Treasury pursuant to 26 U.S.C. § 9038(b)(3).

Attachments

1. Report of the Audit Division on Reagan-Bush '84.
2. Response of Reagan-Bush '84 to the Audit Report.
3. Report of the Audit Division on Reagan-Bush '84 General Election Committee.
4. Memorandum to the Commission Regarding Oral Presentation. (Attachments omitted)
5. Analysis of Reagan-Bush '84 response by the Audit Division.
6. Transcript of Oral Presentation
7. Letter dated August 5, 1987 from John Duffy.
8. Letter dated August 12, 1987 from John Duffy.
9. Response of Reagan-Bush '84 General Election Committee to the audit report.
10. Response of Reagan-Bush '84 to General Eelection Committee Interim Audit Report.
11. Sample Television Station Invoice (Statute of Liberty Commercial).
12. Audit Division Explanation of Modification of the Initial Determination.
13. Response of Reagan-Bush '84 to the Interim Audit Report.

14. Memorandum from Ron Robertson to Rick Halter RE: Reagan-Bush '84 Primary Campaign Media Costs.

15. Memorandum Re: NOCO update - Reagan-Bush '84 (Primary), and attached NOCO statement, dated December 9, 1987.

COPIES OF ATTACHMENTS ARE AVAILABLE
FROM THE FEC PRESS OFFICE OR THE
PUBLIC RECORDS OFFICE UPON REQUEST.

FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

July 10, 1986

MEMORANDUM

TO: FRED EILAND
CHIEF, PRESS OFFICE

FROM: ROBERT J. COSTA
ASSISTANT STAFF DIRECTOR
AUDIT DIVISION

SUBJECT: PUBLIC ISSUANCE OF FINAL AUDIT REPORT - REAGAN-BUSH '84 (THE CANDIDATE'S PRIMARY COMMITTEE)

Attached please find a copy of the above mentioned Final Audit Report which was approved by the Commission on July 7, 1986.

It should be noted that Agenda Document #86-57, considered by the Commission in the Open Session of June 26, 1986, contains the analysis prepared by the Commission's Office of General Counsel, as well as the Primary Committee's response to the interim report. These documents and possibly the report considered by the Commission on June 26, 1986 may be of interest to anyone reviewing the attached report. Therefore, it is suggested that persons requesting the final report be made aware of the contents of Agenda Document #86-57.

Informational copies of the report have been received by all parties involved and the report may be released to the public.

Attachment as stated

cc: FEC Library
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Public Record

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

REPORT OF THE AUDIT DIVISION ON REAGAN-BUSH '84

I. Background

A. Overview

This report is based on an audit of Reagan-Bush '84 ("the Committee" or "the Primary Committee") to determine whether there has been compliance with the provisions of the Federal Election Campaign Act of 1971, as amended ("the Act") and the Presidential Primary Matching Payment Account Act. The audit was conducted pursuant to 26 U.S.C. § 9038(a) which states that "After each matching payment period, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of every candidate and his authorized committees who received payments under Section 9037."

In addition, 26 U.S.C. § 9039(b) and 11 C.F.R. § 9038.1(a)(2) state, in relevant part, that the Commission may conduct other examinations and audits from time to time as it deems necesssary.

The Committee registered with the Federal Election Commission on October 17, 1983. The Committee maintains its headquarters in Washington, D.C.

The audit covered the period from the Committee's inception, October 17, 1983, through August 31, 1984, the last day covered by the most recent report filed with the Commission at the time of the audit. In addition, certain financial activity was reviewed through January 15, 1985. The Committee reported an opening cash balance of $-0-, total receipts of $27,682,289.68, total disbursements of $25,817,114.96 and a closing cash balance of $1,865,174.72 on August 31, 1984. Under 11 C.F.R. § 9038.1(c)(4) additional audit work may be conducted and addenda to this report issued as necessary.

This report is based upon documents and working papers which support each of the factual statements. They form part of the record upon which the Commission based its decisions on the matters in the report and were available to Commissioners and appropriate staff for review.

B. Key Personnel

The Treasurer of the Committee is Angela M. Buchanan Jackson.

C. Scope

The audit included such tests as verification of total reported receipts, disbursements and individual transactions; review of required supporting documentation; analysis of Committee debts and obligations; review of contribution and expenditure limitations; and such other audit procedures as deemed necessary under the circumstances.

II. Finding and Recommendation Related to Title 2 of the United States Code

A. Matter Referred to the Office of General Counsel

A certain matter noted during the audit was referred to the Commission's Office of General Counsel.

III. Findings and Recommendations Related to Title 26 of the United States Code

A. Apparent Non-Qualified Campaign Expenses

Section 9038(b)(2)(A) of Title 26, United States Code states that if the Commission determines that any amount of any payment made to a candidate from the matching payment account was used for any purpose other than to defray the qualified campaign expenses with respect to which such payment was made, it shall notify such candidate of the amount so used, and the candidate shall pay to the Secretary an amount equal to such amount.

The Commission, in a Notice of Proposed Rulemaking published in the Federal Register on June 28, 1984, set forth a pro-rata formula which would base repayments for non-qualified campaign expenses on the proportion of federal funds to total funds received by the candidate. The text of the regulation along with the Explanation and Justification were published in the Federal Register on August 22, 1984 and transmitted to Congress. On March 5, 1985 the revised regulations were resubmitted for publication. The proposed regulations were before the Congress for 30 legislative days as of May 20, 1985, and approved by the Commission for publication in final form on June 11, 1985.

The formula and the appropriate calculation with respect to the Committee's receipt activity is as follows:

Total Matching Funds Certified Through Date of Ineligibility (8/22/84) 1/
Numerator + Private Contributions Received Through 8/22/84

$10,100,000 / $26,904,069.30 = .375408

Thus, the repayment ratio for non-qualified campaign expenses is 37.5408%.

1. Apparent Payment of General Election Expenses

The term "qualified campaign expense" is defined at 26 U.S.C. § 9032(9) as a purchase, payment, advance, or gift of money or anything of value incurred by a candidate or by his authorized committee, in connection with his nomination for election (emphasis added).

The Committee made expenditures for voter registration and other political activities totaling $2,136,898.83 which appeared to benefit the candidate's general election campaign only; and were not made in connection with his campaign for nomination for election. Included in this amount is $64,615 in Committee expenditures which were reimbursed by the Reagan-Bush '84 General Election Committee ("the GEC"). (See footnotes 2/ and 3/on pages 3, 5 and 8 of Attachment 1). The expense authorization request forms prepared for three (3) of these expenditures indicate that the amounts are to be charged to the general election budget.

a. Voter Registration

Voter registration expenses totaling $1,847,776.54 were identified by the Audit staff during a review of expenditures (See Attachment 1). Payments were made to computer firms, list suppliers, mailing firms, consultants, phone companies, communications firms, telemarketing companies, and individuals. According to documents contained in Committee files, these vendors provided lists of individuals and performed services related to the identification and registration of individuals who indicated support for the candidate. The amounts identified by the Audit staff represent only payments for goods and services used in a state after the date of that state's primary or caucus. Payments for voter registration services used in a state prior to the caucus or primary were not included.

1/ The Candidate's date of ineligibility was determined in accordance with 11 C.F.R. § 9033.5(c).

A portion of this amount ($182,968.16) represents the non-fundraising portion of expenses made in connection with a nationwide voter registration drive on Saturday, June 23, 1984. The drive was held in several hundred locations around the country. Volunteers were assembled in each location and shown a videotape of the candidate urging the volunteers to go out and register voters for the general election. The volunteers then canvassed neighborhoods to identify unregistered supporters of the candidate. The focus of the effort (as reflected in a manual given to organizers, circulars given to participants, a sample press release prepared for the media, and a videotaped pep talk by the candidate sent to each location) was the mass registration of new voters who supported the candidate. However, the drive did include a fundraising appeal as a secondary purpose. As a result, the Committee charged 25% or $60,989.39 of the event cost to the fundraising exemption pursuant to 11 C.F.R. § 100.8(21). The Audit staff noted that the Committee had received $58,477.27 in contributions solicited during the drive.

b. Other Political Activities

Expenditures made by the Committee, totaling $289,122.29, were identified by the Audit staff as apparently related to the general election campaign (See Attachment 2). According to documentation reviewed by the Audit staff, most of these expenditures represent polling expenses for surveys which began after most, if not all, of the primaries and caucuses had been held. The remainder of the amount represents political consulting work performed with respect to a specific state after the respective primary or caucus.

The Treasurer responded that the Committee was aware these expenditures would be questioned but felt that the expenditures were clearly made for the purpose of influencing the candidate's nomination. The expenditures were incurred prior to the nomination date and were made to demonstrate the candidate's continuing support and leadership role in his party and the nation. The expenditures were also made to show that the candidate could represent the party in the general election and convince convention delegates to support the candidate.

In the Commission approved interim report, the Audit staff recommended that within 30 days of receipt of the report, the Committee submit evidence to demonstrate that the $2,136,898.83 in expenses for voter registration and other political activities were made in connection with the candidate's nomination and are therefore qualified campaign expenses. The interim report further stated that absent such a showing the Audit staff intended to recommend that the Commission make an initial

determination that the amount ($2,136,898.83) representing the value of general election expenses be viewed as non-qualified campaign expenses and a pro-rata portion, $802,208.92 ($2,136,898.83 x .375408) be repaid to the U.S. Treasury pursuant to 26 U.S.C. § 9038(b)(2).

The Committee's response argues that expenses incurred after the date of delegate selection in a state merit no closer examination than expenses incurred prior to that date. In support of this position the Committee presents three arguments as follows:

1. The Statutory Definition of Qualified Campaign Expense Requires Only That the Expense Be Incurred Prior To the Date of the Candidate's Nomination.

The Committee contends that Congress did not intend "to require more than that the expense be incurred prior to the date of nomination or that Congress intended to authorize the Commission to evaluate the sufficiency of the nexus between the expenses and the campaign for nomination." The Committee cites legislative history wherein it is stated "that candidates are permitted full flexibility and discretion in their election efforts, subject only to limitation on the dollar amounts of expenditures and contributions." While the Audit staff acknowledges the concerns voiced in the legislative history cited by the Committee as well as the Commission's accordance of wide discretion to candidates in how to conduct their publicly-funded campaigns, the Commission also has the responsibility to insure that compliance with the Act's spending limitations is achieved. To permit candidates to exercise such wide discretion that primary election funds could be spent to further the candidate's general electon would nullify the very limits established by Congress (see 26 U.S.C. §§ 9003(b)(1) & 9035(a) and 2 U.S.C. §§ 441a(b)(1)(A) and (B)).

2. The Staff's Request Conflicts With The Commission's Policy of Restraint In Its Review of Candidates' Spending Decisions

The Committee also contends that the Audit staff's request (that the Committee demonstrate that the expenses in question are not general election expenses) is in conflict with the Commission's policy of restraint in its review of candidates' spending decisions. Although as discussed above, the Commission has accorded wide discretion to candidates in how they conduct their publicly-funded campaigns, the Commission is required by the Act to "conduct a thorough examination and audit of the qualified campaign expenses of every candidate and his authorized committees who receive payments under section 9037 (26 U.S.C. § 9038(a))."

In addition, the Commission's regulations at 11 C.F.R. § 9033.11(a) states that "Each candidate shall have the burden of proving that disbursements made by the candidate or his or her authorized committee(s) or persons authorized to make expenditures on behalf of the candidate or committee(s) are qualified campaign expenses as defined in 11 C.F.R. § 9032.9." Further, the candidate "shall obtain and furnish to the Commission on request any evidence regarding qualified campaign expenses made by the candidate or his or her authorized committee(s)." The Committee's comments in this area are not persuasive.

3. Expenditures Made After The Delegate Selection Process Has Been Completed Are Entitled To The Same Deference As Those Made Before

The Committee has provided a lengthy discussion concerning the nomination process in an attempt to show that expenditures made after the delegate selection process in a state has been completed are entitled to the same deference as those made before. In essence, the Committee sets forth, in support of its position, an overview of the various provisions of State law regarding the amount of discretion accorded to delegates to the national nominating convention in voting for their choice for the nominee of the party. The Committee contends that a large portion of the delegates at any convention are not bound to any particular candidate. Hence, their selection at the conclusion of a state's primary caucus or convention cannot have the importance that the Audit staff seeks to accord it.

Finally, the Audit staff considered additional documentation and explanations further detailing the purposes of the four (4) expenditures totaling $64,615.00 which were reimbursed by the GEC. (See footnotes 2/ and 3/ on pages 3, 5 and 8 of Attachment 1). The information reviewed indicates that these are the type of start-up and polling expenses properly reimbursable by the GEC in accordance with 11 C.F.R. § 9003.4(b)(4)(i).

Summary

It appears that rather than addressing the reasoning contained in the interim audit report, the Committee has elected to argue only that expenses incurred after a state's primary election or caucus is completed are not per se non-qualified campaign expenses. The Audit staff does not disagree. However, the interim report's discussion was focused on what appeared to be expenses which benefitted the candidate's general election campaign since the registration of voters in states where the primary/caucus had

occurred could only result in their votes being cast with respect to the general election with little, if any, benefit accruing to the primary campaign. Deference was accorded to the Committee in that expenses for activities (some of which were identified as voter registration) incurred prior to the date of the primary/caucus in a state were viewed by the Commission as qualified campaign expenses.

The Committee has argued that the expenses in question were qualified campaign expenses for the primary campaign since incurred prior to the date of nomination. The Audit staff acknowledges that with few exceptions the expenses in question were incurred prior to the date of nomination; however, in our opinion the Committee has not demonstrated that these expenses were incurred in connection with the candidate's primary election campaign. Rather, the expenses incurred with respect to the registration of voters in states where the primary/caucus had already occurred can only influence the election in which the voters may exercise their franchise which, in this case, is the general election.

Conclusion

On June 26, 1986, the Commission considered the matters noted above and made a determination that the $2,072,283.83 ($2,136,898.83 less $64,615.00 properly reimbursed by the GEC) in expenses for voter registration and other political activities were made in connection with the candidate's campaign for nomination for election and are therefore qualified campaign expenses. No further action is necessary.

B. Statement of Net Outstanding Campaign Obligations

Section 9034.5(a) of Title 11, Code of Federal Regulations requires that the candidate submit a Statement of Net Outstanding Campaign Obligations (NOCO) which contains, among other items, the total of all outstanding obligations for qualified campaign expenses and an estimate of necessary winding down costs within 15 days of the candidate's date of ineligibility.

In addition, 11 C.F.R. § 9038.3(c)(1) requires a candidate whose net outstanding campaign obligations reflect a surplus on the date of ineligibility to repay to the Secretary within 30 calendar days of the ineligibility date an amount which represents the amount of matching funds contained in the surplus.

Finally, 26 U.S.C. § 9038(b)(3) states that amounts received from the matching payment account may be retained for the liquidation of all obligations to pay qualified campaign expenses incurred for a period not exceeding 6 months after the end of the matching payment period. After all obligations have been liquidated, that portion of any unexpended balance remaining in the candidate's accounts which bears the same ratio to the total unexpended balance as the total amount received from the matching payment account bears to the total of all deposits made into the candidate's accounts shall be promptly repaid to the matching payment account.

On September 21, 1984, the Committee repaid $344,893.24 to the U.S. Treasury representing a pro-rata share of the estimated surplus on the Candidate's date of ineligibility (August 22, 1984). The Audit staff reviewed records and documentation supporting the Committee's calculations. Depicted on page 9 is a NOCO statement prepared by the Audit staff, which reflects certain adjustments to the original NOCO filed by the Committee (these adjustments are based on the Audit staff's review of actual financial activity through January 15, 1985 and Commission action taken with respect to Finding III.B.2.). On February 6, 1985, the Committee's Deputy Treasurer agreed that the audited NOCO statement accurately reflected the Committee's financial position as of August 22, 1984.

It should be noted that the adjustments explained below at items B.1. and 2. were not developed during the initial phase of audit fieldwork and thus, the Deputy Treasurer's comments of February 6, 1985 regarding the NOCO do not extend to these adjustments, nor to the additional repayment determination resulting therefrom.

The NOCO statement on page 9 depicts a calculated surplus of $1,569,320.32. Although the Committee made a repayment on September 21, 1984 in the amount of $344,893.24, an additional amount of $244,242.16 appears to be repayable, as shown on the NOCO below.

REAGAN-BUSH '84

Analysis of Committee's NOCO Statement
As of August 22, 1984 a/

ASSETS			
Cash in Bank		$2,656,049.92	
Accounts Receivable		953,415.41	
Contributions received post 8/22/84 b/		38,808.72	
Accrued Interest		21,975.12	
Reimbursements due from GEC			
-Allocable amount of media fee c/		792,066.60	
-Allocable amount of production costs for shared commercials d/		55,429.55	
TOTAL ASSETS			$4,517,745.32
OBLIGATIONS			
Accounts Payable		$2,326,295.66	
Income Taxes		222,129.34	
ESTIMATED WINDING DOWN COSTS (1/15/85 TO 7/31/85) e/			
Legal Fees	$300,000.00		
Accounting Fees	65,000.00		
Rent and Storage	25,000.00		
General Expenses	10,000.00		
TOTAL ESTIMATED WINDING DOWN COSTS		400,000.00	
TOTAL OBLIGATIONS			2,948,425.00
NET OUTSTANDING CAMPAIGN OBLIGATIONS - SURPLUS AS OF AUGUST 22, 1984 f/			$ 1,569,320.32
AMOUNT REPAYABLE, (SURPLUS MULTIPLIED BY REPAYMENT RATIO) g/			$ 589,135.40
Less: 9/21/84 repayment made			(344,893.24)
Repayment Amount			$ 244,242.16

a/ August 22, 1984 is the date determined by the Commission to be the Candidate's date of ineligibility for purposes of incurring qualified campaign expenses.

b/ Includes contributions received after 8/22/84 but dated prior to 8/23/84.

c/ This adjustment is explained fully at Finding III.B.1.

d/ This adjustment is explained fully at Finding III.B.2.

e/ An adjustment(s) to Estimated Winding Down Costs (1/15/85 to 7/31/85) will be made, as necessary, to account for any changes due to extending the projected termination date beyond 7/31/85, as well as the verification of the estimates used.

f/ Since certain estimates were used in computing this amount, the Audit staff will review the Committee's reports and records to compare the actual figures with the estimates and prepare adjustments if necessary. For example, the amount could change based on our review of the Committee's actual winding down costs. In addition, other adjustments to this amount may be necessary as a result of certain matters noted in Findings III.B.1. and 2.

g/ For calculation of the repayment ratio see discussion of apparent Non-Qualified Campaign Expenses under Finding III.A. on pages 2-3.

The two adjustments to the NOCO which form the basis for the additional repayment amount are discussed below.

Background

The Primary Committee and the GEC contracted with Tuesday Team, Inc. (TTI) to handle the production and time buying for commercials to be aired during both the primary and general election campaigns. A separate contract was negotiated for each election campaign. For these services, the Primary Committee paid a consultant fee of $1,000,000 to TTI, and TTI received a consultant fee of $1,315,000.29 for its services with respect to the general election campaign.

The committees wired funds to TTI which with the exception of the consultant fees were either deposited in the TTI production accounts or the media (time buying) accounts established by TTI to transact the business relative to the contracts with each committee. TTI in turn made payments to vendors for the expenses related to production of commercials and the purchace of advertising space.

1. Fee Payment to Media Firm

For a primary Presidential candidate, the term "qualified campaign expense" is defined at 26 U.S.C. § 9032(9) as a purchase, payment, advance, or gift of money or anything of value incurred by a candidate or by his authorized committee, in connection with his nomination for election (emphasis added).

For a General Election Presidential candidate, the term "qualified campaign expense" is defined at 26 U.S.C. § 9002(11)(A)(iii) as an expense incurred by an authorized committee of the candidates of a political party for the offices of President and Vice President to further the election of either or both of such candidates to such offices.

The Regulations at 11 C.F.R. § 106.1(a) require that expenditures made on behalf of more than one candidate shall be attributed to each candidate in proportion to the benefit reasonably expected to be derived.

In the Interim Report of the Audit Division on the GEC, the Audit staff cited 2 U.S.C. § 441b and said it appeared the consultant fee paid by the GEC to its media firm was too low and a possible in-kind corporate contribution had been made by the firm. Our analysis was based on the application of a standard 17.65% mark-up on media time buys and production costs normally charged by media firms. (In fact, initially the Primary Committee referred to this standard mark-up rate to explain a portion of the $1,000,000 fee it paid to TTI.) Since the GEC incurred $25,278,001.03 in media buys and production expenses, the $1,315,000.29 fee appeared much too low in light of the normal 17.65% mark-up.

At the exit conference, GEC officials responded that the fee paid for the general election period was negotiated when the market was "soft." They also said that their contract was similar to media contracts with other "prestigious" firms that purchase a large volume of media time.

In the interim report, the Audit staff recommended that the GEC submit evidence demonstrating an in-kind contribution had not been received from the corporate media consulting firm. The Audit staff added that based on a review of that documentation, additional recommendations could be forthcoming.

In its response to the interim report, the GEC dismissed the Audit staff's interpretation of the Primary Committee's justification for the fee paid TTI during the nomination period. The GEC simply stated that it sought and obtained a flat fee arrangement through arms length negotiations.

The GEC concluded that the fee was substantial when considering the time frame "(a)nd there is absolutely no evidence whatever that the fee did not compensate Tuesday Team for the market value of its services." The response did not elaborate on this point, but instead contained documentation supporting the contention that the media firm was compensated for the market value of its services in accordance with normal advertising business practices. The documentation consists of articles from trade journals and a letter from an advertising firm stating that negotiations often result in a set fee instead of the standard 17.65% commission on media buys. The articles indicate that in lieu of the standard commission, advertising firms will accept less when the budgets are large, the clients are prestigious, and the opportunity for growth is present. One article quotes an industry official as stating "as long as the advertiser recognizes our right to have a decent profit, 7.5% to 10% of gross billings, you can project profit and manpower usage."

The Audit staff agrees that the documentation supplied supports the contention that TTI was compensated for the market value of its services to both the Primary Committee and the GEC in accordance with normal industry practices. This conclusion is based on the Audit staff's analysis of combined activity of both the Primary Committee and GEC. The analysis indicates that TTI received an average gross profit of 8.336% for its services to both committees. This rate of return is consistent with normal advertising firm practices as outlined in the articles supplied in the response. Therefore, it no longer appears that the media firm has made an in-kind contribution to the GEC. Rather, it appears that the fees negotiated by both committees were not allocated properly between them. Our analysis indicates that the GEC should reimburse the Primary Committee $792,066.60 to reflect the proper allocation of the fee paid TTI in accordance with 11 C.F.R. § 106.1(a).

This amount is arrived at by applying the 8.336% rate to the $25,278,001.03 paid by the GEC for production expenses and media time buys and results in an appropriate fee of $2,107,066.89 or $792,066.60 more than the $1,315,000.29 actually paid. Conversely, application of the 8.336% gross profit rate to the Primary Committee's buys for time and production of $2,494,543.58 results in an appropriate fee of $207,933.40 or $792,066.60 less than the $1,000,000.00 actually paid. Therefore, the GEC should reimburse the Primary Committee $792,066.60 for appropriate allocation of the media fee.

Conclusion

On June 26, 1986, the Commission determined that within 30 days of receipt of this report, the Primary Committee is to bill the GEC for the amount ($792,066.60) of the allocable portion of the fee paid by the Primary Committee, which appears should have been borne by the GEC.

2. Media Production Costs

The Regulations, at 11 C.F.R. § 106.1(a) require that expenditures made on behalf of more than one candidate shall be attributed to each candidate in proportion to the benefit reasonably expected to be derived.

Certain production costs, identified by the Committee as relating to commercials to be aired during both the primary and general election campaigns, were viewed by the Committee as allocable between the primary and general election campaigns. On September 7, 1984, the GEC reimbursed $304,389.50 to the Committee. The Committee indicated that this amount represented 50% of total production costs associated with certain commercials. The Committee's Deputy Treasurer stated that this allocation was based on the fact that the same commercials were produced for use in both the primary and general election campaigns and that the allocation percentage was developed in early 1984 based on planning and estimated usage of production prices.

The auditors made numerous requests for documentation supporting the 50% allocation before, during, and after our review of TTI media records in New York City on December 18 - 19, 1984; however, such information was not made available. During the February 12, 1985 exit conference, the Deputy Treasurer informed the auditors that on the previous day, the Committee had refunded $162,807 to the GEC based on a further analysis of production costs and use of campaign commercials. This amount is included in the NOCO Statement under Accounts Payable. The Deputy Treasurer said he would supply information supporting his calculations in a few days. On February 25, 1985, the Deputy Treasurer supplied the Audit staff with schedules (Attachment 3) indicating that some commercials were not used in the general election campaign. The schedules did not provide the following information necessary to verify the $304,389.50 reimbursement by the GEC or the $162,807 refund:

(1) Verification that some TV spots were produced for the primary campaign only.

(2) Justification for allocating production costs (of spots produced for both campaigns) between the primary and general election campaigns on a 50% basis.

(3) Check copies, paid bills, and invoices to support production costs by commercial as listed on page 3 of Attachment 3.

As noted above, in addition to paying production costs and the cost of the media time purchased, the Committee also paid the media firm a $1,000,000 consulting fee. The Committee had initially indicated that the flat fee it paid to its media firm was in lieu of cost plus 17.65% not only on media time buys but also on production costs and a number of other services and facilities furnished by the firm. The Deputy Treasurer did not agree that any portion of the flat fee should be included in the total of allocable production costs. However, it is the Audit staff's opinion that to the extent that a portion of the fee is attributable to the cost of producing advertisements used by the GEC as well as by the Committee, the amount should be included in the total of allocable production costs.

Interim Report Recommendations and Committee Response

In the interim audit report, the Audit staff recommended that the Committee make available for our review documentation to support the allocation of media production costs to the primary and general election campaigns. The documentation requested was to include check copies, paid bills, and invoices to support production costs by commercial as listed on Attachment 3; evidence of how the flat consulting fee relates to the total of allocable production costs; justification for the 50% allocation of production costs between the primary campaign and general election campaign for spots aired in both campaigns; and verification for the Committee's contention that certain spots were used in the primary campaign only.

As part of their September 16, 1985 response to the interim audit report, the Committee made available for our review, documentation to support costs for commercials listed on Attachment 3. In addition, the Committee offered a justification for their 50%/50% allocation of production costs with the GEC and an explanation of how the $1,000,000 fee paid to TTI relates to this allocation. In its December 9, 1985, response to the Interim Report of the Audit Division on the Reagan-Bush '84 General Election Committee, the GEC supplied documentation regarding the consulting fees paid TTI. The Audit staff performed follow-up fieldwork to review this information.

Follow-up Fieldwork

During follow-up fieldwork completed October 18, 1985, the Audit staff attempted to obtain traffic reports or other documentation necessary to verify the reasonableness of the 50% rate of allocation. The Deputy Treasurer responded that the Committee could not locate these records, if they [indeed] existed. Therefore, the Audit staff could not, at that time, verify that the 50% allocation rate was reasonable.

During the course of fieldwork relative to the GEC's December, 1985 response to the interim report, the Audit staff was in contact with a representative of the entity that purchased TV time on local stations. In February 1986, this representative indicated that if the firm did not have the documentation necessary (scheduling instructions to TV stations/networks on which commercial to broadcast) to calculate usage of the shared commercials, the Committee had those documents.

Therefore, on March 25, 1986, the Commission formally requested that the Committee make available for our review, documentation showing the extent of the shared advertisements' usage by both the Primary Committee and the GEC.

In a letter dated April 24, 1986, Counsel for Committee responded that material related to media purchases, including some scheduling instruction forms were located, however, the search of Committee records did not locate a significant number of these forms. Counsel then concluded that, in accordance with the media buyer's usual procedure, the forms must have been destroyed. Finally, Counsel stated that the Committee is willing to give the Audit staff direct access to the records in storage and if upon examination any records are found that the Audit staff wishes to examine more closely, the Committee will arrange to have them retrieved from storage and made available for Audit staff inspection along with the records already located as a result of Committee efforts. On April 30, 1986, the Audit staff visited the warehouse in Springfield, Virginia and located several boxes which contained background information on media purchases for both campaigns. This information, coupled with that found by the Committee, and in conjunction with documents made available in October 1985, appeared sufficient to proceed with an analysis of the shared commercials. Therefore, in May 1986, the Audit staff conducted additional follow-up fieldwork to review this data.

Summary of Follow-up Fieldwork Performed

The first step in the review was to verify total production costs for each commercial as listed on page 3 of Attachment 3. The Audit staff reviewed invoices and other records made available relating to payments made from the TTI Production account. Our review indicated that the distribution of production costs by commercial as listed on page 3 of Attachment 3 was accurate except for the amount associated with the commercial entitled "Statue of Liberty." As a result of our review of production account records, we identified $64,691.36 in expenses related to the "Statue of Liberty" or $34,193.36 more than the amount listed by the Committee. See listing of these expenditures at Attachment 4. The Deputy Treasurer could not explain the difference.

The next step in the review was to analyze all TV network/local station invoices and affidavits for both the Primary Committee and GEC. The Audit staff examined approximately $23,000,000 in documentation related to the purchase of TV broadcast time for the primary and general election campaigns and scheduled the frequency (number of times the commercial ran) and gross time cost of all commercials produced by the Primary Committee. Because time costs vary widely depending on markets and the disparities in time costs between network, cable, and local buys, the Audit staff calculated relative usage between the Primary Committee and GEC based on time costs instead of frequency. Our review revealed that Primary Committee produced commercials entitled "Spring of 84:30," "Spring of 84:60," "America's Back:30," "America's Back:60," and "Ronald Reagan 5 minute #1" were used exclusively by the Primary Committee. The commercial entitled "The Bear," also produced by the Primary Committee, was used exclusively by the GEC, and Primary Committee produced commercials entitled "Prouder, Stronger, Better:30," "Prouder, Stronger, Better:60" and "Statue of Liberty" were shared by both campaigns.

Our review further revealed that 55.25% of the buys for "Statue of Liberty" were made by the Primary Committee and 44.75% were made by the GEC. On the other hand, 43.10% of the buys for "Prouder, Stronger, Better:30" was Primary related and 56.90% was GEC related. The ratio for "Prouder, Stronger, Better:60" was 29.75% Primary and 70.25% GEC. These percentages were applied to the verified production costs. The audited results as shown on Attachment 5 indicated that the GEC portion of the production costs for the three shared commercials total $166,131.44 or $50,574.44 more than allocated by the Committee.

In addition, the Committee allocated only 50% of the cost for "The Bear" which was produced by the Primary Committee at a cost of $53,754.00 but was used exclusively by the GEC. Therefore, the Audit staff allocated the entire cost of "The Bear" to the GEC. Further, the GEC paid several bills related to the May, 1984 production of "America's Back:30" and "America's Back:60" (used exclusively by the Primary Committee); the amount paid ($9,893.13) may be offset against any amounts determined to be owed by the GEC to the Primary Committee (see Attachment 5, line 10).

As noted on Attachment 5, we have calculated that the GEC's share of the direct production costs paid by the Primary Committee is $219,885.44. Based on our analysis of the fee payment to the media firm discussed at B.1., it appears that the Audit staff should add a markup of 8.336% (vs 17.65%) to the GEC's share ($219,885.44) of the direct production costs. Because the Primary Committee is to be reimbursed for these production costs by the GEC, the Primary Committee must also be reimbursed for the related portion [$18,329.65 ($219,885.44 x 8.336%)] of the production costs included in the fee paid to TTI.

To summarize, the audit analysis at Attachment 5, shows that given the 8.336% markup is reflective of the value of the production expenses contained in the fee paid to TTI, the allocable amount is further increased resulting in a reimbursement due the Primary Committee (over and above the $142,434 already reimbursed by the GEC) of $85,887.96.

Conclusion

On June 26, 1986, the Commission determined that the audit analysis at Attachment 5 should be adjusted to reflect Commission approval of the Committee's 50/50 formula for allocating production costs between the two campaigns. The Commission further determined that within 30 days of receipt of this report, the Primary Committee is to seek from the GEC the amount ($55,429.55) of allocable production costs still owing.

Initial Repayment Determination on NOCO Surplus

On July 7, 1986, the Commission made an initial determination that the pro rata portion ($589,135.40) of the Committee's surplus as calculated by the Audit staff, is repayable to the U.S. Treasury pursuant to 26 U.S.C. § 9038(b)(3). After applying the $344,893.24 repaid by the Committee on September 21, 1984, the amount to be repaid totals $244,242.16 which is to be repaid to the U.S. Treasury within 90 calendar days of receipt of this report in accordance with 11 C.F.R. § 9038.2(d).

If the candidate does not dispute this determination within 30 calendar days of receipt of this report under 11 C.F.R. § 9038.2(c)(1), the initial determination will be considered final.

Repayment Amount: $244,242.16

REAGAN-BUSH '84

PAYMENTS FOR VOTER REGISTRATION EXPENSES[1]
INCURRED AFTER STATE'S PRIMARY OR CAUCUS

STATE/VENDOR	PRIMARY OR CAUCUS DATE	CHECK NUMBER	CHECK DATE	CONTRACT OR SERVICE DATE	AMOUNT	PURPOSE
FLORIDA	March 13, 1984					
Computerized Telemarketing		16155	6-28-84	6-25-84	$ 40869.82	Voter Registration
" "		17277	7-20-84	6-25-84	9588.89	calls per Contract
" "		17486	7-24-84	6-25-84	2802.34	dated 6-25-84
" "		18559	8-9-84	6-25-84	20500.00	
Computerized Telemarketing		19091	8-17-84	6-25-84	29572.89	
Direct Mail Systems		14333	5-14-84	5-16-84	3262.50	Voter Registration
" " "		15373	6-14-84	5-16-84	9562.50	development project
" " "		15760	6-20-84	5-16-84	9250.00	per contract
" " "		16612	7-3-84	5-16-84	3000.00	dated 5-16-84
" " "		17949	7-31-84	5-16-84	11703.00	
" " "		18287	8-6-84	5-16-84	9187.50	
" " "		19928	8-84	5-16-84	551.40	
" " "		15159	6-84	5-16-84	1906.00	
" " "		16143	6-84	5-16-84	1732.50	
" " "		16145	6-84	5-16-84	1965.00	
" " "		16612	7-3-84	5-16-84	1059.62	
Direct Mail Systems		15696	6-84	5-16-84	742.39	
Hinton-Weston		15700	6-20-84	5-2-84	27976.00	Prospective Voter
"		15701	6-20-84	5-2-84	7254.40	calls per contract
"		18294	8-6-84	5-2-84	12486.00	dated 5-2-84
Hinton-Weston		14328	5-10-84	5-2-84	20000.00	
PHG Telecomputer		13529	4-26-84	4-2-84	18800.00	Voter Registration calls per 4-2-84 contract
PHG Telecomputer		19088	8-17-84	8-84	1225.87	Orange County FLA test calls
Marion Bailey		13621	4-14-84	4-9/12-84	574.34	Travel Reimbursements
" "		13720	5-3-84	4-15/20-84	652.88	for Florida Voter
Marion Bailey		19772	9-3-84	8-12/24-84	1672.54	program
					$ 247978.38	

1/ Items listed herein were generated from a comprehensive review of large expenditures comprising more than 80% of the dollar volume of total committee activity.

STATE/VENDOR	PRIMARY OR CAUCUS DATE	CHECK NUMBER	CHECK DATE	CONTRACT OR SERVICE DATE	AMOUNT	PURPOSE
NEW JERSEY	June 5, 1984					
Direct Communications		17279	7-20-84	7-6-84	$ 16250.00	Voter Registration
" "		17280	7-20-84	7-6-84	16250.00	calls in New Jersey
" "		18561	8-9-84	7-6-84	13000.00	per Contract Addendum
Direct Communications		18897	8-15-84	7-6-84	94250.00	dated 7-6-84
Universal Data		17290	7-20-84	6-11-84	6597.33	Computerized cards for
Universal Data		18925	8-15-84	8-6-84	15000.00	Registration effort
U.S. Postmaster		18593	8-8-84	8-6-84	1170.00	Postage for Voter Registration
State account			8-3-84	8-84	50.00	State account - June 84
					$ 162567.33	
ALABAMA	March 13, 1984					
U.S. Postmaster		18908	8-15-84	8-20-84	$ 3000.00	Postage for Voter Program
PNG Telecomputer		13529	4-26-84	4-2-84	23500.00	Voter Registration
" "		100050	6-26-84	4-2-84	23500.00	calls per Contract
" "		17271	7-20-84	4-2-84	27416.00	dated 4-2-84
" "		17272	7-20-84	4-2-84	27416.00	
" "		17951	7-31-84	4-2-84	26551.36	
PNG Telecomputer		19088	8-17-84	4-2-84	7135.85	
					$ 138519.21	
GEORGIA	March 13, 1984					
Computerized Telemarketing		100027	5-4-84	5-2-84	$ 10250.00	Voter Registration
" "		14329	5-17-84	5-2-84	10250.00	calls per 5-2-84
" "		15181	6-7-84	5-2-84	14041.07	Contract
Computerized Telemarketing		15767	6-20-84	5-2-84	20217.71	
PNG Telecomputer		13046	4-12-84	4-2-84	37600.00	Voter Registration
" "		13529	4-26-84	4-2-84	37600.00	calls per 4-2-84
PNG Telecomputer		18894	8-15-84	4-2-84	1809.76	Contract
					$ 131768.54	

STATE/VENDOR	PRIMARY OR CAUCUS DATE	CHECK NUMBER	CHECK DATE	CONTRACT OR SERVICE DATE	AMOUNT	PURPOSE
LOUISIANA	May 19, 1984					
Direct Communications		14804	5-31-84	5-25-84	28750.00	Voter Registration
• •		15706	6-13-84	5-25-84	31250.00	calls per Contract
• •		100051	6-26-84	5-25-84	30000.00	dated 5-25-84
• •		16619	6-28-84	5-25-84	1600.00	
• •		18561	8-9-84	5-25-84	25000.00	
Direct Communications		19936	9-10-84	5-25-84	2391.67	
U.S. Postmaster		15698	6-20-84	6-25-84	3000.00	Postage for Voter Programs
					$ 121991.67	
KENTUCKY	May 12, 1984					
Direct Mail Systems		15374	6-14-84	5-16-84	$ 9011.88	Voter Registration Develop-
Direct Mail Systems		18288	8-6-84	5-16-84	20478.00	ment per 5-16-84 Contract
Hinton-Wesson		15165	6-7-84	6-4-84	23500.00	Voter Registration
•		17275	7-20-84	6-4-84	11750.00	per Contract dated
•		17276	7-20-84	6-4-84	23040.34	5-2-84 with work
Hinton-Wesson		19182	8-17-84	6-4-84	6674.00	begun 6-4-84
Campaign Mail and Data		16323	6-29-84	6-18-84	4315.35	Voter Registration Brochure
U.S. Postmaster		15713	6-20-84	6-29-84	11550.00	Voter Registration Postage
U.S. Postmaster		19104	8-17-84	8-20-84	3400.55	Voter Registration Postage
125 Individuals		Various	Various	9/84 - 10/84	7543.50	Payments to Voter Registration Workers
					$ 121263.62	
NORTH CAROLINA	May 8, 1984					
PNG Telecomputer		15160	6-7-84	5-30-84	$ 15700.00	List Rental
• •		16916	7-12-84	6-21-84	23500.00	Voter Registration
• •		17476	7-24-84	7-18-84	8460.00	calls made after
• •		17477	7-24-84	7-18-84	8460.00	primary
• •		18905	8-15-84	7-18-84	10500.00 3/	
• •		100094	8-2-84	8-1-84	37750.00 2/	
• •		100104	8-17-84	8-15-84	10412.50	
PNG Telecomputer		19088	8-17-84	8-15-84	3140.60	
					$ 117923.10	

2/ Reimbursed by Reagan-Bush '84 General Election Committee
3/ $7500 of this amount reimbursed by Reagan-Bush '84 General Election Committee

STATE/VENDOR	PRIMARY OR CAUCUS DATE	CHECK NUMBER	CHECK DATE	CONTRACT OR SERVICE DATE	AMOUNT	PURPOSE
TEXAS	May 5, 1984					
Campaign Mail and Data		14334	5-17-84	5-15-84	$ 5770.00	Vice President Voter
		14553	5-24-84	5-15-84	10834.60	Project begun 5-15-84
		14554	5-24-84	5-15-84	2752.52	
Campaign Mail and Data		14555	5-24-84	5-15-84	2350.58	
U. S. Postmaster		100102	8-16-84	8-17-84	11200.00	Postage for Voter
U. S. Postmaster		100103	8-16-84	8-17-84	21500.00	Programs
Communications Specialists		15704	6-20-84	5-14-84	4363.12	Brochure and
		17278	7-20-84	6-27-84	4451.76	deadhangers shipped
		18560	8-9-84	7-84	8136.91	after the primary
		19511	8-30-84	8-84	32544.93	
		20573	9-25-84	8-84	6824.53	
		15703	6-20-84	5-16-84	1010.18	
		15702	6-20-84	5-16-84	790.96	
		16639	7-84	7-84	870.01	
		17487	7-84	7-84	266.44	
Communication Specialists		19456	8-84	8-84	444.29	
FNG Telecomputers		18905	8-15-84	7-84	1668.12	Texas Registration calls
From State Account		Various	Various	After 5-18-84	3322.00	
					$ 119108.87	
VIRGINIA	March 26, 1984					
Campaign Mail and Data		19184	8-17-84	8-84	$ 24498.17	List for Registration
FNG Telecomputer		13046	4-12-84	4-2-84	20366.00	Voter Registration
		13837	5-9-84	4-2-84	20336.00	calls per Contract
		100053	6-26-84	4-2-84	13087.73	dated 4-2-84
		16915	7-12-84	4-2-84	15980.00	
		17159	7-18-84	4-2-84	1929.59	
FNG Telecomputer		18894	8-15-84	4-2-84	3037.42	
Election Computer Services		13989	5-10-84	5-2-84	1101.14	Computer Sort-Voter Lists
Election Computer Services		17950	7-31-84	7-25-84	90.00	Postage
					$ 100426.05	

STATE/VENDOR	PRIMARY OR CAUCUS DATE	CHECK NUMBER	CHECK DATE	CONTRACT OR SERVICE DATE	AMOUNT	PURPOSE
TENNESSEE	May 1, 1984					
Computerized Telemarketing		17485	7-24-84	7-84	$ 25359.73	Voter Registration calls
Computerized Telemarketing		18559	8-9-84	7-84	6594.03	made in July
Capital Telemarketing		17165	7-18-84	7-84	12540.00	Voter Registration
" "		19086	9-5-84	7-84	20682.45	calls made after
Capital Telemarketing		20621	9-28-84	7-84	159.00	Primary
U.S. Postmaster		19096	8-17-84	8-28-84	50.00	Postage
Approximately 25 Individual & Groups		Various	Various	8-84	18577.95	Payments for Voter Registration Workers
					$ 83963.96	
MISSISSIPPI	April 14, 1984					
Direct Mail Systems		15372	6-14-84	6-84	$ 3684.92	Voter Registration
" " "		19928	8-84	8-84	838.30	program begun after
Direct Mail Systems		16144	6-84	6-84	747.62	caucus
Capital Telemarketing		15707	6-20-84	6/84 - 7/84	7125.00	Voter Registration
" "		16620	7-9-84	6/84 - 7/84	11400.00	calls which
" "		17164	7-18-84	6/84 - 7/84	9728.76	begun after caucus
" "		17166	7-18-84	6/84 - 7/84	81.50	
" "		18909	8-15-84	6/84 - 7/84	2366.07	
" "		20621	9-28-84	6/84 - 7/84	159.00	
Capital Telemarketing		21029	10-16-84	6/84 - 7/84	121.65	
PMG Telecomputer		16125	6-28-84	6/84 - 7/84	786.06	Voter Registration
" "		16124	6-28-84	6/84 - 7/84	5454.66	calls begun after
PMG Telecomputer		18894	8-15-84	6/84 - 7/84	531.23	caucus
South Central Bell		18907	8-15-84	6/84 - 7/84	18000.00 2/	Phone bank for Voter Registration
					$ 61926.37	

2/ Reimbursed by Reagan-Bush '84 General Election Committee

STATE/VENDOR	PRIMARY OR CAUCUS DATE	CHECK NUMBER	CHECK DATE	CONTRACT OR SERVICE DATE	AMOUNT	PURPOSE
WASHINGTON STATE	**March 13, 1984**					
Pacific Northwest Bell		14924	6-4-84	4/84 - 5/84	$ 516.50	Voter Registration
		14926	6-4-84	4/84 - 5/84	289.94	phone banks set-up
		14928	6-4-84	4/84 - 5/84	204.14	in this state will
		14950	6-4-84	4/84 - 5/84	252.92	after the primary
		14951	6-4-84	4/84 - 5/84	134.43	or caucus
		14952	6-4-84	4/84 - 5/84	1109.23	
		16178	6-28-84	4/84 - 5/84	1985.31	
		16315	6-29-84	4/84 - 5/84	296.57	
		16317	6-29-84	4/84 - 5/84	1453.37	
		16342	6-29-84	4/84 - 5/84	471.34	
		16343	6-29-84	4/84 - 5/84	296.61	
		16365	6-29-84	4/84 - 5/84	1944.42	
		16366	6-29-84	4/84 - 5/84	533.12	
		16367	6-29-84	4/84 - 5/84	420.41	
		18558	8-9-84	4/84 - 5/84	604.09	
Pacific Northwest Bell		19437	8-28-84	4/84 - 5/84	554.16	
Payroll		Various	Various	4/84 - 5/84	37580.53	phone banks payroll
					$ 48647.09	
OREGON	**May 15, 1984**					
Hinton-Wesson		16923	7-12-84	6-84	$ 24680.58	Voter Registration
Hinton-Wesson		18294	8-6-84	6-84	2851.51	calls in Oregon after primary
Election Computer Services		20352	9-18-84	5/84 - 6/84	375.00	Voter Registration
		14314	5-17-84	5/84 - 6/84	18991.46	work after primary
Election Computer Services		18566	8-9-84	5/84 - 6/84	62.00	
					$ 46960.47	
SOUTH CAROLINA	**March 10, 1984**					
Bryant Beaman		993	3-21-84	3-20-84	$ 6673.68	Voter Registration
		15179	6-7-84	5-25-84	10672.00	work done after
Bryant Beaman		13372	4-23-84	4-11-84	18000.00	3-10 Primary
State Account		Various	Various	4/84 - 5/84	1994.82	State Account items after 3-10 primary for Voter Registration
					$ 37339.82	

STATE/VENDOR	PRIMARY OR CAUCUS DATE	CHECK NUMBER	CHECK DATE	CONTRACT OR SERVICE DATE	AMOUNT	PURPOSE
CALIFORNIA	June 5, 1984					
American Petition Consultants		18928	8-15-84	7/84 - 8/84	$ 15001.00	Voter Registrations at 1.75 each
NEW HAMPSHIRE	February 28, 1984					
New Hampshire Republican State Committee		979	3-7-84	3/84	$ 12000.00	Purchase of Voter list after primary
New Hampshire Republican State Committee		14744	5-31-84	3/84	2000.00	
					$ 14000.00	
IOWA	February 20, 1984					
Republican State Central Committee		18577	8-9-84	8/84	$ 7577.00	Iowa phone bank after caucuses
ARIZONA	May 5, 1984					
PNG Telecomputer		14317	5-17-84	5/84	$ 6267.00	Voter Registration after caucus
State Account			6-28-84	6/84	40.00	
					$ 6307.00	
NEW MEXICO	June 5, 1984					
Data Company Inc.		18295	8-6-84	7/84 - 8/84	$ 1456.17	Mail for Voter Registration after primary
Data Company Inc		18515	8-9-84	7/84 - 8/84	1568.13	
PNG Telecomputer		18894	8-15-84	7/84 - 8/84	1584.26	Voter Registration calls after primary
					$ 4608.56	

VENDOR	PRIMARY OR CAUCUS DATE	CHECK NUMBER	CHECK DATE	CONTRACT OR SERVICE DATE	AMOUNT	PURPOSE
NATIONAL EFFORT AFTER LAST PRIMARY OR CAUCUS	June 5, 1984					
Thornbury Direct		17167	7-18-84	6/84 - 7/84	$ 22862.82	Church Voter
" "		18910	8-15-84	6/84 - 8/84	19148.93	Registration
" "		19097	8-17-84	6/84 - 8/84	29034.51	done after all
" "		21035	9-84	6/84 - 8/84	52.26	primaries and
Thornbury Direct		17496	7-84	6/84 - 7/84	604.19	caucuses
Marion Bailey		21021	10-16-84	6/84 - 8/84	337.81	National Voter Registration calls
Ellen Conway		Various	Various	6/84 - 8/84	4425.84	Travel reimbursement for Voter Registration
U.S. Postmaster		18038	8-1-84	7-84	1365.00 2/	Postage
					$ 77830.56	
REAGAN ROUND-UP	June 23, 1984					
Various		Various	Various	6-23-84	$ 182968.16	Nationwide Voter Registration drive held after all primaries and caucuses
GRAND TOTAL					$1847776.54	

2/ Reimbursed by Reagan-Bush '84 General Election Committee

REAGAN-BUSH '84
POLITICAL EXPENSES BENEFITTING
GENERAL ELECTION CAMPAIGN ONLY

VENDOR	CHECK NUMBER	CHECK DATE	CONTRACT OR SERVICE DATE	AMOUNT	PURPOSE
Decision/Making/Information	14174	5-17-84	5-14-84	$ 10150.00	Polling - Start up
" " "	14884	6-4-84	5-31-84	12000.00	Polling - Start up
" " "	14885	6-4-84	5-31-84	15000.00	Polling - Start up
" " "	14886	6-4-84	5-31-84	17000.00	Polling - Start up
" " "	15318	6-12-84	6-11-84	25000.00	Polling - Data base
" " "	15319	6-12-84	6-11-84	20000.00	Polling - Research
" " "	15320	6-12-84	6-11-84	11000.00	Polling - Minorities
" " "	17392	7-23-84	7-12-84	10000.00	Polling - Targeting
" " "	17393	7-23-84	7-12-84	10000.00	Polling - On Line Access
" " "	17394	7-23-84	7-12-84	26000.00	Polling - Mapping
" " "	17413	7-23-84	7-12-84	4800.00	Polling - 20 Questions
" " "	17946	7-31-84	7-30-84	26700.00	Polling - Targeting
" " "	18283	8-6-84	8-6-84	52050.00	Polling - Mapping
" " "	18257	8-6-84	7-30-84	10000.00	Polling - NJ, TX, CA, TN
" " "	20402	9-18-84	7-30-84	3000.00	Polling - Cook County
				$ 252700.00	
Ed Nichols Associates	13750	5-3-84	4/84	$ 17155.63	Iowa Mailing after February caucus
Robert Gouty Company	13260	4-19-84	4-15-84	$ 1666.66	Consulting - Illinois after March Primary
" " "	14417	5-24-84	5-15-84	2000.00	
" " "	16502	7-9-84	6-15-84	2000.00	
Robert Gouty Company	19585	8-30-84	7-15-84	4000.00	
				$ 9666.66	
Warren Tompkins	13537	4-26-84	4/84	$ 2000.00	Consulting - South Carolina began after March Primary
" "	14698	5-31-84	5/84	2000.00	
" "	15988	6-30-84	6/84	2000.00	
" "	17642	7-26-84	7/84	2000.00	
Warren Tompkins	19453	8-24-84	8/84	1600.00	
				$ 9600.00	
			TOTAL	$ 289122.29	

MEMORANDUM

February 25, 1985

TO: BAY BUCHANAN

FROM: SCOTT MACKENZIE

SUBJECT: ALLOCATION OF CAMPAIGN COSTS

Attached is a copy of the Tuesday Team's "Allocable" Product Costs expended in the Primary Campaign. Originally, it was anticipated that the General Election Committee would use all of the commercials except "The Bear". Therefore, the following allocation was computed:

Total Allocable Production Costs	$ 662,533
Less: "The Bear"	<53,754>
Production Cost to be split	$ 608,779
Allocation Percentage	50%
Allocation to the GEC	$ 304,389

However, prior to the start of the General Election Campaign decision was made to utilize only the following commercials in the General Election:

(1) "The Bear"

(2) The Statue of Liberty

(3) Spring of '84: 60

(4) Prouder, Stronger, Better: 60

Therefore, our allocations should have been adjusted as follows:

Total Allocable Productions Costs		$ 662,53
Less: "Primary Only" Commercials		
Spring of '84 : 30	$ 49,206	
America is Back: 60	146,354	
America is Back: 30	97,569	
Prouder, Stronger, Better: 30	84,537	
Non-Allocable Commercials		<377,66
Production Costs to be split		$ 284,86
Allocation Percentage		5
Allocation to the GEC		$ 142,43

To date, the following has occurred between the Primary and General Election Committees:

	PRIMARY	GENERAL
Allocable Production Costs	$ 662,533	$ -0-
Committee Allocation 9/07	<304,389>	304,389
Allocation Adjustment 2/11	162,807	<162,807>
Current Balance 2/22	$ 520,951	$ 141,582
Required Adjustments	<852>	852
Appropriate Allocations	$ 520,099	$ 142,434

8/15/84

REAGAN-BUSH '84
THE TUESDAY TEAM, INC.
ALLOCABLE PRODUCTION COSTS

	The Bear	Statue of Liberty	Spring of '84 :60	Spring of '84 :30	America Is Back :60	America Is Back :30	Prouder, Stronger, Better :60	Prouder, Stronger, Better :30	Production Totals
Producer's Net	$47,055	$18,553	$50,500	$33,672	$117,721	$78,481	$107,136	$71,424	$525,350
Editorial	1,200	3,194	5,441	3,627	5,764	3,843	5,669	3,779	32,605
Talent	209	1,931	6,661	4,440	16,115	10,744	6,251	4,167	50,590
Shipping	50	29	108	72	35	23	64	43	432
Artwork/Stats	866	221	277	185	532	354	618	412	3,485
Travel & Expenses	2,964	-0-	-0-	-0-	1,779	1,185	1,779	1,186	8,893
Misc./Scouting	414	-0-	2,271	1,514	515	344	1,395	930	7,383
Music	-0-	6,570	4,344	2,896	3,093	2,595	3,093	2,596	26,707
Grand Canyon Footage	-0-	-0-	4,200	2,800	-0-	-0-	-0-	-0-	7,000
TV COMMERCIAL TOTALS	$53,754	$30,498	$73,010	$49,206	$146,354	$97,569	$126,805	$84,537	$662,533

TV Commercial Totals

÷ 2
331,266

Attachment 3
Final Audit Report
Reagan-Bush '84
Page 3 of 3

880701 3985

Reagan-Bush '84
Schedule of Production Costs 1/
Commercial Entitled "Statue of Liberty"

Payee	Check Number	Date	Amount	Purpose
THT Productions	987	5/3/84	$17,735.00	50% of Production Contract
THT Productions	1128	5/14/84	17,735.00	50% of Production Contract
Broadcast Traffic	1134	5/24/84	321.75	Performer's Sessions
Broadcast Traffic & Residuals	1141	6/1/84	1,861.17	Performers Sessions Fees
Princzko Productions	1144	6/1/84	1,939.83	Editing
Manhattan Transfer/ Edit	1146	6/1/84	992.91	Conversion of Film to tape
Bee Vee Sound	1148	6/1/84	418.39	Audio Production
Finley Photographics, Inc.	1149	6/1/84	44.99	Line Matter & Glossy Stats
THT Productions	1154	6/1/84	1,500.00	Production
Broadcast Traffic & Residuals	1168	6/6/84	6,328.26	Performer's Sessions
Federal Express	1184	6/11/84	9.07	Deliveries
Finley Photographics, Inc.	1185	6/11/84	15.09	Gloss Stats, Reproduction
Piece of Cake	1186	6/11/84	12,977.25	Music Production
Bell Sound	1187	6/11/84	1,350.31	Editing & Dubbing
Audio Video Resources	1194	6/12/84	193.83	Re-Recording
Ogilvy and Mather	1195	6/12/84	49.33	Shipping
Bill Werts Photography	1196	6/12/84	267.73	Photography

Reagan-Bush '84
Schedule of Production Costs 1/
Commercial Entitled "Statue of Liberty"

Payee	Check Number	Date	Amount	Purpose
Aspen Graphics Photo	1198	6/12/84	$ 2.45	Title set & stats
Mary Lou Chapman	1202	6/26/84	60.00	Spanish Translation
Teletronics	1206	6/26/84	83.89	Videos
Teletronics	1208	7/2/84	506.61	Editorial
THT Production	1210	7/2/84	136.12	Production
Corelli Jacobs Recordings	1216	7/30/84	162.38	Music
TOTAL			$64,691.36	
Per Committee (Att.3, p.3)			30,498.00	
Difference			$34,193.36	

1/ A copy of an Audit workpaper containing this information was presented to the Committee's Deputy Treasurer on October 18, 1985.

Reagan-Bush '84
Calculation of Allocable Production Costs

	Committee	Audit Analysis	Audit Analysis as adjusted
1. Total Allocable Production Costs	$662,533.00	$696,726.36	$696,726.36
2. Less: Primary Only Commercials:			
Spring of 84:30	(49,206.00)	(49,206.00)	(49,206.00)
Spring of 84:60		(73,810.00)	(73,810.00)
America's Back:30	(146,354.00)	(146,354.00)	(146,354.00)
America's Back:60	(97,569.00)	(97,569.00)	(97,569.00)
Prouder Stronger Better:30	(84,537.00)		
3. Less: General Only Commercials The Bear	(53,754.00)	(53,754.00)	(53,754.00)
4. Net Production Costs to be split	231,113.00	276,033.36	276,033.36
5. Allocation to GEC of shared Commercials	$115,557.00	$166,131.44	$138,016.68
6. Add: General Only Commercial The Bear	26,877.00	53,754.00	53,754.00
7. Net Amount Allocable	142,434.00	219,885.44	191,770.68
8. Add: Media agency markup (.08336%) 1/	-0-	18,329.65	15,986.00
9. Gross Amount Allocable	142,434.00	238,215.09	207,756.68
10. Less: GEC payments for Primary Only Commercials:			
America's Back:60	-0-	(7,012.10)	(7,012.10)
America's Back:30	-0-	(2,881.03)	(2,881.03)
11. Amount Reimbursed	(142,434.00)	(142,434.00)	(142,434.00)
12. Amount yet to be Reimbursed by GEC	$ -0-	$ 85,887.96	$ 55,429.55

1/ Assumes 8.336% markup is reasonable.

Public Record

FEDERAL ELECTION COMMISSION

88 APR 14 AM 10:58

FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

April 12, 1988

MEMORANDUM

TO: THE COMMISSIONERS

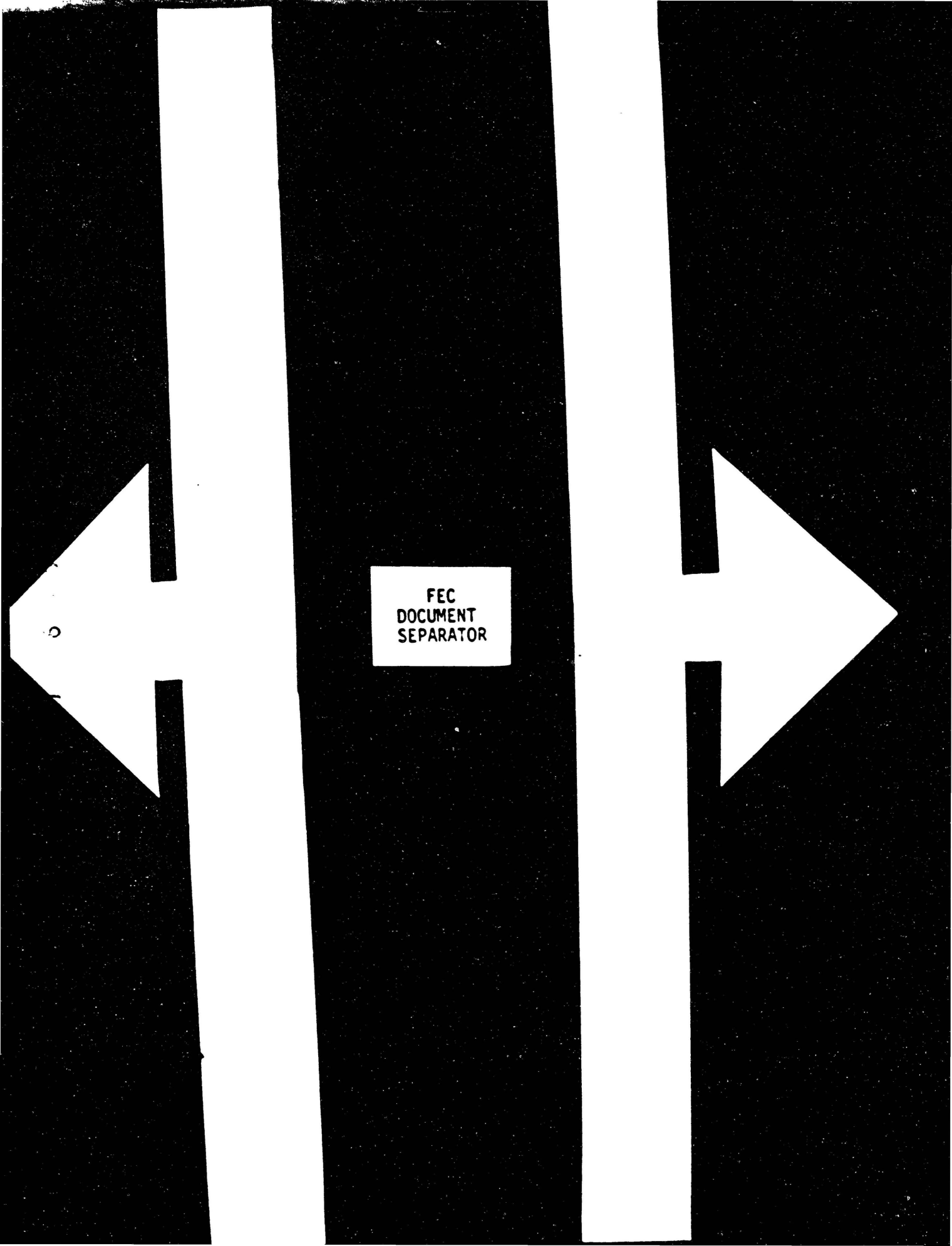
THROUGH: JOHN C. SURINA
STAFF DIRECTOR

FROM: ROBERT J. COSTA
ASSISTANT STAFF DIRECTOR
AUDIT DIVISION

SUBJECT: REAGAN-BUSH '84 PRIMARY
CAMPAIGN REPAYMENT

Attached please find a copy of the receipt from Treasury concerning a repayment in the amount of $58,193.25 received from the Reagan-Bush '84 Primary Campaign. This repayment represents the balance due relative to the final repayment determination.

Attachment as stated


FEC
DOCUMENT
SEPARATOR

Approved as submitted
April 29, 1986.

AGENDA DOCUMENT #X86-033

MINUTES OF AN EXECUTIVE SESSION

OF THE

FEDERAL ELECTION COMMISSION

TUESDAY, MARCH 18, 1986

PRESENT: Joan D. Aikens, Chairman, Presiding

John Warren McGarry, Vice Chairman

Lee Ann Elliott, Commissioner

Thomas E. Harris, Commissioner

Thomas J. Josefiak, Commissioner

Danny L. McDonald, Commissioner

Special Deputy Scott E. Morgan, representing the Secretary of the Senate, Jo-Anne L. Coe, Commissioner Ex Officio

Special Deputy Douglas Patton, representing the Clerk of the House, Benjamin J. Guthrie, Commissioner Ex Officio

John C. Surina, Staff Director

Charles N. Steele, General Counsel

Marjorie W. Emmons, Secretary of the Commission

Chairman Joan D. Aikens called the Federal Election Commission to order in executive session at 10:00 a.m. on Tuesday, March 18, 1986. A quorum was present.

Deleted pursuant to 11 C.F.R. § 2.4 (9)

VII. AUDIT MATTERS (continued)

B. Reagan-Bush '84 (Primary) (continued)

Chairman Aikens noted that there were two issues before the Commission at this time, [Deleted pursuant to 11 C.F.R. § 2.4(9)] and the other having to do with the Reagan-Bush Committee's allocation of media production costs relative to commercials used both in the primary and general election campaigns.

Deleted pursuant to 11 C.F.R. § 2.4(9)

VII. AUDIT MATTERS (continued)

B. Reagan-Bush '84 (Primary) (continued)

VII. AUDIT MATTERS (continued)

B. Reagan-Bush '84 (Primary) (continued)

Chairman Aikens stated that the next issue before the Commission was the matter of the allocation of media costs, and recognized General Counsel Charles N. Steele to comment. Mr. Steele noted that the Commission had three options, as follows: 1) Obtain the information the staff needed to determine if the Committee's allocation was appropriate; 2) Determine the allocation on the basis of the facts now known; or 3) Move to litigation to enforce the Candidate Agreements under the provisions of Title 26.

Chairman Aikens recognized Commissioner Josefiak, who stated he did not think the Commission should make a percentage determination on the allocation at this time, as that should be done in an open meeting. Mr. Steele agreed, but noted again the alternative to move to litigation.

VII. AUDIT MATTERS (continued)

B. Reagan-Bush '84 (Primary) (continued)

Commissioner Josefiak stated that he was against going to litigation before asking the Committee in writing for the needed information, noting that if eventually litigation was determined to be necessary, that this would strengthen the Commission's case.

The Commission discussed the alternatives detailed by the staff, during which Commissioner Josefiak reiterated his position that the Committee should be sent a letter asking them for the specific information we need, giving them a definite time in which to respond, and including in the letter the Commission's options should the Committee fail to provide the information.

Chairman Aikens recognized Commissioner Elliott, who inquired when the Final Audit Report would be before the Commission. Mr. Robert Costa of the Audit Division responded that it would probably be before the Commission in about two weeks.

VII. AUDIT MATTERS (continued)

B. Reagan-Bush '84 (Primary) (continued)

During the ensuing discussion, Mr. Stephen Sanford, Mr. Howard Halter, and Mr. Robert Costa of the Audit Division responded to questions.

Mr. Costa stated he thought there should be a 100% allocation of the expenses of the shared advertisements to the General Election Campaign and that an initial repayment determination could be made on that basis in the final audit report, it being his view that such an action might induce the Committee to come forward with the information wanted by the FEC. He noted that the final audit report could be processed for public release in a shorter time span by taking this course.

VII. AUDIT MATTERS (continued)

B. Reagan-Bush '84 (Primary) (continued)

Chairman Aikens recognized Mr. Rick Halter of the Audit Division who responded to Commissioner Harris' questions pertaining to the meaning of the word, usage, in the draft letter to the Committee, labeled Exhibit I in the staff report. It was agreed that the term should be clarified if a letter is sent to the Committee.

Chairman Aikens recognized Commissioner Josefiak, who

> MOVED to direct the staff of the Audit Division to prepare a letter, in consultation with the Office of General Counsel, asking the Reagan-Bush '84 (Primary) Committee for specific as well as general information on the Spot Television Scheduling Instructions, in order for the Commission to verify the reasonableness of the Primary Committee's 50/50 allocation of production costs for shared commercials.

VII. AUDIT MATTERS (continued)

B. Reagan-Bush '84 (Primary) (continued)

The original motion carried on a vote of 5-1 with Commissioners Aikens, Elliott, Harris, Josefiak, and McGarry voting affirmatively and Commissioner McDonald dissenting.

Chairman Aikens recognized Mr. Rick Halter who stated that the draft letter would be circulated for Commission approval. He then outlined the timetable for finalizing this audit.

VIII. MATTERS NO LONGER ENTITLED TO EXEMPTION

Chairman Aikens recognized General Counsel Charles Steele, who stated that none of the matters before the Commission on this date had lost their exemption under the Sunshine regulations at this time, but that the staff would review the consideration of the Reagan-Bush '84 (Primary) matter and might have a recommendation on whether portions of it might no longer be exempt.

The meeting adjourned at 3:20 p.m.

Signed:

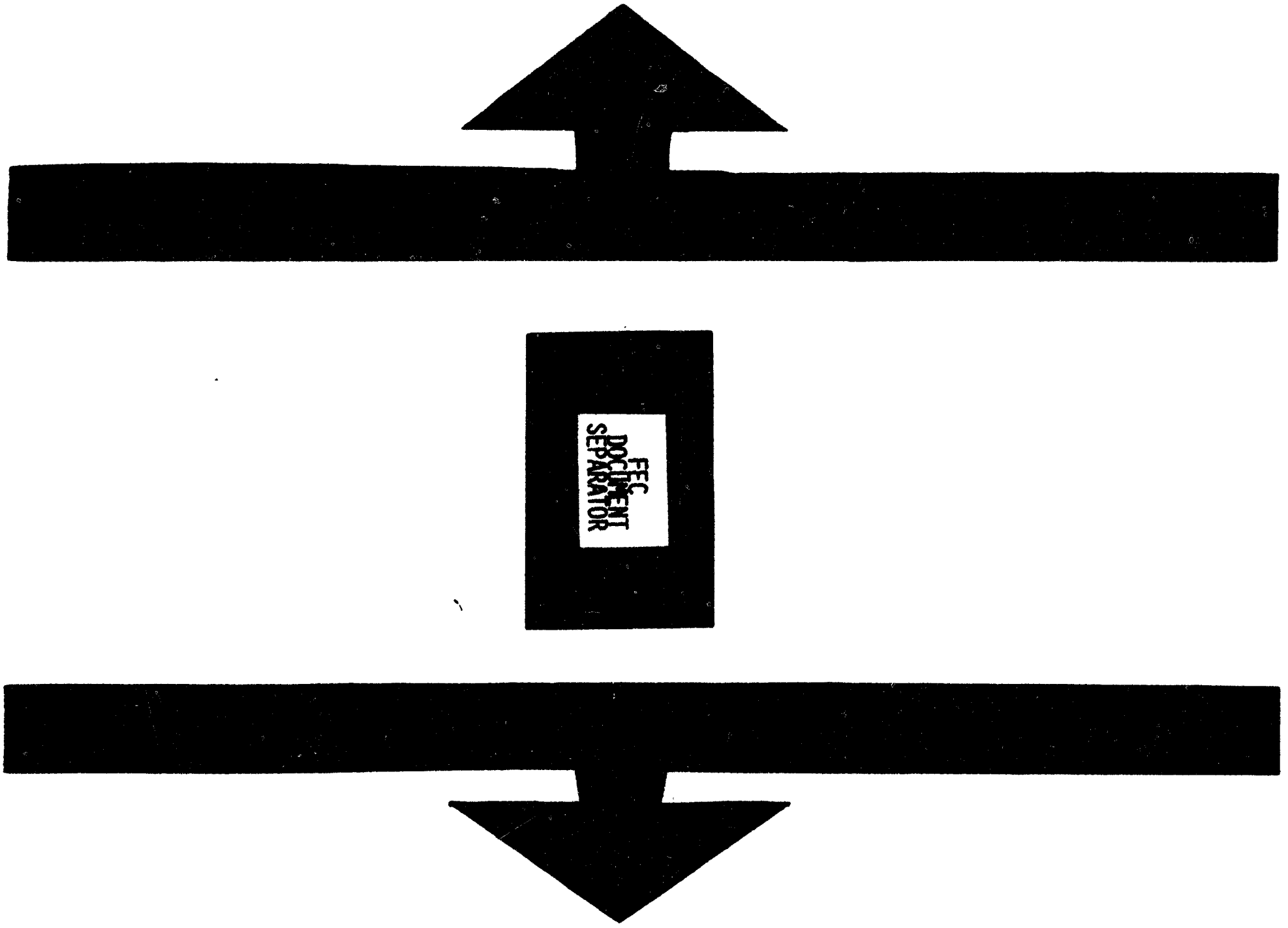
Joan D. Aikens

Joan D. Aikens
Chairman of the Commission

Attest:

Marjorie W. Emmons

Marjorie W. Emmons
Secretary of the Commission



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMON CAUSE, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Civil Action No. 86-3465(JHP) NOTICE OF CASE ACTIVITY

DEFENDANT FEDERAL ELECTION COMMISSION'S NOTICE OF CASE ACTIVITY

On June 15, 1988, the Court remanded plaintiff Common Cause's administrative complaint to the defendant Federal Election Commission (the "Commission" or "FEC") for further proceedings consistent with the Court's memorandum opinion.

This is to notify the Court and counsel for plaintiff that, on June 28, 1988, the Commission determined to reopen consideration of the matter under review initiated by plaintiff's complaint for the purpose of issuing new statements of reasons in accordance with the Court's order. Copies of the statements of reasons subsequently prepared by three of the four Commissioners who previously voted to dismiss that complaint are attached.*/

Respectfully submitted,

Lawrence M. Noble
General Counsel
(D.C. Bar #244434)

---

*/ Frank Reiche, the Commissioner who cast the fourth vote to dismiss the administrative complaint, is no longer a member of the Commission.

Richard B. Bader
Associate General Counsel

Ivan Rivera
Assistant General Counsel

Robert W. Bonham, III
Attorney
(D.C. Bar #397859)

July 15, 1988

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 376-5690

In the Matter of	)	
	)	
	)	
Reagan-Bush '84;	)	MUR 1790
Angela M. Buchanan Jackson,	)	
as Treasurer	)	
	)	

STATEMENT OF REASONS

Commissioner Joan D. Aikens
Commissioner John Warren McGarry

I. INTRODUCTION

In MUR 1790, the Commission considered allegations that Reagan-Bush '84, and Angela M. Buchanan Jackson, as treasurer, violated 2 U.S.C. §434 and 11 C.F.R. §§9003.1 and 9004.7 by failing to pay for expenses and reporting payments relating to a trip made by President Reagan to Chicago on August 24, 1988 to address the National Convention of the Veterans of Foreign Wars. The complaint alleged that the trip was campaign-related and not official government business and that the expenses of the trip should have been charged to Reagan-Bush '84, President Reagan's authorized campaign committee, rather than to the United States Government.

We disagreed with the complainant that the trip was campaign-related within the meaning of the Act and regulations. We voted to reject the General Counsel's recommendations and voted instead to find no reason to believe that the alleged violations occurred and to close the file. We reached our conclusion upon application of a "totality of the circumstances" test which, as demonstrated by the discussion below, was fully consistent with relevant prior Commission decisions. We remain convinced that use of that legal standard was appropriate and that our conclusion based upon it was wholly justified by the facts of this case.

II. APPLICABLE STATUTES AND REGULATIONS

The Federal Election Campaign Act requires political committees, including political committees authorized by Presidential candidates, to report "expenditures made to meet candidate or committee operating expenses." 2 U.S.C. §434(b)(4)(A). The Presidential Election Campaign Fund Act incorporates that reporting requirement as it applies to publicly funded Presidential candidates and their committees through its implementing regulations. Those regulations provide that major party Presidential candidates must agree to comply with the

requirement, among many others, to report "qualified campaign expenses" pursuant to the provisions of the Federal Election Campaign Act in order to be eligible to receive payments from the Fund. 11 C.F.R. §9003.1. The term "qualified campaign expense" includes any expense incurred by a Presidential candidate or the candidate's authorized committee to further his or her election. 26 U.S.C. §9002(11). The Commission's regulations state that travel costs relating to a Presidential candidate's campaign are qualified campaign expenses. 1/

1/ 11 C.F.R. §9004.7(a) provides:

> Notwithstanding the provisions of 11 C.F.R. Part 106, expenditures for travel relating to a Presidential or Vice Presidential candidate's campaign by any individual, including a candidate, shall, pursuant to the provisions of 11 C.F.R. §9004.7(b), be qualified campaign expenses and be reported by the candidate's authorized committee(s) as expenditures.

III. STATEMENT OF FACTS

The Veterans of Foreign Wars is a non-profit non-partisan membership organization committed to addressing the concerns of almost two million veterans of military service to the United States. Its constitution and by-laws expressly preclude endorsements of political candidates.

In early 1984, the V.F.W. made plans to hold a National Convention, which has been an annual event for the last 84 years. On March 1, 1984, six months before the convention was to be held, Clifford G. Olson, Jr., the National Commander of the V.F.W. extended an invitation to President Reagan to address the membership gathered in Chicago, Illinois at the 1984 National Convention. This invitation has been traditionally extended by the V.F.W. to the sitting President of the United States. President Reagan had been the recipient of similar speaking invitations, the last as recently as 1983. The V.F.W. invitation specified that President Reagan should express his views on national security and foreign policy matters, topics of great concern to veterans. MUR 1790, Respondent's Reply to the Complaint at Exhibit B.

President Reagan agreed to and did appear to address approximately 7,000 members of the V.F.W. on August 24, 1984, almost six months after the invitation was extended. In his remarks, President Reagan clearly focussed on matters of concern to V.F.W. members -- military readiness and military strength during a period in history marked by political unrest and uncertainty in Iran and in Grenada and the military response to those situations by the United States. He emphasized the need for, and his Administration's commitment to, maintaining the readiness and strength of our military forces to demonstrate that the United States is a leader in peace, not an instigator of war. In his address to the V.F.W., the President defended the position taken by his Administration in the area of foreign policy and national security matters.

At no time before, during or after President Reagan's speech did he or any of his staff mention his candidacy or any other candidacy, his election or any election activity. At no time did President Reagan or any member of his staff advocate the election or defeat of any candidate for Federal office nor did President Reagan or his staff solicit anyone present at this event for contributions in support of any candidate for Federal office.

President Reagan concluded his address by complimenting and honoring the membership and leadership of the V.F.W. for their continuing commitment to the interests and concerns of veterans to this country.

IV. ISSUE PRESENTED

The sole question presented by the complaint was whether President Reagan's trip to Chicago to address the National Convention of the Veterans of Foreign Wars was campaign-related and, thus, should have been paid for with campaign funds and reported by Reagan-Bush '84, or was, instead, undertaken in performance of President Reagan's official duties as an incumbent President and, thus payable with appropriated funds of the United States Government.

V. APPLICABLE LEGAL STANDARD

During the course of its thirteen year history, the Commission has frequently been called upon to determine whether specific activity of a Federal officeholder is related to performance of official duties or is campaign-related. In making these difficult determinations, the Commission has

consistently applied a legal standard that has been described as a "totality of circumstances" test, involving examination of several factors.

The first factor to be examined is whether the factual situation involves activity "expressly advocating" any candidacy for Federal office.[2/] The second factor to be examined is whether the factual situation involves any communication that can be said to solicit contributions for a candidate for federal office. After an examination for the presence of communications constituting express advocacy or solicitations for contributions, the Commission has considered the timing, setting and purpose of an event in conjunction with other activity that may be occurring. All of these factors are reviewed by the Commission as relevant and important factors within the "totality of circumstances" standard.

2/ 11 C.F.R. 109.1(b)(2) provides that "expressly advocating" means "any communication containing a message advocating election or defeat, including but not limited to the name of the candidate, or expressions such as 'vote for', 'elect', 'support', 'cast your ballot for', and 'Smith for Congress', or 'vote against', 'defeat' or 'reject'."

VI. FACTUAL AND LEGAL ANALYSIS

We believe that a full and fair review of the facts and circumstances presented by this case leads to the conclusion that President Reagan's appearance at the 85th Annual Convention of the Veterans of Foreign Wars was part of his official duties as President and was not "related" to his campaign for re-election within the meaning of the Act and regulations. This conclusion properly recognizes the President's role as a ceremonial and symbolic leader. It thus rejects the apparent notion that all actions taken after a nominating convention by a President -- whether it be as Head of State, Commander-in-Chief, Minister of Foreign Affairs, Chief Law Enforcer or one of the many other roles filled by the President -- should be automatically viewed as campaign-related and paid for by his campaign committee. Indeed, the facts indicate that the President's appearance before the V.F.W. Convention -- a national organization with a keen interest in military and foreign policy affairs -- was consistent with the duties and responsibilities of an incumbent President. The President was simply performing the important function of any President which is to provide members of the

public with information on significant matters. In so doing, he was addressing the concerns and fears of a large segment of the population which had served in the United States military forces in wartime and in peacetime. This is particularly important with respect to foreign affairs where the President has long been viewed as "the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 Annals of Cong. 596, 613-614 (1800) (Remarks of then-Representative John Marshall).

In applying the "totality of circumstances" test to this case, we first examined the evidence presented to determine whether any part of the event contained any clear express advocacy of President Reagan's re-election or of his opponent's defeat, and found that the President's remarks contained no such express advocacy. Nowhere in the text of President Reagan's remarks was there any "communication containing a message advocating election or defeat" of any candidate for any office. 11 C.F.R. §109.1(b)(2).

The General Counsel acknowledged that the event involved no express advocacy, but stated "while the President did not expressly advocate his re-election, certain sections of his

speech may have been designed to create a campaign atmosphere in light of the fact that he had just arrived from the Republican National Convention." (emphasis added). MUR 1790, First General Counsel's Report at 2. To support the statement relating to the creation of a "campaign atmosphere," the General Counsel excerpted the following segments of the address:

> The honor of meeting th the VFW ... is a great way to wind up a terrific week.
>
> Four years ago, right here in Chicago, I stood before your convention, and when you think back to 1980, it's hard to forget the mess America was in, hard to forget the foolish talk of a malaise, the unfairness of runaway price increases, 21 1/2-percent interest rates, weakened defenses, Americans held hostage, and the loss of respect for our nation abroad. It seemed that we voke up every morning wondering what new humiliation our country had suffered overseas, what disappointing economic news lay waiting for us on the front page.
>
> ...Well, I think we've come a long way together. In fact, I believe we've closed the books on that dismal chapter of failed policies and self-doubt.
>
> As I said last night in Dallas ...
>
> Our military forces are back on their feet, substantially stronger and better able to protect the peace today than they were 4 years ago.
>
> Now, some may insist they're just as committed to a strong deterrent even as they would cancel the B-1 bomber and the Peacekeeper

> missile. They may deny that a nuclear freeze would preserve today's high, unequal, and unstable levels of nuclear weapons, and they may deny a freeze would reduce any incentive for the Soviets to return to the negotiating table and resume the search for equitable and fair reductions.

MUR 1790, First General Counsel's Report at 2-3.

The General Counsel conceded that there was a total absence of express advocacy in these remarks. Every sentence excerpted by the General Counsel relates to the stated policies and concerns of President Reagan's Administration with respect to maintaining a strong military position, not to his re-election campaign. We rejected the General Counsel's reasoning that references to past public concern over the weakening economy, inflation, rising interest rates and reduced military budgets converted this appearance into a campaign event. We rejected the General Counsel's characterization of those remarks as an attempt to create a "campaign atmosphere." The remarks by this incumbent President should properly be viewed as an accounting for Administration policies and actions in the critical area of military readiness.

Next, we examined the facts presented for any evidence of solicitation of contributions on behalf of President Reagan's

campaign by the President, his staff or anyone associated with the Veterans of Foreign Wars and found no such solicitations.

Some Commissioners have suggested that upon finding no express advocacy nor any solicitation for contributions, the inquiry should then cease with the conclusion that the event was not campaign-related. While we would agree that these are important and potentially determinative factors if present, we believed we must look further to the timing, the setting and the purpose of the event as integral components of the "totality of circumstances" test and as necessary to the ultimate determination that certain activity is or is not campaign-related.

With respect to timing, it is true that President Reagan made his appearance at this particular V.F.W. Convention one day after he was formally renominated by the Republican Party at its nominating convention in Dallas. However, it is also true that the National Convention of the V.F.W. is an annual fall event, and that the invitation to President Reagan was extended six months before the Republican National Convention. There is absolutely no evidence to suggest that the V.F.W. calculated its national convention to coincide with the timing of President

Reagan's possible renomination. To argue that the timing of this appearance makes it a campaign event would mean that no incumbent President could make an official appearance to perform officeholder duties after the date of renomination. This approach would cripple a sitting President who must continuously explain and champion his Administration's policies to the public. Indeed, it is well-recognized that "the White House is first and foremost a place of public leadership." J. Barber, The Presidential Character 5 (1974.) We rejected the argument that the timing of President Reagan's appearance in close proximity to his renomination at the Republican National Convention converted the appearance into a campaign event.

We then examined the setting of President Reagan's appearance in Chicago. His speech was part of a series of events planned for the annual national convention of this non-partisan, non-profit organization. This appearance before an important segment of the general public was no different in terms of setting and audience from hundreds of other appearances President Reagan has made during his tenure as President. In fact, President Reagan had spoken to the same group in the same tone on the same topics on prior occasions. Members of Congress continually must meet with constituent groups with specific

concerns in their Congressional districts; similarly, the President must meet frequently with and address the concerns of larger constituent groups.[3/] Upon reviewing the setting of this event, we concluded it was an appearance in furtherance of a President's official duties and not "campaign-related."

Finally, we considered the purpose of the appearance in the context of the V.F.W. National Convention. The evidence presented indicated that the V.F.W. has a past history of inviting incumbent Presidents to address its membership on issues of great concern to veterans of military service. Invitations extended and accepted by those Presidents enhance the stature and dignity of this membership organization and encourage its membership to continue to fund and support its goals. Again,

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3/ This Commission has acknowledged in many advisory opinions dealing with similar factual situations, that officeholders make frequent appearances in performance of official officeholder duties before the very people who will vote on the officeholder's re-election without the event being campaign-related. See AO 1980-22, 1 Fed. Elec. Camp. Fin. Guide (CCH)¶5479 (April 15, 1980); AO 1981-37, 1 Fed. Elec. Camp. Fin. Guide (CCH)¶5623 (Oct. 13, 1981); AO 1982-56, 1 Fed. Elec. Camp. Fin. Guide (CCH)¶5694 (Oct. 29, 1982).

there was no evidence to suggest that the V.F.W.'s invitation was calculated to be a campaign opportunity for President Reagan. At no time before, during or after the event did President Reagan or his staff meet with V.F.W. representatives. The evidence is overwhelming that the purpose of President Reagan's address was to inform and defend his Administration's actions and policies before an audience that was particularly attuned to and concerned about foreign policy and national security matters.

After considering all of these elements within the totality of circumstances test -- including the presence or absence of express advocacy, the presence or absence of solicitation of contributions, the timing, setting and purpose of the event -- we concluded that reasonable persons would conclude that the appearance was made in performance of President Reagan's official duties. We, therefore, voted to reject the General Counsel's recommendations to find reason to believe that respondents had violated 2 U.S.C. §434(b)(4) and 11 C.F.R. §§9003.1 and 9004.7 and to close the file.

VII. DISCUSSION OF COMMISSION PRECEDENT

Our approach in analyzing this case is not new or novel. Our consideration of the totality of circumstances is totally consistent with the approach recommended by the General Counsel in his Report in this matter and adopted by the Commission in many advisory opinions. A brief review of those agency precedents is instructive on the question of whether certain activity is campaign-related.

In AO 1977-42, 1 Fed. Elec. Camp. Fin. Guide (CCH)¶5312 (May 12, 1988), the Commission considered the totality of circumstances and ruled that a corporation employing a radio talk show host, who became a candidate for federal office, would not make a contribution in violation of 2 U.S.C. §441b by continuing to pay him compensation during his period of candidacy. The Commission reasoned that the major purpose of the salary payments was other than to influence his nomination or election even though his continued appearances during his candidacy on the air might indirectly benefit that candidacy. The Commission noted that the relationship between the broadcast corporation and its employee pre-dated the individual's candidacy. Thus, considering the totality of circumstances, including the timing, setting and

purpose of the activity, the Commission concluded that the activity was not campaign-related. The Commission also conditioned its holding on the absence of express advocacy communications and solicitation of contributions in support of any candidate for federal office.

The issue of whether Federal officeholder activity during a period of candidacy is campaign-related or in furtherance of official duties was presented in AO 1977-54. 1 Fed. Elec. Camp. Fin. Guide (CCH)¶5301 (March 24, 1978). In that matter, a Member of Congress, who was also a candidate, became Chairman of a statewide petition drive to stop ratification of the Panama Canal Treaty, necessitating many public appearances, and the use of his name in mailings and newsletters and on media advertisements. In applying a "totality of circumstances" test in determining this Member's activity was not campaign-related, the Commission did emphasize that the facts indicated the communications at issue would neither contain express advocacy messages nor solicit contributions. These two factors, however, were not the sole basis for the Commission's ruling.

The Commission also considered the stated purpose of the Member's activity, which was to defeat the ratification of a significant treaty with a foreign country and not to influence the nomination or election of any candidate to Federal office. In addition, the Commission also considered the setting of the event in the Member's home state and was persuaded that the requestor would work to minimize his efforts within his district and would deliberately focus his attention on activity outside his congressional district. Finally, the Commission considered the fact that the proposed activity by the Member of Congress would occur at a time when the Member was a candidate for re-election. In AO 1977-54, the Commission applied a "totality of circumstances" test and did not rely solely on a two-prong test consisting of an examination for the presence of express advocacy and solicitations for contributions.

In AO 1978-4, 1 Fed. Elec. Camp. Fin. Guide (CCH)¶5293 (Feb. 24, 1978), the Commission considered the appearance of a Federal officeholder at a dinner commemorating his long-standing service in Congress. The Commission considered the timing of the event in March of an election year, the setting of the dinner in the Congressman's home district, the non-partisan, non-profit nature of the organizing committee and the stated purpose of the

event which was to celebrate the honoree's twenty-five years of Congressional service and that the event would include neither advocacy of any candidate nor any solicitations for contributions. The Commission ruled that the purpose of the event was not to influence the honoree's re-election campaign, even though the event was held during an election year. Although the Commission clearly conditioned its holding on the absence of express advocacy and solicitation for contributions, the other factual considerations discussed show that the Commission applied a "totality of circumstances" test.

The Commission again used the totality of circumstances standard in AO 1978-15, 1 Fed. Elec. Camp. Fin. Guide (CCH)¶5304 (March 30, 1978), to determine whether the appearance of a Federal officeholder as the host of a charity fundraising event was campaign-related. The Commission took into consideration the fact that the officeholder's commitment to the charitable organization pre-dated his candidacy, the fact that the major purpose of the event was to raise funds for a legitimate charitable cause, assurances by the requestor that there would be no advocacy of any candidate nor any solicitation for campaign contributions and the fact that the officeholder would have no

control over the content and distribution of literature publicizing the event. Based on consideration of all of these factors, the Commission concluded that the activity in question was not campaign-related.

In AO 1980-16, 1 Fed. Elect. Camp. Fin. Guide (CCH)¶5474 (March 21, 1980), the Commission was presented with a situation involving the appearance of candidates for Federal office at a celebrity golf tournament held to raise money for leukemia research. In an opinion that has been cited for the proposition that the Commission adopted a two-prong test, the Commission considered not only the absence of express advocacy and solicitations for contributions but also the setting of the candidate appearances -- a well-known golf tournament; the stated purpose of the event -- to raise funds for a legitimate charitable cause; and the timing of the event -- at a time when invited Federal officeholders were candidates for re-election. Based on all of these facts, and applying a "totality of circumstances" test, the Commission ruled that the appearances of Members of Congress, as described, would not be campaign-related.

The Commission again adopted a "totality of circumstances" approach in considering whether the appearance of Federal

officeholders and candidates at a town meeting would be campaign-related in AO 1980-22, 1 Fed. Elec. Camp. Fin. Guide (CCH)¶5479 (April 15, 1980). The Commission reviewed the setting of the forum where the iron and steel industry was facing critical production problems, the fact that discussion during the forum would be limited to these particular industry problems and concerns, the fact that the purpose of the meeting was other than to influence the nomination or election of any candidate, which fact was bolstered by the requestor's statement that neither the introductory comments by the sponsor nor subsequent remarks by the officeholders would relate to campaign activity but would be strictly limited to issues facing the steel industry. After considering all of these factors, the Commission concluded that the participation of the Federal officeholders, even though they may have been candidates at the time, was not campaign-related. The Commission recognized that Federal officeholders must make appearances related to official duties and that these appearances may occur during a period of candidacy without converting the appearance into campaign activity. The Commission did caution that there should be no express advocacy of any candidate nor any solicitation of contributions for any candidate and conditioned its approval on their absence. Although the absence of

communications constituting "express advocacy" and solicitations for contributions were considered critical elements by the Commission in reaching a decision in this matter, it is apparent that the Commission also considered the elements of timing, setting and stated purpose of the candidate appearances which are integral components of the "totality of circumstances" standard.

The Commission was called upon in AO 1981-37, 1 Fed. Elec. Camp. Fin. Guide (CCH)¶5623 (Oct. 13, 1981), to determine whether appearances by an incumbent Member of Congress as moderator of a series of public affairs forums involving prominent public figures paid for by corporations would result in prohibited corporate contributions to the Member's campaign for re-election. In concluding that the Congressman's appearances would not be campaign-related, the Commission noted that the purpose and focus of the activity was not to influence the nomination or election of any candidate for federal office, but, rather, to provide a public forum for legitimate discussion of issues and that the incumbent's participation in the program was part of his official duties as a Member of Congress. In addition, the Commission took into consideration the requestor's statement that no political advertising would be sold by the corporate sponsor during or adjacent to the programs and further, that the sale of program

tapes and transcripts would be limited. The Commission cautioned, however, that its conclusion was conditioned on the absence of any communications in conjunction with the proposed programs advocating the election or defeat of a clearly identified candidate and the absence of communications soliciting contributions for any Federal candidate.

In AO 1982-15, 1 Fed. Elec. Camp. Fin. Guide (CCH)¶5656 (April 19, 1982), the Commission concluded that a law firm could continue to run advertisements promoting its services even though one of its partners had become a candidate for Federal office. In analyzing this factual situation to determine whether the facts indicated that the activity was campaign-related, the Commission considered the law firm had a past history of engaging in similar advertising practices. It also noted that the major purpose of the activity was to promote the services of the law firm and not to influence the partner/candidate's nomination or election to federal office. In addition, the frequency of the ads in question did not increase as the election approached, and there was no mention of the partner's candidacy in any of the ads. The Commission recognized that an individual who becomes a candidate should be able to continue gainful employment without

the activities of that employment being considered campaign-related.

In AO 1982-56, 1 Fed. Elec. Camp. Fin. Guide (CCH)¶5695 (Oct. 29, 1982), the Commission considered the appearance of a Federal officeholder in an advertisement endorsing a candidate for state office. In applying a "totality of the circumstances" test, the Commission considered the stated purpose of the advertisement, which was to influence a state candidacy rather than the nomination of the Federal officeholder, the text of the ad which mentioned only the non-federal candidacy, and made no mention of the Federal officeholder's candidacy, the absence of express advocacy, and the absence of solicitations for contributions for any candidate. Based upon application of the "totality of circumstances" test, the Commission concluded that the Federal officeholder did not engage in campaign-related activity, and payment of the expenses of these ads by the state candidate did not result in an in-kind contribution to the Federal officeholder's campaign.

Advisory Opinion 1984-13, 1 Fed. Elec. Camp. Fin. Guide (CCH)¶5759 (May 17, 1984), issued to the National Association of Manufacturers provides perhaps the clearest illustration of the

Commission's decision-making process. In that opinion, the Commission ruled that appearances of candidates and party representatives at an event sponsored and financed by one or more corporations and held simultaneously with the Republican Party's National Convention in Dallas in 1984 constituted campaign-related activity which was impermissible under the Act. Once again applying a totality of circumstances test to the facts presented, the Commission concluded that even though the corporate sponsors had agreed not to expressly advocate the election or defeat of any candidate for Federal office or solicit contributions for any candidate, the timing and the purpose of the event clearly linked it to the upcoming congressional elections and gave the event partisan overtones. The clear purpose of the event was to provide a showcase for Republican candidates just before critical primary elections and the 1984 general election. In applying the "totality of circumstances" test, the Commission found the activity impermissible even in the absence of express advocacy and solicitation of contributions.

This examination of precedent demonstrates that the Commission has consistently applied a "totality of circumstances" test to distinguish between campaign-related activity and activity in furtherance of official Federal officeholder duties.

Even in those advisory opinions that appeared to rely on a "two-prong test," it is clear that in each instance, the Commission took into account factors in addition to the presence of express advocacy and the presence of solicitation for contributions.[4/]

VIII. CONCLUSION

Our vote to find No Reason to Believe against Reagan-Bush '84 and its treasurer was based on a legally sound application of the "totality of circumstances" test to determine whether

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4/ Some months after the Commission voted to close the file with reference to MUR 1790, the Court of Appeals for the District of Columbia Circuit issued its ruling in Orloski v. Federal Election Commission, 795 F.2d 156 (D.C. Cir. 1986), a case involving corporate funding of an event sponsored by an incumbent officeholder. With respect to the legal standard to be applied in such a determination, the Court of Appeals stated that it would not be arbitrary, capricious and contrary to law for the Commission to apply a two-prong test. The Court of Appeals did not rule that the two-prong test was the only permissible interpretation of the Federal Election Campaign Act with respect to the case before it. Nothing in this Statement of Reasons is inconsistent with the Court of Appeals decision in Orloski v. Federal Election Commission. See Orloski at 165-167.

specific activity involving the President of the United States was within the realm of official duties and responsibilities of that office, or was instead campaign-related activity. We saw no reason to hold an incumbent President to a different or higher standard than an incumbent Member of Congress engaged in official officeholder duties while a candidate. As the law does not preclude Federal officeholders from making public appearances before voters in their states or Congressional districts, nor should it preclude the President of the United States, who has a more significant public role to perform as a world leader, from making public appearances to explain and defend his Administration's policies.

Although we came to a different conclusion than did the General Counsel in applying the law to the facts of this case, we believe the result we reached was in full accord with past agency precedents, as previously discussed, and wholly justified by the facts before us. Furthermore, our conclusion was certainly consistent with the result reached by those Commissioners who may have applied the "two-prong test," under which the presence of either express advocacy or solicitation of contributions would be conclusive as to whether the activity is

campaign-related. In our view, however, the absence of both express advocacy and solicitation of contributions does not end the inquiry. Examination of activity for the presence or absence of "express advocacy" communications or solicitations for contributions represents a critical threshold inquiry in determining whether an event is campaign-related. The presence of either element would almost certainly decide the issue, and preclude the need for further examination of other factors within the "totality of circumstances". But the absence of either element in the "two-prong test" does not, in our opinion, prevent the Commission from reviewing other factors, such as the timing, setting or purpose of the event, and reaching the conclusion that the activity was campaign-related rather than within the duties of an officeholder.

As a preliminary consideration, the "two-prong test" may result in a finding that activity was inescapably campaign-related. The test does not serve, however, to prove that activity is unarguably or conclusively not campaign-related. Such a conclusion demands examination of the "totality of the circumstances" as applied in the present matter. Although the two components of the two-prong test are critical components

of the "totality of circumstances" test, we cannot ignore the purpose, timing and setting of the activity, each of which may bear heavily on whether an event was, in fact, campaign-related.

Finally, we would again note that application of either test or standard in this case would support our conclusion that the event in question was not campaign-related, and would support our finding of no Reason to Believe that respondents had violated the Federal Election Campaign Act or Commission regulations.

7/13/88
Date

Joan D. Aikens
Commissioner

7/13/88
Date

John Warren McGarry
Commissioner

BEFORE THE FEDERAL ELECTION COMMISSION

IN THE MATTER OF	)	
	)	
Reagan-Bush '84	)	MUR 1790
General Election Campaign	)	
Angela M. Buchanan Jackson	)	
as treasurer	)	

STATEMENT OF REASONS

Commissioner Lee Ann Elliott

I. INTRODUCTION

On June 15, 1988, Judge Pratt of the United States District Court for the District of Columbia requested the Federal Election Commission reconsider its dismissal of Matter Under Review 1790 and provide an additional explanation for not voting to persue this administrative complaint. Common Cause v. Federal Election Commission, No. 86-3465, slip op. at 11. The court found the Commission had not adequately addressed the needs of its first remand which sought statements explaining the legal standards applied in dismissing the complaint. Id. at 4-6.; Common Cause v. FEC, 676 F. Supp. 286, 292 (D.D.C. 1986).

The following statement sets out my reasons for voting against the staff recommendation in MUR 1790 and explains why my vote is, in fact, consistent with years of applicable Commission precedent, the Federal Election Campaign Act and its legislative history, and the law of this circuit.

II. FACTS AND ISSUES PRESENTED

On August 22, 1984, Ronald Reagan was nominated by the Republican Party as its candidate for President of the United States.

On August 24th, President Reagan left the Republican Convention in Dallas and flew to Chicago to address the 85th annual convention of the Veterans of Foreign Wars ("VFW"). The VFW is a non-profit, non-partisan organization whose constitution and by laws prohibit it from endorsing political candidates. The VFW extended its invitation to President Reagan on March 1, 1984, six months prior to the President's nomination, and asked him to discuss his administration's policies on national security and foreign affairs.

At the VFW convention, President Reagan clearly focused his remarks to the issues requested in the VFW's invitation. The President discussed his administration's committment to the readiness and strength of our military and addressed international issues of concern to American veterans. President Reagan did not expressly advocate his candidacy during his speech, did not mention his opponent or the upcoming election, and did not solicit contributions from the audience. This speech was considered part of President Reagan's official duties as head-of-state. Accordingly, the speech's costs were paid from funds appropriated for the official functioning of the office of the President.

On September 20, 1984, Common Cause filed a complaint with the Federal Election Commission alleging the August 24, 1984 speech by President Reagan was "campaign-related" and should be paid by the President's authorized re-election committee and reported to the Commission as a "qualified campaign expense." 2 U.S.C. §434; 11 C.F.R. §§9003.1, 9004.7.

The Presidential Election Campaign Fund Act requires publicly financed presidential candidates to pay for all "qualified campaign expenses" from funds made available under 26 U.S.C. §9001 et. seq.

The Federal Election Campaign Act ("Act") requires presidential candidates to regularly report these qualified campaign expenses to the Commission. 2 U.S.C. §434(b).

Commission regulations define a "qualified campaign expense" as an expense incurred during a reporting period "to further a candidate's election to the office of President." 11 C.F.R. §9002.11(a) Travel costs "relating to a presidential candidate's campaign" are specifically included in the definition of qualified campaign expenses at 11 C.F.R. §9004.7(a). Commission regulations further provide that "if any campaign activity, other than incidental contacts, is conducted at a stop, the stop shall be considered campaign-related." 11 C.F.R. §9004.7(b). See also 11 C.F.R. §106.3. The only issue in this case, therefore, is whether President Reagan's August 24, 1984 speech to the VFW was "campaign-related" requiring the President's committee to pay for and report this expenditure as a qualified campaign expense.

In support of its allegation that President Reagan's speech was campaign related, Common Cause complained the President "reiterated several themes" of his campaign and that the audience and press reacted as if the remarks were a campaign speech. Citing one Advisory Opinion, Common Cause stated the "FEC has made clear that whether a speech or other activity is campaign-related depends on its purposes" and that the "evident purpose" of the President's speech "was partisan activity." Complaint at 4-6.

In response to the complaint, the Reagan-Bush '84 Committee stated that the Department of Justice and the Comptroller General of the United States have analyzed when the President's travel is "political" or "official." These departments recognize that:

> appearing at party functions, fundraising and campaigning for specific candidates are the principal examples of travel which should be considered political. On the other hand, travel for inspections, meetings, non-partisan addresses and the like ordinarily should not be considered 'political' travel even though they may have partisan consequences.

Response at 3-4 quoting affidavit of Asst. Atty. Gen. Olson. Accordingly, the departments concluded that travel expenses for official appearances by the President to explain his administration's policies are legitimately paid from official funds. Response at 4 quoting Memo. of Comptroller General.

The Reagan-Bush Committee also analyzed four of the Commission's Advisory Opinions in which the Commission held events were not campaign-related "based on (1) the absence of any communication expressly advocating the election or defeat of Federal candidates, and (2) avoidance of any solicitation, making or acceptance of campaign contributions for federal candidates." The Committee concluded that since no advocacy or solicitation occurred during the speech, the Commission should find no reason to believe the Campaign Act had been violated. Response at 7-8, 11.

On December 21, 1984, the FEC's General Counsel recommended the Commission find reason to believe Reagan-Bush '84 violated 2 U.S.C. §434(b)(4) and 11 C.F.R. §§9003.1 and 9004.7 in connection with the VFW speech. The General Counsel conceded the President did not expressly advocate his re-election but that his speech was "designed to create a campaign atmosphere" and "nurtured the campaign spirit."

Counsel urged the Commission look past the words "campaign-related" in our regulations and instead use a broader inquiry that "supports the spirit of" the Explanation and Justification to our presidential regulations. See 45 Fed. Reg. 43377 (1980); MUR 1790, 1st Gen. Cnsl. Rept. ("Report"), Dec. 24, 1984, at 2, 3, 6, 10.

Counsel did not directly analyze the Advisory Opinions cited by the Reagan-Bush Committee in which the Commission applied a "two-prong test" in evaluating political speech. Instead, Counsel advocated that the Commission consider "many factors and circumstances of varing significance" including "the setting in which the remarks are made, the timing of the event at which the remarks are made, the reaction that the remarks evoke, as well as the remarks themselves." On this "totality of circumstances" approach, Counsel recommend the Commission find reason to believe the cited violations occurred. Report at 8-9.

In considering the General Counsel's Report and using applicable Commission precedent in this area, I voted with the majority to reject the General Counsel's recommendation and find no reason to believe the Act had been violated. In my opinion, President Reagan was invited to and appeared at the VFW convention as President of the United States, and not as the Republican Party's nominee in the 1984 general election.

III. DISCUSSION

The following discussion sets out my reasons for using a "two-prong" test for evaluating an officeholder's speech and states how I applied that test to the facts of this case. This discussion will sort

out what appears to be, but is not, conflicting precedent and will comment on Counsel's suggestion to use a "totality of circumstances" approach for this case. Lastly, I will discuss when a "totality of circumstances" approach is appropriate in evaluating a candidate's speech.

1. **Background of the "two-prong" test.**

An officeholder's speech will be considered campaign-related only if it expressly advocates the election or defeat of a clearly identified candidate or solicits contributions on behalf of a federal candidate. This "two-prong" test is sensible and workable Commission precedent and has repeatedly been held a permissible construction of the Act. Further, the "two-prong" test avoids subjective or imponderable considerations when evaluating an officeholder's speech.

In using the "two-prong" test, I have properly followed the Supreme Court's guidance that the Act does not apply to an incumbent's non-campaign appearances as an officeholder. Buckley v. Valeo, 424 U.S. 1, 84 n. 112 (1976) (recognizing that legislators have a duty to "communicate with their constitutients" and have an "other role as politicans" to win elections.) In accepting that officeholders have a continuing responsibility to report to their various constituencies, even while they are candidates for re-election, I consistently apply the Court's guidance that the Act is not intended to regulate speech by officeholders in their role as officeholders.

To determine when an officeholder is speaking in a "campaign-related" manner that is regulated by the Act, I have joined the Commission's examination of whether 1) there are communications expressly advocating the election of the officeholder as a candidate or

the defeat of his opponent; or 2) whether contributions to the candidate's campaign are solicited or accepted. See, e.g., Advisory Opinion ("AO") 1977-42, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5313; AO 1977-54, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5301; AO 1978-4, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5293; AO 1979-25, 1 Fec. Elec. Camp. Guide (CCH) ¶ 5410; AO 1980-16, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5474; AO 1980-22, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5479; AO 1980-89, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5537; AO 1981-37, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5623; See also Matter Under Review (MUR) 1476 Exp. 1st. Gen. Cnsl. Rept., Oct. 29, 1982; MUR 1555, Gen. Cnsl. Rept., Oct. 6, 1983; Pre-MUR 123-MUR 1699, 1st Gen. Cnsl. Rept., June 27, 1984 (citing MUR 1458, Gen. Cnsl. Brief, Dec. 7, 1982); See generally AO 1984-48, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5789 (approving cost guidelines for campaign-related use of state-owned aircraft); MUR 1729, Gen. Cnsl. Rept., Jan. 3, 1985 (reason to believe was found since dinner proceeds were forwarded to campaign committee, but see statements of Commissioners Elliott, Aikens and Reiche asking "the record reflect that they had disassociated themselves from the [totality of circumstances] standards, on page 3 of the staff report." Federal Election Commission minutes of an Executive Session, Tuesday, January 15, 1985, Agenda item E., page 10); MUR 1686, Gen. Cnsl. Rept., Jan. 15, 1985 (attending a fundraiser is campaign-related trip).

These precedents stretching over 11 years of the Commission's 13 year history confirm a consistent application of the "two-prong" test to determine if an officeholder's speech is campaign-related. The necessity for this statement of reasons, however, requires an examination of a few of these precedents in some detail.

In AO 1977-54, the Commission was asked whether an officeholder's participation in an issue-related petition drive would be considered "campaign-related" activity subject to the Act. The Commission's answer represents a seminal use of the "two-prong" test and clearly recognizes the continuing responsibilities of officeholders:

> expenses of the petition drive...would not be considered as contributions to or expenditures by Mr. Gingrich's campaign. However, the Commission assumes that such activity (i) will not occur in circumstances involving the solicitation, making or accepting of campaign contributions for Mr. Gingrich's campaign committee, and (ii) will not include any communication expressly advocating his nomination or election to Federal office or the defeat of another candidate for Federal office.

(CCH) at ¶ 5302.

In AO 1980-16, the Commission was asked whether "corporations may contribute transportation, lodging and meals" to Congressmen and Senators for their participation in a charitable event without making a prohibited contribution. The Commission's answer was simple and unanimous:

> so long as the event does not involve any solicitation of campaign contributions to candidates for Federal office participating in the event, or any

> advocacy in support of their election, corporations may provide transportation, lodging and meals to celebrities that include candidates for Federal office and not be in violation of the Act.

(CCH) at ¶ 5475.

In AO 1980-22, the Commission was asked whether an incorporated trade association could invite federal officeholders, who may also be candidates, to a "series of 'town meetings' to discuss the future of the steel industry." The Commission concluded that officeholders could be invited to address the forum, but the Commission specifically "conditions its conclusion on the avoidance of any campaign contribution solicitations, or advocacy supporting or opposing any candidate for Federal Office." (CCH) at ¶ 5479-80 citing AO 1978-56, AO 1978-15, AO 1977-54, and AO 1977-42.

Lastly, in AO 1981-37, the Commission was asked whether a Congressman could participate in a series of "public affairs programs" without violating any provision of the Act. While the Commission noted that the Congressman's "involvement in the public affairs program may indirectly benefit future campaigns," the Commission found no violation of the Act "conditioned, however, on (i) the absence of any communication expressly advocating your nomination or election or the defeat of any other candidate, and (ii) the avoidance of any solicitation, making or acceptance of campaign contributions in connection with this activity." (CCH) at ¶ 5623.

Although AO 1981-37 went on to "note" other facts, the Commission expressly overruled:

> those portions of Advisory Opinions 1975-8, 1975-13, 1975-20, and 1975-108 which hold that all speeches of a candidate for Federal office made before a substantial number of people, who comprise a part of the electorate with respect to which the individual is a candidate, are presumably made for the purpose of enhancing the individual's candidacy. In addition this opinion qualifies Advisory Opinion 1977-31 where the Commission held that a corporation's employment of a candidate as an announcer for a series of corporate sponsored radio announcements constituted something of value, and therefore, a contribution of the candidate.

Id.

Although, these are only four examples of the many years of reliance on the "two-prong" test, it is clear that the "two-prong" test decided every case where an officeholder, as an officeholder, was appearing at an event. Different characterizations of these opinions may now exist, placing new emphasis on the opinion's statement of facts. While it is true each of these opinions also described the facts of the request in its answer, as every Advisory Opinion ever issued by the Commission has, there is no indication the Commission's recital of the facts acted as a substitute for its legal application of the "two-prong" test.

The "two-prong" test has been and continues to be sensible and workable Commission precedent. It is a clear, objective and understandable method for evaluating the speech of an officeholder

who may also be a candidate for election. The "two-prong" test recognizes that officeholders have a continuing responsibility to comment on the issues of the day. See Buckley at 42. This test clearly divides when an officeholder is speaking to his constituency from when a candidate is speaking to the electorate. The "two-prong" test is the precedent of this Commission and shall continue to be until a majority overrules these prior decisions or the judiciary finds it an impermissible interpretation of the statute.

The federal courts have repeatedly held or acknowledged the "two-prong" test to be a "permissible construction" of the Act. Orloski v. FEC, 795 F.2d 156, 161-67 (D.C. Cir. 1986) aff'g Orloski v. FEC, No. 83-3513 (D.D.C. Dec. 6, 1984); Common Cause v. FEC, No. 86-3465 slip op. at 3; Common Cause v. FEC, 676. F. Supp. 286, 290 (D.D.C. 1986). In fact, the "two-prong" test "represents a reasonable accommodation between the Act's objectives and administrative exigencies" and "is sufficiently reasonable to be entitled to judical deference." Orloski at 165, 167.1/

1/ In my opinion, Orloski is not "arguably distinct" because it involves "corporate donations for congressional incumbents." At issue is whether its rationale applies to this case. I find its rationale quite applicable since we are applying the legal standard of "campaign-related" not the prohibitions of 2 U.S.C. §441b. "Campaign-related" stands as a legal threshold not only for corporate donations to an incumbent's activities, but also governs the allocation of party committee overhead and certain political party expenditures on behalf of candidates, 11 C.F.R. §106.2, See also 2 U.S.C. §441a(d); congressional and senatorial travel with or without use of government conveyance, 11 C.F.R. §106.3; partisan and non-partisan appearances, 11 C.F.R. §114.3-4; the possible making of contributions or expenditures, AO 1977-54; is relevant in determining "candidacy" under 2 U.S.C. §433 and guiding the reporting under 2 U.S.C. §434; is helpful in determining state-by-state expenditure
(Footnote continued on next page)

The most attractive aspect of the "two -prong" test is its equitable and objective application for distinguishing between "official" and "campaign-related" speech. This objective test allows officeholders to understand the law before making a speech and conform their conduct to clearly articulated standards. The objective "two-prong" test also does not unduly compromise the Act's purposes. There is nothing in the Act's legislative history indicating the Commission's application of the "two-prong" test is contrary to any expressed intention of Congress. See Orloski at 165-66. Quite the opposite, Congress has expressly left it to the Commission in matters such as these to "formulate policy with respect the the Act." 2 U.S.C. §437c(b)(1).

There is also no legislative history indicating Congress intended the Commission's policy to include officeholder's speech within the definition of "expenditure." Further, there is "no legislative history

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1/ Continued
allocations under the Presidential Primary Matching Payment Account Act, 2 U.S.C. §9031 et. seq.; and obviously can determine whether an incumbent President must use campaign money for use of government conveyance in delivering a speech. Accordingly, "campaign-related" is more than just a method of analyzing corporate donations or travel. It is a legal prefix that applies in many of the Act's factual settings.

Even if the view is taken that "campaign-related" does not have universal application but is limited to corporate expenditures, its use is still perfectly analogized to this case since corporate expenditures are held to be prohibited, even if an officeholder is appearing as an officeholder, when those expenditures "expressly advocate" a federal candidate's election or defeat. Orloski at 166-67. This holding was recently adopted by the Supreme Court when it stated, "[w]e therefore hold an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of §441b." FEC v. Massachusetts Citizens for Life, Inc., ("MCFL") 107 S. Ct. 616, 623 (1986). See also AO 1978-46. Accordingly, the "express advocacy" threshold for prohibiting a corporate expenditure is the same "express advocacy" threshold for regulating an officeholder's speech.

to guide us in determining the scope of the critical phrase 'for the purpose of influencing any election'." Buckley at 77. Accordingly, the Commission's interpretation of the Act continues to be judically deferrable, and "logical, reasonable and consistent with the overall statutory framework." Orloski at 167. The reasonableness of this policy is enhanced when viewed against 11 years of even-handed application.

Complainant disagrees with the Commission's long standing policy and apparently believes that any officeholder's speech that appears to have a "purpose" to "further" his election should be "campaign-related." Complaint at 6-7.

I specifically reject the complainant's suggestion that the Commission conduct a subjective inquiry into "purpose" and make a legal determination based on a speaker's or listener's "state of mind" rather than on what is actually said. First, complainant points to nothing in the Act or its legislative history that promotes a subjective-purpose approach over our objective test for defining when a speech is campaign-related.

Second, if "intent" is what the complainant seeks to uncover, then complainant should understand the "two-prong" test does not ignore intent since "it is common legal practice to infer intent from underlying circumstances." Orloski at 162. With a "two-prong" test, the Commission can infer the probable intent of the speaker by objectively focusing on what is said.

Third, a purpose approach that conditions liability for remarks on the subjective basis of "intending" to have an "effect or impact" on an election swings far wide of the permissible reach of the statute. The Federal Election Campaign Act does not regulate "intending effects or impacts," it regulates campaign contributions to prevent corruption or the appearance of corruption. Buckley at 23-29. Grasping at "impacts" takes the Commission away from its assigned role. As the Supreme Court cautioned in Buckley, "the distinction between discussion of issues and candidates and advocacy of election or defeat may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." Id. at 42. Further, even though the discussion of public issues by officeholders may "tend naturally and inexorably to exert some influence on voting at elections," Id. at 42 n.50, that influence alone will not bring remarks within the regulated area of campaign finance.

Accordingly, the Commission must not imply "campaign-related" intent to every speech by an officeholder, even while a candidate, or speculate on the possible impact his or her speech may have on voting. The Commission must objectively look at the words of a speech and apply settled factors of the "two-prong" test. To do otherwise replaces an objective review of the message itself with a subjective critique of the motivation of the speaker. See FEC v. Furgatch, 807 F.2d 857, 863 (9th Cir.) ("to fathom [the speaker's] mental state would distract us unnecessarily from the speech itself") cert. denied, 108 S. Ct. 151 (1987).

In enforcing the Act, regulating an officeholder's speech on a "purpose" basis would produce an incomprehensible trail of standardless decisions contrary to the goals of the Act and inconsistent with an officeholder's right to speak. "Purpose" analysis is wholly subjective and promotes ad-hoc, after-the-fact decision making. An ever-shifting majority of Commissioners would review each speech and decide whether it conveyed a "campaign-related purpose" to them, in their own individual hearing or reading. This approach would destroy the legal status of "campaign-related" messages and encourage the Commission to abandon its reasoned application of precedent in favor of an entirely subjective and arbitrary review of the facts. This approach must not be followed since officeholders must know in advance of making a speech whether it contains a regulated "campaign-related" appeal. See Buckely at 41 n.48 quoting Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972) (vague laws not only "trap the innocent by not providing fair warning," they foster "arbitrary and discriminatory appliation" and inhibit protected expression by inducing citizens to "steer far wider of the unlawful zone" than necessary); Orloski at 165 (a "subjective test based on the totality of the circumstances would inevitably curtail permissible conduct.")

Lastly, a purpose analysis that considers "the reaction the remarks evoke" abandons all objective review of speech and subjects officeholders to the wildly divergent views of their listeners. It is unthinkable to hold an officeholder subject to campaign finance laws

just because of what a listener, in his own individual hearing, might deduce from a message. Speech is subject to the Act depending on what it says, not the varied understanding potential recipients may have. Further, the complainant is inducing the Commission to consider press commentary and reaction to a speech in deciding whether a speech is "campaign-related." It is bad enough the Commission is urged to use its own subjectivity in these matters, but to discharge our statutory responsibility on the basis of another's subjective beliefs is an abdication of our authority. A few well-placed "listeners" or reporters could convert legitimate constituent-related speech into campaign-related advocacy. There is no reason the Commission should bring otherwise permissible speech within the government's control on the basis of another's subjective beliefs or commentary. Simply put, speakers cannot be placed at the mercy of their listeners or the press. Such an analysis "offers no security for free discussion....and compels the speaker to hedge and trim." Buckley at 42-43 quoting Thomas v. Collins, 323 U.S. 516, 535 (1945); see also United Stated v. United Auto Workers, 352 U.S. 567, 595-96, (Douglas J., dissenting).

Nothing in the Act or the Commission's history compels me to adopt the complainant's vague and shifting subjective inquiry for this case. Complainant's invitation to entertain some purpose disembodied from the Act is a sure way to frustrate the statute rather than implement it. See Walton v. United Consumers Club, Inc., 786 F.2d 303, 310

(7th Cir. 1986). The clear and equitably applied objective criteria of the "two-prong" test are, and continue to be, the standards properly applied to this case.2/

2. Application of the "two-prong" test.

Applying the "two-prong" test to President Reagan's remarks at the VFW convention yields no "campaign-related" message since the President did not expressly advocate his election or his opponent's defeat, nor did he solicit or receive any campaign contributions. No solicitations were made, obviously, since the Reagan-Bush Committee was operating under The Presidential Election Campaign Fund Act. 26 U.S.C. §9001 et. seq. The inquiry into "express advocacy" however, requires a little more detail.

2/ Disagreement with the General Counsel is of no significance for the Commissioners are not "required to accept the advice of some members of [its] legal staff," since "[t]he Commissioners are appointed by the President to administer the agency, the agency's staff is not." San Luis Obispo Mothers for Peace v. NRC, 751 F.2d. 1287, 1327 (D.C. Cir. 1984) (language from Section IV of opinion, the court later vacated Section III-B of the decision for en banc consideration, 760 F.2d. 1320) See also Stark v. FEC, Civil Action No. 87-1700, Slip op. at 10. (Opinion filed February 8, 1988) (Jackson, J.) ("This court reads Democratic Congressional Campaign Committee v. FEC to require that the same deference be accorded the reasoning of "dissenting" Commissioners who prevent Commission action...as is given the reasoning of the Commission when it acts affirmatively.")

In Buckley v. Valeo, the Supreme Court narrowed the scope of §608(e) of The Federal Election Campaign Act to words of "express advocacy" to salvage the statute from its constitutional deficiencies of vagueness and overbreath. Buckley at 42-45. The Court stated:

> in order to preserve the provision against invalidation on vagueness grounds, §608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.

Id. at 44.

This narrowing was also necessary to bring the statute to the level of the governmental interests advanced for its passage and satisfy the exacting scrutiny applicable to limitations on core first amendment rights. Id. at 44-45. Accordingly, the Court put forth a list of words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject." Id. at 44 n.52.

Courts have begun to look beyond communications containing these key phrases in finding "express advocacy." Furgatch at 863; FEC v. Central Long Island Tax Reform Immediately Committee, ("CLITRIM") 616 F.2d 45 (2d Cir. 1980). While "express advocacy" does not mean "implied" advocacy, CLITRIM at 53, it does recognize that the "short list of words included in the Supreme Court's opinion in Buckley does not exhaust the capacity...to expressly advocate." Furgatch at 863.

In order to fully understand and apply "express advocacy" without problematic inquiry into effect, purpose or subjective intent, it is important to make reference to some objective circumstances. Id. While inquiry into the context of speech invites difficult first amendment questions, "context remains a consideration, but an ancillary one, peripheral to the words themselves." Id. Importantly, an inquiry into context must fit within the legal definition of express advocacy, and not become its own separate factor, since context cannot become its own standard "supply[ing] a meaning that is incompatible with, or simply unrelated to, the clear import of the words." Id. at 864.

Bringing context within the definition of "express advocacy" means according limited legal significance to external factors to round out the words listed in Buckley. When this is done carefully, "express advocacy" preserves the efficacy of the Act while not treading upon the responsibilities of officeholders.

Even when referring to external factors, the speech itself must still be "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate" in order to constitute "express advocacy." Furgatch at 864. Including the context of speech within an analysis of "express advocacy" properly expands our inquiry to find no express advocacy "when reasonable minds could differ as to whether (the speech) encourages a vote for or against a candidate." Id.

Applying the legal standard of "express advocacy," while including contextual facts within it, is necessary to prevent a

chill on protected forms of officeholder speech. Applying "express advocacy" as the law discourages complainants from merely or pejoratively describing a set of facts and declaring "therefore a violation exists." By using "express advocacy," the regulated community will know the Commission applies legal standards and does not propel facts as facts into legal conclusions, but will use facts to help define "express advocacy." This avoids the distracting, subjective and ungovernable notions of purpose and effect, and allows officeholders to know the law of campaign finance before speaking to their constituencies.

In looking for "express advocacy" in President Reagan's remarks to the VFW, I first read the text of his speech for words of advocacy such as those listed in Buckley. Finding none, I next examined the speech, with limited reference to external factors, to determine if it could be interpreted as other than an exhortation to vote for or against a specific candidate. I concluded that the speech does not advocate the re-election of the President or the defeat of his opponent. Although others disagree, when reasonable minds differ over whether remarks exhort listeners to take action, then "express advocacy," by definition, does not exist.

I agree with the conclusion that no "express advocacy" exists knowing that President Reagan was invited to address the convention as President of the United States and not as the Republican nominee in the 1984 general election. His appearance was that of head-of-state and his remarks were on issues of importance to America's veterans. In addressing the VFW membership, President Reagan was fulfilling a responsibility that executive and legislative officeholders perform everyday: reporting to their various constituencies on topics of government and governance. Just because the President also happened

to be a candidate for re-election did not prevent him from continuing to act as an officeholder or speak as one. Lastly, I was not presented with a factor as in Furgatch where the "timing of the advertisement less than a week before the election left no doubt" that the ad was "an express call to action." Furgatch at.865.

In summary, application of the "two-prong" test to determine if President Reagan's speech to the VFW was "campaign-related" proved to be a sensible and workable application of Commission precedent. Objectively judging his speech, as opposed to subjectively judging his appearance, preserved the goals and prohibitions of the Act without treading upon an officeholder's responsibilities or entangling the Commission in subjective considerations.

3. Rejection of a "totality of circumstances" approach for officeholder speech.

The totality of circumstances approach is described in many ways since any case attempting to apply it contains a variety of new circumstances needing to be included. Over time, phrases such as "purpose," "intent," "setting," "timing," "desired effect," "intended impact," "underlying design," "speaker's motivation," "what a listener should," and "press commentary" have been used to characterize circumstances as violations. Each of these factors has no authoritative or precedential weight on its own. Only when all these "circumstances of varying significance" are included does a totality of circumstances approach yield a violation.

Even when a case is successfully made "in consideration of the totality of circumstances," no true precedent has been created

since no one factor can be considered exculpative or dispostive. With this, an officeholder will not know what factor should be avoided in their next speech or appearance. Instead of providing precedent, a totality of circumstances approach appears to be legal argument by the pound: when all the circumstances are added and the scale tips toward a violation, then the Commission must act.

Advocates of the totality of circumstances approach claim it contains two types of considerations apart from the "two-prong" test. First, the totality of circumstances includes a consideration of the objective elements of "time" and "place." Second, the totality of circumstances includes the more subjective elements of "purpose," "intent," "audience reaction," "press coverage," atmosphere" and "campaign spirit." Complaint at 6-7; Report at 3-4, 8-10.

If viewed closely, it is clear that the totality of circumstance's objective elements are already included within the "two-prong" test's definition of "express advocacy." See supra at 18-19. Objective criterion already support whether the speech, itself, is "express advocacy." Id; Furgatch at 863-64. Advocates of a totality of circumstances approach do not have to worry, therefore, that the "two-prong" test does not consider objective elements of speech. Quite the opposite, context is already subsumed within the definition of "express advocacy" and, importantly is part of a legal framework for analysis and not just part of a loosely connected review of facts.

This leaves the subjective elements of the totality of circumstances approach outside the "two-prong" test and, in my opinion, that is exactly where they should stay. The subjective considerations

of "purpose," "intent," and "effect" should not be part of any inquiry into campaign-related speech. These factors are too subjective and ungovernable, and their use attempts to characterize an officeholder's appearance at an event rather than analyze what is actually said. It is unthinkable to hold an officeholder continually subject to campaign finance laws on the basis of "press reaction," "effect" or what others deduce as some "underlying intent." Further, the totality of circumstances recognizes "campaign atmosphere" and remarks that "nurtured the campaign spirit" as factors in regulating speech. Report at 2, 3. The Commission must regulate campaign finance within the Act, not "atmospheres" and "nurtured spirits." We must continually look to the settled, objective, and judically endorsed criterion of the "two-prong" test. We must not advocate a view that goes past our Act to "support the spirit" of the Explanation & Justification to our regulations. Id. at 6.

Accordingly, the totality of circumstances approach for analyzing officeholder speech is really not applicable for officeholders. Its objective elements are already part of the "two-prong" test's legal inquiry into "express advocacy" and its subjective elements are too vaporous upon which to rest a legal conclusion.

4. Appropriate use of a totality of circumstances approach.

It has been asserted that the Commission has, on occasion, applied a totality of circumstances approach to other cases which renders the application of the "two-prong" test to this case arbitrary, capricious or contrary to law. While it is true the Commission

has entertained a totality of circumstances in some opinions,3/ that does not mean our precedent is not in order. The Commission has rightly applied a totality of circumstances approach in cases where 1) candidates, who are not officeholders, may be engaging in "campaign-related" activity. See e.g., AO 1977-42, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5315, AO 1978-15, 1 Fed. Elec. Camp. Guide (CCH) ¶ 5304, AO 1982-15, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5656, AO 1984-13, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5759; or 2) when officeholders engage in activity that is not normally part of their continuing responsibilities as officeholders, See e.g., AO 1982-56, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5695; and 3) when a group invites candidates, some of whom may also be officeholders, as candidates to appear at a function. See e.g., AO 1986-26, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5866, AO 1986-37, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5875; AO 1988-22, issued July 5, 1988.

The first four Advisory Opinions describe activity by candidates who are not officeholders. For example, AO 1977-42 involves a non-officeholder candidate appearing in a series of weekly radio programs4/, AO 1978-15 involves a non-officeholder candidate appearance in advertisements for a charitable fundraiser and AO 1982-15 involves a non-officeholder candidate appearing in advertisements for his law

3/ It has been argued that other opinions, such as AO 1977-42, AO 1980-16, AO 1980-22 and AO 1981-37, See supra at 8-10, also used a totality of circumstances approach. That is a revision of what those opinions actually say.

4/ Although this opinion is routinely cited as part of the "two-prong" line of precedent, it can be mentioned as a totality of circumstances case since the opinion does once refer to "purpose" in its answer.

firm. In all of these cases, no officeholders or officeholder activity is present. The very necessity for a "two-prong" test is absent since there is no danger of treading upon the official responsibilities of the officeholders. See supra at 10-13; Buckley at 84 n.112.

In AO 1984-13 an incorporated association sought to invite candidates as speakers to an afternoon conference. The requestor stated that:

> its invitations to potential speakers for the afternoon session will be based on their status as congressional candidates and not on any other basis, such as a Federal or state officeholder. In fact, you indicate that all potential invitees will be "challengers in congressional races." You do not intend to invite any incumbent Federal officeholder to speak at the session. [emphasis added].

(CCH) at ¶ 5759.

The Commission held that this event is linked by its "timing and purpose" to elections and "the appearances of these candidates in these circumstances will inevitably be campaign-related." Id. Once again, there are no officeholders speaking to their constituencies so there is no reason to apply a "two-prong" test. These individual speakers were invited to this event in only one capacity, as candidates for federal office. When candidates qua candidates speak at an event, it is appropriate to use a totality of circumstances approach. It is necessary to distinguish this approach from the inquiry into

officeholder speech as the opinion did in footnote three where it said this "event is distinguished from...Advisory Opinions 1983-23, 1980-22, 1980-16, 1978-15, and 1978-4." Id. See supra at 7-10. In my concurrence to this opinion, I agreed "with the results reached in Advisory Opinion 1984-13...these individuals were intended to appear within their capacity as candidates. " (CCH) at ¶ 5759 (Concurrence of Commissioner Elliott, disagreeing with partisan, non-partisan analysis and application of 11 C.F.R. §§114.3, 114.4).

In Advisory Opinion 1982-56, the Commission was presented with an officeholder appearing in a series of local advertisements endorsing candidates for local office. Because endorsing candidates is not part of the continuing responsibility of an officeholder, that speech may be subject to a totality of circumstances approach.

Lastly is a series of opinions that use a totality of circumstances approach in evaluating candidates' speeches at various conventions or meetings. In AO 1986-37 for example, the Commission was asked whether a foundation's invitations to individuals "on the basis of their candidacy or potential candidacy" for the "presidency in 1988" would be considered "campaign-related" activity governed by the Act. The Commission answered that it would, saying that the absence of "express advocacy" on the solicitation of contributions does not preclude the event from being "campaign-related." Again, this is the right result since inviting candidates as candidates, even if some of them are officeholders, allows a totality of circumstances approach.

Hopefully, this review has sorted out what appears to be, but is not, conflicting advisory precedent. On the one hand, there is consistent application of the "two-prong" test for officeholders speech for the important reasons stated in Buckley, Orloski and in recognition of the goals and limits of the Act. On the other hand, there is the totality inquiry for candidates as candidates, that clearly distinguishes itself from officeholder precedent yet remains compatible with the "two-prong" test and the purposes of the Act.

III. CONCLUSION

The Supreme Court has stated that the Commission cannot constitutionally regulate the discussion of all public issues even if the discussion "draws in candidates and their positions, their voting records and other official conduct." Buckley at 42 n.50 (emphasis added). Although an officeholder's discussion of issues may "naturally and inexorably...exert some influence on voting at elections," Id., the Commission may only regulate an officeholder's remarks if they contain "express advocacy" or the solicitation of contributions. Limiting an officeholder's speech on any other basis conflicts with decisions that clearly divide the regulated advocacy of campaigns and elections from an officeholder's free discussion of issues. Buckley at 42-45; CLITRIM at 53.

I rejected the General Counsel's recommendation to apply a totality of circumstances approach to MUR 1790 because it was not the correct Commission precedent. It had never been applied to officeholder speech and hopefully never will. Therefore, following Counsel's recommendation in this case would not have been following Commission precedent. Accordingly, I have acted "in conformity with FEC precedent" by voting there is no "reason to believe" this speech was "campaign-related."

Lastly, I want to assure that no offense was intended when I prepared my first statement for this case. I prepared that statement as an elaboration of the very comments I made when voting on this matter with my collegues. After years of working closely in a collegial body, I feel it is important to put forward positive statements of one's own opinions rather than a detailed criticism of the positions and opinions of fellow Commissioners.

This was also the Commission's first attempt to comply with a new and difficult procedure to aid in the review of our work. Hopefully, this public procedure will not polarize or create schisms among the Commissioners or create inflexible published positions such that change cannot occur. The Federal Election Commission is an even-numbered, bi-partisan agency that decides difficult questions in an evolving and politically-charged area. See Orloski at 167. We are often at our best when we reach concensus agreement for a plurality of reasons.

Lee Ann Elliott

July 14, 1988

Lee Ann Elliott
Commissioner