FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

June 16, 1999

MEMORANDUM

TO: RON M. HARRIS
PRESS OFFICER
PRESS OFFICE

FROM: ROBERT J. COSTA
ASSISTANT STAFF DIRECTOR
AUDIT DIVISION

SUBJECT: PUBLIC ISSUANCE OF THE FINAL AUDIT REPORT ON
DOLE FOR PRESIDENT, INC

Attached please find a copy of the final audit report and related documents on Dole for President, Inc., which was approved by the Commission on June 3, 1999.

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: Office of General Counsel
Office of Public Disclosure
Reports Analysis Division
FEC Library

REPORT OF THE AUDIT DIVISION

ON

DOLE FOR PRESIDENT, INC

Approved June 3, 1999

FEDERAL ELECTION COMMISSION

999 E STREET, N.W.

WASHINGTON, D.C.

FEDERAL ELECTION COMMISSION
Washington, DC 20463

REPORT OF THE AUDIT DIVISION ON DOLE FOR PRESIDENT, INC.

I. BACKGROUND

A. AUDIT AUTHORITY

This report is based on an audit of Dole for President, Inc. (DFP). The audit is mandated by Section 9038(a) of Title 26 of the United States Code. That section 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 committee who received payments under section 9037." Also, Section 9039(b) of the United States Code and Section 9038.1(a)(2) of the Commission's Regulations state that the Commission may conduct other examinations and audits from time to time as it deems necessary.

In addition to examining the receipt and use of Federal funds, the audit seeks to determine if the campaign has materially complied with the limitations, prohibitions, and disclosure requirements of the Federal Election Campaign Act of 1971 (FECA), as amended.

B. AUDIT COVERAGE

The audit of DFP covered the period from its inception, January 12, 1995 through December 31, 1997. DFP reported an opening cash balance[1] of $-0-; total receipts of $56,583,853;[2] total disbursements of $55,926,465;[2] and a closing cash balance of $657,388.[3]

---

1 All figures are rounded to the nearest dollar amount. These amounts were taken from amended reports filed in 1997 and 1998 during audit fieldwork.

2 These figures do not reflect the transfers of $2,000,000 between DFP and DK (See finding II.A.)

3 Ending cash is overstated by approximately $476,000 at year end 1997. (See finding II.C.)

C. CAMPAIGN ORGANIZATION

DFP maintains its headquarters in Washington, D.C. The treasurer is Mr. Robert E Lighthizer.

DFP registered with the Federal Election Commission on January 12, 1995. During the period audited, DFP maintained depositories in Alexandria, Virginia and Washington, D.C. To handle its financial activity, DFP opened and used nineteen bank accounts. From these accounts DFP made approximately 19,650 disbursements. Into these accounts, DFP received approximately 401,300 contributions from 168,000 contributors. These contributions totaled approximately $32,075,000.

In addition, DFP received $13,545,771[4] in matching funds from the United States Treasury. This amount represents 87.65% of the $15,455,000 maximum entitlement that any candidate could receive. Senator Dole ("the candidate") was determined eligible to receive matching funds on May 31, 1995. DFP made twelve requests for matching funds totaling $13,596,469. The Commission certified 99.63% of the requested amount. For matching fund purposes, the Commission determined that Senator Dole's candidacy ended on August 14, 1996, the date he was nominated at the Republican Convention in San Diego, California. As applicable to Senator Dole, the Commission's Regulations at 11 CFR §9033.5(c) state than the candidate's ineligibility date shall be the last day of the matching payment period as specified at 11 CFR §9032.6. DFP received its twelfth and final matching fund payment of $373,697 on August 1, 1996.

D. AUDIT SCOPE AND PROCEDURES

In addition to a review of the Committees' expenditures to determine the qualified and non-qualified campaign expenses incurred by the campaign, the audit covered the following general categories:

1. The receipt of contributions or loans in excess of the statutory limitations (Findings II.A. and B.);

2. the receipt of contributions from prohibited sources, such as those from corporations or labor organizations;

3. proper disclosure of contributions from individuals, political committees and other entities, to include the itemization of contributions when required, as well as, the completeness and accuracy of the information disclosed (Findings III.A., B., C. and D.);

---

[4] DFP made three refunds to the U.S. Treasury totaling $21,000 for matching funds which had been received for contributions that were subsequently refunded.

4. proper disclosure of disbursements including the itemization of disbursements when required, as well as, the completeness and accuracy of the information disclosed;

5. proper disclosure of campaign debts and obligations;

6. the accuracy of total reported receipts, disbursements and cash balances as compared to campaign bank records (Finding II.C.);

7. adequate recordkeeping for campaign transactions;

8. accuracy of the Statement of Net Outstanding Campaign Obligations filed by Dole for President, Inc. (DFP) to disclose its financial condition and to establish continuing matching fund entitlement (Finding III.G.);

9. DFP's compliance with spending limitations (Findings III.E. and III.F.); and,

10. other audit procedures that were deemed necessary in the situation.

As part of the Commission's standard audit process, an inventory of campaign records is normally conducted prior to the audit fieldwork. This inventory is conducted to determine if the auditee's records are materially complete and in an auditable state. Based on our review of records presented, fieldwork began immediately.

As the audit progressed, additional materials and information were required from DFP, its vendors, an individual, and the Republican National Committee (RNC). To obtain the needed materials the Commission issued subpoenas to 10 entities. Portions of the findings presented below are based on the material supplied in response to those subpoenas.

Unless specifically discussed below, no material non-compliance was detected. It should be noted that the Commission may pursue further any of the matters discussed in this report in an enforcement action. Finally, this report constitutes notice of potential Federal funds repayment pursuant to 11 C.F.R. §9038.2(a)(2).

In a series of meetings between December 3, 1998, and March 4, 1999, the Commission considered the Staff findings and recommendations. The action taken with respect to each issue is described at the end of the respective finding.

II. AUDIT FINDINGS - NON REPAYMENT MATTERS

A. LOAN TO DOLE KEMP '96

Section 9003.2(a)(2) of Title 11 of the Code of Federal Regulations states, in relevant part, that to be eligible to receive payments under 11 CFR part 9005, each Presidential and Vice Presidential candidate of a major party shall certify to the Commission that no contributions have or will be accepted by the candidate or his or her authorized committee except for contributions solicited for, and deposited to, the candidate's legal and accounting compliance fund, or to make up any deficiency in payments received from the Fund.

Section 9032.9(a) of Title 11 of the Code Federal Regulations states, in part, that a *qualified campaign expense* means a loan or advance of money – incurred by or on behalf of a candidate or his authorized committee from the date the individual becomes a candidate through he last day of the candidate's eligibility, made in connection with his campaign for nomination and neither the incurrence nor payment of which constitutes a violation of any law of the United States.

Section 9034.4(b)(3) of Title 11 of the Code of Federal Regulations states, in part, that any expenses incurred after a candidate's date of ineligibility, as determined under 11 CFR §9033.5, are not qualified campaign expenses except for costs associated with the termination of political activity to the extent permitted under 11 CFR §9034.4(a)(3).

Section 104.3 of Title 11 of the Code of Federal Regulations requires political committees authorized by a candidate for Federal office to report, for the reporting period and the calendar year, total receipts, total disbursements, transfers to other committees authorized by the same candidate, and transfers from other committees authorized by the same candidate. Further, each authorized committee shall report the full name and address of each authorized committee of the same candidate to which a transfer is made or from which a transfer is received during the reporting period, together with the date and amount of such transfer.

In the process of reconciling DFP's bank accounts, the Audit staff identified a series of transfers between DFP and the Dole - Kemp '96 General Committee (DK) which were not properly disclosed or itemized. Between October 30 and November 1, 1996, DFP transferred $2,000,000 to the DK. Without the transfers from DFP, the DK bank account statements would have had a negative balance at November 1, 1996 of approximately ($2,563,375). This balance excludes certificates of deposit used as collateral for a line of credit and letters of credit issued in lieu of cash deposits for telephone service, credit cards, and other vendors. Although these certificates of deposit represent $2,948,077 in DK funds, the balances were not available to pay checks issued by DK.

In a memorandum dated December 5, 1996, included in its disclosure report for the post general election period, DFP stated:

> "In the process of consolidating its primary committee bank accounts, transfers totaling $2,000,000 were made from Signet Bank accounts to Franklin National Bank. These funds were transferred in error to an account titled "Dole-Kemp '96 Operating Expenses" instead of the primary account which is titled "Dole for President Operating Expenses." This error was made, discovered, and corrected within this reporting period."

The account described as "Dole-Kemp '96 Operating Expenses" was in fact titled "Dole for President General Committee," and, as noted, the transfers occurred over a three day period. DFP transferred $500,000 on October 30; $1,250,000 on October 31; and, $250,000 on November 1 for a total of $2,000,000. The transfers, as noted in the memorandum, occurred between accounts at two different banks. Transfer advices from the originating bank identified the name and account number of the destination account for each transfer as follows: October 30 - "Dole for President/AC-1016040712," October 31 - "Dole for President General Operating Expenses/AC-1016040712" and November 1 - "Dole for President Operating expenditures/AC-1016040712." Though the account name varied, the account number did not. It was the number of the DK operating account. The memorandum that requested the October 31 transfer was found by the Audit staff. It was a faxed copy that had been received at the transferring bank and it also identified the transfer's destination by the DK operating account number. This document suggests that no error occurred; that the transferring bank made the $1,250,000 transfer exactly as requested. Further, no documentation was found to suggest that the intended transfer destination for any of the three transfers was other than the DK operating account. It was also noted that DFP's general ledger originally classified each of the transfers as a "loan." On December 23, 1996, the general ledger entry classifications were changed from "loan" to "transfer error." DFP did open a second primary operating account, #3000024220, at Franklin National Bank. According to a notation found on the account signature cards, November 4, 1996 is listed as the opening date and November 6 is the date of the first deposit; both dates are after the last transfer.[5]

These transfers were reversed when DK transferred $2,000,000 to DFP on November 25, 1996. However, in order for DK to accomplish the return of the $2 million, it was necessary for DFP to repurchase from DK certificates of deposits in the

---

[5] Another transfer of $25,000 was made to DK on November 4, 1996. The documentation with that transaction suggests that it was intended for account #3000024220, the Franklin National Bank account opened by DFP on that day. That transfer was deposited to DK's press reimbursement account and refunded on January 14, 1997. Documentation surrounding this transaction suggests that it was erroneously credited to DK's account.

amount of $1 million. DK had purchased these certificates of deposit from DFP on August 30, 1996. They were used to secure letters of credit that served as DK's telephone deposits and other security deposits. However when the certificates of deposit were repurchased by DFP, one in the amount of $202,767 ($200,000 plus accrued interest), had been liquidated. Therefore, DK owes DFP $202,767. That amount is reported by DFP as a debt owed to it.

This issue was discussed with DFP representatives and their response was to state that amended disclosure reports would "...be filed to show transfers made in error between committees, as well as the reversal of these transfers which were made to correct the error."

The Audit staff concluded that the transactions described above represent loans to and repayments from DK by DFP. The loan was also a prohibited contribution on the part of DFP to DK,[6] and as such, DFP incurred a non-qualified campaign expense. Further, DFP made an additional contribution to DK and incurred an additional non-qualified campaign expense when it repurchased certificates of deposit that either secured DK's deposits, or had been liquidated by DK since funds represented by the CD's were not available to DFP.[7] The contributions and non-qualified campaign expenses were resolved when the letters of credit and other security requirements were eliminated in the winding down period and the funds represented by the CD's became available.

In the Exit Conference Memorandum (the Memorandum) it was recommended that DFP file amended Summary and Detailed Summary pages, schedules A-P and B-P for the Post General period which fully disclose and itemize the transfers between DFP and DK, provide documentation that demonstrated the transfers were not contributions from DFP to DK for the period that the funds were with DK, and provide any other relevant information regarding the transfers between DFP and DK which would support their contention that the transfers were inadvertent and not intentional. It was further specified that the documentation to be provided should demonstrate that it was permissible for DFP to purchase certificates of deposit from DK that were serving as security for deposits required of DK; and that the DFP operating account at Franklin National Bank was open at the time the transfers were made. Finally, DFP was to provide transfer requests which identify the DFP operating account by number; an analysis of DK's security deposit requirements at the time the certificates of deposit were

---

6 In advisory opinion 1992-38, the Commission permitted the Clinton-Gore committee to borrow funds from its GELAC to cover short term cash flow problems caused by amounts due from the Secret Service. That opinion did not permit similar borrowing from a Federally funded primary campaign. The opinion further required the amount borrowed to be repaid from the next amounts received from the Secret Service, and full reporting of the transactions.

7 In Advisory Opinion 1988-05, the Commission held that a committee's proposed use of public funds received in connection with one election, to pay obligations incurred by another committee of the same candidate incurred in connection with a different election to be a non qualified campaign expense.

repurchased by DFP; and any documentation from Franklin Bank which supports DFP's contention that the transfers had been erroneously credited.

In its response to the Memorandum, DFP states that it has filed amended disclosure reports to disclose both the initial transfers and the correcting transfer. On April 22, 1998, DFP filed schedules A-P, line 18, Transfers From Other Authorized Committees, and B-P, line 24, Transfers To Other Authorized Committees, which disclose the transfers in and out of its accounts. No amended Summary or Detailed Summary pages were included. Further, DFP maintains that the transfers occurred in error but provided none of the requested documentation to support its contention.

With respect to the conclusion that DFP's purchase of the certificates of deposit constituted a contribution to DK, DFP explained that its letters of credit, underlying certificates of deposit, lines of credit, and loans were obtained in the normal course of business as provided for at 11 CFR §110.7(b)(11) and therefore could not be contributions. DFP's relationship with the banking institutions that provided the certificates of deposit, letters of credit, and commercial loans was not questioned. Rather, DFP's purchase during the expenditure report period of the certificates of deposit securing the business relationship between DK and its vendors is the issue. In the Memorandum that transaction was identified as a contribution from DFP to DK. With respect to this, DFP notes only that the Certificates of Deposit were transferred back to DFP which has been the lead committee during the wind down phase. That statement does not resolve the question. (See Section III.H.1.b. for a discussion of wind down costs)

DFP has failed to demonstrate that the $2 million transferred to DK, and the purchase of the certificates of deposit underlying DK's security arrangements with its vendors were not contributions to DK.

The Commission voted to receive this finding without any determination on the merits of the analysis of the facts or the interpretation of the law contained therein.

B. Receipt of an Excessive In-kind Contribution

Section 100.7(a)(1) of Title 11 of the Code of Federal Regulations state, in relevant part, that the term contribution includes anything of value such as advances of services made by any person for the purpose of influencing any election for Federal office. Subsection (iii)(A) states that the term *any thing of value* includes all in-kind contributions. Unless specifically exempted under 11 CFR §100.7(b), the provision of services at a charge which is less the usual an normal charge for such service is a contribution. If services are provided at less than the usual and normal charge, the amount of the in-kind contribution is the difference between the usual and normal charge for the services and the amount charged to the political committee. Subsection (iii)(B) states that the *usual and normal charge* for any services other than those provided by an

unpaid volunteer, means the hourly charge for the services at a commercially reasonable rate prevailing at the time the services were rendered.

Section 110.1(b)(1) of Title 11 of the Code of Federal Regulations states that no person shall make contributions to any candidate, his or her authorized political committees or agents with respect to any election for Federal office which, in the aggregate, exceed $1,000.

Section 114.9(e) of Title 11 of the Code of Federal Regulations states, in relevant part, that a candidate who uses an airplane which is owned or leased by a corporation not licensed to provide commercial service for travel in connection with a Federal election must, in advance, reimburse the corporation where regular commercial service is available the first class air fare and where no regular commercial service exists, the usual charter rate.

A Gulfstream IV jet aircraft, personally owned by Mr. William Keck, was used by Senator Dole and his campaign for travel from Sunday to Friday, May 28 through June 2, 1995. Senator Dole and his campaign staff, according to a DFP itinerary, made at least nine[8] flights on the airplane paying first class airfare for each member of its entourage for each flight leg. The total reimbursed to Mr. Keck was $17,225.[9]

DFP believes that these flights were entitled to treatment under 11 CFR §114.9(e) because the airplane functioned as the corporate jet for Coalinga Corp. despite the fact that it was privately owned. Patrick Templeton, Washington Representative for Coalinga Corp., wrote as follows in response to the Audit staff inquiries of DFP concerning these flights:

> "Senator Dole's campaign travel on an aircraft registered in the name of William Keck is properly reimbursable at first class rates. The aircraft functioned as the corporate jet for Coalinga Corp., a sub-chapter S corporation which is a diversified holding company wholly owned by Mr. Keck. The aircraft was registered in Mr. Keck's name rather than in the name of Coalinga Corp., dictated by tax law considerations. If Mr. Keck, as a Coalinga employee, or any other Coalinga employee, needed a jet for corporate business, they used the aircraft in question. Also, Coalinga's Washington representative traveled on the aircraft every time Senator Dole

---

[8] The nine trips were Washington, DC to Manchester, NH; Concord, NH to Boston, MA; Boston, MA to Chicago, IL; Chicago, IL to San Francisco, CA; San Francisco, CA to Los Angeles, CA; Irvine, CA to Las Vegas, NV; Las Vegas, NV to Phoenix, AZ; Phoenix, AZ to Tuscon, AZ; and Tuscon, AZ to Washington, DC. A second itinerary suggests that an additional flight with passengers occurred between Santa Monica, CA and Santa Ana, CA(Irvine, CA).

[9] DFP wrote two checks for this flight. The first check was dated May 25, 1995, but was made out to Coalinga Corp. Because Mr. Keck personally owned the plane, a second check was requested. The date of the check written to Mr. Keck was June 2, 1995.

or any other public official traveled on the plane (except in one instance).[10] The tail numbers of the plane ended with "CC" (N404CC)[11] for Coalinga Corp. and has other markings in the cabin that make reference to Coalinga Corp."

The "Financial Control and Compliance Manual," an FEC publication offering guidance for presidential primary candidates receiving Federal funds, cautions that the reimbursement rate for the use of aircraft owned by individuals is the usual and normal charge for services provided. Usual and normal charges in such instances will generally be the equivalent charter rate for the means of transportation used.

In order for the use of an airplane to qualify under the provisions of 11 CFR §114.9(e), it must be either owned or leased by a corporation. Coalinga Corp. through its Washington Representative concedes that the plane was not owned or leased by a corporation. Thus, the use of this airplane should have been reimbursed on the basis of the usual and normal cost for a similar charter.

KaiserAir, Inc.[12] quotes an hourly charter rate of $4,500 for the use of a Gulfstream IV. In addition to the nine identified flights, four positioning flights are included in the calculation of total flight hours. The usual and normal costs of chartering this trip was computed by multiplying the advertised hourly charter rate by the total flight hours as listed on the KaiserAir itinerary. The airplane flew 26.3 reimbursable hours for the campaign and the usual and normal charge should have been $118,350 (26.3 hrs. x $4,500 per hr.). DFP paid $17,225 for the use of the airplane and therefore received an in-kind contribution from Mr. Keck of $100,125 ($118,350 less the already paid $17,225 and a contribution allowance of $1,000).

In the Memorandum it was recommended that DFP show that the actual charter cost was timely paid and it therefore had not, received an excessive in-kind contribution, or provide any additional relevant information that would show that the flights were correctly reimbursed.

DFP, responding to the Memorandum, states at the time it was used by DFP the aircraft was not being used as a charter aircraft, but as a corporate aircraft in all respects except formal title. DFP again mentions the aircraft's tail number and states that

---

[10] None of the itineraries lists a Coalinga Corp. employee as passenger for the flights made by Senator Dole and his staff.

[11] The Audit staff notes that Mr. Keck also owns a small acrobatic airplane with tail registration N403CC.

[12] KaiserAir, Inc. of Oakland, California, which apparently operated the airplane for Mr. Keck, is a privately owned aircraft management and service company. In addition to overseeing all phases of airplane management, KaiserAir offers a charter option for clients who wish to offset operating expenses by chartering their aircraft.

it had "...no way of knowing that plane was not a corporate aircraft" and that others, including members of congress have used this particular plane, reimbursing flights at rates provided for at 11 CFR §114.9(e). From this it is concluded that DFP paid the appropriate rate for the aircraft. DFP goes on to argue that even if Mr. Keck's aircraft is individually owned, payment of a charter rate for flights to cities with commercial service is not appropriate. The response cities 11 CFR §114.9(e) and §9004.7(b)(5)(i).

DFP acknowledges that the aircraft was owned personally by Mr. Keck. Section 114.9(e) applies only to aircraft owned or leased by a corporation or labor organization. Since no evidence of any lease agreement between Mr. Keck and Coalinga Corporation has been presented, 11 CFR §114.9(e) does not apply to the use of this aircraft. Though it is understandable that DFP may have been unaware that this aircraft was not owned or leased by a corporation, it does not change the application of the regulation. As for 11 CFR §9004.7(b)(5)(i), it deals with the use of government aircraft by campaigns and is clearly not applicable. As noted earlier the "Financial Control and Compliance Manual" explains that the use of an aircraft owned by an individual is valued at the usual and normal charge for the service provided. It goes on to explain that the usual and normal charge will generally be the equivalent charter rate for the service actually used and not the commercial rate for the same trips.

DFP then argues that, if the charter rate is the correct valuation method, the auditors had used an erroneous charter rate of $4,500 per hour and that, according to Mr. Keck, the correct "inside" rate for known and repeat passengers was actually $3,100. An additional error in the auditor's calculations, according to DFP, was the inclusion of charges for positioning flights or "dead-head time." DFP stated "It is not the customary practice of charter airlines to charge for such 'dead-head' time." The response goes on to explain that a charter customer would not generally use an aircraft that is based 3,000 miles away and incur significant dead-head charges. Finally, DFP states that although DFP did not receive an in-kind contribution from Mr. Keck, if it is determined that one was made, it could not exceed $28,895 (15.2 flight hours @ $3,100 per hour less $17,225 already paid and $1,000 contribution allowance).

Other than Mr. Keck's statement, no supporting documentation has been provided to establish the existence, availability, or amount of an inside charter rate. The rate used in the Memorandum is an advertised rate for the same model of aircraft operated from the same location by the same company that manages Mr. Keck's aircraft. With respect to dead-head flights DFP offers no support for the statement that air charter companies do not generally charge for such flights. On the contrary, DFP was billed and paid for all such flights that were flown by both charter companies that provided DFP with its campaign planes. It is agreed that under normal circumstances a campaign would not select a charter aircraft that was based 3,000 miles away. However, in this case that is precisely what DFP did. Thus, the calculation of the in-kind contribution from Mr. Keck contained in the Memorandum remains unchanged ($100,125 ($118,350 less the already paid $17,225 and a contribution allowance of $1,000)).

Finally, DFP comments that this is a matter for consideration by the Office of General Counsel and does not involve the repayment of public funds since none were involved. As noted in the background section above, any of the matters in this report may be pursued in a compliance action. As for a repayment, this transaction is treated as both a contribution and a disbursement as are all in-kind contributions. The disbursement transaction is applicable to the spending limitation, and the contribution is part of the mixed pool of private and public resources that were available to the campaign. The relative amounts of private and public resources in that mixed pool determines the repayment ratio prescribed at 11 CFR §9038.2(b)(2)(iii).

The Commission approved the Audit staff and the Office of General Counsel's (hereafter Staff) analysis that as a result of the flights on Mr. Keck's plane, DFP had received an in-kind contribution in the amount of $100,125. Therefore, this in-kind contribution was included in DFP's total expenditures subject to the spending limitation and in the calculation of the repayment ratio [see footnote 17 at page 19].

C. MISSTATEMENT OF FINANCIAL ACTIVITY

Sections 434(b)(1), (2) and (4) of Title 2 of the United States Code state, in part, that a political committee shall disclose the amount of cash on hand at the beginning of the reporting period and the total amount of all receipts and all disbursements for the reporting period and the calendar year.

The Audit staff's reconciliation of reported financial activity to bank records for the calendar year 1997 revealed the following misstatements:

1. Beginning Cash on Hand

The Committee's beginning cash on hand was overstated by $257,125, the result of reporting discrepancies in prior periods.[13] The correct reportable cash on hand was $2,149,139.

2. Receipts

The Committee's reported receipts were understated by $62,077. The components of the misstatement are as follows:

[13] The overstatement of beginning cash is the net effect of reporting errors in receipts and disbursements in 1996 and 1995. These discrepancies were not material, owing to the magnitude of bank activity for those periods. The Audit staff has identified receipts and disbursements in 1996 which account for approximately $190,000 of the overstated cash and has provided a schedule of these corrections to DFP.

Reported Receipts		$404,001
Interest Not Reported	$13,058	
Transfers from GELAC not reported	$11,486	
Transfers from DK not reported	$30,162	
Vendor refund not reported	$ 2,662	
Payroll offset not reported	$ 551	
Press Reimbursements not reported	$ 4,688	
Reconciling Item	$ (530)	$ 62,077
Correct Reportable Receipts		$466,078

3. Disbursements

The Committee's reported disbursements were understated by $281,226. The components of the misstatement are as follows:

		$2,152,876
Reported Disbursements		
Transfer to GELAC Not Reported	$ 45,088	
Transfers to DK Not Reported	$186,773	
Arithmetic Discrepancies within Total Disbursements Reported	$ 46,930	
Cleared check reported as void	$ 772	
Reconciling Item	$ 1,663	$ 282,388
Correct Reportable Disbursements		$2,434,102

4. Ending Cash On Hand

The reported ending cash on hand at December 31, 1997 was overstated by $476,273, resulting from the misstatements detailed above. The correct ending cash on hand was $181,115.

The Memorandum recommended that DFP file a comprehensive amended report for calendar year 1997 correcting the misstatements noted above and amend its most recently filed report to correct the ending cash on hand.

In response to the Memorandum, DFP states that it has complied with the Audit staff's suggestions and is filing amended summary pages for 1997, and that the appropriate supporting schedules will be filed shortly.

The summary schedules included in DFP's response did not include any entries but receipts and disbursement totals for the detailed summary page. Although DFP promises that a subsequent filing of supporting schedules will be made, as of November 10, 1998, DFP has yet to file complete amended reports for 1997.

The Commissioners voted to receive this finding without any determination on the merits of the analysis of the facts or the interpretation on the law contained therein.

III. AUDIT FINDINGS AND RECOMMENDATIONS - PAYMENTS TO THE U.S. TREASURY

A. EXPENSES PAID BY THE RNC

1. Background

This section discussed DFP's position with respect to the overall spending limitation at the time Senator Dole became the Republican Party's presumptive nominee and enumerated four categories of expenses paid by the RNC. Each category is noted below[14].

2. DFP Expenses Paid As Coordinated Expenditures

Section 441a(d)(2) of the United States Code permits the national committee of a political party to make limited expenditures in connection with the general election campaign of its candidate for President of the United States. The Staff questioned whether certain expenditures claimed by the RNC to have been made under this provision were instead in-kind contributions to DFP, and attributable to DFP's spending limitation[15].

The Staff recommended that the Commission determine that the RNC had made in-kind contributions to DFP in the amount of $813,857 and that $774,252 ($813,857 less a compliance exemption) was attributable to DFP's spending limitation.

The Commission made two determinations with respect to the expenses discussed above. By a motion adopted on a 5-1 vote regarding non-media expenses, the Commission accepted DFP's claims that the amount of $936,245 constituted coordinated expenditures. In doing so, the Commission rejected the Staff recommendation that these expenses represent in-kind contributions to DFP and are attributable to DFP's spending limitation. By a second motion approved 6-0, the Commission determined that expenditures by the RNC for advertising before and during the nominating convention ($32,527) featuring the Party's presumptive nominee, and which were claimed and reported as coordinated expenditures, would be accepted as

---

[14] For the full presentation and discussion of this issue see Agenda Documents 98-87 and 99-49, Finding III.A. and the audio tapes of the Commission's Open Session meetings on the following dates: December 3rd, 9th, and 10th 1998, January 14th and 28th, February 3rd and 25th, March 4th, and April 29, 1999.

[15] Ibid.

claimed. The Total amount of $968,772 would then be counted against the RNC's 2 U.S.C. §441a(d) limitation.

3. Payroll

A number of DFP staff members left DFP payroll in March and April of 1996, and were employed by the RNC. Records indicated that in many cases the duties of the employees were similar in both positions. The Staff questioned whether the salary payments and expense reimbursements made by the RNC for those employees characterized as "advance staff" were in-kind contributions to DFP by the RNC[16].

The Staff recommended that the Commission determine that salary and expense reimbursement payments totaling $135,743 were in-kind contributions by the RNC to DFP, and that $117,550 ($135,743 less a compliance exemption) be attributed to DFP's spending limitation.

During the Commission's deliberations concerning this matter, a motion was offered to approve the Staff recommendation. That motion failed to garner sufficient votes to pass.

4. Media

The RNC sponsored a television advertising program in the spring and summer of 1996. It was argued by DFP and the RNC that the ads featuring Senator Dole and/or President Clinton were alleged "issue ads"[17].

The Staff recommended the Commission determine that the cost of producing and broadcasting the ads be allocated between DK and DFP and that the portion attributed to DFP, $5,588,900, represented a contribution in-kind from the RNC to DFP. It was also recommended that it be determined this in-kind contribution was attributable to DFP's spending limitation.

In considering the Staff recommendation, the Commission took the following actions:

It disagreed with the allocation of the expenditures between DFP and DK. The Commission's action caused all of the media expenses to be attributed to DFP. Accordingly, the total amount spent by the RNC for media that the Staff concluded represented a contribution to DFP was increased to $18,553,619. See Section III.A. of Report of the Audit Division on Dole/Kemp '96, Inc. and Dole/Kemp '96 Compliance Committee, Inc.

---

16 Ibid.

17 Ibid.

A motion that the Commission determine in general that it will make no repayment determinations based on alleged overall excessive spending by candidates receiving presidential matching funds, failed by a vote of 3 to 2, with 1 abstention.

By a motion adopted on a 6-0 vote, the Commission rejected the Staff recommendation for a matching fund repayment related to the $18,553,619 in the media expenses. The repayment would have resulted from the media expenses being added to expenditures subject to the spending limitation, and the exceeding of that limitation.

By a motion adopted on a 6-0 vote, the Commission directed the Audit Division to revise the portion of the report relating to party ads to clarify that the Commission has not reached any conclusion regarding the Staff's in-kind contribution analysis and to indicate that Commissioners may submit statements for the record.

The Commission directed that the media expenses discussed above not be considered when the matching fund repayment ratio was determined.

5. Polling Expenses

The RNC incurred expenses for public opinion polling in the spring and summer of 1996 which the Staff concluded were, in part, in-kind contributions to DFP[18].

The Staff recommended that pursuant to 11 CFR §106.4, the Commission determine that polling expenses incurred by the RNC in the amount of $463,844 were in-kind contributions to DFP and attributable to its spending limitation.

A motion to approve the Staff recommendation failed on a vote of 3-3.

B. PRIMARY EXPENSES PAID BY RELATED COMMITTEES

Section 441a(a)(1)(A) of Title 2 of the United States Code states that no person shall make contributions to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000.

Section 100.7(a)(1) of Title 11 of the Code of Federal Regulations states, in part, that the term contribution includes a gift, subscription, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office. The term anything of value includes all in-kind contributions.

---

[18] Ibid.

Unless specifically exempted under 11 CFR §100.7(b), the provision of any goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services is a contribution. Examples of such goods or services include, but are not limited to: Securities, facilities, equipment, supplies, personnel, advertising services, membership lists, and mailing lists.

Section 100.7(b)(16) of Title 11 of the Code of Federal Regulations states, in part, that the payment by a candidate for any public office (including State or local office), or by such candidate's authorized committee, of the costs of that candidate's campaign materials which include information on or any reference to a candidate for Federal office and which are used in connection with volunteer activities (such as pins, bumper stickers, handbills, brochures, posters, and yard signs) is not a contribution to such candidate for Federal office, provided that the payment is not for the use of broadcasting, newspapers, magazines, billboards, direct mail or similar types of general public communication or political advertising. The payment of the portion of the cost of such materials allocable to Federal candidates shall be made from contributions subject to the limitations and prohibitions of the Act.

Section 9003.4(a) of Title 11 of the Code of Federal Regulations states, in part, that a candidate may incur expenditures before the beginning of the expenditure report period if such expenditures are for property, services or facilities which are to be used in connection with his general election campaign and which are for use during the expenditure report period.

Section 9002.12(a) of Title 11 of the Code of Federal Regulations states, in part, that *expenditure report period* means, with respect to any Presidential election, the period of time which begins on the date on which the major party's presidential nominee is chosen and ends 30 days after the Presidential election.

Sections 9034.4(e) of Title 11 of the Code of Federal Regulations discusses the attribution of expenditures between the primary and general election spending limitations. Subsection (e)(1) sets forth the general rule that expenditures for goods and services to be used exclusively in the primary campaign shall be attributed to the primary spending limitation, and expenditures for goods and services to used exclusively in the general election campaign shall be attributed to that spending limitation. Subsections (e)(3), (4), (6), and (7) provide guidance with respect to specific categories of expenditures as described below:

- Expenses for the usage of offices or work performed on or before the date of the candidate's nomination shall be attributed to the primary election, except for periods when the office is used *only* by persons working *exclusively* on general election campaign preparations.

- Expenditures for campaign materials that are purchased by the primary election campaign committee and later transferred to the general election committee shall be attributed to the general election limits. Materials transferred to but not used by the general election committee shall be attributed to the primary election limits.

- Costs of a solicitation shall be attributed to the primary election or to the GELAC, depending on the purpose of the solicitation. If a candidate solicits funds for both the primary election and for the GELAC in a single communication, 50% of the cost of the solicitation shall be attributed to the primary election, and 50% to the GELAC.

- Expenditures for campaign-related transportation, food and lodging of any individual, including the candidate, occurring prior to the date of the candidate's nomination shall be attributed according to when the travel takes place. If the travel takes place on or before the date of the candidate's nomination, the cost is a primary election expense. Travel to and from the convention shall be attributed to the primary election. Travel by a person who is working *exclusively* on the general election campaign preparations shall be considered a general election expense even if the travel occurs before the candidate's nomination. (emphasis added)

Prior to the 1996 election cycle, substantial effort was dedicated to determining whether expenditures made in the late primary period had a primary or general election purpose. In the 1992 election cycle, a number of expenditures made in the primary period by both major party candidates were questioned as possible general expenses. Both the Bush and Clinton committees argued convincingly in response to their respective preliminary audit findings that most disbursements made prior to their candidate's date of nomination were necessarily made on behalf of the primary campaign.

In 1995, the Commission formulated new regulations found at 11 CFR §9034.4(e) which codified the position adopted when the 1992 audit determinations were made. For 1996, the major factor considered when reviewing expenditures and making a determination to which election they relate [primary or general] is when the expenditure was incurred. The key date is the date that the party nominates its candidate. Expenses incurred before that date are presumed to be for the primary campaign, while expenses incurred after that date are presumed to be for the general election campaign. Limited exceptions are provided, but such exceptions require a definite showing of exclusive use for the election other than that indicated by the date. Allowing exceptions to be granted easily would have the effect of invalidating the rule.

As previously noted, by March 31, 1996, DFP reported having only $2 million in spending limitation remaining, but was four and one half months from the end of the primary campaign period. Given this situation, the Audit staff, using the newly

formulated regulations as guidance, performed a detailed review of expenses incurred by the Dole for President Compliance Committee, Inc., Dole/Kemp '96, Inc. and Kemp for Vice President before the Candidate's August 14, 1996 date of ineligibility. The results of those reviews are presented below.

1. Primary Expenses Paid by the GELAC

The Dole for President Compliance Committee, Inc.(GELAC) registered with the Federal Election Commission on February 15, 1995. Between registration and DOI, the GELAC spent $1,405,245 and shared staff and offices with DFP. For the first eleven months, the GELAC accepted only contributions that were redesignations of contributions initially made to DFP and incurred little in the way of expenses. In January 1996, GELAC began paying salaries to staff formerly paid solely from DFP fund-raising accounts, and began soliciting direct contributions. These solicitations were frequently done jointly with DFP. An initial review of the GELAC disbursements made prior to DOI, identified expenditures of approximately $950,000 that were correctly attributed to the GELAC in the primary period. However, expenditures of $454,404 attributable DFP were also identified.

Of the $454,404 in DFP disbursements, salaries accounted for $210,262 and overhead $115,302. Overhead expenses included office supplies, computer hardware and software, telephone costs, and charges for other office equipment. Under 11 CFR §9034.4(e)(3) these salary and overhead expenses were viewed as primary campaign expenses unless it could be demonstrated that they related to periods devoted exclusively to the general election effort. No such showing was made. The balance of the primary disbursements, $128,839, were for travel, including some expenses related to attending the Republican National Convention, and the primary share of joint solicitation costs. Approximately $93,000 of the $128,839 was spent on two fund-raising projects.

On April 11 and 12, the campaign held a series of fund-raising events in Memphis, Tennessee, and Dallas, San Antonio and Houston, Texas, described as a compliance trip. All associated costs, including advance travel costs, air charter expense, plane catering, ground transportation, press filing center costs and solicitation costs, were paid by the GELAC. An invitation for the Memphis event contained a joint solicitation for DFP and for the GELAC. This, along with the fact that over seventy percent of the contributions received and attributed to these fund-raisers was deposited to primary accounts, establish that the events were joint solicitations. As a result, travel costs of $57,267, are primary expenses pursuant to 11 §CFR 9034.4(e)(7). Additionally, half of all solicitation costs related to the fund-raisers, $32,603 are DFP expenses pursuant to 11 CFR §9034.4(e)(6).

The second instance of a joint solicitation funded by the GELAC was a "Lawyers for Dole" event held in Chicago on July 19, 1996. A solicitation device for this event requested contributions for both the DFP and the GELAC. This time 45%

of the receipts attributed to this event, $58,675, were deposited in the primary accounts. The GELAC paid $2,887 of the primary share of the solicitation costs.

At the close of fieldwork, DFP was provided a schedule of GELAC expenditures identified as having been made on behalf of DFP. DFP provided documentation in response, and where appropriate, adjustments were made to the total presented here.

In the Memorandum, it was recommended that DFP provide documentation which demonstrates that disbursements in the amount of $454,404 made by the GELAC were not DFP expenses pursuant to 11 CFR §9034.4(e). Absent such a demonstration, the Audit staff stated that it would recommend that the Commission determine that these expenses are attributable to the DFP spending limitation and that the amount is due to the GELAC.

DFP responded to the Memorandum as follows:

> "The attached documents establish that payments made by the Compliance Committee were for expenditures for overhead and salaries incurred exclusively for the benefit of the Compliance Committee. See Exhibit 7. Indeed the Audit Staff focuses on costs incurred for facilities and expanded work space that would be used by the Compliance Committee exclusively in the general election campaign. This rebuts the presumption that expenditures incurred prior to the date of a candidate's nomination should be allocated to the primary election. 11 C.F.R § 9304.4(e);[sic] Financial Control Compliance Manual for Presidential Primary Candidates Receiving Public Financing Chapter 1, Section C(2)(c).
>
> "With respect to the fundraisers in Texas and Tennessee referenced by the Audit Staff, DFP has pro-rated between the Committees the costs of the fundraisers and travel thereto in accordance with the Commission's regulations at 11C.F.R. 9034.4. Indeed, when travel costs were related to a dual fundraising purpose, the Primary Committee diligently followed the Commission's procedure for allocating such expenditures between the Primary Committee and the Compliance Committee. See 11 C.F.R. 9034.7.
>
> "Thus, only $35,317 is owed to the Compliance Committee. Also, only $35,317 should be added to DFP's expenditures subject to the spending limit and $10,860 is repayable to the U.S. Treasury."

Exhibit 7 to DFP's response consists of copies of documents such as invoices, check requests and tissue copies of the checks that were reviewed during the audit field work. These documents do not show that expenditures made by the GELAC

were exclusively for general election purposes. The only evidence of exclusive GELAC activity is DFP's statement to that effect. During the period in question the GELAC was principally engaged in fundraising. In point of fact, most of the fund-raising was done jointly between GELAC and DFP. This fact seems to refute any claim of exclusivity.[19] As noted in the Memorandum, of the disbursements reclassified, salaries accounted for $210,262 and overhead $115,302. The balance, $128,839, were for travel, including some expenses related to attending the Republican National Convention, and the primary share of joint solicitation costs. The reclassified expenditures were not as DFP suggests in their response predominately "costs incurred for facilities and expanded work space."

DFP concedes that some of the costs associated the fund-raisers[20] in Texas and Tennessee should have been allocated, including a portion of the related travel expense. For the allocation of travel expenses DFP cited 11 CFR §9034.7. However that section deals primarily with the allocation of travel costs between campaign and non-campaign purposes and the use of government conveyance. Neither subject is relevant to the matters at hand. All campaign travel in the primary period, if it cannot be exclusively attributed to the general campaign, is an expense of the primary campaign as outlined at 11 CFR §9034.4(e)(7). Section 9034.4(e)(6) of Title 11 of the Code of Federal Regulations states that the cost of communications that solicit contributions for both the GELAC and the primary campaign will be allocated equally between the two. Given these rules, the allocation of the fundraising and travel costs in the Memorandum is correct. The solicitation (event) costs are allocated equally between DFP and the GELAC and the travel costs are attributed to DFP.

Since DFP has not provided documentation demonstrating that GELAC was exclusively engaged in activity related to the general election, the conclusion remains that GELAC made substantial disbursements in the primary period on behalf of DFP. However, in a review of the documentation provided by DFP, an offset to expenses paid for the Texas fund-raisers was identified. One half of this offset $521 ($1,042 ÷ 2) was netted against the amount attributed to GELAC primary expenditures. Further, it was determined that the salaries of fundraising personnel could be included among the cost of the joint solicitations. The amount of those salaries is $153,394 with 50%, or $76,697, being attributable to the GELAC. Therefore, the contribution is $377,186 ($454,404 from the Memorandum-$521 refund-$76,697 in fundraising salaries)

---

[19] While it is DFP's intention to apply the general rule found at 11 CFR 9034.4(e)(1), it fails to establish the exclusivity of purpose required for its application. Instead DFP simply says that GELAC is exclusively occupied with GELAC matters despite the fact that GELAC is mailing joint solicitations and engaging in joint events for both the GELAC and DFP. Under such circumstances, the brightline regulations at 11 CFR 9034.4(e)(3), (4), (6) and (7) apply.

[20] DFP does not address the Lawyers for Dole fund raiser.

Recommendation

The Audit staff recommended that the Commission determine that pursuant to 11 CFR §9034.4(e), disbursements in the amount of $377,186 made by the GELAC are attributable to DFP's spending limitation and that this amount is payable to the GELAC by DFP.

The Commission approved the Staff recommendation.

2. Primary Expenses Paid by Dole-Kemp '96

Dole/Kemp '96, Inc. registered with the Federal Election Commission on May 3, 1996. As noted in the citations above, 11 CFR §9003.4 permits a general election campaign to incur expenses prior to the beginning of the expenditure report period, if those expenses are for property, services, and facilities to be used in the general election campaign. Examples of such expenditures include expenses for establishing accounting systems and for organizational planning. This regulation must be read in conjunction with 11 CFR §9034.4(e) which requires that expenses incurred by the general election campaign before the beginning of the expenditure report period be exclusively for the general election. Therefore, the campaign must be able to demonstrate that any expenditure incurred by DK prior to the candidate's date of nomination, is exclusively for the general election. Absent that demonstration the expenditure will be attributed to the primary campaign.

Between June 17, 1996 and August 14, 1996, the beginning of the expenditure report period, DK spent approximately $416,000. Of this amount, $278,562 was identified as having been for goods, facilities and services used in the primary period, and for which the campaign has not demonstrated an exclusive general election purpose. Included is $71,184 paid for rent and related expenses that is addressed in Finding III. D. Headquarters Rent and Security Deposits. The balance of the pre-expenditure report period DK disbursements include:

- $58,786 for telephone service, installation, and equipment;
- $80,288 for office furniture and equipment;
- $36,173 for utilities;
- $6,588 for collateral materials;
- $11,552 for HQ security;
- $8,550 for supplies;

- $4,186 for convention related expenses, and;
- $1,255 for miscellaneous expenses.

Accordingly, for the purposes of this finding, DK made primary disbursements of $207,378 ($278,562 - $71,184) chargeable to the DFP spending limitation.

At the close of fieldwork, DFP was provided a schedule of DK expenditures identified as having been made on behalf of DFP. DFP provided documentation in response, and where appropriate, adjustments were made to the total presented above.

In the Memorandum, the Audit staff recommended that DFP provide documentation which would demonstrate that disbursements made by DK were not primary related. For office and overhead expenses, the information submitted was to demonstrate that the facilities were being used by persons working exclusively on the general election (11 CFR §9034.4(e)(3)). For all other expenses, the material submitted was to establish that the goods and services were used in the Expenditure Report Period. Absent such a showing, the Audit staff stated that it would recommend that the Commission determine that $207,378 paid by DK represent primary expenses, are attributable to the DFP spending limitation, and an equal amount is due to DK.

DFP responded to the Memorandum as follows:

> "Expenditures made prior to the date of the Republican party convention are allocated to the general election if those expenditures were made exclusively for general election purposes. 11 C.F.R. § 9304.4(e);[sic] Financial Control and Compliance Manual For Presidential Primary Candidates Receiving Public Financing Chapter 1, Section C(2)(c). The attached documents make clear that the expenditures singled out by the Audit Staff were for facilities, including furniture, supplies, and equipment and the build-out of the office space necessary to accommodate the larger campaign staff, obtained for the general election. See Exhibit 8. As Andrea Mack, the campaign's Deputy Director for Administration, explains in the attached statement, the general election committee had to begin preparation for the general prior to the date of Senator Dole's nomination so that the Committee staff would have facilities and equipment with which to work once the general election campaign began. See Exhibit 9. Thus, given the exclusive general election purpose for which almost all of the pre-convention expenditures were made, they must be attributed to the general election.

"Upon review of the items in question, the Committee has determined that $1,543.16 should have been paid by Dole for President. The remaining $262,054.65 is not owed to Dole/Kemp. Also, this amount should not be added to DFP's expenditures subject to the spending limit and $80,581.80 is not subject to repayment to the U.S. Treasury."

The documentation provided at Exhibit 8 consists of copies of invoices with the associated check requests and tissue check copies. It is the same documentation that was originally reviewed to ascertain that DK had made disbursements on behalf of DFP. To paraphrase DFP, the attached documents not only single out expenditures made for facilities, including furniture, supplies, and equipment and the build-out of the office space necessary to accommodate the larger general election campaign staff, they, more to the point, single out disbursements made within the primary period where exclusive general election use has not been demonstrated. Andrea Mack's statement at exhibit 9 explains that the campaign was in the process of gearing up for the general election. Implicit in Ms. Mack's memo is Senator Dole's status as the presumptive nominee.

There can be no doubt that the campaign was engaged in preparations for the general election during July and August of 1996. Given the Senator's travel schedule and the necessary preparations for the convention, there is also no doubt that the primary campaign was continuing. It is important to note that the 11 CFR §9034.4(e), as previously discussed, was instituted to simplify the allocation of expenses between the campaigns for both the Commission and the campaigns. According to that regulation, unless the campaign can establish and document that a discrete group of employees occupying a discrete portion of campaign headquarters were engaged exclusively in general election preparation, all salary and overhead expenses up to the date of nomination are primary expenses. Although DFP argues that the various expenses enumerated above were exclusively for the general election, it must be noted that none of the campaign staff was paid by DK prior to Senator Dole's nomination and that DFP allocated the tenth floor renovations, which it maintains were exclusively general, equally between itself and DK. DFP's share was paid by the RNC as a coordinated expenditure. Available documentation does not support DFP's contention.

With respect to campaign materials that were purchased before the date of nomination, they should have been purchased by DFP and any amounts that were on hand could have been sold to DK at cost. (See 11 CFR §9034.4(e)(4)). The "Financial Control and Compliance Manual for Presidential Primary Candidates Receiving Public Financing," suggests that an inventory be prepared to support the transfer. A similar procedure could be used for office supplies and materials. No evidence of any such procedure has been provided.

In the audit report presented to the Commission, the Staff concluded that, having failed to establish that the expenses enumerated above related

exclusively to the general election, overhead expense of $207,378, paid by DK in the primary period, were correctly attributed to DFP.

Recommendation

The Audit staff recommended that the Commission determine that, pursuant to 11 CFR §9034.4(e), disbursements in the amount of $207,378 made by DK were attributable to DFP's spending limitation and that that amount is payable to DK by DFP.

A subsequent analysis of DK's expenditures questioned in this finding identified disbursements in the amount of $114,391 for assets that, if they had been properly acquired by DFP, would have been transferable to DK after the convention. At the time of the transfer, DK would have reimbursed DFP 60% of the original cost of the assets. Total disbursements made by DK on behalf of DFP is therefore reduced by $68,635 [$114,391 x 60%] to $138,743.

The Commission determined that, pursuant to 11 CFR §9034.4(e), disbursements in the amount of $138,743 made by DK are attributable to DFP's spending limitation and that that amount is payable to DK by DFP.

3. In-Kind Contribution - Kemp for Vice President

Expenditures by KVP for campaign materials promoting the Dole/Kemp '96 ticket, and their distribution at the Republican National Convention, were questioned as possible in-kind contributions to DFP[21].

The Staff recommended that the Commission determine that DFP received an in-kind contribution from KVP of $77,237 and that amount was attributable to DFP's spending limitation.

The Commission rejected the Staff recommendation.

C. TELEPHONE EQUIPMENT LEASES AND PURCHASES

DFP obtained a number of telephone systems from NTFC Capital Corporation (NTFC). The Staff questioned the payment of some of the charges related to these telephone systems by DK, the GELAC, and the RNC. Further, the handling of a telephone system that was stolen, and the sale and repurchase of the telephone systems

[21] For the full presentation and discussion of this issue see Agenda Documents 98-87 and 99-49, Finding III.B.3. and the audio tapes of the Commission's Open Session meetings on the following dates: December 3rd, 9th, and 10th 1998, January 14th and 28th, February 3rd and 25th, March 4th, and April 29, 1999.

between DFP and DK was questioned. Finally, amounts still due to NTFC were questioned as contributions by NTFC[22].

The Staff recommended that the Commission determine that:

- The RNC made an in-kind contribution to DFP in the amount of $38,608 representing two installments on DFP's telephone system lease.
- DFP must pay DK $18,628 related to the sale, repurchase, and valuation of two of the telephone systems discussed above.
- DFP must pay the GELAC $2,123 for expenses that it paid on DFP's behalf.
- DFP understated expenditures subject to the spending limitation by $248,778 as a result of the transactions explained above.

After adjusting for the Commissions' acceptance of the RNC's payment of two installments on Lease #48972 as coordinated [2 U.S.C. §441a(d)] expenses, the Commission concluded that:

- A contribution had been received from NTFC and that $35,214 is outstanding;
- DFP owes DK $39,118 as a result of the various transactions related to the telephone systems;
- DFP owes the GELAC $2,123 as a result of the various transactions related to the telephone systems; and,
- As a result of these conclusions and of the improper recording of other transactions related to the telephone systems, DFP is required to add $233,943 to its expenditures subject to its spending limitation.

D. HEADQUARTERS RENT AND SECURITY DEPOSITS

DFP leased office space from Union Center Plaza Associates Washington, D.C. for its national headquarters. DFP's rent between March 1, 1995 and May 31, 1996

---

22 For the full presentation and discussion of this issue see Agenda Documents 98-87 and 99-49, Finding III.C. and the audio tapes of the Commission's Open Session meetings on the following dates: December 3rd, 9th, and 10th 1998, January 14th and 28th, February 3rd and 25th, March 4th, and April 29, 1999.

was $28,382 per month. DFP expanded the office space it occupied in June 1996 and again in July. The rent owed by DFP rose to $48,677 for June 1996 and to $96,275 for July and August.[23] In the review of the headquarters rent, three areas of concern were identified. Rent due from DFP was partially paid by others. Construction work and miscellaneous headquarters expenses incurred prior to the date of ineligibility were not paid by DFP. Security deposits paid by DFP were not correctly reimbursed and assigned[24].

The Staff recommended that the Commission determine that

- DFP received an in-kind contribution from the RNC for rent and related costs in the amount of $116,307.
- DFP should transfer $32,773 to DK, the net result of the amounts shown on the chart above and that the transfer should be reported by both committees.
- the GELAC transfer $15,201 to DFP representing the net result of the amounts shown on the chat presented above and that the transfer be reported by both committees.
- as a result of the transactions described above, expenditures subject to the spending limitation were understated by $89,766 and that DFP should amend its disclosure reports to reflect the additional amount.

As noted in the previous finding, the Commission accepted the RNC's designation of certain coordinated [2 U.S.C. §441a(d)] expenses. Included among these expenses were occupancy related expenditures of $116,307 made on behalf of DFP. In accepting the RNC's claim, the Commission rejected that portion of the Staff recommendation that DFP received an in-kind contribution from the RNC for rent and related costs.

By removing the occupancy related expenditures of $116,307, the adjustment to the spending limitation is reduced by $95,229 ($116,307 x (1 - .181234)) to -$5,462.

When the Commission considered the Staff recommendation with respect to this matter, the revised adjustment to the spending limitation had been calculated. The Commission approved the balance of the Staff recommendation.

---

[23] The August rent actually owed by DFP was prorated at approximately 45% [(14 ÷ 31) x 100%].

[24] For the full presentation and discussion of this issue see Agenda Documents 98-87 and 99-49, Finding III.D. and the audio tapes of the Commission's Open Session meetings on the following dates: December 3rd, 9th, and 10th 1998, January 14th and 28th, February 3rd and 25th, March 4th, and April 29, 1999.

E. EXPENDITURES SUBJECT TO THE SPENDING LIMITATION

Sections 441a(b)(1)(A) and (c) of Title 2 of the United States Code state, in part, that no candidate for the office of President of the United States who is eligible under section 9033 to receive payments from the Secretary of the Treasury may make expenditures in excess of $10,000,000 in the campaign for nomination for election to such office as adjusted by the Consumer Price Index published each year by the Bureau of Labor Statistics of the Department of Labor.

Section 9035(a) of Title 26 of the United States Code states, in part, that no candidate shall knowingly incur qualified campaign expenses in excess of the expenditure limitation applicable under section 441a(b)(1)(A) of Title 2.

Section 9032.9(a) of Title 11 of the Code of Federal Regulations states, in part, that a qualified campaign expense is one incurred by or on behalf of the candidate from the date the individual became a candidate through the last day of the candidate's eligibility; made in connection with his campaign for nomination; and neither the incurrence nor the payment of which constitutes a violation of any law of the United States or the State in which the expense is incurred or paid.

Sections 9033.11(a) and (b)(1)(i) of Title 11 of the Code of Federal Regulations state, in part, that each candidate shall have the burden of proving that disbursements made by the candidate or his authorized committee are qualified campaign expenses as defined in 11 CFR §9032.9. For disbursements in excess of $200 to a payee, the candidate shall present a canceled check negotiated by the payee and either a bill, an invoice or voucher from the payee stating the purpose of the disbursement.

Sections 9034.4(e)(5) of Title 11 of the Code of Federal Regulations states, in relevant part, that the production costs for media communications that are broadcast both before and after the date of the candidate's nomination shall be attributed 50% to the primary limitation and 50% to the general election limitation.

Sections 9038.2(b)(2)(i)(A) and (ii)(A) of Title 11 of the Code of Federal Regulations state, in part, that the Commission may determine that amount(s) of any payments made to a candidate from the matching payment account were used for purposes other than to defray qualified campaign expenses. Further, an example of a Commission repayment determination under paragraph (b)(2) includes determinations that a candidate, a candidate's authorized committee(s) or agents have made expenditures in excess of the limitations set forth in 11 CFR §9035.

Section 9038.2(b)(2)(iii) of Title 11 of the Code of Federal Regulations states, in part, that the amount of any repayment under this section shall bear the same ratio to the total amount determined to have been used for non qualified campaign expenses as the amount of matching funds certified to the candidate bears to the candidate's total deposits, as of 90 days after the candidate's date of ineligibility.

Section 9038.2(b)(2)(v) of Title 11 of the Code of Federal Regulations states, in part, that if a candidate or candidate's authorized committee(s) exceeds both the overall expenditure limitation and one or more State expenditure limitations, the repayment determination under 11 CFR §9038.2(b)(2)(ii)(A) shall be based on only the larger of either the amount exceeding the State expenditure limitations(s) or the amount exceeding the overall expenditure limitation.

1. Calculation of DFP's Expenditures Subject to the Spending Limitation.

Generally, all qualified campaign expenses incurred by a candidate receiving federal funds under 11 CFR §9035 are subject to the overall spending limitation. There are, however, two categories of expenditures which are, within specific guidelines, not included in the calculation of the total expenditures. They are exempt fund-raising and exempt legal and accounting compliance expenses. All fund-raising expenses, not to exceed twenty percent of the overall spending limitation, are exempt. An amount equal to ten percent of all payroll, payroll taxes and overhead expenses may be considered exempt legal and accounting compliance expense. A alternate allocation method is available to committees which generally allows a larger exemption for legal and accounting compliance expenses. After exempt compliance and fund-raising expenses are deducted, a primary committee receiving matching funds for the 1996 election was permitted to incur expenditures of $30,910,000.

When audit fieldwork began, DFP, on its Post General 1996 disclosure report, reported expenditures in excess of the spending limitation. At the entrance conference, on January 15, 1997, all work papers pertaining to the calculation of the reported totals were requested. On June 6, 1997 allocation spreadsheets, the first of two sets to be provided, were made available for review. When deficiencies were pointed out to DFP representatives, their response was to provide more detailed allocation spreadsheets on August 14, 1997. The timing of the receipt of the later spreadsheets coincided with DFP's filing of amended disclosure reports for all report periods.

It was apparent from the allocation spreadsheets that DFP intended to use the alternate method to calculate exempt compliance expense. But DFP provided no documentation to support their claim of a 13% compliance exemption for headquarters office overhead. It was not until August 28, 1997, that DFP made a available an internal memo from July 1995 which suggested that the legal and accounting share of headquarters office overhead were 4% and 9% respectively. This estimate was based on relative square footage of office space, but never accounted for the expansion of headquarters floor space which occurred beginning in May of 1996.

In addition to the application of the 13% compliance share of the overhead for headquarters, DFP direct charged a portion of office supplies and equipment as compliance expenses. It is presumed that already included in the compliance

percentage of all headquarters overhead are those charges which DFP also direct charged to the same category. It was concluded that these direct charges to overhead constituted a double count of some compliance overhead.

Because of the deficiencies outlined above, it was decided to recalculate exempt compliance expenses for DFP. The legal and accounting compliance share of headquarters office overhead was calculated to be 18.1234% based on the headquarters office payroll. The disbursements database provided by DFP was reconciled to bank records and to the latest DFP reports. Specific categories of disbursements were drawn from the database and the exempt compliance disbursements for 1995 and 1996 were calculated to be $1,870,544 and $1,694,081 respectively. The maximum fundraising exemption of $6,182,000 was applied. The total disbursements were adjusted for reconciling items such as offsets to expenditures, contribution refunds, loan repayments and transfers to other affiliated committees. At August 14, 1996, the Audit staff determined that DFP had made expenditures of $32,120,870 subject to the overall spending limitation.

2. Additions to Expenditures Subject to the Limitation from Other Findings

The following amounts were discussed above and involve additions and subtractions to expenditure subject to the overall spending limitation.

- $100,125 resulting from the improper reimbursement for the use of a privately owned aircraft;[see Finding II.B.]

- $377,186 resulting from primary expenditures made on DFP's behalf by the GELAC;[see Finding III.B.1.]

- $138,743 resulting from primary expenditures made on DFP's behalf by DK; [see Finding III.B.2.]

- $233,943 resulting from the payment by DK, GELAC, RNC of portions of DFP's obligation on the telephone system and the transfer of same to DK; [see Finding III.C.]

- ($5,462) resulting from the payment by DK and GELAC of portions of DFP's rent and related obligations;[see Finding III.D.]

The amounts shown above have been revised to reflect Commission action on each of the findings and recommendations discussed earlier in this report.

3. Additions Resulting from Asset Transfers to DK and GELAC

a. Dole Supporter List:

DFP transferred supporter lists to DK in exchange for $324,817 on May 31, 1996. This represented DFP's calculation of half of the list development costs. An additional $53,957 was wired on July 2, 1996 to DFP from DK. A recalculation of the list value accounted for this transfer. In the documentation accompanying the second payment, DFP and DK value the lists at 60% of the cost of 828,227 names at $.40 per name and 60% of estimated development costs of $300,000. From this, the Audit staff concluded that DFP and DK regarded the lists as capital assets and are transferring them as such under the provisions of 11 CFR 9034.5(c)(1). However, DK neither reports a subsequent sale of the supporter list nor includes them as an asset on DK's statement of Net Outstanding Qualified Campaign Expenses. Historically, campaign lists have not been included among capital assets because there is a reluctance on the part of the Commission to require their sale in order to settle campaign debt.

Using DFP's costs, their valuation of the supporter list is approximately $.76 per name or $760 per thousand names. It should also be noted that DFP representatives have maintained that the supporter list is not the DFP donor list. Generally, a donor list is more valuable than a supporter list. One directory of mailing lists offers political supporter lists for $55.00 per thousand. Clinton-Gore '96 contracted with Names in the News/California, Inc., a list management company, to manage and offer for public use the campaign's active donor list. The price charged was $80.00 per thousand names, substantially less than $760 per thousand. Further, at the time the memorandum was prepared DFP, despite numerous requests, had not provided any documentation which establishes the number of names contained on the supporter list or documented its cost calculation.

For these reasons, the Audit staff has not considered the supporter lists to be capital assets. Therefore the proper valuation of the lists is fair market value. Information gathered suggests that $760 per thousand names is many times the fair market value. However, because the number of names had not been established, at the time the Memorandum was prepared there was no way to attach even a reduced valuation to the lists. As a result, the entire amount was considered to be due from DK and no offset to expenditures subject to the limitation was allowed.

In the Memorandum it was recommended that DFP provide documentation which demonstrates the number of names included on the supporter lists, and provide evidence of the lists' fair market value. Absent such a demonstration, the Audit staff intended to recommend that the Commission determine that DFP received an in-kind contribution from DK and that DFP repay $378,774 to DK and add $378,774 to its spending limitation.

DFP responded to the Memorandum as follows:

> "As DFP explained in its previous response, it is standard industry practice to establish a price per supporter name by dividing the total cost of a supporter program by the total number of names generated by such program. See statement attached at Exhibit 13. As the Audit Staff requested, DFP has attached records documenting that the total number of names generated by the Dole Supporter program was 876,087. Id. Thus at $0.40 per name, these documents establish that the $350,435 was the fair market value of the list.
>
> "Thus only $28,340 should be added to DFP's spending limitation and $8,714.55 must be repaid to the U.S. Treasury."

DFP cites the memo [Exhibit 13] from Campaign Tel Ltd (CTL) which notes that "the .40 cent pricing of the 1996 records" is a "price as any other industry 'price per record' is based on the following formula: Total cost of program dollar amount divided by the number of favorables generated." CTL goes on to state that this, referring to the derivation of the unit cost, is an industry standard. DFP citing this industry standard, reverses the derivative process by multiplying the number of names on the lists by the "industry standard" .40 cents and arrives at the cost of the list and then, in a non sequitur, equates this unit cost with the fair market value. At no point in its memo does CTL address fair market value let alone suggest that a cost of .40 cents per name is a reflection of fair market value.

Fair market value of a list is not determined by the cost but rather by what someone is willing to pay for the use of the list. The SRDS Direct Marketing List Source, June 1998, Volume 32 Number 3, a catalog of thousands of available lists, was consulted to make a determination of the valuation of lists comparable to the Dole supporter lists. Donor lists, which the Dole supporter list is not, were first considered.[25] The "Republican-Solid GOP Donors" list is currently available for $100.00 per thousand names [$0.10 per name]. The Dole Donors ($5 to $500) list is currently valued at $125.00 per thousand [$0.125 per name]. The "Dole Signature Series Donors" list, comprised of donors to various conservative and government reform, veterans and charitable appeals, signed and endorsed by Senator Dole, is available for $85.00 per thousand [$0.085 per name]. In the category of support lists, there is a "Run Pat Run!" list of supporters of Pat Buchanan which is available for $100.00 per thousand. Based on this and the market value of the Clinton campaign's donor lists as discussed above, the Dole supporter lists cannot be reasonably valued at more than $100 per thousand names. As requested in the Memorandum, DFP included in its response documentation from

---

[25] It should be noted that donor lists are generally perceived to be more valuable than supporter lists.

CTL which listed the total number of names on the list as 876,087.[26] Accordingly, the estimated fair market value at which the list may have been transferred to DK is not more than $87,609 (876,087 names multiplied by $100.00 per thousand names).

Recommendation

The Audit staff recommended that the Commission determine that DFP received a contribution from DK of $291,165 ($378,774 - $87,609), that DFP be required to repay $291,165 to DK, and add $291,165 to DFP's spending limitation.

The Commission adopted the Staff recommendation with the following stipulation. They directed that the valuation assigned to the lists be equal to half of the list cost documented, $150,000 ($300,000 x 50%). Thus, DFP received an in-kind contribution in the amount of $228,774 ($378,774 - $150,000), DFP is required to repay $228,774 to DK, and must add $228,774 to DFP's spending limitation.

b. Film Footage:

DFP transferred film footage to DK on May 31, 1996 for $266,086. The valuation of the transfer was later reduced to $189,081 and an appropriate amount was refunded. The amount paid represented one half of the production costs as calculated by DFP, $155,942, and one half of associated focus group costs equal to $33,139, for 14 of DFP's commercials that were also used by DK.

Documentation provided shows that fourteen primary commercials were transferred to DK. Records also establish that each was broadcast at least once in the general election period. Examples of placements were "Historic Reforms" shown once at 6:18 A.M. on September 18, 1996, in Bismarck, North Dakota and "American Hero" shown once at 7:35 A.M. on September 16, 1996, in Sioux City, Iowa. For an expenditure of only $455, DK ran all fourteen commercials and met the requirement for primary and general cost sharing.

The documentation failed to establish a connection between the commercials and some of the production costs. The Audit staff could only associate $54,193 of the production costs with the commercials used by DK. Similarly, $28,684 of the focus group costs were associated with the commercials. Thus, DFP transferred $101,749 ($155,942 - $54,193) in production costs and $4,455 ($33,139 - $28,684) in

---

[26] The number of names attributed to the list by DFP has not been a constant. Each time the lists were valued, the number has changed. When the lists were transferred on May 27, 1996 to DK, transfer documentation stated that the lists contained 874,085 names. When the transfer was adjusted on July 2, 1996, the supporting calculation indicated that there were 828,227 names on the lists.

focus costs more than supported. In this transaction, DFP received $106,204 ($101,749 + $4,455) in excess of the asset value transferred to DK.

Based on the documentation made available at the time the Memorandum was prepared, DFP owed DK $106,204 and an equal amount needed to be added to DFP's expenditures subject to the spending limitation.

In the Memorandum it was recommended that DFP provide documentation which would show the connection between the remaining production and focus group costs and a specific commercial. Absent such a demonstration, the Audit staff intended to recommend that the Commission determine that DFP received an in-kind contribution from DK, that DFP must repay $106,204 to DK, and add $106,204 to its spending limitation.

DFP responded to the Memorandum as follows:

> "DFP has attached invoices that demonstrate that twelve of the fourteen advertisements whose production costs were assessed to Dole/Kemp were aired during the general election. See Exhibit 14. There has been some confusion generated by the remaining two ads because the production code numbers assigned to those ads changed after the ads were edited by the primary committee, but the original pre-edit code numbers were used when the ads were transferred to the general committee. DFP has attached contemporaneous memoranda that establish that the remaining two ads transferred to Dole/Kemp whose production costs were charged to Dole/Kemp were also aired by during the general election. Id. Thus, $106,204 should not be added to DFP's spending limit, nor must DFP repay $32,657.73 to the U.S. Treasury."

It is not clear to what confusion DFP is alluding in its response. Earlier, during fieldwork, a question had been raised about three commercials that were not identified on the television station invoices. The answer provided at the time was essentially the same as in the response. The Memorandum acknowledged that all 14 commercials had been run by DK.

DFP did not address the underlying problem in its response to the Memorandum, that is the lack of documentation which would establish a direct connection between the film production costs and the commercials run. Of the $311,883 in total production costs, only nine of thirty-four invoices in amounts totaling $108,384 had been specifically identified with any of the fourteen commercials in question. It appears that a portion of DFP's library of film footage is being attributed to these commercials as well. The cost of establishing a library of film footage is not part of the cost of producing these particular commercials. To permit such a calculation would require a recalculation of the cost of a particular commercial each time a portion of that

footage was used by either the primary or the general election campaign. No documentation was provided that would warrant an increase in the amount of the production costs to be transferred to DK. Similarly, DFP identified focus group costs of $66,281 which it maintains were related to the production of the commercials. Of this amount, $57,369 of the costs could be identified with the fourteen commercials from the description on the documentation provided. Again, no new documentation was provided which would indicate that the balance spent for the focus group work was connected with these commercials. Accordingly, no increase in the value of the focus group work to be reimbursed by DK is indicated.

Recommendation

The Audit staff recommended that the Commission determine that $101,749 ($155,942 - $54,193) in production costs and $4,455 ($33,139 - $28,684) in focus group costs were improperly reimbursed to DFP by DK. It was further recommended that DFP be required to return the amounts to DK and that an equal amounts be added to DFP's expenditures subject to the spending limitation.

The Commission approved the Staff recommendation.

c. Improperly Valued Assets:

A review of the asset transfers by DFP to DK and the GELAC identified assets reportedly transferred by DFP, for which no documentation of DFP's acquisition could be found and in one instance where the transfer value exceeded the documented value by $20,000.

On July 31, 1996, DK paid DFP $8,546 for these assets. In addition DK over paid DFP for a copier by $20,000. On August 22, 1996, the GELAC paid DFP $24,055 for undocumented assets.

At the close of fieldwork, DFP was provided with a schedule of the specific assets for which documentation could not be found or were over valued according to the available documentation. DFP responded that it had paid for every asset it had used or transferred, but did not supply any additional documentation.

In the Memorandum it was recommended that DFP provide documentation which would demonstrate its acquisition of these assets and their cost. Absent such a demonstration, it was stated that the Audit staff would recommend that the Commission determine that DFP was required to repay $28,546 to DK, $24,055 to the GELAC, and that $52,601 be added to DFP's spending limitation.

DFP responded to the Memorandum as follows:

"DFP has no additional documentation at this time, leaving $28,546 payable to Dole-Kemp '96, $24,055 payable to the GELAC and $52,601 added to the spending limit.."

Recommendation

The Audit Staff recommended that the Commission determine that DFP is required to repay $28,546 to DK and $24,055 to the GELAC, and that an additional $52,601 is applicable DFP's spending limitation.

The Commission approved the Staff recommendation.

4. Miscellaneous Adjustments to Expenditures Subject to the Spending Limitations:

a. DFP received five offsets totaling $684,616 from either DK or GELAC for the transfer of assets, for which 18.1234% of the original cost has been excluded from expenditures subject to the spending limitation as a compliance related expenses. The offsets should be applied to expenditures subject to the limitation in the same ratio as the original expenditures. DFP offset expenditures subject to the limitation for the full amount. The offset total must be reduced by $169,200, the amount paid for the headquarters telephone system because it was adjusted for in calculations found at Finding III.C. Accordingly, 18.1234% or $93,411 (($684,616-$169,200) x 18.1234%) should be added to expenditures subject to the limitation.

b. During the expenditure report period, GELAC paid USAir for a DFP obligation in the amount of $5,073 and reimbursed DFP $16,967 for primary expenses. These must also be added back to expenditures subject to the limitation.

c. Offsets received after Senator Dole's nomination totaling $597,154 by DFP and $6,145, received by DK for expenses originally paid by DFP, may be subtracted from expenditures subject to the spending limitation.

d. A payment by DFP, after Senator Dole's nomination, for air charter services of $6,350 which were applicable to DK should also be subtracted from expenditures subject to the spending limitation.

5. Summary of Amounts Chargeable to the Spending Limitation

The effect of the adjustments to the DFP spending limitation are as shown below. The amounts on the chart have been adjusted to reflect Commission action on findings appearing earlier in this report.

Expenses subject to the limitation through DOI, August 14, 1996:	$32,120,870
ADD:	
In-Kind use of Air Plane (p.7)	100,125
RNC 441a(d) in-kind contribution	0
RNC Salary/Reimbursement in-kind contribution	0
RNC Media	0
RNC Polling	0
GELAC 1996 primary expenditures (p. 17)	377,186
DK primary expenditures (p. 20)	138,743
Kemp for Vice-President	0
NTFC adjustment to spending limit (p. 24)	233,943
Occupancy adjustment to limit (p. 25)	(5,462)
Dole/Kemp - Lists (p. 29)	228,774
Dole/Kemp- File Footage (p. 32)	101,749
Dole/Kemp- Focus Groups (p.32)	4,455
Transfer of incorrectly valued Assets (p. 34)	52,601
Asset Transfer Adjustment (p. 34)	93,411
GELAC paid DFP USAir expense (p. 35)	5,073
GELAC reimbursed Primary Expense (p. 35)	16,967
LESS:	
Operating Offsets Post Date of Nomination (p. 35)	(597,154)
Offsets Paid DK, but Owed to DFP (p. 35)	(6,145)
DK Air charter Expense paid by DFP (p. 35)	(6,350)
Expenditures subject to the primary spending limitation:	$32,858,786
Subtract Adjusted Primary Spending Limit	($30,910,000)
Expenditures in Excess of the Spending Limitation:	$1,948,786

In the Memorandum it was recommended that DFP demonstrate that it had not exceeded the spending limitation at 2 U.S.C. §441a (b)(1)(A). Absent such a demonstration the Audit staff intended to recommend that the Commission determine that DFP exceeded the limitation and that DFP be required to make a repayment to the United States Treasury.

In addition to the responses to specific categories of expenses discussed elsewhere in this report, DFP responded to the Memorandum as follows:

> "To the extent that the Committee may have exceeded the spending limit, that amount, according to the Committee's calculations, would be not more than approximately $1.5 million."

While DFP has acknowledged that it exceeded the spending limit by approximately $1,500,000, it provided no documentation which would detail and explain the its calculation of this amount.

Recommendation

The Audit staff recommended that the Commission determine that DFP exceeded the overall spending limitation at 2 U.S.C. 441a (b)(1)(A) by $9,372,323 and that $2,474,953 was repayable to the United States Treasury.

After accounting for the various Commission determinations noted above, the Staff recommended that the Commission determine that DFP exceeded the overall spending limitation at 2 U.S.C. 441a (b)(1)(A) by $1,948,786 and that $588,956[27] was payable to the United States Treasury.

The Commission voted on three separate motions that were relevant to this recommendation. First, as noted at Section III.A.4., supra, a motion was made that, in part, stated the Commission would make no repayment determinations based on alleged overall excessive spending by candidates receiving presidential primary matching funds. That motion failed to receive sufficient votes to be approved (3-2, with one abstention). Second, a motion was made to adopt the Staff recommendation including the repayment determination. That motion also failed to receive sufficient votes to be adopted on a 3-3 vote. Finally, a motion was adopted on a 6-0 vote to determine that DFP had exceeded the spending limitation by $1,948,786, but without a repayment determination.[28]

F. ALLOCATION OF STATE EXPENDITURES

Section 9035(a) of Title 26 of the United States Code states, in part, that no candidate shall knowingly incur qualified campaign expenses in excess of the expenditure limitation applicable under section 441a(b)(1)(A) of Title 2.

Sections 9038.2(b)(2)(i)(A) and (ii)(A) of Title 11 of the Code of Federal Regulations state, in part, that the Commission may determine that amount(s) of any payments made to a candidate from the matching payment account were used for the purposes other than to defray qualified campaign expenses. Further, an example of a

---

[27] According to 11 CFR §9038.2(b)(2)(v), should a candidate be determined to have exceeded both the overall and the state expenditure limitations, only the greater of the two amounts would be subject to repayment.

[28] For the full presentation and discussion of this issue see Agenda Documents 98-87 and 99-49, Finding III.A. to III.E. and the audio tapes of the Commission's Open Session meetings on the following dates: December 3rd, 9th, and 10th 1998, January 14th and 28th, February 3rd and 25th, March 4th, and April 29, 1999.

Commission repayment determination under paragraph (b)(2) includes determinations that a candidate, a candidate's authorized committee(s) or agents have made expenditures in excess of the limitations set forth in 11 CFR §9035.

Section 9038.2(b)(2)(iii) of Title 11 of the Code of Federal Regulations states, in part, that the amount of any repayment under this section shall bear the same ratio to the total amount determined to have been used for non qualified campaign expenses as the amount of matching funds certified to the candidate bears to the candidate's total deposits, as of 90 days after the candidate's date of ineligibility.

Section 9038.2(b)(2)(v) of Title 11 of the Code of Federal Regulations states, in part, that if a candidate or candidate's authorized committee(s) exceeds both the overall expenditure limitation and one or more State expenditure limitations, the repayment determination under 11 CFR §9038.2(b)(2)(ii)(A) shall be based on only the larger of either the amount exceeding the State expenditure limitations(s) or the amount exceeding the overall expenditure limitation.

Sections 441a(b)(1)(A) and 441a(c) of Title 2 of the United States Code state, in part, that no candidate for the office of President of the United States who is eligible under Section 9033 of Title 26 to receive payments from the Secretary of the Treasury may make expenditures in any one state aggregating in excess of the greater of 16 cents multiplied by the voting age population of the state, or $200,000 as adjusted by the Consumer Price Index.

Section 106.2(a)(1) of Title 2 of the Code of Federal Regulations states, in relevant part, that for Presidential primary candidates receiving federal matching funds pursuant to 11 CFR parts 9031 *et seq*, expenditures described in 11 CFR §106.2(b)(2) shall be allocated to a particular State if incurred by a candidate's authorized committee(s) for the purpose of influencing the nomination of that candidate for the office of President with respect to that State. An expenditure shall not necessarily be allocated to that state in which the expenditure is incurred or paid. In the event that the Commission disputes the candidate's allocation or claim of exemption for a particular expense, the candidate shall demonstrate, with supporting documentation, that his or her proposed method of allocating or claim of exemption was reasonable.

Section 106.2(b)(1) of Title 2 of the Code of Federal Regulations states, in part, that unless otherwise specified under 11 CFR §106.2(b)(2), an expenditure described in 11 CFR §106.2(b)(2) and incurred by a candidate's authorized committee(s) for the purpose of influencing the nomination of that candidate in more than one State shall be allocated to each State on a reasonable and uniformly applied basis.

Sections 106.2(b)(2)(i), (ii), (iii), (iv) and (v) of Title 2 of the Code of Federal Regulations state, in relevant part, that media costs, mass mailing costs, overhead costs less a 10% compliance exemption, special telephone program costs and polling costs are allocable to state spending limitations.

Section 110.8(c)(2) of Title 2 of the Code of Federal Regulations states, in part, that the candidate may treat an amount that does not exceed 50% of the candidate's total expenditures allocable to a particular State under 11 CFR §106.2 as exempt fundraising expenses, and may exclude this amount from the candidate's total expenditures attributable to the expenditure limitations for that state. The candidate may treat 100% of the cost of mass mailings as exempt fundraising expenses, unless the mass mailings were mailed within 28 days before the state's primary or caucus. The total of all amounts excluded for exempt fundraising expenses shall not exceed 20% of the overall expenditure limitation.

For the 1996 election cycle, the state spending limitation for Iowa was $1,046,984 (16 cents multiplied by the Iowa voting age population of 2,117,000 and adjusted for the cost of living by a factor of 3.091). DFP reported expenditures allocable to Iowa of $1,040,306.[29] The Audit staff reviewed and verified the accuracy of a sample of disbursements appearing on a detailed schedule of Iowa allocable expenditures provided by DFP. That schedule supported the amount reported by DFP as allocable to the Iowa spending limitation. The schedule proved to be reliable and therefore the Audit staff accepted the reported amount as accurate for the items contained on the schedule. A subsequent review of vendors from the allocation schedule and other vendors receiving Iowa related disbursements, identified additional allocable expenses of $142,366.[30]

The additional allocable disbursements were made to 19 vendors, 18 of whom had received other allocable payments and, were listed on DFP's Iowa expense schedule. Almost all the individual disbursements comprising the $142,366 were identified as allocable to Iowa on either the DFP's accounting system or on the supporting documentation culled from the vendor files.

The purpose or characterization of the additional allocable expenditures are as follows.[31] Assorted Iowa overhead expenditures made to fifteen vendors for such things as office supplies, event expenses, office utilities and printing totaled $85,638. Allocable Iowa polling expenses totaled $41,742. Expenditures of $15,369 were made for phone programs and related development costs.

---

29 On an amended report filed July 15, 1997, the DFP adjusted this figure by $1,147, reducing the allocable Iowa disbursements to $1,039,159. Because no documentary support has been provided to identify the disbursement or disbursements adjusted, the Audit staff continues to recognize the earlier reported figure.

30 At the close of field work, the Audit staff provided the information as outlined in this finding to DFP. This finding included preliminary calculation of additional allocable expenditures made by DFP and subject to the Iowa spending limitation. As a result of material subsequently provided by DFP, the figure for additional allocable expenses was reduced.

31 A mass mailing credit of $383 was identified and netted against the total additional allocable expenses for Iowa.

No apparent pattern was found to the DFP's failure to include these expenses in its reported Iowa expenditures subject to the spending limitation. The Audit staff noted that DFP also omitted allocable expenses from its New Hampshire limitation calculation. Additional allocable expenses for New Hampshire of approximately $267,000 were identified. In a manner very similar to the Iowa allocations, the majority of the vendors to whom additional allocable disbursements were made, had been itemized on DFP's New Hampshire schedule for other allocable expenses. And again, as had occurred in Iowa, the additional allocable expenses were generally identified in either the DFP accounting system or on the supporting vendor documentation as expenses allocable to New Hampshire. Only an over allocation of $270,591 for New Hampshire media expenses, identified by the Audit staff, prevented DFP from exceeding the spending limitation for New Hampshire.

The deficiency in the allocable amount reported by DFP for Iowa was not the direct result of a failure of DFP's accounting system. As already noted, most of the additional allocable expenses were clearly identified as such on either the supporting documentation and in the general ledger. DFP accounting personnel demonstrated a clear understanding of what constituted an allocable expense. Because no work papers accompanied the schedule of expenses allocated to Iowa, the Audit staff was not able to evaluate the procedure used to aggregate the appropriate expenses and therefore cannot explain why the DFP failed to properly include these disbursements.

An over allocation of media expenses for Iowa, though much smaller than the one found to have occurred in New Hampshire, was also identified by the Audit staff. This amount, $14,257, was subtracted from the additional allocable amount. The actual additional amount subject to the Iowa spending limitation after applying the 10% overhead exclusion and then the 50% fundraising exemption was $59,772. Using the accepted reported figure as the baseline, the Audit staff concluded DFP made expenditures chargeable to Iowa spending limitation of $1,100,078 ($1,040,306 + $59,772). Thus, DFP spent $53,094 in excess of the Iowa spending limitation ($1,100,078 - $1,046,984).

In the Memorandum, it was recommended that DFP provide documentation which clearly demonstrates that disbursements subject to the Iowa spending limitation did not exceed the limitation. It was explained that absent such a demonstration, should the amount by which DFP's spending exceeded the state limitation for Iowa be greater than the amount that its spending exceeded the overall spending limitation, the Audit staff would recommend that the Commission determine that the DFP be required to repay the U.S. Treasury $16,454 [$53,094 multiplied by the repayment ratio as then calculated].

DFP responded as follows:

> "The FEC auditors erroneously counted indirect polling expenditures toward DFP's Iowa expenditure limit. These indirect costs were related to

activities that were analytical and strategic in nature and had overarching implications for the campaign in all fifty states and not only in Iowa. See attached statement of Bob Ward who was head of polling for the campaign (Exhibit 2). Thus they are not allocable to the Iowa limit. Indeed, per instructions from DFP, polling vendors broke down their bills according to whether their services were directly related to Iowa or were indirect as described above. See id. For example, invoices from Public Opinion Strategies specified such indirect costs as "overhead." See attached statement from Bob McInturff (Exhibit 3). The vendors provided these overarching indirect services with the intent that they would provide polling services to DFP throughout its entire national campaign."

DFP concluded that the audit inclusion in the calculation of expenses allocable to Iowa of indirect polling costs of $21,083, pager rentals of $1,054, database preparation charges of $21,693 for phone numbers to be used in Iowa polling and telemarketing, and travel costs of $10,609 incurred by a production company which was responsible for putting on Dole events in Iowa was incorrect.

With respect to the issue of "indirect polling costs," DFP's intention is to divide the cost invoiced for specific state polls into the basic cost of conducting the poll and indirect costs [charges for services of a strategic and analytic nature] with the consequence being that only the former expense is allocable while the latter is not. The regulations at 11 CFR §106.2(b)(2)(v) note that expenditures incurred for the taking of a public opinion poll covering only one state shall be allocated to that state and included in the costs to be allocated are the consultant's fees, travel costs, and other expenses associated with the design and conduct of the poll. Clearly, the allocable cost attributed to the cost of conducting a poll would include strategic and analytic services connected with the design of that poll. DFP has provided no documentation which suggests the charges invoiced for these Iowa polls were charges for anything other that the consultant's fee, travel costs or other expenses associated with the design of or the conducting of those polls.

Perhaps, had DFP received no other such strategic and analytic services from either of the two vendors in question, a case might be made for breaking out a portion of these polling costs as representing such a service. But in fact, one vendor, under contract to DFP, was receiving a monthly consulting fee in exchange for "general and technical consulting services, advice and counsel on campaign strategies, election techniques, scheduling, media events, and advertising." The other vendor received $146,737 for services [not allocated] which presumably included work of a strategic and analytic nature which had "overarching implications for the campaign in all fifty states." While there is no doubt that DFP paid for and received strategic and analytical services from these vendors which were not state specific and therefore not allocable, nothing on the invoices for the Iowa polls indicates that the charges were for anything other than the design and implementation of the poll which must, according to the regulations, be allocated to the Iowa state spending limit.

All rental fees for pagers leased in Iowa were included in the audit calculation of expenses allocated to Iowa. Invoices for the pagers indicate that they were leased and used in Iowa. Although DFP allocated a portion of the pager rental fees, they did not allocate the rent for the pagers used by the advance staff on the grounds that the advance staff used the pagers in states other than Iowa. In its response, DFP provided no documentation which indicates that these pagers functioned outside of Iowa, let alone were in fact used by the advance staff outside of Iowa. Thus all of the pager rental expense incurred in Iowa remains allocable to the Iowa state expenditure limitation.

DFP states that the database work provided by Strategic Planning is not allocable to Iowa. The allocable expenses identified by the Audit staff included only invoiced charges for the development of Iowa phone lists. All costs related to the design and implementation of a telephone program are allocable to the state in which the program is to be conducted. It would seem that the costs of the compilation of lists of phone numbers are costs related to the design of a telephone program and thus are allocable to the particular state. Because DFP provided no documentation which indicated that the development of Iowa phone lists as described on the various invoices was not a part of an Iowa state phone program, the expenditure must be included in amounts allocable to the Iowa state expenditure limitation.

DFP wishes to exclude from allocation the travel expense of TKO Productions, a vendor who provided support services for numerous Iowa campaign events. This vendor is not an employee of the campaign and therefore any transportation expense it incurs is a cost of their doing business. As a cost of doing business and providing a service, it is naturally included in the total cost of the services provided and logically included in the event overhead cost. As an event overhead expense in a particular state, it must be allocated to expenditures subject to the spending limitation for that state.

DFP's response provides no reason to modify the original finding that DFP spent $53,094 in excess of the Iowa spending limitation ($1,100,078 - $1,046,984).

Recommendation

The Audit staff recommended that the Commission determine that DFP exceeded the state spending limitation at 2 U.S.C. §441a (b)(1)(A) and §441a(c) by $53,094 and that $14,087 was repayable to the United States Treasury.

The Commission approved the Staff recommendation that it find that DFP exceeded the state expenditure limit for Iowa by $53,094. However, as noted in the

previous finding, the Commission declined to determine that any repayment was due as a result of excessive spending.[32]

G. DETERMINATION OF NET OUTSTANDING CAMPAIGN OBLIGATIONS - SURPLUS

Section 9034.5(a) of Title 11 of the Code of Federal Regulations requires that within 15 days of the candidate's date of ineligibility, the candidate shall submit a statement of net outstanding campaign obligations which contains, among other things, the total of all outstanding obligations for qualified campaign expenses and an estimate of necessary winding down costs. Subsection (b) of this section states, in part, that the total outstanding campaign obligations shall not include any accounts payable for non-qualified campaign expenses.

Section 9038.2(b)(4) of Title 11 of the Code of Federal Regulations states, in part, that the Commission may determine that the candidate's net outstanding campaign obligations, as defined in 11 CFR §9034.5, reflect a surplus.

Senator Dole's date of ineligibility was August 14, 1996. The DFP filed a Statement of Net Outstanding Campaign Obligations (NOCO) which reflected a $24,623 surplus at August 14, 1996. The Audit staff reviewed DFP's financial activity through July 31, 1998, analyzed estimates of winding down costs prepared by DFP and developed the figures shown below. Also, Commission determinations with respect to findings discussed in previous sections of this report are reflected in the NOCO Statement. Those adjustments had been made when the Commission considered the Staff recommendation relative to surplus funds.

---

[32] According to 11 CFR §9038.2(b)(2)(v), should a candidate be determined to have exceeded both the overall and the state expenditure limitations, only the greater of the two amounts would be subject to repayment.

Dole For President Committee, Inc.

Statement of Net Outstanding Campaign Obligations

as of August 14, 1996 as determined July 31, 1998

ASSETS			
Adjusted Cash in Bank			$ 2,782,131
Accounts Receivable			
Interest		10,072	
Press		420,867	
Secret Service		164,816	
Vendor Refunds		303,842	
Due From DK	(b)	664,429	
Due From GELAC	(c)	1,360,056	
Due from Multi Media		66,165	
Total Accounts Reveivable			2,990,247
Total Assets			5,772,378
OBLIGATIONS			
Accounts Payable for Qualified Campaign Expenses	(d)	(1,193,444)	
Due To DK	(e)	(574,158)	
Due To GELAC	(f)	(426,280)	
Total Accounts Payable			(2,193,882)
Wind down Costs:			
Actual 12/6/96-7/31/98	(g)	(2,161,132)	
Estimated Wind down After 7/31/98	(h)	(275,000)	
Total Wind down			(2,436,132)
Due to the U.S. Treasury-Stale Dated Checks			(225,536)
Total Obligations			(4,855,550)
Net Outstanding Campaign Obligations - Surplus			$ 916,828

(a) Outstanding checks issued prior to the date of ineligibility and determined to be stale-dated have been added back to the cash in bank figure.

(b) **Due From DK for**

Bell Atlantic Refund of Deposit	20,000
Bell Atlantic & Ameritech Refunds	6,145
Sale Non Capital Assets - post doi	55,049
Sale Capital Assets - post doi	221,900
Repurchase of CD's Redeemed By DK	201,756
Asset Repurchase on 7/27/97 of equipment from DK was not recognized. The total was $166,427. The remainder is included in the amount due to DK for telephone costs. That amount is a net of several adjustments. [See finding III.C.]	58,355
DK Travel Exp Paid by DFP	3,688
Av Atlantic Overpayment	80,316
DK expense paid durning wind down	10,870
DK Air Charter Expense Paid by DFP	6,350
	664,429

(c) **Due From GELAC for:**

GELAC Share of Wind down. DFP paid all wind down costs post December 5, 1996. One half of the wind down expense should be paid by DK or GELAC.	1,070,801
GELAC paid the 11/30/96 and the 12/13/96 payrolls and was incorrectly reimbursed by DFP. Included in this adjustment is the entire 11/30/96 payroll, and half of the 12/13/96 payroll. The remainder of the 12/13/96 payroll is wind down and is addressed as a part of wind down expense above.	186,978
DFP Deposit Refunds Rec. by GELAC	15,201
Sale Non-Capital Assets to GELAC - post DOI	42,600
Sale Capital Assets to GELAC - post DOI	44,476
	1,360,056

(d) The expenditures addressed in Finding III.H.1.a., were paid after the date of ineligibility. Therefore they have been excluded from Accounts Payable for Qualified Campaign Expenses.

(e) **Due To DK for:**

Pre DOI Expenses Paid By DK See Finding III.B.2.	(138,743)
Telephone Expenses See Finding III.C.	(39,118)
Focus Group Expenses See Finding III.E.3.b.	(4,455)
Film Footage See Finding III.E.3.b.	(101,749)
Supporter Lists See Finding III.E.3.a.	(228,774)
Undocumented Asset transfer of 7/31/96 & 8/22/96 to DK See Finding III.E.3.c.	(28,546)
Rent Expenses See Finding III.D.	(32,773)
	(574,158)

(f) **Due To GELAC for:**

Primary Expenses See Finding III.B.1	(377,186)
DFP Expenses Reimbursed By GELAC See Finding III.E.4.b.	(16,967)
U.S. Air Expense See Finding III.E.4.b.	(5,073)
GELAC Phone	(2,123)
D&B fees paid by GELAC in Wind down period	(876)
Undocumented Asset transfer of 7/31/96 & 8/22/96 to GELAC See Finding III.E.c.	(24,055)
	(426,280)

(g) This represents the wind down cost paid by the Primary Committee.

(h) Consistent with the position taken by the Audit staff at Finding III.G.1.b.that DFP was responsible only for winding down expenses related to it, the winding down estimate of $550,000 provided for both DFP and DK was halved and entered as $275,000.

Section 9038.3(c)(1) of Title 11 of the Code of Federal Regulations states, in part, that if on the last day of candidate eligibility the candidate's net outstanding campaign obligations reflect a surplus, the candidate shall within 30 days of the ineligibility date repay to the Secretary an amount which represents the amount of matching funds contained in the candidate's surplus. The amount shall be an amount equal to that portion of the surplus which bears the same ratio to the total surplus that the total amount received by the candidate from the matching payment account bears to the total deposits made to the candidate's accounts.

The Audit staff's calculation of DFP's Net Outstanding Campaign Obligations as of August 14, 1996, as revised to reflect the Commission's actions with respect to other findings in this report, shows it to have been in a surplus position in the amount of $916,828 and that, $283,481 ($916,828 x .309198[33]) is repayable to the U.S. Treasury.

In the Memorandum it was recommended that DFP provide evidence that its Statement of Net Outstanding Campaign Obligations did not reflect a surplus or that the surplus was a lessor amount. At the time the Memorandum was prepared the amount of the surplus was calculated to be $243,248. Absent the presentation such evidence, the Audit staff stated that it would recommend that the Commission determine that an proportional amount of the surplus is repayable to the United States Treasury pursuant to 11 CFR §9038.3(c)(1).

DFP responded to the Memorandum as follows:

> "DFP has reviewed its statement of net campaign obligations and has found no surplus. Indeed, total monies available to DFP are addressed in the conclusion."

The principal reason for the increase in the amount of the surplus between the the Memorandum and the calculation shown above, has to do with the estimate of remaining winding down costs. In the Memorandum calculation the entire estimate was included on the DFP NOCO Statement. It has been learned that, consistent with DFP's position on other wind down costs, the estimate covered both DFP and DK. Consistent with the calculation of other wind down costs discussed below, the amount has been reduced to one half of the total to reflect the DK share of the costs [See Finding III.H.1.b. below].

Other than insisting in its response to Finding III.H.1.b that it was properly funding all wind down expenses from primary funds, DFP provided no documentation to support its contention that it has found no surplus. Of course, if DFP was permitted to

---

[33] This figure (.309198) represents the Committee's repayment ratio as calculated pursuant to 11 CFR §9038.3(c)(1). [see explanation at footnote #17]

fund all of wind down, including DK's obligations, there would be no surplus funds. But because DFP may only pay wind down attributable to the primary campaign, it is in a surplus position.

Contrary to DFP's claim, "total monies available to DFP" is not addressed in the conclusion of its response. Indeed, the conclusion merely states that "...to the extent the Committee may have exceeded the spending limit, that amount, according to the Committee's calculations, would be no more than approximately $1.5 million." It is unclear what DFP meant to communicate by its inclusion of a reference to "total monies available" or what effect this might have on its claim that net outstanding campaign obligations do not indicate a surplus.

Recommendation

The Audit staff recommended that the Commission determine DFP's Statement of Net Outstanding Campaign Obligations reflects a surplus of $916,828 and that, $283,481 ($916,828 x .309198[34]) is repayable to the United States Treasury pursuant to 11 CFR §9038.3(c)(1)[35].

The Commission adopted the Staff recommendation.

---

[34] The repayment ratio is calculated as shown in the table below. The Commissioners adopted motions on December 10, 1998, and January 28, 1999, which rejected Staff recommendations that they determine DFP had received in-kind contributions from the RNC for media, polling and 441a(d) expenditures and from Kemp for Vice-President, Inc. for miscellaneous pre date of ineligibility expenditures. Accordingly, these in-kind contributions are not included in the following calculation The numerator is equal to the net matching funds received by DFP and the denominator is equal to all contributions (including in-kind contributions), matching funds and interest.

Repayment Ratio =	.309198
Ratio Calculation =	$13,524,771 / $43,741,518
Total for Numerator / Net Matching Funds Received:	$13,524,771
Total Deposits [all contributions & matching funds]:	43,574,394
Interest:	46,884
1995 - 1996 Other In-kinds:	20,115
In-kind from Keck:	100,125
Total for denominator:	$43,741,518

[35] The figures in this recommendation have been revised to reflect Commission action on other findings in the report. The revised amounts were available at the time of the Commission's vote on this recommendation.

H. OTHER REPAYMENTS

1. Non-qualified Expenditures

Section 9004.4(a)(4)(iii) of Title 11 of the Code of Federal Regulations states, in part, that 100% of salary, overhead and computer expenses incurred after the end of the expenditure report period may be paid from a legal and accounting compliance fund established pursuant to 11 CFR §9003.3 and will be presumed to be solely to insure compliance with 2 U.S.C. §431 *et seq.* and 26 U.S.C. §9001 *et seq.*

Section 9032.9(a) of Title 11 of the Code of Federal Regulations states, in part, that a qualified campaign expense is one incurred by or on behalf of the candidate from the date the individual became a candidate through the last day of the candidate's eligibility; made in connection with his campaign for nomination; and neither the incurrence nor the payment of which constitutes a violation of any law of the United States or the State in which the expense is incurred or paid.

Section 9033.11(a) of Title 11 of the Code of Federal Regulations states, in part, that each candidate shall have the burden of proving that disbursements made by the candidate or his authorized committee(s) or persons authorized to make expenditures on behalf of the candidate or committee(s) are qualified campaign expenses.

Section 9034.4(a)(1) of Title 11 of the Code of Federal Regulations states, in part, that all contributions received by an individual from the date he becomes a candidate and all matching payments received by the candidate shall be used only to defray qualified campaign expenses or to repay loans or otherwise restore funds (other than contributions which were received and expended to defray qualified campaign expenses) which were used to defray qualified expenses.

Sections 9038.2(b)(2)(i)(A) and (ii)(B) of Title 11 of the Code of Federal Regulations state, in part, that the Commission may determine that amount(s) of any payments made to a candidate from the matching payment account were used for the purposes other than to defray qualified campaign expenses. Further, an example of a Commission repayment determination under paragraph (b)(2) includes determinations that a candidate, a candidate's authorized committee(s) or agents have made expenditures for expenses resulting from a violation of State or Federal law, such as the payment of fines or penalties.

Section 9038.2(b)(2)(iii) of Title 11 of the Code of Federal Regulations states, in part, that the amount of any repayment under this section shall bear the same ratio to the total amount determined to have been used for non qualified campaign expenses as the amount of matching funds certified to the candidate bears to the candidate's total deposits, as of 90 days after the candidate's date of ineligibility.

a. Incurred Prior to the Expenditure Report Period

In the course of reviewing DFP's disbursements, items were identified which, on their face, do not appear to be qualified campaign expenditures. The expenditures in question were presented to DFP at the close of fieldwork. DFP was able to show that some of these expenses were qualified campaign expenses.

At the time the Memorandum was prepared, eleven expenditures for $20,231 had not been addressed by DFP and were regarded as non-qualified. The categories of non-qualified campaign expenses were as follows: a $4000 refund of an NSF contribution, $6,465 in tax penalties paid to local jurisdictions, $1,703 in duplicate payments to two vendors and $8,063 in expenditures not campaign related. Of the expenditures which were not campaign related, $5,054 was paid for personal travel by committee staff and billed to the campaign, and the remaining $3,009 was paid for the preparation of a U.S. Senate financial disclosure statement.

In the Memorandum it was recommended that DFP provide documentation which demonstrated that the above disbursements were qualified campaign expenses. Absent such a demonstration, the Audit staff intended to recommend that the Commission determine that the DFP is required to make a repayment to the U.S. Treasury.

DFP responded that it "does not dispute the Audit Staff's assessment of these items."

Recommendation

The Audit staff recommended that the Commission determine that DFP is required to repay the U.S. Treasury $6,255 [$20,231 x .309198].[36]

The Commission approved the Staff recommendation.

b. Incurred in the Post Expenditure Period

Winding Down expenses of $1,961,138 for both the primary and general committees were incurred between December 5, 1996 and March 5, 1998. DFP paid all of the these costs. The Memorandum concluded that the cost should have been allocated between the two committees. Absent a better allocation technique, an equal allocation was used. Half of this amount, $980,569, was therefore shown as a receivable of DFP from DK. Further, this amount is a non qualified winding down expense for DFP.

---

[36] The figures in this recommendation have been revised to reflect Commission action on other findings in the report. The revised amounts were available at the time of the Commission's vote on this matter.

In the Memorandum it was recommended that the DFP provide documentation which demonstrated that DK either paid its share of wind down expenses or that DFP received reimbursement from DK for DK's share of wind down expenses. Absent such a demonstration, the Audit staff stated that it would recommend that the Commission determine that the DFP be required to make a repayment to the U.S. Treasury.

DFP responded to the Memorandum as follows:

> "The Audit Staff erroneously imposed a pro-rata rule of the payment of wind down costs. Indeed, nothing in the Commission's regulation[sic] requires that the primary and the general committees split these costs. In the absence of such a directive, DFP is entitled to pay the entire costs of the wind down process.
>
> "Also, the Primary Committee is explicitly entitled to pay for its wind down costs after the date of the nomination. 11 C.F.R. 9034.4(a)(3). DFP's audit has been going on since the presidential campaign came to an end. Also, there has been no distinction between DFP's audit and Dole/Kemp's audit. Thus, DFP is explicitly entitled to pay for the wind down costs under 11 C.F.R. §034.4(a)(3)."

DFP correctly notes that guidance for primary wind down expense is found at 11 CFR §9034.4(a)(3). To pay wind down expenses from a mixed pool of public and private funds, the wind down expense must meet the definition of a qualified primary wind down expense. Qualified primary wind down expenses, as outlined at 11 CFR §9034.4(a)(3), are costs associated with the termination of primary campaign political activity. These include the costs of complying with the post election requirements of the Act and other necessary administrative costs associated with winding down the campaign, including office space rental, staff salaries, and office supplies. To reiterate the point, 11 CFR §9034.4(a)(3) identifies only primary wind down expenses as being permissible expenses of the primary committee. Thus, wind down expenses of another committee are not and can not be qualified expenses of the primary committee.[37]

There is no prohibition against the sharing of space and staff by two campaigns. In the interest of economy, this is what DFP and DK did. While the regulations do not require that the wind down costs be split, the regulations require

---

[37] Similar guidance for the general wind down expenses can be found at 11 CFR §9004.4(a)(4). A general committee may pay only qualified wind down costs with public funds. Qualified general wind down expenses, as outlined at 11 CFR §9004.4(a)(4), are costs associated with the termination of the political activity. These are the costs of complying with the post election requirements of the Act and other necessary administrative costs associated with winding down the campaign, including office space rental, staff salaries, and office supplies.

that the primary, if it is using funds containing public moneys, pay only wind down expenses attributable to the primary. Therefore; given that the wind down activity both of the primary and general election campaigns' has occurred simultaneously in shared facilities with a shared staff, and that the DFP may not pay for more than its share of the wind down costs, and lacking a more precise allocation method, the costs should be equally attributed to the primary and general campaigns.

A review of additional wind down expenses through July 31, 1998 revealed that DFP had continued to pay the wind down expense for DK and itself. Accordingly, half of the additional expense, $90,232 was added to the wind down receivable due DFP from DK.

Recommendation

The Audit staff recommended that the Commission determine DFP made wind down disbursements totaling $1,070,801 on behalf of DK and that amount is due from GELAC. Further the amount due from GELAC is an asset to be reflected on DFP's NOCO statement.

The Commission approved the Staff recommendation.

2. Stale-Dated Checks

Section 9038.6 of Title 11 of the Code of Federal Regulations states, in part, that if the committee has checks outstanding to creditors or contributors that have not been cashed, the committee shall notify the Commission of its efforts to locate the payees, if such efforts are necessary, and its efforts to encourage the payees to cash the outstanding checks. The committee shall also submit a check for the total amount of such outstanding checks, payable to the United States Treasury.

The Audit staff reviewed the DFP's bank activity through February 1998 for outstanding checks. The results of the review were presented to DFP at the close of fieldwork. DFP was able to demonstrate that a portion of those initially identified were not unpaid obligations. When the Memorandum was prepared 522 checks totaling $244,239 remained outstanding. Of these, 429 in the amount of $190,418 were contribution refunds.

In the Memorandum it was recommended that DFP provide evidence that the checks were either not outstanding or that they were void and no obligation existed. If the checks were not outstanding the evidence provided was to include copies of the front and back of the negotiated checks or negotiated replacement checks. If the checks were void the evidence presented was to include statements from the vendors acknowledging that they have been paid in full, or account reconciliation's showing that all billings have been paid. Absent the submission of such evidence, the

Audit staff intended to recommend that the Commission determine that stale-dated checks, totaling $244,239, are payable to the United States Treasury.

In its response to the Memorandum, DFP identified four categories of payments related to stale dated checks totaling $33,367, which it concluded do not represent obligations on its part. First, it notes that there are five checks in the amount of $4,837 which were written in error. Secondly, six checks, totaling $3,650, are identified as having been negotiated. Personal services that DFP contends may be provided to a committee and result in no obligation to that committee are determined to account for payments to nine individuals totaling $7,046. Finally, four vendors, to whom stale dated checks totaled $17,834, and with whom DFP had a long history of transactions, who may have required security deposits prior to providing service, and from whom refunds have been received are eliminated as creditors because they have not re-billed or otherwise requested payment of these amounts.

In its response, DFP provided no documentation in support of its challenge to stale dated checks. With respect to the checks identified as written in error, no verification was provided from the vendors confirming that either no obligation existed or that the obligation had been satisfied. No copies of canceled checks were provided to support the claim that six checks had been negotiated and therefore were no longer outstanding.[38] While individuals may donate personal services to and assume travel costs on behalf of a campaign with no contribution to or obligation on the part of the campaign, these special circumstances must be documented to demonstrate the individual's intent, particularly in instances where the individuals had been previously paid as committee employees. DFP did not provide evidence of such arrangements, or that it had contacted or attempted to contact these individuals to obtain a statement acknowledging that no obligation on the part of the DFP exists. Two travel reimbursements which had been included in this category were voided, reissued and negotiated. DFP may be correct in that it no longer owes the last category of vendors for services provided, but they did not provide documentation that they had obtained, or sought to obtain, written confirmation from these vendors acknowledging that their accounts were paid in full. Further, DFP did not provide a detailed reconciliation for the accounts in question. Accordingly, except as noted, DFP's reductions to the stale dated check total were not accepted.

A post fieldwork review of DFP's wind down expenses indicated that checks totaling $18,703,[39] the majority reissued in March 1998, had cleared the bank. Accordingly, the stale dated check total was reduced to $225,536 [$244,239 - $18,703].

---

38 The negotiation of four of the six checks was verified during the post field work review.

39 Of the $33,367 challenged by DFP, checks totaling $6,517 were included in the amount of reissued and negotiated checks.

In their 1998 third quarter disclosure report, DFP reported voiding operating expenditure checks in the amount of $20,442 and contribution refund checks in the amount of $190,599. The total voided, $211,041, was the same amount as that which DFP acknowledged in its response to the Memorandum to be stale dated and repayable to the U.S. Treasury. Implicit in DFP's acknowledgment was the fact that the contribution refunds represented impermissible funds and as such were not available for use by DFP. Section 103.3(b)(4) of Title 11 of the Code of Federal Regulations requires committees to maintain sufficient funds to make all such refunds. In the same report, DFP also reported that ending cash on hand was $48,265. Thus, some of the funds, acknowledged to be impermissible, have evidently been expended.

Recommendation

The Audit staff recommended that the Commission determine DFP had stale dated outstanding checks totaling $225,536 and that DFP be required to pay this amount to the United States Treasury.

The Commission adopted the Staff recommendation.

I. SUMMARY OF AMOUNTS DUE TO THE U.S. TREASURY

Finding No.	Finding Title	Amount
III.G.	Determination of Net Outstanding Campaign Obligations-Surplus	$ 283,481
III.H.	Other Repayments	
	1. Non-qualified Expenditures	
	a. Incurred Prior to the Expenditure Report Period	6,255
	2. Stale-Dated Checks	225,536
Total Amount Due to the U.S. Treasury		$ 515,272

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 21, 1998

MEMORANDUM

TO: Robert J. Costa
Assistant Staff Director
Audit Division

THROUGH: James A. Pehrkon
Acting Staff Director

FROM: Lawrence M. Noble
General Counsel

Kim Bright-Coleman
Associate General Counsel

Lorenzo Holloway
Assistant General Counsel

SUBJECT: Proposed Audit Reports on Dole for President, Inc.; Dole/Kemp '96, Inc.; and Dole/Kemp '96 Compliance Committee, Inc. (LRA # 467 and # 506)

The Office of General Counsel is continuing its review of the proposed Audit Reports on Dole for President, Inc. ("the Primary Committee"), Dole/Kemp '96, Inc. ("the General Committee"), and Dole/Kemp '96 Compliance Committee, Inc. ("the GELAC") [collectively, "the Dole Committees"] which were submitted to this Office on September 16, 1998 and September 18, 1998, respectively. This Office will present its comments to you as they are prepared. Individual subject matters are discussed in individual sections, as noted by the section headings.

I. PRIMARY COMMITTEE LOAN TO GENERAL COMMITTEE (II.A. IN PRIMARY COMMITTEE REPORT AND II.A.2.a. IN GENERAL COMMITTEE REPORT)

We concur with the Audit staff's conclusion that, in connection with the October 30 and November 1, 1996 transfer of $2 million from Primary Committee accounts to General Committee accounts, the Primary Committee incurred non-qualified campaign expenses when it contributed to the General Committee by loaning it funds. Further, we concur with the Audit staff that, in connection with the subsequent purchase of certificates of deposit, the Primary Committee contributed to the General Committee when it purchased certificates of deposit from the General Committee.[40] However, we recommend that the Audit staff also conclude that the Primary Committee incurred non-qualified campaign expenses when it purchased the certificates of deposit from the General Committee for two reasons.

First, the Primary Committee paid the General Committee more than the usual and normal charge for the funds it received. The Committees acknowledge that one certificate of deposit in the amount of $200,000 plus $2,767 interest had already been redeemed by the General Committee, and the Committees acknowledge a debt of $202,767 owed to the Primary Committee by the General Committee. The full value of the remaining certificates of deposit was $800,000 plus earned interest. However, the certificates of deposit were worth less than their face value plus interest because the General Committee continued to use the certificates of deposit to secure letters of credit. However, the Primary Committee paid $800,000 plus earned interest to purchase the certificates of deposit. If a committee pays more than the usual and normal charge for goods or services, the excessive amount has no connection with the candidate's nomination and therefore is not a qualified campaign expense. 11 C.F.R. § 9032.9(a)(2). Therefore, the amount by which the Primary Committee's payments exceeded the value of the certificates of deposit is a non-qualified campaign expense. *See* Statement of Reasons in the Matter of Dr. Lenora B. Fulani, *et al.* (Mar. 7, 1997).

The second reason for our view that the Primary Committee incurred non-qualified campaign expenses when it purchased the certificates of deposit from the General Committee is that the Primary Committee permitted the General Committee to continue to use the certificates of deposit to secure letters of credit used in the General Committee's operations. By doing so, the Primary Committee used its funds, which include public funds, to provide a form of security to the General Committee. A guarantee, endorsement, and any other form or security are considered loans and therefore contributions pursuant to 11 C.F.R. § 100.7(a)(1)(i). In Advisory Opinion 1988-5, the Commission recognized that a committee's use of public funds received in connection

[40] The proposed Audit Reports refer to this transaction as a "repurchase" because the General Committee had purchased these certificates of deposit from the Primary Committee on August 30, 1996.

with one election to secure the obligations of another committee in connection with a different election would be a non-qualified campaign expense. *See* Advisory Opinion 1988-5 (noting that such use would be non-qualified campaign expense whether the transactions were characterized as "transfers, contributions or loans (including any loan guarantee or security)").[41] Therefore, we recommend that the Audit staff conclude that the Primary Committee also incurred non-qualified campaign expenses when it purchased the certificates of deposit from the General Committee.

We understand that the letters of credit that were secured by the certificates of deposit have expired and that the Primary Committee has unfettered access to the certificates of deposit funds. With the expiration of the letters of credit, the value of the certificates of deposit was no longer reduced by the General Committee's use of the certificates of deposit as security. Consequently, the Primary Committee received the full value of the certificates of deposit in its possession once the certificates of deposit were no longer used by the General Committee as security. Pursuant to 11 C.F.R. § 100.7(a)(1)(i), when the Primary Committee permitted the General Committee to use Primary Committee certificates of deposit as security, the Primary Committee loaned those funds to the General Committee. When the General Committee, which had already provided the certificates of deposit to the Primary Committee, ceased using the certificates of deposit as security, it repaid the loan. Pursuant to 11 C.F.R. § 100.7(a)(1)(i)(B), a loan, to the extent it is repaid, is no longer a contribution. On this basis, we concur with the Audit staff's conclusion that the Primary Committee should not be required to repay the non-qualified campaign expenses for which it has received or expects to receive reimbursements.

II. PRIMARY EXPENSES PAID BY DOLE-KEMP '96 (III.B.2. IN PRIMARY COMMITTEE REPORT AND III.A.1.d. IN GENERAL COMMITTEE REPORT)

The Audit staff recommends that the Commission determine that, pursuant to 11 C.F.R. § 9034.4(e), disbursements in the amount of $207,378 made by the General Committee, are attributable to the Primary Committee's overall expenditure limitation. While we generally agree with your approach, we do not believe you have sufficiently addressed the issue of whether some of these expenditures may be General Committee pre-expenditure report period expenses for property, services or facilities which are to be used in connection with the general election campaign and which are for use during the

[41] Furthermore, we recommend that the proposed reports be revised to include a discussion of Advisory Opinion 1988-5, which concludes that use of public funds in connection with any election other than the election for which they were awarded is a non-qualified campaign expense. Additionally, to put the Advisory Opinion in context, this finding should also include the definition of the term "qualified campaign expense," 11 C.F.R. § 9032.9, even though that regulatory section is discussed elsewhere in the proposed Audit Report.

expenditure report period. 11 C.F.R. § 9003.4. Such expenditures may include, but are not limited to: expenditures for establishing financial accounting systems and expenditures for organizational planning. *Id.*

The Explanation and Justification for section 9003.4 states that purpose of the regulation was to "permit a candidate to set up a basic campaign organization" before the date of ineligibility. Explanation and Justification for 11 C.F.R. § 9003.4, 45 Fed. Reg. 43375 (June 27, 1980). Section 9003.4 was modified by section 9034.4 only as it relates to polling expenditures, and otherwise continued to allow general election committees to incur expenditures prior to the general election expenditure report period. *See* Explanation and Justification for 11 C.F.R. § 9003.4, 60 Fed. Reg. 31857 (June 16, 1995). In order to effectuate the regulation's undisturbed purpose of assisting in the set-up of a "basic campaign organization," certain "start-up" costs can be incurred by the General Committee. In this case, we believe that the costs of telephone equipment and its installation and the costs of office furniture and equipment may constitute expenditures contemplated by section 9003.4 as "property, services or facilities which are to be used in connection with the general election campaign" and constitute parts of a "basic campaign organization."[42]

Staff assigned:
Peter G. Blumberg
Susan L. Kay
Tracey L. Ligon
J. Duane Pugh
Jamila Wyatt

[42] We note that the Office of General Counsel memorandum to the Audit Division of March 20, 1998 regarding the application of 11 C.F.R. § 9034.4(e)(3) addressed candidate committee campaign expenditures in general. The March 20, 1998 memorandum references section 9003.4 and notes some of the potential uses of funds for the pre-expenditure report period.

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 23, 1998

MEMORANDUM

TO: Robert J. Costa
Assistant Staff Director
Audit Division

THROUGH: James A. Pehrkon
Acting Staff Director

FROM: Lawrence M. Noble
General Counsel

Kim Bright-Coleman
Associate General Counsel

Lorenzo Holloway
Assistant General Counsel

SUBJECT: Proposed Audit Report on Dole for President, Inc.
(LRA # 467)

The Office of General Counsel is continuing its review of the proposed Audit Reports on Dole for President, Inc. ("the Primary Committee") submitted to this Office on September 16, 1998. This Office will present its comments to you as they are prepared. Individual subject matters are discussed in individual sections, as noted by the section headings.

I. EXPENSES PAID BY THE GELAC (III.B.1.)

The Audit Division recommends that the Commission determine that disbursements by the Dole/Kemp '96 Compliance Committee, Inc. ("the GELAC") in the amount of $453,883 are attributable to the Primary Committee's overall expenditure limitation pursuant to an application of 11 C.F.R. § 9034.4(e) which addresses allocation of candidate expenses between primary and general election committees. This Office

agrees that section 9034.4(e) applies to the GELAC.[43] However, this Office notes that all GELAC expenditures should also be evaluated in light of 11 C.F.R. § 9003.3(a)(2) which addresses permissible uses of GELAC funds. This regulation states that the GELAC can use its funds for, *inter alia*, legal and accounting costs related "solely" to compliance with 2 U.S.C. § 431, *et seq.* and 26 U.S.C. § 9001, *et seq.* and for the "costs of soliciting contributions to the GELAC." 11 C.F.R. § 9003.3(a)(2).[44] The '"solely' for compliance" standard is similar to the "exclusivity" standard of section 9034.4(e) and, therefore, we agree with your overall conclusion that the GELAC must demonstrate the exclusivity of its operations for any expenditure to be attributed to it.

However, the Report suggests that administrative costs related to fundraising (fundraiser salaries, rent for fundraisers' offices) must be attributed to the Primary Committee's overall expenditure limitation and not to the GELAC since the individuals involved in fundraising for the GELAC also raised funds for the Primary Committee. Consequently, you conclude that the lack of fundraising efforts "exclusively" on behalf of the GELAC requires that these individuals' salaries and related expenses be paid entirely by the Primary Committee. This Office believes that expenses that are part of the cost of a joint solicitation, such as salaries, overhead, and travel, may be attributed 50% to the Primary Committee and 50% to the GELAC as a cost of the solicitation under 11 C.F.R. § 9034.4(e)(6). Section 9034.6(e)(6) does not define "cost of solicitation," but we believe that it includes more than just the cost of a "communication" since the regulation uses the terms "solicitation" and "communication" separately, and the regulation is written in a manner that suggests that the two are different. Nevertheless, the Primary Committee has not demonstrated that the costs at issue were part of the cost of any solicitation.[45] *Id.*

II. PRIMARY EXPENSES PAID BY KEMP FOR VICE PRESIDENT (III.B.3)

The Audit staff recommends that the Commission determine that the Primary Committee received an in-kind contribution from the Kemp for Vice President Committee ("KVP") in the amount of $77,237 that is attributable to the Primary Committee's overall expenditure limitation. The expenditures at issue include a Dole/Kemp '96 rally sign, other campaign materials inscribed with "Dole Kemp '96" or

---

[43] Section 9034.4(e) applies to a candidate's authorized committees and the GELAC is an authorized committee of the candidate. 11 C.F.R. § 9003.3(a). In addition, section 9034.4(e)(6) refers specifically to the attribution of expenditures between a primary committee and the GELAC for fundraising solicitation communications.

[44] Section 9003.3 does not indicate when the GELAC can begin making disbursements in connection with general election legal and accounting compliance.

[45] It is our understanding that the GELAC did not engage in joint fund-raising activity with the Primary Committee pursuant to 11 C.F.R. § 9034.8. However, the primary financing joint fund-raising rules at 11 C.F.R. § 9034.8 do not prohibit a GELAC from participating in joint fundraising activities with the Primary Committee under 11 C.F.R. § 9034.4(e)(6).

"Dole Kemp #1," and a payment for a consultant to review the organization and distribution of materials for the Republican National Convention. These obligations were incurred preceding the nomination of both Senator Dole and Mr. Kemp.

The Primary Committee argues that these expenditures do not constitute in-kind contributions to the Primary Committee under 11 C.F.R. § 100.7(b)(16) (the "coattail exemption").[46] Based on the rationale set forth in the Audit Report, we agree with the Audit staff's conclusion that these expenditures do not fall within the "coattail exemption" and should be attributed to the Primary Committee. If, however, the Primary Committee is able to show that the disbursements in question were for the purpose of influencing Mr. Kemp's campaign for nomination to the Office of Vice President, we recommend that these expenditures be attributed to KVP.

Staff assigned:
Peter G. Blumberg
Susan L. Kay
Tracey L. Ligon
J. Duane Pugh
Jamila I. Wyatt

[46] This Office notes that KVP is the subject of an ongoing audit and all the information relevant to that audit has not been received by the Audit Division. Information received by the Audit Division in the context of the KVP audit may have an impact on the Primary Committee. If the information has an impact on the Primary Committee, it should be included in the Primary Committee's Audit Report.

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 21, 1998

MEMORANDUM

TO: Robert J. Costa
Assistant Staff Director
Audit Division

THROUGH: James A. Pehrkon
Acting Staff Director

FROM: Lawrence M. Noble
General Counsel

Kim Bright-Coleman
Associate General Counsel

Lorenzo Holloway
Assistant General Counsel

SUBJECT: Proposed Audit Report on Dole for President, Inc.
(LRA # 467)

I. INTRODUCTION

The Office of General Counsel is reviewing the proposed Audit Report on Dole for President, Inc. ("the Primary Committee") submitted to this Office on September 16, 1998. As you note in your cover memorandum transmitting the proposed Report to this Office, it appears that at this time the Commission seeks to address these matters in early November 1998. This proposed schedule necessarily requires an expedited legal review from this Office. As suggested in your cover memorandum, this Office will submit comments on particular sections of the Report as soon as we complete such review so that any revisions to those sections could be made as soon as possible. The comments contained herein will address matters on which we concur with your approach and have only minor suggestions. As a threshold matter, we understand that the draft Audit Report was submitted to this Office prior to the completion of the referencing process and,

therefore, we request that you inform us in writing of any changes to the Report that may be made during the referencing process.[47] If you have any questions concerning our comments, please contact Peter Blumberg, the lead attorney assigned to these matters.

II. RECEIPT OF EXCESSIVE IN-KIND CONTRIBUTION (KECK AIRCRAFT) (II.B.)[48]

We agree with your conclusion that the Primary Committee was not entitled to pay first class airfare pursuant to 11 C.F.R. § 114.9(e) for use of a private airplane owned by William Keck. Section 114.9(e) applies only to aircraft owned or leased by a corporation or labor organization. Because the aircraft was owned personally by Mr. Keck, section 114.9(e) is not applicable, and instead, the Primary Committee should pay the usual and normal charge for use of the aircraft under 11 C.F.R. §§ 100.7(a)(1)(iii)(A) and (B).

The Primary Committee claims that Mr. Keck's aircraft was "a corporate aircraft in all respects except formal title." Primary Committee Response, at 3. The fact that the airplane may have functioned as a corporate jet cannot change its status as a privately owned aircraft for purposes of evaluating the applicability of section 114.9(e). In Advisory Opinion 1979-52, the Commission determined that the sole owner of a corporation was subject to the requirements of section 114.9(e). The Commission stated, "[s]ection 114.9(e) of Commission regulations does not distinguish between corporations whose stock is held by many persons and those corporations where a candidate is the sole stockholder of the corporation." AO 1979-52 at 2. The Commission further stated in AO 1979-52 that section 114.9(e) would not apply if the organizational structure of the entity at issue was changed to a sole proprietorship. *Id.* Therefore, whether section 114.9(e) is applicable is determined by the entities organizational structure and not by how the entity uses the aircraft. Thus, section 114.9(e) is not applicable and the Committee should have paid Mr. Keck the usual and normal charter rated for the use of his privately owned aircraft pursuant to 11 C.F.R. §§ 100.7(a)(1)(iii)(A) and (B).

III. ALLOCATION OF STATE EXPENDITURES (II.C.)

We suggest an alternative approach to your finding on exceeding the state expenditure limitation. Pursuant to 11 C.F.R. § 9038.2(b)(2)(v), when a committee exceeds both the state and overall expenditure limitations, the repayment determination will be based on the larger of either the amount exceeding the state expenditure limitation or the amount exceeding the overall expenditure limitation. In your Report, you have

---

[47] Additionally, because the proposed Audit Reports concern the audit of a publicly-financed candidate, the Office of General Counsel recommends the Commission consider the Audit Report in open session. 11 C.F.R. §§ 9007.1(e)(1) and 9038.1(e)(1).

[48] Parenthetical references are to the relevant sections of the Primary Committee's proposed Audit Report.

declined to make a recommendation on the amount that the Primary Committee may have exceeded the state expenditure limitation in Iowa since you assume that the recommendation on exceeding the overall limitation will be adopted by the Commission. Nevertheless, we believe that the better approach is to contain recommendations for both findings in the Report. In order to determine which amount is higher, the Commission must take action on both determinations. *See* 2 U.S.C. § 437c(c) (requiring the affirmative vote of four Commissioners for all decisions). If the Commission adopts both proposed recommendations, the Commission would subsequently seek repayment only for the larger of the two amounts, and the recommendation for the lower amount would simply be rendered inoperative. Additionally, in order to facilitate the Commission's discussion of these issues in the proper context, we believe that the state expenditure limitation issue should be moved to the portion of the Report where other repayment matters are discussed.

IV. OTHER RECOMMENDATIONS

Finally, this Office concurs with your findings and recommendations on the following sections of the proposed Report and has no comments on such sections:

Misstatement of Financial Activity (II.D.)

Stale-dated Checks (III.G.)

Staff assigned:
Peter G. Blumberg
Susan L. Kay
Tracey L. Ligon
J. Duane Pugh
Jamila Wyatt

TOMS-5SD-NO-202

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 27, 1998

MEMORANDUM

TO:	Robert J. Costa Assistant Staff Director Audit Division
THROUGH:	James A. Pehrkon Acting Staff Director
FROM:	Lawrence M. Noble General Counsel Kim Bright-Coleman Associate General Counsel Lorenzo Holloway Assistant General Counsel
SUBJECT:	Proposed Audit Report on Dole for President, Inc. - Media Advertisements and Other Expenses Paid for by the Republican National Committee, Repayment Ratio and Winding-Down Costs (LRA # 467)

The Office of General Counsel has completed its review of the proposed Audit Report on Dole for President, Inc. ("Primary Committee") submitted to this Office on September 16, 1998. The following memorandum contains our comments on issues related to the media, polling, winding-down costs and coordinated expenditures sections of the proposed Audit Report (sections III.A.4., III.A.5., III.G.1.b. and III.A.2., respectively, of the proposed Audit Report). We understand that the proposed Audit Report was submitted to this Office prior to the completion of the referencing process and, therefore, we request that you alert us to any changes to these sections. If you have any questions concerning our comments, please contact Peter G. Blumberg or J. Duane Pugh.

I. INTRODUCTION

During the course of audit fieldwork, you requested this Office's assistance in preparing subpoenas to obtain additional information for the audits. Thereafter, the Commission issued subpoenas and orders to answer questions to 10 entities. Specifically, subpoenas and orders were issued to Dole for President, Inc., Dole/Kemp '96, Inc. (the "General Committee"), the Republican National Committee (the "RNC"), AV Atlantic, United Jet International, and Multi Media Services Corp. on January 21, 1998; to Franklin National Bank on March 13, 1998; and to the RNC, Fabrizio, McLaughlin, and Associates, Robert M. Ward, and Target Enterprises, Ltd. on May 11, 1998. We recommend that you reference these subpoenas in your Report so that there is a record of this activity.

Moreover, two of the subpoenas have not yet been fully complied with and additional documentation is expected which may have an impact on your findings. Therefore, we recommend that you consider withholding the findings in sections III.A.3.a., b. and c. (Payroll) and III.A.5. (Polling Expenses),[49] or portions thereof, if the outstanding documentation cannot be incorporated into this Report. Once the information is obtained, the Commission can issue addenda to the Audit Report. 11 C.F.R. § 9038.1(d)(3). The addenda can include additional repayment determinations. 11 C.F.R. § 9038.1(d)(3); *see* 11 C.F.R. § 9038.2(f). Further, the Commission could consider the information in connection with any subsequent inquiry pursuant to 26 U.S.C. § 9039 and 11 C.F.R. § 9039.3. These procedural options should be considered in light of the requirement that repayment determinations be more than a "progress report" and must satisfy the repayment notification requirement. *See Simon v. FEC,* 53 F.3d 356, 359 (D.C. Cir. 1995). *See also Fulani v. FEC,* 147 F.3d 924, 926 (D.C. Cir. 1998) (repayment determinations must be "the product of a 'thorough examination and audit'"). The lack of documentation is especially relevant with respect to your findings at sections III.A.3.b.-c. (Other Employees and Consultants) where you conclude that expenditures made by the Republican National Committee to certain consultants and other employees are attributable to the Primary Committee's overall expenditure limitation based primarily on the unusual timing of the RNC's hiring of these individuals. The Commission is continuing to seek documents from the RNC that would provide information on the type of work performed by these individuals.*

[49] The supoenas seek information related to polling expenditures discussed in the proposed Audit Report, as well as information related to polling expenditures that are in addition to those already discussed in the Audit Report.

* Similar evidentiary problems may not exist with the related findings on advance staff (section III.A.3.a. (Advance Staff)) since the RNC advance staff's appearance on Primary Committee travel itineraries is persuasive evidence that the individuals were working for the Primary Committee.

II. RNC EXPENDITURES FOR MEDIA (III., A., 4.)

The proposed Audit Report attributes media expenditures paid for by the RNC on behalf of Senator Dole's campaign to the Primary Committee's overall expenditure limitation.[50] The proposed Audit Report recommends that the Commission find that the RNC paid a total of $18,453,619 directly and through Republican state party committees for media expenditures on behalf of the Dole campaign for advertisements that aired between April 1996 and August 1996. This recommendation is based on your conclusion that there is evidence that the campaign staff and consultants coordinated with the RNC regarding the creation and placement of the media advertisements that appear to contain an "electioneering message" and references to a "clearly identified candidate."[51]

This Office concurs with the proposed Report's recommendation that some of the cost of the advertisements paid for by the RNC on behalf of the Dole campaign should be added to the expenditures subject to the Primary Committee's overall expenditure limitation; however, as noted below, we also recommend that the proposed Audit Reports be revised to attribute some of the media expenditures to the General Committee's expenditures subject to its expenditure limitation.[52] Moreover, this Office concurs that, as a result, and in combination with other

[50] The Primary Committee argues that "If the Audit Division believes that an excessive contribution was made [by the RNC to the Primary Committee], the proper procedure is to . . . let the Commission decide whether to pursue the matter in an enforcement action." Generally, a finding can be a part of an audit report regardless of whether it is part of an enforcement action. It is well established that audits related to repayments under the Presidential Election Campaign Fund Act ("Fund Act"), 26 U.S.C. §§ 9001, *et seq.*, and the Presidential Primary Matching Payment Account Act ("Matching Payment Act"), 26 U.S.C. §§ 9031, *et seq.*, and enforcement investigations related to violations of the Federal Election Campaign Act ("FECA" or "the Act"), 2 U.S.C. §§ 431, *et seq.*, are separate and independent processes. *See Reagan Bush Comm. v. FEC,* 525 F. Supp. 1330, 1337 (D.D.C. 1981) (noting that "repayment determinations are not considered to involve violations of law . . . the procedure leading to repayment determinations which includes the audit process and the procedure for enforcing violations of the [Fund Act] and FECA are treated as two different functions under the statutory scheme and by the FEC in practice"). Moreover, the Commission has authority to examine a committee's compliance with FECA during its audits. *See* 11 C.F.R. § 9038.1(b)(2)(iii). Further, in *Bush-Quayle '92 Primary Comm., Inc. v. FEC,* 104 F.3d 448, 451 (D.C. Cir. 1997), the Court of Appeals explicitly noted that the audit finding at issue in that case presupposed a violation of federal election law, but it did not question the propriety of such an audit finding.

[51] There are grounds on which to conclude that the subject RNC advertisements are in-kind contributions to the Dole campaign separate from the coordination/content analysis. The RNC used Primary Committee film footage in its advertisements and therefore financed "the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents." 2 U.S.C. § 441a(a)(7)(B)(ii). This use of "campaign materials ... shall be considered to be to be an expenditure for purposes of this paragraph " (e.g. a coordinated expenditure and a contribution to the relevant candidate). *Id.* The Primary Committee acknowledges the RNC's limited use of certain footage, but states that "the RNC made a decision independent of the campaign to use that footage in its ad and entered into an 'arms-length' agreement" to purchase the footage from the Primary Committee.

[52] *See* Part II.C. *infra.* According to the proposed Audit Report, an allowance has already been made for a contribution from the RNC to the Primary Committee for the full amount permitted under 2 U.S.C. § 441a(a)(2).

findings that add expenditures to the overall expenditure limitation, the Primary Committee exceeded its expenditure limitation. 2 U.S.C. § 441a(b)(1)(A) and (c); 26 U.S.C. § 9035(a). Further, we concur with the recommendation that the Commission determine that the Primary Committee must make a *pro rata* repayment for non-qualified campaign expenditures in excess of the expenditure limitation.

The overall expenditure limitation for candidates receiving public funds for the primary election is set forth at 2 U.S.C. § 441a(b)(1)(A), (c) and 26 U.S.C. § 9035(a), and at 2 U.S.C. § 441a(b)(1)(B) and (c) for the general. *See also* 11 C.F.R. §§ 110.8(a); 9035.1(a)(1). An expenditure is made on behalf of a candidate, and thus subject to the expenditure limitation, if it is made by an authorized committee or any other agent of the candidate or any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure. 2 U.S.C. § 441a(b)(2)(B). Because the statute requires that expenditures made by others at the campaign's request be subject to the expenditure limitation, this Office believes that it is appropriate to apply the RNC expenditures to the Primary or General Committee's expenditure limitation as long as the expenditures were "knowingly incurred in connection with the candidate's campaign for the nomination." 26 U.S.C. §§ 9003(b); 9035(a); *see also* Statement of Reasons Supporting Final Repayment Determination in Dole for President (February 6, 1992) (Commission concluded that in-kind contributions from a political committee to a presidential committee are subject to the state expenditure limitation). The evidence of coordination between the RNC and the Dole campaign with regard to the media expenditures establishes that the Dole campaign knowingly incurred the expenditures.

A. RNC's Coordination with Dole Campaign

As noted above, your recommendations are based on the conclusion that the RNC's media expenditures were coordinated with the Dole campaign and the advertisements contained an electioneering message with reference to a clearly identified candidate. Thus, we begin our analysis with the question of whether the RNC's expenditures for media were "made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents."[53] 2 U.S.C. § 441a(a)(7)(B)(i); *Buckley v. Valeo*, 424 U.S. 1, 78 (1976) (the term "contribution" includes "all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate"); *see* 11 C.F.R. § 109.1(b)(4). Congress's decision to treat coordinated expenditures as in-kind contributions was designed to prevent and limit the opportunities for corruption and the appearance of corruption inherent in coordinated activity. The *Buckley* Court stated that the absence of prearrangement or coordination of an expenditure "alleviates the danger that expenditures will be given as a *quid pro quo* for improper

[53] The statute's inclusion of authorized political committees, agents of the candidate and agents of the committees establishes that a finding of coordination can be based on the activities of any of these actors. Such a finding does not require candidate involvement.

commitments from the candidate." 424 U.S. 1, 47 (1976). The reverse is equally true – the presence of prearrangement or advance coordination of an expenditure between a candidate or his or her committee or agents and the person making the expenditure presents a danger of an illicit *quid pro quo* like a contribution of money. The Commission must consider all of the facts and circumstances to determine whether the quantity and substance of contacts between a candidate and a person, entity or political committee compromised the independence of an expenditure and transformed it into a coordinated expenditure pursuant to 2 U.S.C. § 441a(a)(7)(B)(i).

In defining independent expenditures related to communications that include express advocacy, the Federal Election Campaign Act ("FECA" or "the Act"), 2 U.S.C. §§ 431, *et seq.*, describes the quantity and substance of contact that defeats the independence of the expenditure. 2 U.S.C. § 431(17). To be independent, an expenditure must be made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and it must not be made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate. *Id.* The Commission's regulation on this subject states that any arrangement, coordination, or direction by the candidate or his or her agent prior to the communication is sufficient to defeat the independence of an expenditure and to render the expenditure a contribution to the candidate. 11 C.F.R. § 109.1(b)(4) and (c).

While the line has not always been clear, the Commission has provided some guidance on the quantity and substance of contacts that constitute coordination.[54] For example, the Commission has taken the approach in some case that passing any information about a candidate's plans, projects or needs from the campaign to the expending person may trigger a conclusion of coordination that compromises the independence of an expenditure.[55] However, in

---

[54] *See, e.g.,* 11 C.F.R. § 114.2(c) (any coordinated communications may negate the independence of any subsequent communications). *See also* 11 C.F.R. § 114.4(c)(5) (concerning voter guides that include express advocacy: any contact or other cooperation, coordination, consultation, request, or suggestion will result in a contribution. Concerning voter guides that do not include electioneering messages: any contact other than written exchanges about the candidate's positions on issues will result in a contribution); *but see Clifton v. FEC,* 114 F.3d 1309 (1st Cir. 1997), *cert. denied,* 118 S. Ct. 1036 (1998)(declaring 11 C.F.R. § 114.4(c)(5) invalid under First Amendment insofar as it limited contact with candidates to written inquiries and replies). *Cf.* 62 Fed. Reg. 24,367 (May 5, 1997) (notice of proposed rulemaking regarding the definition of coordination to be codified at 11 C.F.R. § 100.23).

[55] *See, e.g.,* MUR 3918 (Hyatt for Senate) (supporting probable cause determination, coordination found where advertisements, ostensibly for a candidate's law firm, were written by the campaign's media adviser and approved by the candidate); MUR 3192 (Orton for Congress) (supporting probable cause determination, coordination found where an *ad hoc* citizens' group attacked a candidate's opponent where member of group had formerly been a policy advisor to the candidate in the same election cycle and the group learned from the candidate that he would not publicly attack his opponent on allegations raised by group and that the candidate did not want the allegations raised); Advisory Opinion ("AO") 1996-1 (coordinated endorsements by a trade association may compromise its ability to make subsequent independent expenditures); AO 1984-30 (coordinated in-kind contributions in the primary election precluded independent expenditures regarding same candidates in the general election); *FEC v. National Conservative PAC,* 647 F. Supp. 987, 990 (S.D.N.Y. 1986) (use of common campaign strategist constitutes coordination).

other cases, the Commission has not pursued matters where contacts between a candidate and an expending person resulted in changes to the content of a specific communication.[56]

In discussing the quantity and substance of contact necessary to impair the independence of an expenditure and constitute coordination, the United States Supreme Court recently stated that there was not coordination in a situation that lacked a "general or particular understanding." *FEC v. Colorado Republican Fed. Campaign Comm.* 518 U.S. 604, 614 (1996)(plurality op.).[57] This Office believes that the phrase was intended to convey a realistic understanding of the concept of coordination that is broad enough to effectuate the statute's purpose of limiting real or apparent corruption without violating First Amendment rights. While some "general understanding" regarding the expenditures may be necessary, requiring a specific agreement in every case would allow expending persons to make "independent" expenditures after extensive consultation with the candidate or committee about plans, projects, activities and needs, so long as the campaign had no approval of the final content or timing of the communication. Indeed, it might then be more difficult to prove that an expenditure was "coordinated" and therefore a contribution -- a statutory structure intended to broadly limit opportunities for illicit *quid pro quos* -- than it would be to prove the *quid pro quos* themselves under criminal bribery and extortion statutes such as the Hobbs Act, 18 U.S.C. § 1951. *See Evans v. United States,* 504 U.S. 255, 274 (Kennedy, J., concurring) ("The official and the payor [in a Hobbs Act bribery/extortion case] need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods."). Such a situation would be at odds with the purpose of 2 U.S.C. § 441a(a)(7)(B)(i) -- to avert real or apparent corruption.

The Primary Committee argues for a much narrower interpretation of 2 U.S.C. § 441a(a)(7)(B)(i); it maintains that only expenditures that are directed and controlled by a campaign are coordinated expenditures pursuant to 2 U.S.C. § 441a(a)(7)(B)(i). According to the

---

[56] *See, e.g.,* MUR 4282 (Archdiocese of Philadelphia), where it was alleged that after a candidate's committee received word that the Archdiocese's planned voter guide misstated the candidate's record and put him in no better light than his opponent, a representative of the candidate contacted the Archdiocese to complain, and as a result, the Archdiocese changed the voter guide. Although that case involved admitted contact between a candidate's representative and an expending person that was about, and resulted in changes to, the content of a specific communication, the Commission was divided 3-2 on a motion to find reason to believe that violations of the Act occurred. *See also* MUR 4116, Statement of Reasons of Chairman Joan D. Aikens and Commissioner Lee Ann Elliott, 3 (June 4, 1998) ("we would not agree that mere inquiries, without a meeting of the minds of two or more persons on a course of action resulting in expenditures, is sufficient for coordination").

[57] The Supreme Court's holding in *Colorado Republicans* was that the First Amendment prohibits the presumption that national party committee's expenditures are coordinated with its congressional candidates. *Colorado Republicans,* 518 U.S. at 608. The Supreme Court expressly limited its holding, stating: "Since this case involves only the [FECA] provision concerning congressional races, we do not address issues that might grow out of the public funding of Presidential campaigns." *Id.,* 518 U.S. 604, at 612; *see also RNC v. FEC,* 487 F. Supp. 280, 284-87 (S.D.N.Y.) (Congress may condition public funding eligibility upon candidate's voluntary acceptance of expenditure limits), *aff'd mem.* 445 U.S. 955 (1980). However, the Supreme Court did not specify to which public financing issues it was referring. Of course, the conclusion in the proposed Audit Report that the RNC's media expenditures were coordinated with the Dole campaign is based on the facts, not on any presumption.

Primary Committee, the RNC "independently designed, produced, and aired" the advertisements "without direction from the candidate or campaign" and the RNC had "full and final authority over both the production and the geographic distribution of the ads." The Primary Committee adds that its only involvement with the "production or airing of the ads" was when, "as a matter of courtesy, [the RNC] showed the ads to the campaign after the ads were finalized and made public." In addressing the role of Don Sipple, the Primary Committee's media consultant, in the RNC advertising campaign, the Primary Committee states that "when the ads at issue were created, produced and aired, Mr. Sipple was being directed by and his legal duty was to the RNC."

We concur with the Report's conclusions on coordination and believe that the RNC's expenditures were "made . . . in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents." 2 U.S.C. § 441a(a)(7)(B)(i). The record in the audit includes evidence of substantial communication between the RNC and the Dole campaign on every facet of the media campaign. Thus, there is sufficient evidence of coordination between the RNC and the Dole campaign to support the Audit staff's conclusion that the RNC media expenditures were in-kind contributions to the Primary or General Committees. The evidence of coordination that the Report details is such that it is difficult to distinguish between the activities of the RNC and the Dole campaign with respect to the creation and publication of the media advertisements at issue.

Documents and other evidence available to the Commission indicate that campaign officials were provided with, *inter alia*, the following RNC advertising campaign materials: copies of first drafts of advertisement scripts, copies of revised drafts of advertisement scripts; copies of focus group summaries where potential advertisements were screened and reviewed; copies of polling results relating to the advertisements' effect on the popularity of Senator Dole and President Clinton; and memoranda relating to which advertisements should, or would, be broadcast in which markets on which dates. Documents and other evidence available to the Commission also establish that Senator Dole's campaign manager, Scott Reed, attended weekly meetings with RNC personnel where he actively participated in discussions about, *inter alia*, RNC advertising content and about where the RNC ought to run advertisements.

Moreover, evidence indicates that many of the RNC advertisements were produced by Don Sipple, who was employed by Senator Dole's campaign at various points during the campaign as chief media consultant. Additionally, Anthony Fabrizio, another senior Dole consultant and pollster, also consulted and conducted polls for the RNC. The key role of these individuals for both the RNC and the Dole campaign is evidence of coordination. *Cf.* 11 C.F.R. § 109.1(b)(4)(i)(B). Thus, the facts set forth in the proposed Audit Report are sufficient to support a conclusion that the media expenditures made by the RNC were "made . . . in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents." 2 U.S.C. § 441a(a)(7)(B)(i).

B. Content of Advertisements Paid for by the RNC

The next question in determining whether a media expenditure by a national committee is an in-kind contribution is whether the content of the advertisement constitutes an "electioneering message" and references a "clearly identified candidate."[58] *See* AOs 1985-14; 1984-15. In order to determine if the advertisement includes an electioneering message and references to a clearly identified candidate, the Commission will consider the purpose, content and timing of the advertisements at issue.

The Commission first set forth the clearly identified candidate/electioneering message standard in AO 1984-15 and AO 1985-14. In AO 1984-15, the Commission determined that two television advertisements which the RNC proposed to broadcast had "[t]he clear import and purpose . . . to diminish support for any Democratic Party presidential nominee and to garner support for whoever may be the eventual Republican Party nominee" and "effectively advocate the defeat of a clearly identified candidate." The Commission concluded that because the "expenditures for these advertisements benefit the eventual Republican presidential candidate and are made with respect to the presidential general election and in connection with the presidential general election campaign," the expenditures would be reportable either as contributions subject to the limitation set forth at 2 U.S.C. § 441a(a)(2)(A), or as coordinated party expenditures subject to the limitation set forth at 2 U.S.C. § 441a(d).

AO 1985-14 involved television, radio and print advertisements, and mailers, which the Democratic Congressional Campaign Committee ("DCCC") proposed to publish, and which purported to describe Republican policies. Citing AO 1984-15, the Commission concluded that amounts used to fund the communications would be expenditures subject to the limitation set forth at 2 U.S.C. § 441a(d) if the advertisement funded by that amount "(1) depicted a clearly identified candidate and (2) conveyed an electioneering message." The Commission cited *United States v. United Auto Workers,* 352 U.S. 567, 585, 587 (1957), in which the Supreme Court stated that advertisements "designed to urge the public to elect a certain candidate or party" constitute an "expenditure in connection with any federal election."[59] Applying this standard, the Commission determined that advertisements which referred to "the Republicans in Congress" were not subject to limitation under 2 U.S.C. § 441a(d), regardless of whether the advertisement closed with the statement "Vote Democratic." The Commission also concluded that advertisements which referred to "your Republican Congressman" were not subject to limitation under 2 U.S.C. § 441a(d), if the advertisement did not close with the statement "Vote Democratic." However, the Commission on a tie vote was unable to decide whether advertisements which referred to "your Republican Congressman" and which closed with the

---

[58] The Act defines "clearly identified" as meaning "(A) the name of the candidate involved appears; (B) a photograph or drawing of the candidate appears; or (C) the identity of the candidate is apparent by unambiguous reference." 2 U.S.C. § 431(18); *see also* 11 C.F.R. § 100.17.

[59] In *United States v. United Auto Workers,* the Supreme Court defined "expenditure in connection with any election" as used in section 304 of the Taft-Hartley Act. 352 U.S. at 582.

statement "Vote Democratic" were subject to limitation under 2 U.S.C. § 441a(d). Finally, the Commission concluded that the costs of production and distribution of the proposed mailer would be subject to limitation under section 441a(d). Because the advertisements in this audit identify specific Republican and Democratic candidates for President, these advertisements are akin to the proposed mailer at issue in AO 1985-14, in which the DCCC intended to identify specific congressmen by name. Based on its understandings that the proposed mailers would identify particular congressmen by name, and that the distribution of the mailer would include all or part of the district represented by the congressman identified in that mailer, the Commission concluded that the costs of production and distribution would be subject to limitation under the Act.

In AOs 1984-15 and 1985-14, the Commission considered the purpose, content, and timing of the advertisements at issue. The Commission's determination that the costs of the proposed mailer were subject to limitation under section 441a(d) was based on the Commission's assumptions that the mailer would identify particular congressmen by name, and that the distribution of the mailer would include all or part of the district represented by the congressman identified in that mailer. As to timing, the Commission considered the proposed dates on which the advertisements were to be run, stating that the "proposed program is for the purposes of influencing the 1986 election process," "emphasiz[ing] that this opinion is limited to the timetable you have specified." The Commission's reference to the place and the timing of the communicative activity makes clear that the determination whether spending for a particular communication contains an electioneering message requires consideration of the context in which the communication is published.[60] The Commission also considered the purpose of the advertisements. In AO 1985-14 the Commission explicitly relied on the representation that the media program had "the clear purpose of influencing voter perceptions of these candidates with a view toward weakening their positions as candidates for re-election." Similarly, in AO 1984-15, the conclusion that the proposed television advertisements were subject to regulation as contributions or coordinated party expenditures was explicitly based, in part, on the opinion that "the clear import and *purpose* of [the] proposed advertisements [was] to diminish support for whoever may be the presidential nominee and to garner support for whoever may be the eventual Republican Party nominee."[61]

---

[60] The Commission in AO 1985-14 assumed that the media campaign was developed without cooperation or consultation with any candidate, and based the theory that the limitations under 2 U.S.C. § 441a(d) apply to party expenditures irrespective of actual coordination with a candidate. AO 1984-15 involved a RNC media campaign which, in the view of the Commission, was intended to benefit "the eventual Republican Party nominee [for President]." Thus, AOs 1985-14 and 1984-15 both involved media campaigns which had a purpose of influencing the election of certain candidates, but which were implemented without coordination with the candidate. Both AO 1984-15 and 1985-14 were issued prior to the Supreme Court's 1996 decision, *Colorado Republicans.*

[61] In another opinion, AO 1995-25, the Commission concluded that costs related to advertisements focusing on national legislative activity and the promotion of the Republican Party were allocable between the Republican Party's federal and nonfederal accounts pursuant to 11 C.F.R. § 106.5(b)(2)(i) and (ii). Unlike the situation in AO 1995-25, here the content of the media campaign, the coordination between Dole campaign officials and the RNC, and the content of the advertisements together reveal that the purpose of the advertising campaign was to influence the election of Senator Dole. Moreover, the Commission in AO 1995-25 explicitly declined to address the

As noted, the FECA permits limited coordinated expenditures to be made by party committees "in connection with general election campaign[s] of candidates for federal office," including expenditures for communications such as media advertising. 2 U.S.C. § 441a(d). The Supreme Court, in *Colorado Republican,* did not address the appropriate measure of the content of such communications. However, the Court of Appeals in its earlier decision in *FEC v. Colorado Republican Federal Campaign Comm.,* 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded on other grounds,* 518 U.S. 604 (1996) (plurality op.), expressly deferred to the Commission's long standing "construction of § 441a(d) as regulating political committee expenditures depicting a clearly identified candidate and conveying an electioneering message." 59 F.3d at 1022 (citing AO 1984-15). The Court of Appeals relied not upon particular language in the communication, but rather upon the overall impact of the message as one intended to "garner support" for one candidate and to "diminish support" for another. 59 F.3d at 1023.

The Primary Committee argues that the Audit Division did not apply the "express advocacy" test. However, the Commission has not required express advocacy in order to determine that a coordinated disbursement is a contribution or, in the case of coordinated party expenditures, subject to the limitations of 2 U.S.C. § 441a(d). The *Buckley* Court applied the "express advocacy" test only in the limited context of independent expenditures, 424 U.S. at 40-44, 78-79, and no court has, without being overruled by a higher court, required application of the express advocacy test to anything other than independent expenditures.[62] The Supreme Court in *Buckley* recognized a distinction between independent expenditures and expenditures for communications that are authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, and held that the latter are to be treated as expenditures of the candidate and contributions by the person or group making the expenditure. 424 U.S. at 46-47, n. 53. The Court explained that coordinated expenditures are treated as in-

---

issue whether or not the proposed advertisements contained an electioneering message, stating that "[t]he Commission relies on [the requesting party's] statement that those advertisements that mention a Federal candidate or officeholder will not contain any electioneering message. In view of this representation, the Commission does not express any opinion as to what is or is not an electioneering message by a political party committee." AO 1995-25 at n.1. Moreover, the Commission explicitly left open the possibility that the advertisements might be subject to section 441a(d), stating its conclusion that "legislative advocacy media advertisements that focus on national legislative activity and promote the Republican Party should be considered as made in connection with both Federal and non-federal elections, unless the ads would qualify as coordinated expenditures on behalf of any general election candidates of the party under 2 U.S.C. § 441a(d)."

[62] Another reason to limit the express advocacy test to independent expenditures is that not all coordinated expenditures are communicative. For instance, if a supporter provided aircraft charter service to a publicly funded candidate's campaign, in coordination with the campaign, the supporter has made an in-kind contribution and an expenditure. This is consistent with the definition of "expenditure" at 2 U.S.C. § 431(9)(A) and with 2 U.S.C. § 441a(a)(7)(B)(i), which provides that coordinated expenditures are contributions. Yet, there is surely no "express advocacy" in the provision of the aircraft charter services to the campaign. As the *Colorado Republicans* Court noted the similarities between coordinated expenditures and other kinds of contributions are similar: "many [coordinated] expenditures are also virtually indistinguishable from simple contributions (compare, for example, a donation of money with direct payment of a candidate's media bills)." 518 U.S. at 624.

kind contributions subject to the contribution limitations in order to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." 424 U.S. at 46-47.

Furthermore, the vagueness concerns that caused the Supreme Court to apply the express advocacy test to independent expenditures in *Buckley* and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986),[63] are not present in the case of coordinated expenditures. The *Buckley* Court was concerned that the requirements of the FECA, for disclosure of independent expenditures above a certain dollar threshold "could be interpreted to reach groups engaged purely in issue discussion." 424 U.S. at 79. However, because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application," *id.* at 42, it would be difficult to know in advance without the express advocacy standard whether a given independent communication had a sufficient nexus to a Federal election to be subject to the Act; but in the case of a coordinated communication some of the required nexus to a Federal election may be found in the act of coordination itself. *See id.* at 78 ("So defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign").

Moreover, the application of a strict "express advocacy" test to coordinated expenditures would undermine the statutory purpose of protecting the electoral process from real or apparent corruption. The *Buckley* Court noted that:

> It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign. Yet no substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office.

Buckley, 424 U.S. at 45. The Supreme Court went on to say that the independent expenditure limitations were, in any event, not necessary to close a loophole in the Act's contribution limitations, because the Act treated coordinated expenditures as contributions, thus closing the loophole. *Id.* at 45-46. Thus, express advocacy only applies to independent expenditures.

The advertisements in question in this audit "clearly identify" Senator Dole, or in some cases, President Clinton, both candidates at the time the advertisements ran. Additionally, based on the texts of the advertisements, it appears that the advertisements contain an electioneering message. The texts contain phrases such as "Tell President Clinton you won't be fooled again"

---

[63] *See also California Medical Ass'n v. FEC,* 453 U.S. 182, 195 (1981) (plurality op.); *Akins v. FEC,* 101 F.3d 731, 741 (D.C. Cir. 1996) (en banc), *vacated on other grounds,* 118 S. Ct. 1777 (1998); *Orloski v. FEC,* 795 F.2d 156, 167 (D.C. Cir. 1986).

and "Bill Clinton, he's really something." These phrases may be designed to urge the public to elect a certain candidate. The advertisements feature Senator Dole and President Clinton, sometimes together and sometimes separately, and juxtapose their positions on certain political issues like the gas tax or on matters relating to personal behavior. The advertisement, "the Story," is unique in that it provides biographical facts about the candidate and describes his commendable personal characteristics in a manner that appears to serve to garner support for the candidate. For instance, the advertisement's focus on Senator Dole's military service is consistent with the reported campaign strategy to highlight his military record. *See* Katharine Q. Seelye, *Dole Says Veterans Are Better Americans*, N.Y. TIMES, August 15, 1996.[64] Although "the Story" references "Work for Welfare," "Criminal Justice Reform" and "Wasteful Washington Spending," there is no representation that these items are part of a legislative agenda. Additionally, as noted in the Report, the advertising campaign's purpose appeared to be designed to assist the Dole campaign and elect Senator Dole. One memorandum refers to broadcasting advertisements in "target presidential states," and poll results track the advertising's effectiveness by measuring Senator Dole's popularity versus President Clinton's. Therefore, this Office concurs with the proposed Audit Report's conclusions that the RNC and the Dole campaign coordinated media expenditures, that the advertisements contain an electioneering message and references to a clearly identified candidate, and that the advertisements should be considered an in-kind contribution to the Dole campaign.[65]

C. Treatment of Media Expenditures as Primary Expenditures

The proposed Audit Report applies the RNC media expenditures on behalf of Senator Dole's campaign to the Primary Committee's overall expenditure limitation. The magnitude of the activity involved raises the difficult question of whether these expenditures should be applied to the primary or general election expenditure limit.

The Office of General Counsel agrees with the Audit Division's conclusion that these media expenditures should be subject to attribution between the primary and general expenditure limitations according to the same analysis that a candidate's expenditures are attributed. 11 C.F.R. § 9034.4(e). Because the media expenditures were simultaneously in-kind contributions by the RNC and expenditures by the candidate, they are equivalent to and commingled with expenditures paid for by his authorized committee and are subject to the expenditure limitations. *See* 11 C.F.R. § 104.13(a); 2 U.S.C. § 441a(b) and (c); 26 U.S.C. § 9035(a). *Cf.* 11 C.F.R. § 109.1(c). This Office believes that the Commission's "bright-line" rules at 11 C.F.R. § 9034.4(e) for attribution of expenditures between the primary and general election limitations provide guidance for the attribution of the media expenditures, consistent

---

[64] Similarly, the advertisement's focus on Senator Dole's value system was also consistent with the Senator's reported campaign strategy of making character an issue. *See* Robert Shogan, *GOP Mounts Broad Attack on President's Character*, L.A. TIMES, June 18, 1996.

[65] *See infra* Part II., C. for a discussion of attribution to applicable expenditure limitation.

with the application of these rules to all expenditures subject to the expenditure limitations. Therefore, this Office reaches the conclusion that the media expenditures should be attributed between the primary and general expenditure limitations pursuant to 11 C.F.R. § 9034(e).

The Commission promulgated 11 C.F.R. § 9034.4(e) to establish a "bright line" cut-off date between primary and general election expenses "with regard to certain specific types of expenditures that may benefit both the primary and the general election." *See* Explanation and Justification for 11 C.F.R. § 9034.4(e), 60 Fed. Reg. 31,867 (June 16, 1995). The general "bright line" rule is that goods or services used exclusively for the primary or general election campaign are allocable to that election. 11 C.F.R. § 9034.4(e)(1). Otherwise, expenditures for media and other communications used for both the primary and general elections are attributed between the primary and general elections based upon whether the date of broadcast or publication is before or after the candidate's date of nomination. 11 C.F.R. § 9034.4(e)(6).

In adopting the rule, the Commission recognized that the application of the rules could result in the attribution of some primary-related expenditures to the general election expenditure limitations and *vice versa,* but reasoned that "these differences should balance themselves out over the course of a lengthy campaign." 60 Fed. Reg. 31,867 (June 16, 1995). The Commission has promulgated regulations based on the timing of the contribution in other contexts, such as the designation of contributions to the primary or general election. *See, e.g.,* 11 C.F.R. § 110.2(b)(2)(ii); *see also* 11 C.F.R. § 102.9(e). While 11 C.F.R. § 9034.4(e) does not explicitly discuss national party committees, the regulation applies to a publicly financed candidate's expenditures subject to the limitations, which include expenditures in the form of in-kind contributions.

This Office believes that the "bright line" regulations should apply because in-kind contributions are also expenditures by the recipient candidate. *See* 11 C.F.R. §§ 104.13(a)(1) and (2); 109.1(c). By coordinating with the Dole campaign and paying for media expenditures in order to influence the election of Senator Dole, the RNC made in-kind contributions to the candidate which were simultaneously expenditures by his campaign committees. *See* 2 U.S.C. §§ 431(8)(A)(i) and (9)(A)(i); 11 C.F.R. §§ 100.7(a)(1)(iii) and 110.8(a)(1)(iv)(A). The Commission treats in-kind contributions like any other expenditures by a publicly financed candidate. *See* Statement of Reasons, Senator Robert Dole and the Dole for President Committee, Inc. at 24 (February 6, 1992)(The Commission "generally allocates in-kind contributions to a [publicly financed] committee's expenditure limitation."). Moreover, the in-kind contributions are considered commingled with the candidate's other expenditures and subject to repayment: "[o]rdinarily, federal matching funds and private contributions are commingled in a committee's accounts. The Commission considers in-kind contributions to be part of this commingled pool of available funds." *Id.* at 25. Thus, all of a publicly financed candidate's expenditures, including expenditures in the form of in-kind contributions received, are considered commingled in the mixed pool of expenditures subject to the expenditure limitations. *See* 2 U.S.C. §§ 441a(b) and (c); 26 U.S.C. § 9035(a). The "bright line" rules should be applied consistently to all of a campaign's expenditures, including in-kind

contributions paid for by national party committees, in order to avoid having two identical media expenditures paid for and broadcast at the same time and made on behalf of a candidate's campaign treated as primary and general expenditures depending on whether the candidate or party committee paid for them.

Pursuant to 11 C.F.R. § 9034.4(e)(1), any expenditure for goods or services that are used exclusively for the general election campaign shall be attributed to the general election expenditure limits, which are set forth at 11 C.F.R. § 110.8(a)(2), as adjusted under 11 C.F.R. § 110.9(c). Based on the facts described in the proposed Audit Reports, some of the advertisements attempted to diminish support for President Clinton, but in no way referred to Senator Dole. Without any reference to any of the competitors in the primary election, these advertisements appear to have been used exclusively for the general election campaign. Such advertisements include: Case Study, Even More Talk, More, More Talk, Pledge, Stripes and Who. Because these seven advertisements apparently had a purpose only to diminish support for President Clinton and did so in a way that did not attempt to increase support for any of the candidates for the Republican nomination over the competitors for that party's nomination, the advertisements apparently were not used for the primary election campaign. Senator Dole became the inevitable nominee on March 26, 1996,[66] and it appears all of the advertisements were broadcast after that date. Because Senator Dole was the presumptive nominee and because these seven advertisements attempted to diminish support for his general election opponent, the advertisements were used exclusively for Senator Dole's general election campaign. Therefore, pursuant to 11 C.F.R. § 9034.4(e)(1), the expenditures related to the seven advertisements should be attributed to the expenditure limits of the General Committee.

Alternatively, as general election expenditures, the RNC would have been permitted to make such coordinated expenditures pursuant to 2 U.S.C. § 441a(d). Thus, the media expenditures related to the seven advertisements listed above can be considered coordinated party expenditures to the extent the RNC has not exhausted the applicable contribution limit at 2 U.S.C. § 441a(d), as adjusted by other findings in the proposed Audit Report. In order to attribute these media expenditures to the coordinated party expenditure limitation at 2 U.S.C. § 441a(d), the RNC must have made those expenditures directly or through its properly designated state party committees, and the RNC must have used funds raised in accordance with the limitations and prohibitions of the FECA. 11 C.F.R. § 110.7(a)(4). Any remaining amounts should be attributed to the General Committee's expenditure limitation. 2 U.S.C. § 441a(a)(1)(B) and (c). Therefore, we recommend that the proposed Audit Reports for the Primary and General Committees be revised in accordance with this discussion.

With respect to the expenditures related to the other three advertisements described in the proposed Audit Report, the Plan, Surprise and the Story, there is an argument that none of the media expenditures were used exclusively for the primary or exclusively for the general

[66] *See, e.g.*, R. Cook, Dole's Nomination Clinch Fits Reagan, Bush Molds, *Congressional Quarterly*, 897 (Mar. 30, 1996).

campaign. Rather, it can be argued that the advertisements were used for both the primary and the general elections. The Plan, Surprise and the Story all appear to have been used for both the primary and general election campaigns. Surprise depicts both Senator Dole and President Clinton and therefore it seems to have an obvious general election use, but also a primary election use of urging support for Senator Dole as the best choice for the Republican nomination because of his standing compared to the Republican nominee's ultimate opponent, the Democratic nominee.[67] *Cf.* Final Audit Report on Reagan Bush '84 Primary (July 7, 1986) (stating that expenditures to unify party or to help candidate retain delegates' support had a primary election purpose). The Story is a flattering portrayal of Senator Dole and it was broadcast prior to his nomination, both of which indicate a primary election use.[68] Because it was broadcast in states chosen based on Senator Dole's competitive standing against his general election opponent, the advertisement cannot meet the exclusively use test under 11 C.F.R. § 9034.4(e)(1). The Plan presents Senator Dole's position in a favorable light without reference to any of his primary or general election opponents.

Therefore, the three advertisements are not subject to attribution under the exclusive use tests of 11 C.F.R. § 9034.4(e)(1), but are instead attributed by broadcast date pursuant to 11 C.F.R. § 9034.4(e)(6).[69] Using this approach, based on the timing of these three advertisements, the related media expenditures were primary campaign expenditures that are allocable to the Primary Committee's expenditure limitations. 11 C.F.R. § 9034.4(e)(6). Therefore, this Office concurs with the finding in the Audit Report with respect to these three advertisements that the Primary Committee exceeded the expenditure limitation and the recommendation that the Commission determine that the Primary Committee must make a *pro rata* repayment of the excessive amount. 26 U.S.C. § 9038(b)(2).

The approach of subjecting national party committee in-kind contributions to attribution between the primary and general elections pursuant to 11 C.F.R. § 9034.4(e) does give rise to an anomaly regarding 2 U.S.C. § 441a(d) expenditures. As a result of applying 11 C.F.R. § 9034.4(e) to some of the media expenditures involved in this audit, advertisements that may have a sufficient general election purpose to have been permitted as section 441a(d) coordinated party expenditures but for section 9034.4(e)'s requirement that mixed purpose advertisements be attributed based on broadcast timing, should not be permitted as coordinated party expenditures

---

[67] In fact, some unsuccessful primary election candidates compare themselves not to their primary election opponents, but to their general election opponents and argue that they are their party's candidate most likely to defeat the other general election candidates. Nonetheless, the primary election purpose of such efforts is clear and is not eliminated by any candidate's success in the primary election.

[68] *See also* description in Part II., B. *supra.*

[69] Media production costs for media broadcast both before and after the date of nomination are split 50% to the primary and 50% to the general election. 11 C.F.R. § 9034.4(e)(5). Because it was broadcast before and after Senator Dole's nomination, production costs for the Plan should be attributed pursuant to 11 C.F.R. § 9034.4(e)(5). Distribution costs for the advertisement known as the Plan are discussed in Part VI *infra.*

and, instead, should be attributed to the Primary Committee's expenditure limit. We recognize that this consequence may be undesirable. If 11 C.F.R. § 9034.4(e) did not control the attribution of the media expenditures, AO 1984-15 would provide guidance. In that advisory opinion, which was issued before the promulgation of 11 C.F.R. § 9034.4(e), the Commission concluded that a national party committee could make coordinated party expenditures pursuant to 2 U.S.C. § 441a(d) on behalf of its "presumptive nominee" before the individual has received the official nomination. The Commission explained, "[a]lthough timing is relevant, the Commission does not view the timing of broadcast as controlling how expenditures for the advertisements should be treated for limitation and reporting purposes." AO 1984-15. Instead, "the proper analytical focus for attributing a national party expenditure between a primary and a general election campaign is whether the expenditure was made for the purpose of influencing the outcome of the general election or for the purpose of influencing the outcome of the nomination." *Id.* However, the advisory opinion applies only to 2 U.S.C. § 441a(d) expenditures, while 11 C.F.R. § 9034.4(e)(1) allocates expenditures exclusively related to an election to that election regardless of timing. Thus, we do not believe that the advisory opinion resolves the issue of how to attribute expenditures between the primary and general election limitations where the expenditures appear to have a mixed purpose related to both the primary and general elections. The Commission promulgated 11 C.F.R. § 9034.4(e) in order to resolve these kinds of situations.

Under a "functional" approach, an examination of the facts related to each advertisements could lead to an attribution of expenditures related to the advertisements between the primary and general election that reflected the relative purposes served by each advertisement. The Office of General Counsel believes that the better approach is to analyze these expenditures under 11 C.F.R. § 9034.4(e). To analyze each mixed purpose advertisement, including external events occurring at the time each was developed and aired, in addition to investigating activity leading to the creation of each particular advertisement, to determine which purpose predominated, would be a difficult undertaking. The Commission promulgated the "bright line" rules for expenditures having a mixed purpose in order to obviate the need to use its limited resources to perform such a time consuming task. This Office recommends that the audit report should be revised to apply 11 C.F.R. § 9034.4(e)(2) through (6), which allocate expenditures based on date, to any expenditures used for both Senator Dole's primary and general elections that were reported by the RNC as coordinated party expenditures pursuant to 2 U.S.C. § 441a(d). While this approach may seem to limit the RNC's ability to allocate expenditures under section 441a(d) before the candidate's date of nomination in apparent contradiction to the guidance provided by AO 1984-15, the exclusivity standard in 11 C.F.R. § 9034.4(e)(1) preserves the national party committees' ability to use coordinated party expenditures subject to 2 U.S.C. § 441a(d) prior to the nomination of their candidates. Finally, it is important to note that the repayment amount in these proposed Audit Reports is substantial not because of 11 C.F.R. § 9034.4(e)(1)'s limitation on 2 U.S.C. § 441a(d) to expenditures that are used exclusively for the general election. Instead, the repayment amounts are substantial due to the size of the RNC's in-kind contribution to the Primary Committee, which dwarfs either of the applicable contribution limits, whether it is for a $5,000 contribution to the Primary Committee

and, instead, should be attributed to the Primary Committee's expenditure limit. We recognize that this consequence may be undesirable. If 11 C.F.R. § 9034.4(e) did not control the attribution of the media expenditures, AO 1984-15 would provide guidance. In that advisory opinion, which was issued before the promulgation of 11 C.F.R. § 9034.4(e), the Commission concluded that a national party committee could make coordinated party expenditures pursuant to 2 U.S.C. § 441a(d) on behalf of its "presumptive nominee" before the individual has received the official nomination. The Commission explained, "[a]lthough timing is relevant, the Commission does not view the timing of broadcast as controlling how expenditures for the advertisements should be treated for limitation and reporting purposes." AO 1984-15. Instead, "the proper analytical focus for attributing a national party expenditure between a primary and a general election campaign is whether the expenditure was made for the purpose of influencing the outcome of the general election or for the purpose of influencing the outcome of the nomination." *Id.* However, the advisory opinion applies only to 2 U.S.C. § 441a(d) expenditures, while 11 C.F.R. § 9034.4(e)(1) allocates expenditures exclusively related to an election to that election regardless of timing. Thus, we do not believe that the advisory opinion resolves the issue of how to attribute expenditures between the primary and general election limitations where the expenditures appear to have a mixed purpose related to both the primary and general elections. The Commission promulgated 11 C.F.R. § 9034.4(e) in order to resolve these kinds of situations.

Under a "functional" approach, an examination of the facts related to each advertisements could lead to an attribution of expenditures related to the advertisements between the primary and general election that reflected the relative purposes served by each advertisement. The Office of General Counsel believes that the better approach is to analyze these expenditures under 11 C.F.R. § 9034.4(e). To analyze each mixed purpose advertisement, including external events occurring at the time each was developed and aired, in addition to investigating activity leading to the creation of each particular advertisement, to determine which purpose predominated, would be a difficult undertaking. The Commission promulgated the "bright line" rules for expenditures having a mixed purpose in order to obviate the need to use its limited resources to perform such a time consuming task. This Office recommends that the audit report should be revised to apply 11 C.F.R. § 9034.4(e)(2) through (6), which allocate expenditures based on date, to any expenditures used for both Senator Dole's primary and general elections that were reported by the RNC as coordinated party expenditures pursuant to 2 U.S.C. § 441a(d). While this approach may seem to limit the RNC's ability to allocate expenditures under section 441a(d) before the candidate's date of nomination in apparent contradiction to the guidance provided by AO 1984-15, the exclusivity standard in 11 C.F.R. § 9034.4(e)(1) preserves the national party committees' ability to use coordinated party expenditures subject to 2 U.S.C. § 441a(d) prior to the nomination of their candidates. Finally, it is important to note that the repayment amount in these proposed Audit Reports is substantial not because of 11 C.F.R. § 9034.4(e)(1)'s limitation on 2 U.S.C. § 441a(d) to expenditures that are used exclusively for the general election. Instead, the repayment amounts are substantial due to the size of the RNC's in-kind contribution to the Primary Committee, which dwarfs either of the applicable contribution limits, whether it is for a $5,000 contribution to the Primary Committee

under 2 U.S.C. § 441a(a)(2) or whether it is the amount remaining under 2 U.S.C. § 441a(d) for a coordinated party expenditure.

III. OVERALL EXPENDITURE LIMITATION AND THE REPAYMENT RATIO

With respect to the Primary Committee, the Commission may seek a *pro rata* repayment for the amounts spent in excess of the expenditure limitations. 11 C.F.R. §§ 9038.2(b)(1)(i) and (ii). Amounts in excess of the overall expenditure limitation are non-qualified campaign expenses. 11 C.F.R. § 9034.4(b)(2). The Commission may seek a repayment for non-qualified campaign expenses. 26 U.S.C. § 9038(b)(2). However, the non-qualified campaign expense or the amount in excess of the expenditure limitation is not composed of only expenditures that the RNC made on behalf of the Primary Committee, it is also composed of public funds. *See* 11 C.F.R. § 9034.4(a); *Kennedy for President Committee v. FEC*, 734 F.2d 1558, 1565 (D.C. Cir. 1984); *Reagan for President Committee v. FEC*, 734 F.2d 1569 (D.C. Cir. 1984). Therefore, when the Commission seeks a repayment for amounts in excess of the expenditure limitation, it is not capturing expenses paid by the RNC on behalf of the Primary Committee. Rather, the repayment for exceeding the expenditure limitation is an attempt "to 'recoup' only the federal funds used for unqualified expenditures." *Kennedy*, 734 F.2d at 1565. *See John Glenn Presidential Committee v. FEC*, 822 F.2d 1097, 1098 (D.C. Cir. 1987) ("The statutory recoupment remedy pursued by the FEC does not call back private spending; it does police the restrictions Congress placed on the expenditure of public moneys"). The regulations contemplate that the sum to be repaid for exceeding the expenditure limitation will equal the portion of the matching payments that was used for non-qualified purposes. 11 C.F.R. § 9038.2(b)(2).

The proposed Report raises a related issue of whether contributions made by the RNC to the Primary Committee are to be included in the total deposits when calculating the repayment ratio. The repayment ratio in the proposed Report is 0.21.[70] The Report includes all contributions, whether in-kind or monetary, in the mixed pool of public and private funds used in calculating the repayment ratio. The in-kind contributions are included in the repayment ratio's denominator as part of total deposits. This Office agrees that the method for calculating the repayment ratio in the proposed Audit Report is correct.

The regulations establish that the amount of a repayment shall bear the same ratio to the total amount determined to have been used for non-qualified campaign expenses as the amount of matching funds certified to the candidate bears to the candidate's total deposits, as of 90 days after the candidate's date of ineligibility. 11 C.F.R. § 9038.2(b)(2)(iii). Total deposits is defined

[70] We note that the Primary Committee's proposed Audit Report states a repayment ratio rounded to the nearest hundredth, while the proposed Audit Report for the Clinton/Gore '96 Primary Committee, Inc., states a repayment ratio rounded to the nearest hundred-thousandth. We recommend that you round and state the ratios consistently in the two proposed Audit Reports.

as all deposits to all candidate accounts minus transfers between accounts, refunds, rebates, reimbursements, checks returned for insufficient funds, proceeds of loans and other similar amounts. 11 C.F.R. § 9038.3(c)(2). However, the Commission's regulations do not explicitly state whether in-kind contributions are to be included in the denominator of the fraction for total deposits when calculating the repayment ratio.

The Office of General Counsel believes that the in-kind contributions that are attributable to the Primary Committee's expenditure limitation should be included in the denominator of the fraction for total deposits. The purpose of the repayment process is to recapture public funds used for non-qualified campaign expenditures. 11 C.F.R. § 9038.2(b)(2). Since federal matching funds and private contributions are commingled in the campaign fund, it is difficult to determine an absolutely accurate estimate of the amount of matching funds used for non-qualified purposes. *Kennedy,* 734 F.2d at 1565. In order to be as accurate as possible in recapturing public funds, in-kind contributions must be included in the denominator. The *Kennedy* Court noted that "by requiring repayment of 100 percent of the amount of unqualified expenditures, without at least estimating the extent to which such expenditures derived from matching funds sources, the Commission has shirked its statutory responsibility to make a reasonable determination that the repayment sum represents the matching funds used for unqualified purposes." *Id.* at 1562. Including in-kind contributions in the denominator for total deposits lowers the ratio of public funds to more accurately reflect the amount that can be recaptured as public funds spent in excess of the overall expenditure limitation.[71] Furthermore, in an example of a calculation of the repayment ratio based on surplus funds, the amount of in-kind contributions are included when determining total deposits and receipts of the committee. *See Financial Control and Compliance Manual,* at 67-68 (January 1996).

Footnote 19 of the proposed Audit Report notes that the RNC in-kind contributions are included in the repayment ratio calculation. However, it is unclear whether other in-kind contributions were included in the calculation. Therefore, we recommend that the proposed Audit Report be revised to note the amount and types of in-kind contributions that were included in the ratio calculation. In order to facilitate the discussion of this issue, this Office recommends that the Report include discussion on calculating the repayment ratio when a committee receives an in-kind contribution subject to the expenditure limitations.

With respect to the General Committee, any of these expenditures that are attributable to the General Committee's expenditure limitation and were not within the 2 U.S.C. § 441a(d) limitation are entirely repayable since publicly financed general election committees that receive the full public grant must repay the entire amount of a contribution. 26 U.S.C. § 9007(b)(3).

---

[71] According to the proposed Audit Report, the RNC's payment of media expenses, salaries, consulting payments, and other expenditures were determined to be in-kind contributions by the RNC to DFP. Footnote 49 of the proposed Audit Report states the figure that represents the repayment ratio.

IV. POLLING

With regard to the Audit Report finding on polling, the question arises whether 11 C.F.R. § 106.4 applies to polling activity paid for by the RNC. The Audit Report notes that the Primary Committee "was part of the planning for the RNC polling that was done between the end of March of 1996 and the convention," held on August 14, 1996. A significant portion of the polling appears to be related to the RNC's media expenditures. The RNC paid for focus groups that viewed and commented on potential advertisements and for tracking polls that measured the effectiveness of the advertising campaign over time. The Audit Report establishes that the polling was coordinated by, *inter alia*, a pollster who was simultaneously a consultant for both the Primary Committee and the RNC and that polling results were made available to the Primary Committee, which had otherwise stopped purchasing polls in March 1996.[72] This factual situation falls within the ambit of section 441a(a)(7)(B)(i) of the Act, which provides that an expenditure made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents shall be considered a contribution to such candidate. 2 U.S.C. § 441a(a)(7)(B)(i); *Buckley,* 424 U.S. at 78.

Section 106.4 appears to contemplate a situation in which poll results are purchased by a person not authorized by a candidate to make expenditures and are subsequently accepted by a candidate or a candidate's authorized committee or agent. *See* AO 1990-12 (Commission concluded that if campaign volunteer who previously commissioned and paid for survey for purposes unrelated to campaign, imparted poll results to campaign or used poll information to advise campaign, information would constitute in-kind contribution, the amount of which would be determined by Section 106.4).[73] Thus, if the expenditures for polling were not coordinated from the start, and polling information was shared only subsequent to it being obtained by the RNC, section 106.4 would apply to determine the amount of the contribution. 11 C.F.R. § 106.4.[74] While section 106.4 does not specifically address in-kind contributions resulting from coordinated expenditures, it would not be inconsistent to apply the regulation to allocate coordinated expenditures such as the polling expenditures at issue here. Since the RNC's payment of 100% of the polling expenditures was not correct and no attempt at allocation between the RNC and the Dole campaign was made, it is not necessary to reach the issue of how the polling costs should be allocated at this time.

---

[72] *See supra* note 1 and accompanying text (regarding polling information subpoenas).

[73] Poll results are considered to be accepted by a candidate if the candidate or the candidate's authorized political committee or agent (1) requested the poll results before their receipt; (2) uses the poll results; or (3) does not notify the contributor that the results are refused. 11 C.F.R. § 106.4(b)(1), (2), and (3). The regulation then delineates how the amount of such contribution will be determined. 11 C.F.R. § 106.4(e).

[74] We understand that in the audit for the Clinton/Gore '96 Primary Committee, Inc., the Audit Division has concluded that section 106.4 should apply to expenditures for certain polls shared between the Clinton Committee and the Democratic National Committee. If the facts in the Clinton and Dole situations are similar, you must use the same approach. If there are relevant factual distinctions, then alternative approaches for the two audits are justified.

V. OTHER REPAYMENTS: NON-QUALIFIED CAMPAIGN EXPENDITURES INCURRED IN THE POST EXPENDITURE REPORTING PERIOD

We concur with the Audit staff's conclusion that the costs of winding-down the Primary Committee and the General Committee should not be allocated entirely to the Primary Committee. Winding down expenses of $2,141,602 for both the Primary and General Committees were incurred between December 5, 1996 and July 31, 1998. The Primary Committee paid all of these costs. Pursuant to 11 C.F.R. § 9034.4(a)(3), costs associated with the termination of political activity, such as the costs of complying with the post election requirements of the Act and other necessary administrative costs associated with winding down the campaign including office space rental, staff salaries, and office supplies, shall be considered qualified campaign expenses. The regulation's use of "the campaign" refers to the primary election campaign, and not the general election campaign. Therefore, the winding down costs that are qualified campaign expenses for the Primary Committee pursuant to 11 C.F.R. § 9034.4(a)(3) are limited to winding down costs for the Primary Committee.[75]

Section 9034.4(a)(3) of the Commission's regulations provides that winding down costs are qualified campaign expenses. Therefore, the Primary Committee also has the burden of proving its expenditures are winding down costs as defined in 11 C.F.R. § 9034.4(a)(3). 11 C.F.R. § 9033.11. Because the winding down expenditures at issue include winding down expenditures for the General Committee, this Office believes that the Primary Committee has not met its burden of proof with respect to these expenditures. Due to the Primary Committee's failure to meet its burden, the Audit staff lacks a precise method to allocate the winding down expenditures between the Primary and the General Committees. However, because some winding down costs were for the purpose of winding down the Primary Committee's activity, we concur with the Audit staff's attribution of the winding down expenses equally to the Primary and the General Committees. Nevertheless, if the Committee can show through supporting documentation that another allocation method more accurately reflects the winding down expenses of the respective committees, the adjustments can be made accordingly.[76] *Cf.* Buchanan Statement of Reasons at 23 (Aug. 1, 1995) (winding down costs require some specificity).

---

[75] The Primary Committee acknowledges that some portion of the winding down expenses at issue relate to the termination of the General Committee's political activity.

[76] *See* 11 C.F.R. § 9038.2(c)(2) (committee may seek administrative review).

VI. COORDINATED EXPENDITURES (III.A.2.)

The Audit Report concludes that Republican National Committee expenditures totaling $936,245 that were reported as coordinated party expenditures under 2 U.S.C. § 441a(d) do not qualify as coordinated party expenditures pursuant to the statute since the expenditures were not made for the general election, but rather, were operating expenditures of the Primary Committee. Therefore, the Audit Report concludes that these expenditures are in-kind contributions to the Primary Committee and attributable to the Primary Committee's overall expenditure limitation.[77] Additionally, the proposed Audit Report states that the advertisement known as the Plan was broadcast by the RNC and the expenditures related to the distribution costs were reported as coordinated party expenditures subject to 2 U.S.C. § 441a(d).

As described *supra* in Part II.C., this Office believes that 11 C.F.R. § 9034.4(e) applies to in-kind contributions from the national party committees. Therefore, pursuant to 11 C.F.R. § 9034.4(e)(1), a national party committee can make coordinated party expenditures pursuant to 2 U.S.C. § 441a(d) prior to the nomination of its candidate only to the extent those expenditures meet the exclusive use test of 11 C.F.R. § 9034.4(e)(1). If the expenditures were for goods and services that were not used exclusively for the general election, then the expenditures must be attributed in accordance with 11 C.F.R. § 9034.4(e)(2) through (6). This Office recommends that the Audit Division amend its analysis to state and apply the exclusive use test of 11 C.F.R. § 9034.4(e)(1) to the expenditures. Most of the expenditures at issue do not appear to have been used exclusively for the general election. The proposed Audit Report should make clear that any expenditures that were not used exclusively for the general election under section 9034.4(e)(1) cannot be section 441a(d) coordinated party expenditures. With regard to the expenditures that do no meet the exclusive use test of section 9034.4(e)(1), the analysis should include the requirements of 11 C.F.R. § 9034.4(e)(2) through (6) and attribute the expenditures as provided in those provisions.

Finally, we recommend that the proposed Audit Report be revised to include the discussion of the RNC's coordinated party expenditures under 2 U.S.C. § 441a(d) for telephone service and equipment, and rent, renovations and related services currently addressed in Sections III.C. and III.D., to Section II.A.2. of the proposed Audit Report so that all of the RNC coordinated party expenditures are discussed in one section. This will provide administrative convenience as well as a comprehensive presentation of the expenditures at issue.

[77] The Audit staff identifies nine "Expense Categories" for which the Dole campaign received coordinated funds. These categories include: travel and event expenses, rent, overhead, speech writers and coaches, telephone expenses, polling, convention related travel and expenses, telemarketing and a miscellaneous category.

Staff assigned:

Peter G. Blumberg
Susan L. Kay
Tracey L. Ligon
J. Duane Pugh
Jamila I. Wyatt

FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 10, 1999

Senator Robert J. Dole
c/o Mr. Kenneth A. Gross, Esq.
Skadden, Arps, Slate, Meagher, & Flom
1440 New York Avenue, NW
Washington, D.C. 20005

Dear Senator Dole:

Attached please find the Report of the Audit Division on Dole for President, Inc. The Commission approved the report on June 3, 1999. As noted on page 3, the Commission may pursue any of the matters discussed in an enforcement action.

In accordance with 11 CFR §§9038.2(c)(1) and (d)(1), the Commission has made a determination that a repayment to the Secretary of the Treasury in the amount of $515,272 is required within 90 calendar days after service of this report (September 13, 1999).

Should you dispute the Commission's determination that a repayment is required, Commission regulations at 11 CFR §9038.2(c)(2) provide you with an opportunity to submit in writing, within 60 calendar days after service of the Commission's notice (August 13, 1999), legal and factual materials to demonstrate that no repayment, or a lesser repayment, is required. Further, 11 CFR §9038.2(c)(2)(ii) permits a Candidate who has submitted written materials to request an opportunity to address the Commission in open session based on the legal and factual materials submitted.

The Commission will consider any written legal and factual materials submitted within the 60 day period when deciding whether to revise the repayment determination. Such materials may be submitted by counsel if you so elect. If you decide to file a response to the repayment determination, please contact Kim L. Bright-Coleman of the Office of General Counsel at (202) 694-1650 or toll free at (800) 424-9530. If you do not dispute this determination within the 60 day period provided, it will be considered final.

The Commission approved Audit Report will placed on the public record on or about June 15, 1999. Should you have any questions regarding the public release of this report, please contact Ron Harris of the Commission's Press Office at (202) 694-1220.

Any questions you may have related to matters covered during the audit or in the audit report should be directed to Marty Kuest or Joe Stoltz of the Audit Division at (202) 694-1200 or toll free at (800) 424-9530.

Sincerely,

Robert J. Costa
Assistant Staff Director
Audit Division

Attachments:

Audit Report

FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 10, 1999

Mr. Allen Haywood, Assistant Treasurer
Dole for President, Inc.
c/o Mr. Kenneth A. Gross, Esq.
Skadden, Arps, Slate, Meagher, & Flom
1440 New York Avenue, N.W.
Washington, D.C. 20005

Dear Mr. Haywood:

Attached please find the Report of the Audit Division on Dole for President, Inc. The Commission approved the report on June 3, 1999. As noted on page 3, the Commission may pursue any of the matters discussed in an enforcement action.

In accordance with 11 CFR §§9038.2(c)(1) and (d)(1), the Commission has made a determination that a repayment to the Secretary of the Treasury in the amount of $515,272 is required within 90 calendar days after service of this report (September 13, 1999).

Should the Candidate dispute the Commission's determination that a repayment is required, Commission regulations at 11 CFR §9038.2(c)(2) provide the Candidate with an opportunity to submit in writing, within 60 calendar days after service of the Commission's notice (August 13, 1999), legal and factual materials to demonstrate that no repayment, or a lesser repayment, is required. Further, 11 CFR §9038.2(c)(2)(ii) permits a Candidate who has submitted written materials to request an opportunity to address the Commission in open session based on the legal and factual materials submitted.

The Commission will consider any written legal and factual materials submitted within the 60 day period when deciding whether to revise the repayment determination. Such materials may be submitted by counsel if the Candidate so elects. If the Candidate decides to file a response to the repayment determination, please contact Kim L. Bright-Coleman of the Office of General Counsel at (202) 694-1650 or toll free at (800) 424-9530. If the Candidate does not dispute this determination within the 60 day period provided, it will be considered final.

The Commission approved Audit Report will be placed on the public record on or about June 15, 1999. Should you have any questions regarding the public release of this report, please contact Ron Harris of the Commission's Press Office at (202) 694-1220.

Any questions you may have related to matters covered during the audit or in the audit report should be directed to Marty Kuest or Joe Stoltz of the Audit Division at (202) 694-1200 or toll free at (800) 424-9530.

Sincerely,

Robert J. Costa
Assistant Staff Director
Audit Division

Attachments:

Audit Report

CHRONOLOGY

DOLE FOR PRESIDENT, INC.,

Audit Fieldwork	1/13/97 - 3/16/98
Exit Conference Memorandum to the Committee	5/13/98
Response to Exit Conference Memorandum	7/28/98
Audit Report Approved	6/3/99

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 30, 2000

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence M. Noble
General Counsel

Kim Leslie Bright
Associate General Counsel

Lorenzo Holloway
Assistant General Counsel

Jamila I. Wyatt
Attorney

SUBJECT: Statement of Reasons for Dole for President, Inc. (LRA #467)

On October 19, 2000, the Commission rejected this Office's recommendation to determine that Robert J. Dole and Dole for President, Inc. must repay $283,481 for a surplus of funds. The Commission directed this Office to revise the draft Statement of Reasons in accordance with this decision and circulate the redraft for Commission approval.

Accordingly, attached for Commission approval is a revised draft Statement of Reasons. The attached Statement of Reasons supports the remaining $6,255 repayment determination for the use of public funds to defray non-qualified campaign expenses.

RECOMMENDATIONS

The Office of General Counsel recommends that the Commission:

1. Determine that Robert J. Dole and Dole for President, Inc. must repay $6,255 within 30 days to the United States Treasury pursuant to 26 U.S.C. § 9038(b)(2) and 11 C.F.R. § 9038.2(b)(2);

2. Approve the attached Statement of Reasons; and

3. Approve the appropriate letters.

Attachment
Proposed Statement of Reasons (attachments omitted)

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Robert J. Dole and	)	
Dole for President, Inc.	)	LRA #467

STATEMENT OF REASONS

On _____, 2000, the Federal Election Commission (the "Commission") determined that Robert J. Dole (the "Candidate") and Dole for President, Inc. (the "Primary Committee") must repay $6,255 to the United States Treasury. The Commission's repayment determination is based on the use of $20,231 in public funds to defray non-qualified campaign expenses. *See* 26 U.S.C. § 9032(9). The Committee is ordered to repay this amount to the United States Treasury within thirty (30) calendar days after service of this determination. *See* 26 U.S.C. § 9038(b)(2); 11 C.F.R. § 9038.2(d)(2). This Statement of Reasons sets forth the factual and legal basis for this Post Administrative Review Repayment Determination. 11 C.F.R. § 9038.2(c)(3).

I. INTRODUCTION

The Primary Committee registered with the Commission on January 12, 1995 as the principal campaign committee for Senator Robert J. Dole, a candidate for the 1996 Republican Party's nomination for the office of President of the United States. Attachment 1, at 3. Senator Dole was determined eligible to receive matching funds on May 31, 1995. *Id.* The Primary Committee received $13,545,771 from the United States Treasury for the purpose of seeking the Republican Party nomination. *Id.* The

Commission conducted an audit of the Primary Committee pursuant to 26 U.S.C. § 9038(a).

On June 3, 1999, the Commission approved the Audit Report and determined that the Primary Committee must repay a total of $289,736 to the United States Treasury. *See* Attachment 1.[1] The Commission's repayment determination was based on its findings that the Primary Committee had a surplus of funds in the amount of $916,828[2] and used $20,231 in public funds to defray non-qualified campaign expenses. 11 C.F.R. § 9038.2(b)(4) and (2).

On August 30, 1999, the Primary Committee submitted a written response to the Commission seeking an administrative review of the repayment determination and requesting an oral hearing as permitted under 11 C.F.R. § 9038.2(c)(2)(i).[3] Attachment 2. The Commission granted the Primary Committee's request for an oral hearing and heard an oral presentation by the Primary Committee on December 15, 1999. *See* Attachment 4. Following the oral hearing, the Primary Committee submitted additional documentation on December 22, 1999.[4] *See* Attachment 5.

---

[1] The repayment determination does not include a payment of $225,536 that the Commission determined was due to the United States Treasury for stale-dated checks. 11 C.F.R. § 9038.6.

[2] In the context of the Administrative Review, the Commission rejected a staff analysis recommending a repayment of $283,481 ($916,828 x .309198) for a surplus of funds resulting from the Primary Committee's payment of the Dole/Kemp '96, Inc.'s winding down expenses.

[3] On July 30, 1999, the Commission granted the Primary Committee a fifteen-day extension of time to respond to the Commission's repayment determination.

[4] The additional documentation was submitted as a follow-up to the oral presentation made to the Commission by both Dole for President, Inc. and Dole/Kemp '96, Inc. At the oral hearing, Dole/Kemp '96, Inc. contested a Commission determination that Dole/Kemp '96, Inc. must repay $3,168,097 to the United States Treasury. Inasmuch as the additional documentation submitted on December 22, 1999, relates only to issues addressed by Dole/Kemp '96, Inc., it is not discussed herein.

II. REPAYMENT NOTIFICATION

As a preliminary matter, the Commission addresses a procedural argument raised by the Primary Committee for the first time at its oral hearing. The Primary Committee argued that it was not timely notified of the Commission's repayment determination. Attachment 4 at 7-8. The Primary Committee challenged the timeliness of notification of the Commission's repayment determination as follows:

> ... we preserved our procedural and due process defenses, and we are preserving or making the argument herein that the notices for repayment are not timely at this point because we don't believe that the notices that had been provided to us in the form of the exit conference memorandum is sufficient to fulfill the three-year requirement under the statute.
>
> That was not ripe at the time of our response to the exit conference memorandum because we responded in August. The three-year period ran in November after that at that time, but we did preserve that right for both the committees ....

Attachment 4 at 7-8.[5] The Primary Committee's written response stated that in addition to the arguments contained in the written response, the Primary Committee "preserves all constitutional, procedural and jurisdictional claims that may be available to it." Attachment 2 at 1.

The Commission concludes that the Primary Committee failed to raise the issue of repayment notification in a timely fashion. Section 9038.2(c)(2)(i) of the Commission's regulations provide that a candidate who disputes the Commission's repayment

---

[5] As noted above, at the oral hearing, the Primary Committee stated that it did not believe that notice "in the form of the Exit Conference Memorandum" was sufficient, and that it responded to the Exit Conference Memorandum in August. The Commission presumes that the Primary Committee is referring to the Audit Report, not the Exit Conference Memorandum, with regard to its notification claim because it is the Audit Report, approved by the Commission on June 3, 1999, to which the Primary Committee responded in August 1999. It is also the Commission's issuance of the Audit Report, not the Exit Conference Memorandum, that constitutes notification for purposes of the 3-year notification requirement. *See* 11 C.F.R. § 9038.2(a)(2).

determinations shall submit in writing, within 60 calendar days after service of the Commission's notice, legal and factual materials demonstrating that no repayment, or a lesser repayment, is required. 11 C.F.R. § 9038.2(c)(2)(i). A candidate's failure to timely raise an issue in written materials will be deemed a waiver of the candidate's right to raise the issue at any future stage of proceedings including any petition for review filed under 26 U.S.C. § 9041(a). *Id.* However, the Primary Committee did not raise the issue of the Commission's repayment notification in its written response to the Commission's repayment determination. *See* Attachment 2.

Based on the Primary Committee's failure to raise its challenge with respect to the repayment notification in its written materials, the Commission concludes that the Primary Committee waived the right to present such challenge at the oral hearing or any future stage of proceedings pursuant to 11 C.F.R. § 9038.2(c)(2)(i). 11 C.F.R. § 9038.2(c)(2)(i). *See Americans for Robertson v. Federal Election Commission*, 45 F.3d 486, 491 (D.C. Cir. 1995); *see also Explanation and Justification for* § 9007.2(c)(2)(i), 60 Fed. Reg. 31864 (June 16, 1995) (Candidate's failure to timely raise an issue in the written materials presented pursuant to paragraph (c)(2)(i) will be deemed a waiver of the candidate's right to raise the issue at any future stage of the proceedings).

Although the Primary Committee claims that it raised the repayment notification issue in its written response, the Primary Committee's written response merely states that the Committee "preserves all constitutional, procedural and jurisdictional claims that may be available to it." Attachment 2 at 1. This catchall statement provides the Commission with no notice of the nature of the Primary Committee's challenges to the repayment determination as it brings within its ambit an endless array of possible arguments. Simply

including such a broad and vague prescription in the written response cannot be construed as having raised or preserved any particular issue inasmuch as this does not give the Commission timely notice of the nature of the challenges to its repayment determination as required by 11 C.F.R. § 9038.2(c)(2)(i).

The Commission notes, however, that it is not requiring a perfect pleading in a written response to a repayment determination. Nonetheless, the written response must be sufficient to place the Commission on timely notice as to the nature of the Primary Committee's challenges. *See Fulani for President v. Federal Election Commission*, 147 F.3d 924, 927 n.5 (D.C. Cir. 1998) (court denied Committee's petition for rehearing for not setting forth clear and convincing grounds why new questions of fact and law were not and could not have been presented during the earlier determination process, and the court noted that the Committee may have been barred from raising the new theory at the oral hearing pursuant to 11 C.F.R. § 9038.2(c)(2)(i) where the issue had been generally, but not specifically, raised by the Committee in its written submissions).

The Primary Committee also proffers the argument that the repayment notification issue was not "ripe" as justification for not raising the issue in its written response. Attachment 4 at 7-8. The Primary Committee appears to argue that the notification issue was not "ripe" until the 3-year notification period expired. However, the 3-year notification period expired on August 14, 1999, three years following the end of the primary matching payment period.[6] *See* 11 C.F.R. § 9032.6. Subsequently, on August

[6] The primary matching payment period ended on August 14, 1996, the date on which the Republican Party nominated Senator Dole as its candidate for the office of President of the United States. *See* 11 C.F.R. § 9032.6 (matching payment period may not exceed date on which party nominates its candidate). Thus, the Commission was required to notify the Primary Committee of any repayment determination on or before August 14, 1999. *See* 2 U.S.C. § 9038(c). On June 3, 1999, the Commission

30, 1999, the Primary Committee filed its written response to the Commission's repayment determination. Thus, the repayment notification period expired before the Primary Committee submitted its written response. Nevertheless, the Primary Committee did not raise the issue in its written response.[7] The Commission accordingly rejects the Primary Committee's assertion that the timeliness issue was not ripe.

III. NON-QUALIFIED CAMPAIGN EXPENSES

In the context of the Audit Report, the Commission determined that the Primary Committee made disbursements totaling $20,231 for non-qualified campaign expenses and must, therefore, repay $6,255 ($20,231 x .309198) to the United States Treasury. These non-qualified campaign expenses include a $4,000 refund of an unpaid contribution check, a $3,009 payment for the preparation of a United States Senate financial disclosure statement, $6,465 in payments to local jurisdictions for tax penalties, $1,703 in duplicate payments to two vendors, and $5,054 that was paid for the personal travel of campaign staff. Attachment 1 at 50. The Primary Committee's response challenges only the Commission's determination that the Primary Committee must repay $1,237 ($4,000 x .309198) for refunding an unpaid contribution and $930 ($3,009 x .309198) for paying for the preparation of a United States Senate financial disclosure statement, leaving a $4,088 ($13,222 x .309198) balance of unchallenged non-qualified campaign expenditures.

---

approved the Audit Report and determined that the Primary Committee must repay a total of $289,736 to the United States Treasury. *See* Attachment 1. The Audit Report, along with a letter from the Commission notifying the Primary Committee of its repayment determination, was mailed to the Primary Committee on June 10, 1999, and received by the Primary Committee by June 14, 1999, within the three-year notification period.

[7] As noted previously, the Commission granted the Primary Committee a fifteen-day extension of time to respond to the Commission's repayment determination.

The Commission reviewed the Primary Committee's response and concludes that the Primary Committee must repay $6,255 for its use of funds to defray non-qualified campaign expenses, including $1,237 for the refunded contribution, $930 for the preparation of the financial statements, and $4,088 for the balance of unchallenged non-qualified campaign expenses.

A. Refund of a Contribution

In the context of the Audit Report, the Commission determined that the Primary Committee's disbursement of $4,000, purportedly paid by the Primary Committee to refund an excessive contribution check that was never paid to the Primary Committee due to insufficient funds in the contributor's account, was a non-qualified campaign expense and, therefore, repayable to the United States Treasury.

In its written response to the repayment determination, the Primary Committee argues that it is unfair to require a repayment in connection with a disbursement that it made to purportedly refund the excessive portion of a contribution. The contribution was in excess of the contribution limitation of the FECA. Attachment 2 at 2-3. The Primary Committee explains that it received a $5,000 contribution check from Skilled Healthcare PAC, and that it "refunded" $4,000 after realizing that the PAC had not qualified as a multicandidate committee.[8] Attachment 2 at 3. However, the Primary Committee explains, the bank would not honor the original $5,000 contribution check from Skilled Healthcare PAC due to insufficient funds. Attachment 2 at 2-3. The Primary Committee

[8] The FECA permits multicandidate committees to make contributions to a candidate and his or her authorized committee which, in the aggregate, do not exceed $5,000. 2 U.S.C. § 441a(a)(2). However, political committees that do not qualify as multicandidate committees may only make contributions to a candidate and his or her authorized committee which, in the aggregate, do not exceed $1,000. 2 U.S.C. § 441a(a)(1).

asserts that despite repeated efforts, it was unable to retrieve the $4,000 from the PAC, which it understands no longer exists. Attachment 2 at 3. The Primary Committee asserts that under these circumstances, the Commission should not consider the $4,000 disbursement a non-qualified campaign expense as it would be unfair to penalize the Committee for a second time with a repayment when it has already suffered a $4,000 loss. *Id.*

The Commission concludes that the $4,000 erroneously paid by the Primary Committee to Skilled Healthcare PAC was a non-qualified campaign expense, and that a pro rata portion of this disbursement is repayable to the United States Treasury. The funds were not spent in connection with the candidate's campaign for nomination because the original contribution check was never paid to the Primary Committee; thus, the Primary Committee's $4,000 disbursement was lost. While the Primary Committee may have made a mistake in making the $4,000 disbursement, committees must exercise a duty of care when disbursing taxpayer funds. *See generally* 11 C.F.R. § 9034.4(b)(8) (Commission considers factors indicating whether committee exercised duty of care in determining whether lost or misplaced items are considered non-qualified campaign expenses). The factual record indicates that the Primary Committee did not exercise the duty of care in failing to ascertain the propriety of making the $4,000 disbursement. The Primary Committee first deposited the contribution check from Skilled Healthcare PAC in April, 1995; redeposited the check in May, 1995; and did not disburse the $4,000 until September, 1995, *see* Attachment 3 at 5. In light of the Committee's failure to exercise a duty of care by making the $4,000 disbursement after unsuccessful attempts to collect on the original contribution check, the Commission concludes that the $4,000 disbursement

was a non-qualified campaign expense. Therefore, a pro rata portion of the $4,000 must be returned to the United States Treasury. Thus, the Primary Committee must repay $1,237 ($4,000 x .309198) to the United States Treasury.

B. Payment for Services to Prepare Financial Statements

In the context of the Audit Report, the Commission determined that a $3,009 payment by the Primary Committee for the preparation of a United States Senate financial disclosure statement was a non-qualified campaign expense and is therefore repayable in pro rata portion to the United States Treasury. Attachment 1 at 50. The Primary Committee challenges the Commission's determination, asserting that Senator Dole was required to file a financial statement both as a presidential candidate and as a Senator, and that there is overlap between these reporting requirements and the same information is used to prepare the presidential and the Senate disclosure statements. Attachment 2 at 3. Therefore, the Primary Committee argues that it was appropriate for the Primary Committee to pay "its portion" of gathering and reporting the financial information; thus, there should be no repayment in connection with the Primary Committee's payments for services to prepare Senator Dole's financial statements. *Id.*

The total cost to prepare the financial statements was $4,815. An invoice reflects that three-eighths of the cost of the financial services (3/8 x $,4,815 = $1,806) related to Senator Dole's campaign for the Republican presidential nomination, while the remaining five-eighths of the cost (5/8 x $4,815 = $3,009) related to Senator Dole's responsibilities to the United States Senate. Attachment 7. However, the record reflects that the Primary Committee paid the total cost of $4,815 for the financial services. The $3,009 portion of the cost was not spent in connection with the Candidate's campaign for nomination

because it was related to Senator Dole's responsibilities to the United States Senate. Although the Primary Committee claims that the same information was used for both the presidential and Senate statements, the Primary Committee did not provide any documentation to support an allocation different from that reflected on the invoice,[9] *see* 11 C.F.R. § 9033.11(a). Therefore, the Commission concludes that the Primary Committee's $3,009 payment for the preparation of a United States Senate financial disclosure statement is a non-qualified campaign expense, and that the Primary Committee must repay $930 ($3,009 x .309198) to the United States Treasury. *See Robertson v. Federal Election Commission*, 45 F.3d 486, 492 (D.C. Cir. 1995) ("recipients of matching funds bear the burden of accounting for allocation and documentation of campaign expenses").

V. CONCLUSION

For the foregoing reasons, the Commission determines that Senator Robert J. Dole and Dole for President, Inc. must repay $6,255 to the United States Treasury pursuant to 26 U.S.C. § 9038(b)(2). The Commission determined that Robert J. Dole and Dole for President, Inc. must, within 30 days, repay to the United States Treasury $6,255 for the use of public funds to defray non-qualified campaign expenses pursuant to 26 U.S.C. § 9038(b)(2) and 11 C.F.R. § 9038.2(b)(2).

[9] The Primary Committee has not stated whether its argument that the same information was used for Senator Dole's presidential campaign and his Senate disclosure statement supports a 50/50 allocation or some other allocation.

Attachments

1. Report of the Audit Division on Dole for President, Inc. dated June 3, 1999.

2. Request of Dole for President, Inc. for an Administrative Review of the Repayment Determination dated August 30, 1999.

3. Memorandum from the Audit Division to the Office of General Counsel (Analysis of the Administrative Review Request) dated October 7, 1999.

4. Transcript of the Dole for President, Inc. Oral Hearing before the Federal Election Commission on December 15, 1999.

5. Supplemental Submissions of Dole for President, Inc. dated December 22, 1999.

6. Candidate Certification Letter (and Amended Page Three)

7. Invoice for Financial Services

FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Commissioners
Staff Director Pehrkon
General Counsel Noble
Press Office Ron Harris

FROM: Mary W. Dove/Veneshe Ferebee-Vines
Commission Secretary

DATE: July 6, 1999

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

Attached is a copy of the Statement of Reasons regarding Audits of 1996 Clinton/Gore and Dole/Kemp Campaigns signed by Chairman Scott E. Thomas and Commissioner Danny Lee McDonald. This was received in the Commission Secretary's Office on July 6, 1999 at 11:42 a.m.

cc: V. Convery

Attachments

FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

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

---

Chairman Scott E. Thomas
Commissioner Danny L. McDonald

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

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

I.

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

---

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

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

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

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

---

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

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

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

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

[6] 2 U.S.C. § 431(8).

[7] 2 U.S.C. § 431(9).

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

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

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

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

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

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

---

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

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

II.

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

A.

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

---

[14] Fed. Elec. Camp. Fin. Guide (CCH Transfer Binder), ¶5819 at 11,185.
[15] United States v. United Auto Workers, 352 U.S. 567 (1957) (hereinafter "UAW").
[16] Id. At 587.
[17] 2 U.S.C. §437f(b).
[18] At one point our colleagues call the phrases used a "test" and at other times they refer to them as an "amalgam." Sandstrom *et al.* Statement at 2 and 4.
[19] Lest our colleagues be struck down by a bolt of lightning for insinuating they would never stoop to helpful descriptions of the underlying statutory and regulatory provisions, they should concede that only recently in Advisory Opinion 1999-11, they engineered a description of the statute's reach that depended on whether there was "any campaign activity" at the event in question. See Memorandum from Commissioner Sandstrom, Agenda Doc. No. 99-61-A; Advisory Opinion 1999-11 (unpublished) at 3.

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

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

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

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

---

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

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

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

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

B.

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

---

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

III.

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

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

[32] 479 U.S. at 249.

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

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

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

7/2/99
Date

Scott E. Thomas, Chairman

7/6/99
Date

Danny L. McDonald, Commissioner

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: Commissioners
Staff Director Pehrkon
General Counsel Noble
Press Officer Harris

FROM: Mary W. Dove/Lisa R. Davis
Acting Commission Secretary

DATE: June 25, 1999

SUBJECT: Statement of Reasons for the Audits of Clinton/Gore '96 and Dole/Kemp '96.

Attached is a copy of the Statement of Reasons in the Audits of Clinton/Gore '96 and Dole/Kemp '96 signed by Vice-Chairman Darryl R. Wold, Commissioner Lee Ann Elliott, Commissioner David M. Mason and Commissioner Karl J. Sandstrom. This was received in the Commission Secretary's Office on Thursday, June 24, 1999 at 3:47 p.m.

cc: V. Convery

Attachment

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT OF REASONS of VICE CHAIRMAN DARRYL R. WOLD and COMMISSIONERS LEE ANN ELLIOTT, DAVID M. MASON and, KARL J. SANDSTROM On The Audits Of "DOLE FOR PRESIDENT COMMITTEE, INC." (PRIMARY), "CLINTON/GORE '96 PRIMARY COMMITTEE, INC.," "DOLE/KEMP '96, INC." (GENERAL), "DOLE/KEMP '96 COMPLIANCE COMMITTEE, INC." (GENERAL), "CLINTON/GORE '96 GENERAL COMMITTEE, INC.," and "CLINTON/GORE '96 GENERAL ELECTION LEGAL AND COMPLIANCE FUND"

Pursuant to 26 U.S.C. §§ 9038(a) and 9007(a), the Federal Election Commission ("the Commission") audited the "Dole For President Committee, Inc.," the "Clinton/Gore '96 Primary Committee, Inc.," "Dole/Kemp '96, Inc.," the "Dole/Kemp '96 Compliance Committee, Inc.," the "Clinton/Gore '96 General Committee, Inc." and the "Clinton/Gore '96 General Election Legal And Compliance Fund." In doing so, our Audit Division and Office of General Counsel (collectively the "staff") analyzed media advertisements the Democratic and Republican National Committees (collectively "the parties") ran during 1995 and 1996. The purpose of this analysis was to determine whether the cost of these advertisements constituted in-kind contributions (coordinated expenditures) by the parties on behalf of their respective presidential candidates' committees (which, among other things, could have caused the presidential committees to exceed their primary or general election spending limits in violation of 2 U.S.C. § 441a(b)).

In analyzing these advertisements,[1] the staff examined their content for the presence of two factors to determine whether the advertisement were "for the purpose of influencing" an election for Federal office, as that phrase is used in 2 U.S.C. § 431 (8)(A) ("contribution") and (9)(A) ("expenditure"): Whether the advertisements referred to a "clearly identified candidate" and whether they contained an "electioneering message."[2]

[1] *See, e.g.*, "Report of the Audit Division on the Dole For President Committee, Inc. (Primary)" ("Report on DFP"), Agenda Document 98-87, 11/19/98 at 14 & 50; "Report of the Audit on Clinton/Gore '96 Primary Committee, Inc." ("Report on CGP"), Agenda Document 98-85, 11/19/98 at 10, 32-35 & 36-38.

[2] The staff cited Advisory Opinions ("AO")1984-15 and 1985-14 as the authority for using "electioneering message" as a test of the content of a communication. Only AO 1985-14 used that phrase, and it did so in erroneously concluding that the Commission had employed the "electioneering message" test in AO 1984-15, *see* AO 1985-15 at 7; in fact, those words never appear in AO 1984-15. *See* footnote eleven, *infra*, for a discussion of the problems with the staff's interpretation of these opinions.

Because the staff found that both factors were present,[3] the staff recommended that the Commission determine that the costs of the advertisements were in-kind contributions from the parties to their respective presidential campaign committees.[4] The staff also recommended that the Commission determine that the applicable spending limits were exceeded based in part on the cost of the advertisements, and that the Commission require a repayment of presidential matching funds. For various reasons, the Commissioners unanimously rejected the staff's repayment recommendations.

We write here to express our disagreement with the use of "electioneering message" as a test to determine whether communications are "for the purpose of influencing" elections and, therefore, constitute expenditures or contributions under the Federal Election Campaign Act ("FECA"). Specifically, we agree that: (1) The phrase "electioneering message" cannot serve as a substantive test to describe the content of communications that are "for the purpose of influencing" an election because it is derived only from advisory opinions and is not found either in the FECA or in regulations promulgated by the Commission in accordance with the rulemaking procedures specified in the FECA; and (2) The phrase "electioneering message" cannot be used as a shorthand expression of the Commission's interpretation of the statutory standard of "for the purpose of influencing" an election because the advisory opinions from which the phrase is drawn do not convey a clear and consistent application of the statutory standard, and the phrase, standing alone, is both too vague and too broad to have a sufficiently definite meaning. Therefore, we conclude that the phrase "electioneering message" should not be used to describe the content of communications which the Commission would determine to be "for the purpose of influencing" an election to Federal office.

Procedural Defects With Employing The "Electioneering Message" Standard

Congress included an express prohibition in the FECA against the Commission using advisory opinions to establish rules of conduct. Subpart (b) of 2 U.S.C. § 437f, the section governing the use of such opinions, provides that the Commission may employ rules of law that are not set forth in the FECA only if it complies with the procedures set forth in 2 U.S.C. § 438(d) in promulgating them.[5] By necessary implication, subpart (b) of § 437f prohibits the Commission from using advisory opinions as rules of law, for the

[3] *See, e.g.*, Report on DFP, Agenda Document 98-87, 11/19/98 at 50; Report on CGP, Agenda Document 98-85, 11/19/98 at 38.

[4] *See, e.g.*, Report on DFP, Agenda Document 98-87, 11/19/98 at 52; Report on CGP, Agenda Document 98-85, 11/19/98 at 43.

[5] *See id.* at § 437f(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title."); *United States Defense Committee v. Federal Election Commission*, 861 F.2d 765, 771 (2nd Cir. 1988) (*USDC*) (citing 2 U.S.C. § 438(d)) ("A rule of law may initially be proposed by the Commission only as a rule or regulation pursuant to very elaborate procedures involving submission of the rule or regulation to the Congress.").

Commission does not follow the requirements of 2 U.S.C. § 438(d) in drafting such opinions; instead, it follows the requirements of § 437f.[6]

As a result, the Commission may not use advisory opinions as a substitute for rulemaking. Rulemaking is not simply the preferred method for filling in gaps in the FECA. It is the required method. 2 U.S.C. § 437f(b), note five, *supra*. Where the law is of uncertain application, advisory opinions cannot be used as a sword of enforcement. *See generally id.* The regulated community can, however, use advisory opinions as shields against Commission enforcement actions in appropriate circumstances. 2 U.S.C. § 437f(c).

> Advisory opinions are binding only in the sense that they may be relied on *affirmatively* by any person involved in the specific transaction or activity discussed in the opinion or in any materially indistinguishable transaction or activity. . . . On the other hand, to the extent that the advisory opinion *does not affirmatively approve* a proposed transaction or activity, it is binding on no one—not the Commission, the requesting party, *or third parties*.[7]

This reading of the FECA's rulemaking requirements, of course, does not prevent the Commission from enforcing the FECA in novel or unforeseen circumstances. It only requires that, absent controlling regulations or the authoritative interpretations of the courts, the Commission's enforcement standard be the natural dictate of the language of the statute itself.[8]

The threshold problem with the "electioneering message" standard, then, is that it is not a rule. It is only a shorthand phrase that purports to describe the Commission's reasoning in two advisory opinions. See note two, *supra*. The phrase is not defined in either of those opinions. In fact, it does not appear at all in one of them. Rather than being promulgated pursuant to the requirements of the FECA (*see* 2 U.S.C. §§ 438(d) and

---

[6] *See* 2 U.S.C. § 437f(b) (". . . No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provision of this section [i.e., § 437f].").

[7] *USDC*, 861 F.2d at 771 (emphasis added) (citing 2 U.S.C. §§ 438(d) and 437f(b)&(c)); *see also Weber v. Heaney*, 793 F. Supp. 1438, 1452 n. 9 (D. Minn 1992) (" . . . Commission advisory opinions are binding in the sense that they may be relied upon affirmatively by any person involved in the specific transaction or activity discussed in the opinion or in any materially indistinguishable transaction or opinion."), *aff'd*, 995 F.2d 872 (8th Cir. 1993); *Stockman v. Federal Election Commission*, 138 F.3d 144, 149 n. 9 (5th Cir. 1998) (same). Some argue that *Orloski v. Federal Election Commission*, 795 F.2d 156 (D.C. Cir. 1986), supports the contrary conclusion. Unlike *USDC*, however, *Orloski* did not address the FECA's clear prohibitions on using advisory opinions as rules of conduct. Instead, *Orloski* analyzed the advisory opinions implicated there for purposes of determining whether the Commission's interpretation of the FECA was reasonable and consistent and thus should be accorded deference. 795 F.2d at 164-167.

[8] *See Sullivan v. Everhart*, 494 U.S. 83, 89 (1990) (Scalia, J.) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) and *National Labor Relations Board v. Food and Commercial Workers*, 484 U.S. 112, 123 (1987)) ("'[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute,' that is, whether the agency's construction is 'rational and consistent with the statute.'").

437f(b) & (c)), the "electioneering message" standard is an amalgam of these advisory opinions. Even at that, it is not the most natural, let alone the only reasonable, reading of those opinions. In fact, it is difficult to draw any clear meaning from a comparison or combination of AOs 1984-15 and 1985-14 (*see* "Substantive Difficulties," *infra*).

As a result, the regulated community most likely does not have *notice* as to how this standard will govern its conduct, and it certainly did not have an opportunity to *comment* on whether it should. Because of its procedural infirmities, the Commission may not employ the phrase "electioneering message" as expressing a general rule for determining whether communications are "for the purpose of influencing" a federal election.[9]

Substantive Difficulties With The "Electioneering Message" Standard

Apart from its procedural infirmities, the "electioneering message" standard suffers from serious problems of vagueness and overbreadth. As presented by the staff, a communication satisfies this standard if it includes statements which are "designed to urge the public to elect a certain candidate or party,[10] or which would tend to diminish support for one candidate and garner support for another candidate." *See, e.g.,* Report on DFP, Agenda Document 98-87, 11/19/98 at 14 (citing AO 1984-15); Report on CGP, Agenda Document 98-87, 11/19/98 at 10 (citing AO 1984-15).[11]

---

[9] *Democratic Congressional Campaign Committee v. Federal Election Commission,* 645 F. Supp. 169 (D.D.C. 1986), *aff'd in part and rev'd in part,* 831 F.2d 1131 (D.C. Cir. 1987) (*DCCC*) and *Federal Election Commission v. Ted Haley Congressional Committee,* 852 F.2d 1111 (9th Cir. 1988) (*Haley*) do not affect this conclusion. In *DCCC,* the Commission dismissed a complaint, contrary to the recommendation of its General Counsel, without providing a statement of reasons for doing so when it appeared the complaint alleged activity that satisfied the "electioneering message" standard. 645 F. Supp. at 170-171. The Court, in an action brought pursuant to 2 U.S.C. § 437g(a)(8), was faced with the question of whether the Commission had acted "contrary to law" for appearing to disregard its "electioneering message" test without articulating any reason for doing so, *id.* at 171-174; the Court was not faced with the issue here: whether that test, itself, was validly established. In *Haley,* the Court noted that the Commission's interpretation of the FECA in its regulations and advisory opinions was entitled to due deference. 852 F.2d at 1115. But all the advisory opinions to which that Court referred interpreted a Commission regulation, *id.* at 1114-1115; they did not attempt to circumvent the FECA's clear requirement that for rules of conduct, the Commission *have* a regulation. *See also Federal Election Commission v. Legi-Tech,* 967 F. Supp. 523, 529-530 (D.D.C. 1997) (Commission advisory opinions interpreted regulation).

[10] The staff cites AO 1984-15 as authority for this phrase. This phrase, however, comes from 1985-14. *See id.* at 7 (citing *United States v. United Auto Workers,* 352 U.S. 567, 587 (1957)).

[11] There is substantial question as to whether the staff's analysis properly characterizes AO 1984-15. While that opinion uses the phrases "diminish support" and "garner support," *id.* at 5, it concludes that advertisements which clearly identify presidential candidates of one party and include exhortations to "vote" for another party "effectively advocate the defeat of a clearly identified candidate." *Id.* Whatever distinction there may be between "effectively" and "expressly" advocating, the facts presented in that advisory opinion bear similarities to the facts in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986) (*MCFL*), and the Commission's conclusion in AO 1984-15 and the court's conclusion in *MCFL* can be read consistently. The staff suggests an extremely broad interpretation of AO 1984-15, citing the phrase "dimish [or] garner support." *See* Reports on DFP & CGP, *supra.* That opinion's facts, however, suggest a more narrow, and more natural, construction, similar to *MCFL.*

Such formulations, the Supreme Court has held, offend the First Amendment. In *Buckley v. Valeo*, 424 U.S. 1, 42-44 (1976), the High Court held as impermissibly vague the "relative to . . . advocating the election or defeat of [a clearly identified] candidate" standard in 18 U.S.C. § 608(e) (1970) of the original FECA. The "diminish support for one candidate" prong—like the "relative to" standard in the original FECA— is especially problematic because "the distinction between discussion of issues and candidates and *advocacy of election or defeat of candidates* may often dissolve in practical application." *Buckley*, 424 U.S. at 42 (emphasis added).[12]

The factual question of what a particular statement was *designed* to do also gives rise to vagueness problems. The fact that the term "electioneering" and the phrase "designed to urge the public to elect a certain candidate or party" were plucked out of context from a four-decade old Supreme Court opinion (*United States v. Auto Workers*, 352 U.S. 567 (1957) (*UAW*)) does not resolve the question.[13] First, it is clear that *UAW* was not enunciating a constitutionally-permissible standard for regulating speech, but describing a particular communication in the course of an opinion explicitly refusing to reach a ruling on the constitutionality of regulating the specific speech so described. *See id.* at 591 (internal citation omitted) ("Clearly in this case it is not absolutely necessary to a decision to canvass the constitutional issues."). Second, the speech at issue in *UAW* included specific endorsements of candidates. *Id.* at 584. Third, the *per curiam* opinion in *Buckley* cites the dissent in *UAW*, *see* 424 U.S. at 43 (citing *UAW*, 352 U.S. at 595-596 (Douglas, J., dissenting)), which had urged that the FECA's predecessor statute be declared unconstitutional as applied to the electioneering speech at issue in *UAW*.

The relationship, if any, of the two prongs of the "electioneering message" test underscores the test's vagueness. Read narrowly, "urge the public to elect a candidate," AO 1985-14 at 7, could be construed as equivalent to communications "that expressly

---

[12] The "relative to" standard, on its face, was thus unhelpful in distinguishing between these two types of speech. *Id.* As a result, to allow unfettered issue discussion while regulating candidate advocacy, the government, under this standard, had to attempt to divine the speaker's intent. *Id.* at 43. This, the Court noted, would not only be difficult, but dangerous.

> Whether words intended and designed to fall short of invitation would miss that mark is a question both of intent and effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions, it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). The second prong of the "electioneering message" test—given its "diminish [candidate] support" focus—requires the same difficult and dangerous subjective inquiry.

[13] Like a '57 Chevy, a dated Supreme Court opinion may be charming, but often requires substantial restoration to be of practical use.

advocate the election or defeat of a clearly identified candidate." *Federal Election Commission v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238, 249-250 (1986) (quoting *Buckley,* 424 U.S. at 80). In contrast, there is virtually nothing which could be said about a candidate for federal office which might not be interpreted as "diminish[ing] support for one candidate [or] garner[ing] support for another candidate." *See, e.g.*, Report on DFP, Agenda Document 98-87, 11/19/98 at 14 (citing AO 1984-15); Report on CGP, Agenda Document 98-87, 11/19/98 at 10 (citing AO 1984-15).

The "electioneering message" test is also unconstitutionally overbroad for related reasons. As the *Buckley* Court observed,

> [c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

424 U.S. at 42. Regulation of any statement which " diminishes [or garners] support for [a] candidate," AO 1984-15 at 5, would encompass, then, virtually any meaningful utterance identifying a candidate.

The vagueness and overbreadth problems of the "electioneering message" and "relative to" standards are thus two sides of the same counterfeit coin. They are vague because it is not clear when they encompass issue discussion and not candidate advocacy. They are overbroad because, given the nature of campaigning, they will inevitably encompass both. For the same substantive reasons that the Supreme Court held the "relative to" standard in the FECA to be unconstitutional, the Commission may not employ "the electioneering message" standard. Even in the context of coordinated, or presumably coordinated, communications in which the "electioneering message" test has generally been proposed (*see* 11 C.F.R. § 114.4(c)(5)(ii)(B)(2)(E) (regulation of voter guides)), the Commission may not ignore these constitutional requirements.

Conclusion

Given the procedural and substantive infirmities with the "electioneering message" standard, the Commission may not employ it in administering the FECA, the Presidential Primary Matching Payment Account Act, the Presidential Election Campaign Fund Act, or its own regulations.

Darryl R. Wold 6/24/99
Darryl R. Wold Date
Vice Chairman

Lee Ann Elliott 6-24-99
Lee Ann Elliott Date
Commissioner

David M. Mason 6/24/99
David M. Mason Date
Commissioner

Karl J. Sandstrom 6/24/99
Karl J. Sandstrom Date
Commissioner