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

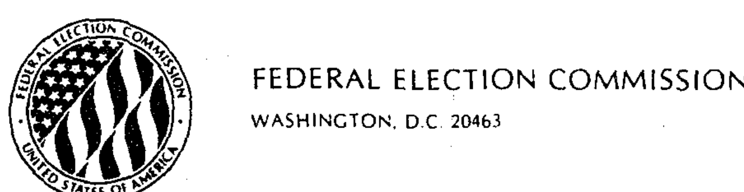
SUBJECT: PUBLIC ISSUANCE OF THE FINAL AUDIT REPORT ON DOLE/KEMP '96, INC. AND DOLE/KEMP '96 COMPLIANCE COMMITTEE, INC.

Attached please find a copy of the final audit report and related documents on Dole/Kemp '96, Inc. and Dole/Kemp '96 Compliance Committee, 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



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]

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[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

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[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

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[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]

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[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*.

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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

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[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 Vice Chairman	Date 6/24/99	Lee Ann Elliott Commissioner	Date 6-24-99
David M. Mason Commissioner	Date 6/24/99	Karl J. Sandstrom Commissioner	Date 6/24/99

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REPORT OF THE AUDIT DIVISION

ON

DOLE/KEMP '96, INC.

AND

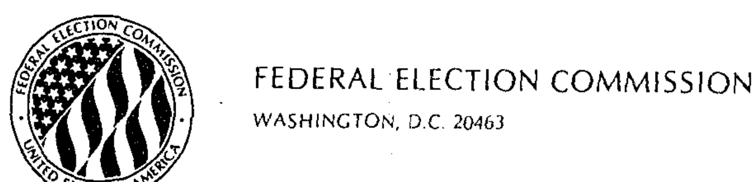
DOLE/KEMP '96 COMPLIANCE COMMITTEE, INC.

Approved June 3, 1999

FEDERAL ELECTION COMMISSION

999 E STREET, N.W.

WASHINGTON, D.C.



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/Kemp '96, Inc. and Dole/Kemp '96 Compliance Committee, Inc. The Commission approved the report on June 3, 1999. As noted on page 3, of the attached report, the Commission may pursue any of the matters discussed in an enforcement action.

In accordance with 11 CFR §§9007.2(c)(1) and (d)(1), the Commission has made a determination that a repayment to the Secretary of the Treasury in the amount of $3,212,143 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 §9007.2(c)(2)(i) 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 §9007.2(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 Alex Boniewicz 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

Attachment:

Audit Report

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

June 10, 1999

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

Dear Mr. Haywood:

Attached please find the Report of the Audit Division on Dole/Kemp '96, Inc. and Dole/Kemp '96 Compliance Committee, Inc. The Commission approved the report on June 3, 1999. As noted on page 3, of the attached report, the Commission may pursue any of the matters discussed in an enforcement action.

In accordance with 11 CFR §§9007.2(c)(1) and (d)(1), the Commission has made a determination that a repayment to the Secretary of the Treasury in the amount of $3,212,143 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 §9007.2(c)(2)(i) 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 §9007.2(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.

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Any questions you may have related to matters covered during the audit or in the audit report should be directed to Alex Boniewicz 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

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DOLE/KEMP '96, INC.
AND
DOLE/KEMP '96 COMPLIANCE COMMITTEE, INC.

APPROVED JUNE 3, 1999

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

REPORT
OF THE AUDIT DIVISION
ON
DOLE/KEMP '96, INC.
AND DOLE/KEMP '96 COMPLIANCE COMMITTEE, INC.

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I. BACKGROUND

A. AUDIT AUTHORITY

This report is based on an audit of Dole/Kemp '96, Inc. (hereafter DK) and Dole/Kemp '96 Compliance Committee, Inc. (hereafter GELAC). The audit is mandated by Section 9007(a) of Title 26 of the United States Code. That section states that "after each presidential election, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of the candidates of each political party for President and Vice President."

Also, Section 9009(b) of Title 26 of the United States Code states, in part, that the Commission may conduct other examinations and audits as it deems necessary to carry out the functions and duties imposed on it by this chapter.

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 as amended.

B. AUDIT COVERAGE

The audit of DK covered the period from its inception, April 30, 1996, through March 31, 1997. DK reported an opening cash balance of $-0-, total receipts of $81,866,654, total disbursements of $81,317,062 and a closing cash balance of $549,592 at March 31, 1997.[1] In addition, a limited review of activity through September 30, 1998 was conducted for the purpose of determining amounts applicable to the expenditure limit.

The audit of the GELAC covered the period from its inception, February 13, 1995 through March 31, 1997. The GELAC reported an opening cash balance of

[1] All figures in this report have been rounded to the nearest dollar.

$-0-, total receipts of $5,630,170, total disbursements of $4,981,285, and a closing cash balance of $648,885. As with DK, a limited review of transactions was performed through September 30, 1998.

C. CAMPAIGN ORGANIZATION

DK registered with the Federal Election Commission on May 3, 1996. The GELAC had been registered since February 15, 1995. The Treasurer of both committees, since their inception, has been Robert E. Lighthizer. Both committees maintain their headquarters in Washington, D.C..

To manage its financial activity, DK maintained nine bank accounts. In addition, DK purchased three certificates of deposit to secure lines of credit, as well as 14 certificates of deposit from the primary committee. From these accounts, DK made approximately 14,190 disbursements. DK was certified to receive $61,820,000 from the United States Treasury on August 15, 1996. Other receipts included loans from the GELAC totaling $1,515,903 and a bank loan in the amount of $525,000 to finance expenses prior to the receipt of the August 15, 1996 Federal grant. Additionally, DK received a $2,000,000 loan from Dole for President '96, Inc. (See Finding II.A.2.a.), an additional $1,570,964 bank loan, $874,000 from the GELAC for reimbursement of compliance related expenses, and approximately $14,000,000 in offsets to operating expenditures.

To manage its financial activity, the GELAC maintained 15 bank accounts. From these accounts, the GELAC made approximately 2,000 disbursements. Approximately 32,000 contributions were received from about 26,000 individuals. These contributions totaled $ 3,397,511. In addition, approximately 90 contributions from about 80 political action committees and other political committees were received totaling $184,295. The GELAC also received $58,456 in offsets to operating expenditures, $256,000 from DK to correct GELAC reimbursements to DK for compliance related expenses, a loan repayment of $1,515,903 from DK, $215,925 from Dole for President '96, Inc. (hereafter DFP) for primary expenses erroneously paid from the GELAC, and $2,080 in miscellaneous receipts.

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 campaign's compliance with statutory limitations with respect to the receipt of contributions or loans;

2. the campaign's compliance with the statutory requirements regarding the receipt of contributions from prohibited sources, such

as those from corporations or labor organizations (see Finding II.A.);

3. proper disclosure of receipts, contributions from individuals, political committees and other entities, to include the itemization of receipts when required, as well as, the completeness and accuracy of the information disclosed;

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 (see Finding II.C.);

7. adequate recordkeeping for campaign transactions;

8. accuracy of the Statement of Net Outstanding Qualified Campaign Expenses filed by the campaign to disclose its financial condition (see Attachment 1);

9. the campaign's compliance with spending limitations (see Finding III.C.); and,

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

As part of the Commission's standard audit process, a limited inventory of the committees' records was conducted prior to audit fieldwork. This inventory was conducted to determine if the committees' records were materially complete and in an auditable state. It was concluded that the records were materially complete.

Unless specifically discussed below, no material non-compliance with Statutory and Regulatory requirements was detected. It should be noted that the Commission may pursue further any of the matters discussed in this report in an enforcement action.

In a series of meetings between December 9, 1998, and March 4, 1999, the Commission considered the findings and recommendations contained below. The action taken with respect to each issue is described at the end of the respective finding.

II. AUDIT FINDINGS: NON-REPAYMENT MATTERS

A. APPARENT PROHIBITED CONTRIBUTIONS

Section 441b(a) of Title 2 of the United States Code states, in part, that it is unlawful for any national bank, corporation or labor organization to make a contribution in connection with any election for Federal office.

Sections 116.3(a) and (b) of Title 11 of the Code of Federal Regulations state, in relevant part, that a corporation in its capacity as a commercial vendor may extend credit to a candidate or political committee provided that the credit is extended in the ordinary course of the corporation's business and the terms are substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation. An extension of credit in the ordinary course of the commercial vendor's business will not be considered a contribution.

Further, 11 CFR §116.3(c) states, that in determining whether credit was extended in the ordinary course of business, the Commission will consider:

(1) Whether the commercial vendor followed its established procedures and its past practice in approving the extension of credit;

(2) Whether the commercial vendor received prompt payment in full if it previously extended credit to the same candidate or political committee; and

(3) Whether the extension of credit conformed to the usual and normal practice in the commercial vendor's trade or industry.

Finally, 11 CFR §116.3 (d), extension of credit by regulated industries, explains that the Commission may rely on the regulations prescribed by other Federal agencies to determine whether extensions of credit by the entities regulated by those Federal agencies were in the ordinary course of business.

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, under penalty of perjury, certify to the Commission that no contributions have or will be accepted by the candidate and 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 9007.2(b)(5) of the Code of Federal Regulations states, in part, that if the Commission determines that an eligible candidate of a major party committee, the candidate's authorized committee(s) or agent(s) accepted contributions to defray qualified campaign expenses, it shall notify the candidate of the amount of contribution so accepted, and the candidate shall pay to the Treasury an amount equal to such amount.

1. Extension of Credit by US Airways

Office of the Secretary, Department of Transportation (DOT) regulations at sections 374a.4(a)(1) and (2) of Title 14 of the Code of Federal Regulations state, in relevant part, that unless full payment in advance is made, no air carrier shall provide transportation to any person it knows, or has reasons to know, is a candidate or a person acting on behalf of such candidate, in connection with the campaign of such candidate, except in accordance with, and subject to, the following conditions:

(1) At least once a month the air carrier shall submit to each such candidate or person a statement covering all unsecured credit extended to such candidate or person, as the case may be (whether in connection with the campaign of such candidate or otherwise.); and,

(2) Such statements shall be mailed no later than the second business day following the last day of the billing period, covered by the statement.

Section 374a.4(a)(4)(i) of Title 14 of the Federal Code of Regulations states that unsecured credit shall not be extended by an air carrier to a candidate, or to any person acting on his behalf in connection with the campaign of such candidate, so long as any overdue indebtedness of such candidate to such air carrier shall remain unpaid, in whole or in part, or so long as such air carrier shall know that any overdue indebtedness of such candidate to any other air carrier remains unpaid, in whole or in part.

Section 374a.4(a)(5)(ii) of Title 14 of the Federal Code of Regulations states that within 7 days after indebtedness becomes overdue for any unsecured credit extended by an air carrier to a person acting on behalf of a candidate in accordance with paragraph (a)(5)(i) of this section, the carrier shall notify the candidate in writing of the amount of the overdue indebtedness, and, unless paid in full within 25 days after the date of such notice, the overdue indebtedness shall be deemed to be the overdue indebtedness of the candidate, for the purposes of paragraph (a)(4)(i) of this section.

During the course of fieldwork, the Audit staff reviewed documentation associated with a debt owed by Dole/Kemp '96, Inc. to US Airways. The review indicated that DK received invoices from US Airways dated September 4, 1996 ($76,905), September 18, 1996 ($81,039) and October 2, 1996 ($246,468), which were paid in full by September 18, 1996, September 26, 1996 and October 17, 1996 respectively. The next invoice, dated October 31, 1996, showed a balance due US

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Airways of $561,439. The final invoice available for our review, dated December 4, 1996, indicated that DK had made no payments and the outstanding balance had increased to $1,066,217. No additional billings for services were noted after December 4, 1996, however since the election had occurred approximately a month earlier DK likely had no further need for the travel account. DK made regular payments from December 12, 1996 through January 15, 1998 to reduce the amount due US Airways to $325,409.[2] Since that time, additional payments have been made reducing the outstanding balance to $272,037 at September 30, 1998 [3].

As noted in the citations above, once a balance becomes an "overdue indebtedness" the carrier is required to follow specific procedures to obtain payment, or discontinue granting credit. Although discontinuing the granting of credit was not an option, given that the first unpaid bill did not become "overdue indebtedness" until after the election, there is no evidence in DK files that additional invoices were received from US Airways, or that other attempts were made by this vendor to collect the debt. Further, there was no evidence that this debt was secured in any manner by DK. The question of an extension of credit outside the ordinary course of business was discussed with DK representatives at a conference held at the conclusion of fieldwork.

Subsequent to this conference, DK representatives provided an unsigned statement which noted that US Airways did not give DK any favorable terms or payment schedules; and, that all dealings were "completely at arms-length." The statement also indicated that US Airways had made repeated demands for payment, but provided no evidence of such efforts. DK also provided a signed statement from Allen Haywood, DK Assistant Treasurer, which stated that a travel account was established with US Airways by the campaign's travel agent, McNair Travel, in order to consolidate all ticketing and billing; and, that US Airways representatives have been in "regular contact" with the campaign over collection of this debt. Additionally, although a May, 1997 collection letter from US Airways demanding payment is cited, no copy of such a document is provided. Finally, a letter from McNair Travel is provided which states that DK's relationship with US Airway's Air Travel Card Division "is typical of the arrangements with our other clients and is standard in the industry."

The Audit staff was not persuaded by DK's response. McNair travel is not in a position to address whether US Airways' extension of credit is in the

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[2] On it's 1997 Year End Report, DK disclosed a debt to US Airways in the amount of $127,205. The Audit staff determined the correct amount to be $340,781. Statements received from the U.S. Department of Transportation, that reflect US Airways' calculation of the amount owed, materially agree with the Audit staff's calculation. DK's response to the memorandum explains that the difference relates to amounts that were to be paid by the RNC as coordinated expenditures [2 U.S.C. §441a(d)]. Since the RNC has not paid the obligations, they are once again being recognized by DK.

[3] US Airways reported the following balances to the U.S. Department of Transportation on the dates indicated: September 30, October 31, and November 30, 1998, $269,504; December 31, 1998, $277, 670; and, January 31, 1999, $280,447.

normal course of its business or whether it complies with Title 14 of the Code of Federal Regulations. Information from US Airways about its billing and collection policies for similar clients has not been provided. Further, no documentation has been provided of any efforts made by US Airways, after December 4, 1996, to collect this debt. In the Exit Conference Memorandum (Memorandum), the Audit staff concluded that DK received a contribution from US Airways. The amount of the contribution was $1,066,217 at December 4, 1996 and that $325,409 remained outstanding as of 2/28/98.

In the Memorandum, the Audit staff recommended that DK provide documentation to demonstrate that the credit extended by US Airways was in the ordinary course of business and did not represent a prohibited contribution. The information provided was to include examples of other customers or clients of similar size and risk for which similar services have been provided and similar credit was extended. Also, information concerning billing policies for similar clients, advance payment policies and debt collection policies were to be included.

In response to the Memorandum, DK restates its argument that it was not given favorable terms or payment schedules by US Airways. DK's response further states that Pam Garrett of US Airways calls Allen Haywood every 3-4 weeks for an update on the account. Finally, DK provides a generic letter dated December 4, 1996 from Mr. Frank Nicholson, Manager, Commercial Credit for US Airways, directed "To Our Valued Customers", which requests payment and notes that effective, January 1, 1997, late charges will start being assessed on outstanding balances. The letter provided was most likely directed to McNair Travel, the campaign's travel agent. No invoices were available after December 4, 1996, so it is not certain whether US Airways has actually assessed these late charges. However, DK's reported outstanding balance does not reflect any increase that could be attributed to late charges. The increases in the outstanding balances reported to the U.S. Department of Transportation beginning in December of 1998, may indicate the assessment of an interest charge.

The Audit staff concludes that DK has failed to provide documentation which demonstrates that US Airways did not extend credit outside of its normal course of business, as defined under 11 CFR §116.3. DK failed to provide documentation from US Airways detailing examples of other customers or clients of similar size and risk for which similar services have been provided and similar credit extended. Further, no information concerning US Airways billing policies for similar clients, advance payment policies or debt collection policies, or documentation of any efforts made by US Airways to collect this debt have been provided. Although not specifically requested in the Memorandum, no evidence has been provided to indicate that US Airways was in compliance with 14 CFR §374a.4.

During the Commission's consideration of this finding a motion was made to reject the Staff conclusion. That motion failed to receive sufficient votes to be approved. Subsequently, 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 herein.

2. <u>Loan from Dole For President '96 Inc. and Extension of Credit By Franklin National Bank</u>

Section 100.7(b)(11) of the Code of Federal Regulations states, in part, that the term "contribution" does not include a loan of money by a State bank, a federally chartered depository institution (including a national bank) or a depository institution whose deposits and accounts are insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration if the loan is made in accordance with applicable banking laws and regulations and is made in the ordinary course of business. A loan will be deemed to be made in the ordinary course of business if it: bears the usual and customary interest rate of the lending institution for the category of loan involved; is made on a basis which assures repayment; is evidenced by a written instrument; and, is subject to a due date or amortization schedule. For purposes of this section, an overdraft made on a checking or savings account shall be considered a contribution by the bank or institution unless: the overdraft is made on an account which is subject to automatic overdraft protection; the overdraft is subject to a definite interest rate which is usual and customary; and there is a definite repayment schedule.

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 identification of each authorized committee of the same candidate to which a transfer is made during the reporting period, together with the date and amount of such transfer. Section 100.12 of Title 11 of the Code of Federal Regulations defines identification as, in the case of any other person, the person's full name and address.

a. Loan from DFP

In the process of reconciling DK's bank accounts, the Audit staff identified a series of transfers between DK and DFP which were neither properly disclosed nor itemized. DFP made three transfers, totaling $2,000,000, to DK between October 30 and November 1, 1996. The transfers were reversed when DK made a transfer to DFP in the amount of $2,000,000 on November 25, 1996.

It was noted that DFP's general ledger originally classified each transfer as a "loan." On December 23, 1996, the general ledger classifications were changed from "loan" to "transfer error." Further, the memo discussed below, mentions that the funds were supposed to be transferred to a DFP bank account named "Dole for President Operating Expenses." DFP did in fact have an account by this name; however,

the account signature card shows that November 4, 1996 was the opening date, three days after the last of the three transfers to DK.

In a memorandum included in the FEC Report for the post general period dated December 5, 1996, DK 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 there were three occurrences 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. 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 account number of DK's operating account.

A faxed copy of the memorandum to the originating bank requesting the October 31 transfer was found. The memorandum identified DK's operating account number as the destination of the transfer. This document suggests that no mistake occurred at the transferring bank with respect to the $1,250,000 transfer. Further, no documentation could be found to suggest that the intended transfer destination for any of the three transfers was not DK's operating account.

DK's cumulative bank account balance on October 29, the day before the first transfer, was negative $199,058. The bank account balance on November 1, the day of the last transfer, was negative $563,375. Further analysis revealed that DK operated with a negative cash balance until November 15, 1996, even with the receipt of the $2,000,000 from DFP. 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 $2,954,051 in DK funds, the balances were not available to pay checks issued by DK. This supports the Audit staff's position that the $2,000,000 was intended to be transferred to DK's bank accounts.

For DK to return the $2,000,000 to DFP, it was necessary to sell back to DFP certificates of deposit, with a face value and cumulative interest

amounting to $1,023,147, which DK had purchased from DFP on August 30, 1996. The certificates of deposit secured letters of credit that satisfied DK's deposit requirements with its telephone vendors and other commercial vendors. However, when the certificates of deposit were sold back to DFP, one in the amount of $202,767 ($200,000 plus accrued interest) had already been redeemed by DK. Therefore, DK owes DFP $202,767. That amount has been reported by DK as a debt owed to DFP.

The Audit staff concluded that the transactions described above represent a $2,000,000 loan from DFP to DK. During the period that the loan was outstanding, it was a contribution.[4] Further, DFP made an additional contribution to DK when it repurchased the 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. The contributions 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.

At a conference held at the end of fieldwork, the Audit staff addressed this matter with DK representatives. Subsequent to the conference, DK representatives filed amended reports which materially disclosed the transfers detailed above.

In the Exit Conference Memorandum it was recommended DK, provide documentation that demonstrates 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 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, DK refers to the DFP response to the same issue. In that response DFP maintains that the transfers occurred in error but provided none of the requested documentation to support their contention.

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[4] 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 press and 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 available funds, and full reporting of the transactions.

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.

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

After considering the Staff conclusion, 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 herein.

b. Extension of Credit By Franklin National Bank

The Audit staff reviewed cash balances for all DK bank accounts maintained with Franklin National Bank, in conjunction with the review of the loan from DFP discussed above, and noted that the cumulative cash balance was significantly below zero. During the 21 day period from October 25, 1996 through November 14, 1996, the cumulative cash balance was overdrawn by as little as $69,507 on November 6, 1996 to as much as $933,984 on November 4, 1996. The average daily cumulative cash balance during this period was negative $374,061. Absent the $2,000,000 loan from DFP, the cumulative cash balances would have ranged from negative $2,069,507 to negative $2,933,984, with an average daily cumulative cash balance of negative $1,909,775. As explained earlier, these negative balances exclude 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 ranged in value from as much as $2,954,051 on October 21, 1996, to as little as $1,751,000 on November 13, 1996, the balances were not available to pay checks issued by DK.

During this period, Franklin National Bank honored every check that was presented for payment without charging DK any fees. Franklin National Bank sent DK unavailable funds/insufficient funds notices whenever one of DK's bank account balances fell below zero. The notices listed the checks that were paid by Franklin National Bank, and the negative account balances which resulted from the

payment of these checks. There was no evidence in DK's files of any attempts by Franklin National Bank to have DK correct its negative cash balance.

On November 5, 1996, 11 days after DK's cumulative cash balance fell and remained below zero, Franklin National Bank provided DK a $900,000 line of credit.[5] The line of credit was guaranteed by DK's credit card receivables, and was to be fully paid by November 15, 1996. DK immediately made a draw of $806,940 against the line of credit, which brought its cumulative cash balance to negative $281,095. Without the draw, the cumulative cash balance would have been negative $1,088,035. From November 5 through November 15, 1996, DK made a series of draws and repayments, amounting to $1,570,964, against this line of credit. Despite these draws, DK's cumulative cash balance remained well below zero until November 15, 1996. The line of credit was paid on November 18, 1996.

Based on the facts as presented above, the Audit staff concluded that DK received a contribution from Franklin National Bank which amounted to as much as $933,984 on November 4, 1996.

At a conference held at the conclusion of fieldwork, the Audit staff addressed this issue with DK representatives, who stated that they would look into this matter. The DK representatives further stated that DK had no special relationship with Franklin National Bank, and that no contribution should result from the actions described above.

In the Memorandum, the Audit staff recommended that DK provide evidence to demonstrate that the credit extended by Franklin National Bank was in the ordinary course of business, and did not represent a contribution. Further, with respect to the overdrafts, DK was to provide documentation that the accounts were subject to automatic overdraft protection; the overdrafts were subject to a definite interest rate which is usual and customary; and there was a definite repayment schedule. The information provided was also to include examples of other clients of similar size and risk for which similar services have been provided.

With respect to Franklin National Bank, the response notes that over the course of the campaign, DFP and DK opened various lines of credit and loans with Signet Bank and Franklin National Bank to cover matching funds which were not paid in early 1996, to secure vendor services, overdraft coverage, borrowing against funds due the campaign and other credit agreements made in the normal course of business. As such, DK notes these agreements do not qualify as contributions to the campaign under 11 CFR §110.7(b)(11). DK goes on to explain that the campaign

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[5] This was the second line of credit between Franklin National Bank and DK. Previously, Franklin National Bank had provided DK with a $546,200 line of credit on July 19, 1996. DK fully repaid this line of credit in a timely manner. All lines of credit complied with the provisions of 11 CFR §100.7(b)(11).

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generally used certificates of deposit to secure its letters of credit. Most letters of credit were established during the primary, with some new vendors added during the general election and some existing vendors requiring additional deposits during the general election. Letters of credit already in place when the general election began were transferred to DK from DFP, with underlying certificates of deposit. After the general election, these letters of credit and the underlying certificates of deposit were transferred back to DFP, which has been the lead committee during the windown phase of the campaign. The response concludes, thus, none of these transactions resulted in contributions to Dole/Kemp.

DK's response does not provided any of the requested information and does not specifically address the overdrafts. Therefore, the conclusion reached in the Memorandum, that DK received a contribution from Franklin National Bank that amounted to as much as $933,984 on November 4, 1996, is unchanged.

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

B. EXCESSIVE CONTRIBUTION MADE BY GELAC- PRIMARY EXPENSES PAID BY THE GELAC

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.

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 be used exclusively in the general election campaign shall be attributed to that spending limitation. Subsections (e)(3), (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.

- 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.

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 GELAC, before the Candidate's August 14, 1996 date of ineligibility. The results of those reviews are presented below.

The GELAC registered with the Federal Election Commission on February 15, 1995. Between registration and August 14, 1996, 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 Senator Dole's nomination, identified expenditures of approximately $950,000 that were correctly attributed to the GELAC in the primary period. However, expenditures of $454,404 attributable to 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 relate 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, campaign officials were 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.

The Exit Conference Memorandum provided to DFP recommended that DFP provide documentation which demonstrated 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 that 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 he 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."

Exhibit 7 to the response to the Memorandum 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.[6] As noted in DFP's 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[7] 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 DFP Memorandum is correct. The solicitation (event) costs are allocated equally between DFP and the GELAC and the travel costs are attributed to DFP.

Since no demonstration has been made that the GELAC was exclusively engaged in activity related to the general election, the conclusion remains that the GELAC made disbursements in the primary period on behalf of DFP. Such disbursements constitute a contribution from the GELAC to DFP. However 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 DFP Memorandum - $521 refund - $76,697 in fundraising salaries).

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 herein.

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6 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.

7 DFP does not address the Lawyers for Dole fund raiser.

C. MISSTATEMENT OF FINANCIAL ACTIVITY

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

1. Dole/Kemp '96, Inc.

The Audit staff's reconciliation of DK's reported financial activity to its bank activity, from the date of the first bank transaction, April 30, 1996, through December 31, 1997, revealed that DK had misstated its receipts, disbursements and cash on hand balances. DK did not provide the Audit staff with workpapers detailing how its reported activity was calculated.

a. April 30, 1996 through December 31, 1996

DK reported total receipts of $79,139,998. Utilizing DK's financial records, the Audit staff determined that DK should have reported total receipts of $82,369,908. Therefore, receipts were understated by $3,229,910. The net understatement of receipts resulted primarily from DK's failure to report: a $2,000,000 loan from DFP (see Finding II.A.2.a.); transfers from the GELAC totaling $946,795; refunds from the press of $282,610; and, vendor refunds of $7,653. In addition, a net overstatement of transfers from DFP of $8,839, the overstatement of a draw on a line of credit of $325 and an unexplained difference of $2,016 contributed to the misstatement.

Total reported disbursements were $78,707,989. DK should have reported total disbursements of $81,121,627. Therefore, disbursements were understated by $2,413,638. The understatement resulted mainly from DK's failure to report: a $2,000,000 loan repayment to DFP (see Finding II.A.2.a.); transfers to the GELAC in the amount of $231,051; credit card charges associated with the collection of reimbursements from the press who traveled with the campaign, totaling $245,722; and, interest paid on a line of credit of $7,458. In addition, the understatement of four disbursements by $35,999, the reporting of voided checks totaling $109,135 and an unexplained difference of $2,543 contributed to the misstatement.

DK reported an ending cash on hand balance of $432,010 on December 31, 1996. This amount was understated by $816,272. This understatement resulted from the misstatements detailed above. The correct ending cash balance was determined to be $1,248,282. Further, DK's beginning cash on hand balance at January 1, 1997 needed to be corrected to reflect the same amount of $1,248,282.

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b. January 1, 1997 through December 31, 1997

DK reported total receipts of $3,846,006. The correct amount was $2,571,496. Therefore, reported receipts were overstated by $1,264,509. The overstatement of receipts resulted primarily from DK's reporting as receipts interaccount transfers totaling $1,551,000. In addition, DK failed to report: vendor refunds of $7,337; interest earned in the amount of $36,924; transfers from DFP of $180,192; and, transfers from the GELAC totaling $97,964. Finally, an overstatement of refunds for press travel of $28,108, and an unexplained difference of $7,819 contributed to this misstatement.

DK reported a cash on hand balance of $1,009,218[8] on December 31, 1997. The correct cash balance was $8,127. Therefore, the cash on hand balance at December 31, 1997 was overstated by $1,001,091. The ending cash on hand overstatement resulted from the receipts misstatements detailed above and DK's failure to report disbursements totaling $24,854.

At a conference held at the conclusion of fieldwork, the Audit staff provided DK representatives with documentation explaining the misstatements for each year. On April 6, 1998, DK filed amended Summary and Detailed Summary pages which materially corrected the misstatements detailed above. Subsequently, the appropriate Schedules A-P and B-P were also filed.

In the Memorandum, the Audit staff recommended no further action with respect to these matters. In its response, DK notes it amended its reports as the Audit staff suggested during the preliminary audit stage.

2. <u>Dole/Kemp '96 Compliance Committee, Inc.</u>

The reconciliation of the GELAC's reported financial activity to bank activity from its inception, February 13, 1995, through March 31, 1997, determined that the GELAC had misstated receipts, disbursements and cash on hand balances. Like DK, the GELAC did not provide the Audit staff with workpapers detailing how its reported amounts were calculated.

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[8] The reported ending cash on hand does not foot, since the original reports were used to determine DK's reported amounts for 1997. On the original reports, cash on hand at January 1, 1997 was $432,010. On October 15, 1997, DK filed amended reports for the 1996 Post General, 1996 Year End and the July 15, 1997 quarterly reports which disclosed transfers from the GELAC for allocated expenses and transfers to the GELAC for allocation corrections. The reporting of these transfers resulted in an increase in cash on hand of $528,000 for the October 15, 1997 quarterly report and the Year End, 1997 report.

a. February 13, 1995 through December 31, 1995

The GELAC reported total receipts of $721,164. Utilizing the GELAC's financial records, it was determined that the GELAC should have reported total receipts of $701,008. Therefore, receipts were overstated by $20,156. This overstatement results from the reporting of $15,463 in contributions redesignated from DFP which were never actually transferred to the GELAC; and an unexplained difference of $4,693.

The GELAC reported total disbursements of $18,701. It should have reported total disbursements of $20,701. As such, disbursements are understated by $2,000. The understatement resulted from a $1,000 contribution refund reported twice, a $2,000 math error on the GELAC's Year End (October 1 to December 31) disclosure report, and the GELAC's failure to report a $1,000 transfer made to DFP.

The GELAC reported a cash on hand balance on December 31, 1995 of $702,463. After correcting for the errors noted above, the correct ending cash-on- hand balance was $680,307. Thus, cash on hand was overstated by $22,156.

b. January 1, 1996 through December 31, 1996

The GELAC reported total receipts of $4,596,736 in 1996. The correct amount was $4,809,657. Thus, reported receipts were understated by $212,921. The understatement was due to the GELAC's failure to report $231,280 in transfers from DK; the over reporting of travel reimbursements from the press by $30,902, and an unexplained under reporting of receipts by $12,543.

The GELAC reported total disbursements of $4,699,525. The correct figure was $5,470,830, resulting in an understatement of $771,305. The understatement was due to: $720,187 in unreported transfers to DK; $85,980 in other unreported disbursements; over reported disbursements of $26,522 resulting from both disbursements that were reported twice and from disbursements that were reported but not paid; a $7,000 math error on the GELAC's' August Monthly (July 1 to July 31) report; and, an unexplained difference of $1,341.

The GELAC reported a cash on hand balance on December 31, 1996 of $599,692. The correct cash balance was $18,487. Therefore, the ending cash on hand balance was overstated by $581,205. This overstatement resulted from the misstatements detailed above for both 1995 and 1996.

c. From January 1, 1997 through March 31, 1997

During the first three months of 1997, the GELAC reported total disbursements of $263,058. The GELAC should have reported total disbursements

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of $298,608. Therefore, its disbursements were understated by $35,550. The Audit staff determined that the understatement in reported disbursement activity was due to the GELAC's failure to report $23,417 in transfers to DK, its failure to report $11,589 in other disbursements, and an unexplained difference of $544.

At March 31, 1997, the GELAC reported an ending cash on hand balance of $648,903. After correcting for the errors noted in the foregoing sections, and a $3,757 adjustment in 1997 reported receipts, the Audit staff determined that the correct ending cash on hand balance was $35,905. Therefore, the GELAC's ending cash on hand balance was overstated by $612,998.

During the course of audit fieldwork, the GELAC filed amended disclosure reports for the three periods covered discussed above. These amended reports materially corrected the 1996 reports. The amended reports filed for the 1995 and 1997 however, failed to correct all of the misstatements noted above. At a conference held at the end of fieldwork, the Audit staff provided GELAC representatives with documentation explaining the misstatements for each year. The GELAC Officials indicated that they would file the appropriate amended reports.

Subsequent to audit fieldwork, the GELAC filed amended disclosure reports for 1995 and 1996 materially correcting the 1995 misstatement noted above. When the Memorandum was prepared no amended report for 1997 had been filed.

In the Memorandum, the Audit staff recommended that the GELAC file an amended report to correct the misstatements in reported activity for 1997, as well as appropriate Schedules B-P for reporting years 1995 and 1996 to disclose disbursements which had not been itemized. In response, the GELAC has filed the appropriate amended reports.

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 herein.

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

A. IN-KIND CONTRIBUTION-MEDIA EXPENSES PAID BY THE RNC

The RNC sponsored a television advertising program in the spring and summer of 1996. It was argued by the DFP and the RNC that the ads featuring Senator Dole and/or President Clinton were alleged "issue ads"[9].

[9] For the full presentation and discussion of this issue see Agenda Documents 98-88 and 99-50, Finding III.A. and the audio tapes of the Commission's Open Session meetings on the following

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In the audit report presented to the Commission, the Audit staff and the Office of General Counsel (Staff) concluded that media expenditures in the amount of $12,864,719 were attributable to DK. This amount was reduced by $1,233,341, the remaining 2 U.S.C. §441a(d) Coordinated Expenditure limitation as calculated by the Staff. The net amount applicable to DK's spending limitation was $11,631,378.

After considering this finding, the Commission directed the Audit staff to remove the discussion and recommendation in this section and to insert a discussion of the same matters into its report on the Dole for President (Primary). See Section III.A.4. of the Dole for President, Inc. audit report.

B. APPARENT EXCESSIVE PRESS AND SECRET SERVICE REIMBURSEMENTS

Sections 9004.6(a) and (b) of Title 11 of the Code of Federal Regulations provide, in part, that expenditures by an authorized committee for transportation, ground services or facilities (including air travel, ground transportation, housing, meals, telephone service, and typewriters) made available to media or Secret Service personnel, will be considered qualified campaign expenses, and, except for costs relating to Secret Service personnel, subject to the overall spending limitation at 11 CFR §9003.2(a). Further, the amount of reimbursement sought for such expenditures shall not exceed 110% of either: the individual's pro rata share of the actual cost of the transportation and services made available; or a reasonable estimate for the individual's pro rata share of the transportation and services made available. An individual's pro rata share is calculated by dividing the total number of individuals to whom such transportation and services are made available into the total cost of transportation and services. Any reimbursement received in excess of this amount shall be disposed of in accordance with 11 CFR §9004.6(d)(1).

Section 9004.6(c)(1) of Title 11 of the Code of Federal Regulations provides, in relevant part, that the committee may deduct from the amount of expenditures subject to the overall expenditure limitation the amount of reimbursements received from media representatives in payment for the actual cost of transportation and services described in paragraph (a) of this section. This deduction shall not exceed the amount the committee has expended for the actual cost of transportation and services provided. The committee may also deduct from the overall expenditure limitation an additional amount of reimbursements received equal to 3% of the actual cost of transportation and services provided under this section as the administrative cost to the committee of providing such services and seeking reimbursement for them. If the committee has incurred higher administrative costs in providing these services, the committee must document the total cost incurred for such services in order to deduct a higher amount of reimbursements received from the overall expenditure limitation. For

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dates: December 3rd, 9th, and 10th 1998, January 14th and 28th, February 3rd and 25th, March 4th, and April 29, 1999.

purposes of this paragraph, "administrative costs" includes all costs incurred by the committee in making travel arrangements and seeking reimbursement, whether these services were performed by committee staff or by independent contractors.

Section 9004.6(d)(1) of Title 11 of the Code of Federal Regulations provides, in relevant part, that reimbursements received in excess of 110% of the actual pro rata cost of the transportation and services made available to a media representative shall be returned to the media representative.

During fieldwork, the Audit staff reviewed records relative to four aircraft operated by DK: One was utilized for Mrs. Dole's campaign travel; one was used for Secretary Kemp's campaign travel, and two were used for Senator Dole's campaign travel. As a result of the various reviews performed, it was determined that DK had over billed members of the traveling press (Press) and United States Secret Service personnel (Secret Service) traveling aboard the aircraft used by Senator Dole and Secretary Kemp. Further, the review of documentation in support of amounts billed to the Press indicated that some of these costs were event related, not ground costs and other services as permitted under 11 CFR §9004.6.

The greatest portion of the over billing arose from the DK estimate of the direct, and indirect, hourly cost of each aircraft. DK used the calculated hourly cost of each aircraft and the elapsed time for each flight to calculate the airfare to be billed to the Press and Secret Service. The contracts for these aircraft contained a fixed price and specified the maximum number of hours that could be flown at that price. This required DK to estimate not only the variable costs (such as fuel, landing fees, catering, etc.) related to operating the aircraft, but also estimate the total number of hours to be flown by each aircraft. These estimates were revised several times during the campaign. The estimated hourly rate used by DK increased as the campaign progressed and then dropped slightly prior to the campaign's conclusion. The Audit staff determined the hourly rate for each aircraft by accumulating all operating costs and dividing that total by the actual number of hours flown by each aircraft. That calculation resulted in a significantly lower average hourly cost for the aircraft used by Senator Dole and Secretary Kemp than used by DK to bill the Press and Secret Service.

The Audit staff also took exception to some of the other costs billed to the Press. Members of the Press were billed for sound and lighting equipment which appear to be event-related, not ground costs. Additionally, the Press was billed for such items as spotlights, port-a-johns, security personnel, barricades, etc., which again appear to be event-related costs. Finally, catering expenses were adjusted in those instances where the quantity of the food and drink billed to the Press was in excess of their needs (for example, 20 traveling press billed for 40 dinners) or which may have been for an event.

The number and type of vehicles supplied by DK for the Press was also evaluated. DK billed the Press for buses and vans utilized in motorcades and for other

transportation needs. In some instances, it was determined that the Press was billed for vehicles which were either not used by them, or far exceeded their seating needs;[10]

Lastly, the estimated amounts used by DK to bill the Press accompanying Secretary Kemp for telephones exceeded what should have been billed based on the actual costs incurred as documented during the audit fieldwork.

The Audit staff reviewed DK workpapers and other documentation used to determine the amounts to be billed to the press traveling with Senator Dole and Secretary Kemp. It was determined that DK had received excessive reimbursements from the press traveling with both Senator Dole and Secretary Kemp. Further, the Secret Service traveling with Senator Dole had been over billed.

At the conference held at the conclusion of fieldwork, the Audit staff informed DK representatives of the these matters and provided them with copies of the workpapers. Further, DK representatives were advised that this matter impacted expenditures subject to the overall spending limitation. The amounts determined to be in excess of cost associated with Press travel can not be used, as it was by DK, to offset expenditures subject to the spending limitation. Similarly, any amount determined to be in excess of the cost of transportation provided to the Secret Service can not be used to offset expenditures subject to the spending limitation.

Subsequent to that conference, DK representatives submitted documentation and workpapers detailing additional press related costs, to include an analysis of administrative costs associated with this program. A narrative was also provided which addresses the Audit staff's exclusion of various costs. Finally, the DK response briefly addresses the overpayment received from the Secret Service.

DK argued that underpayments by the Secret Service for travel on the other aircraft should more than offset the overpayment received for travel on the Dole plane. The Audit staff did not agree. The Secret Service reimburses for travel based on the lower of cost or first class airfare, the maximum amount it will reimburse. What DK characterized as "underpayments" were the result of the amounts billed by DK exceeding the maximum reimbursable amount. Over billings for other travel cannot be used to increase the Secret Service's maximum reimbursable amount. Therefore, when the Memorandum was prepared the amount due to the Secret Service, $20,429, remained unchanged.

DK also provided documentation and analyses with respect to each of the aircraft supporting additional telephone, ground and press filing center costs which were not previously billed to media representatives. The Audit staff reviewed this documentation and adjusted the analyses accordingly.

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[10] A minimum of two seats per press traveler was allowed.

Finally, in its narrative, DK took exception to the Audit staff's exclusion of certain costs, which it felt could be billed to the Press. However, DK failed to provide any documentation in support of any of the examples it used, nor was documentation provided relative to specific items excluded. Each area of concern is discussed below.

With respect to "Quantity of Press Services," DK stated that press costs which the Audit staff felt were excessive were disallowed. "For instance, if four press buses were used and the auditors felt three were enough, then the cost of the fourth bus was disallowed. Another example is catering. If the invoice says catering for 100 and there were 75 press, then the auditors are disallowing 25% of the cost." DK argued that its Advance staff was required to make accommodations based on the trip logistics and anticipated number of traveling press. DK noted that simultaneous movements of the press would require an additional vehicle; and, in any case, two seats were provided for each press person to accommodate the individual and his or her equipment. Regarding catering, DK noted an example where although breakfast for 75 was ordered, there were complaints after half the press had eaten and another 75 breakfasts were ordered. DK noted that the auditors would disallow 50% of the cost.

The Audit staff not only allowed the cost of vehicles based on two seats per press person, but also considered the use of both vans and buses in transporting the press. Additionally, DK's own analyses, itineraries, and manifests were used to make these determinations and they establish that the number of *traveling press* was relatively constant. Finally, DK did not address the more significant examples identified with respect to transportation, which included billing the Press for the cost of using eight (8) buses to transport people to a rally, and, billing the Press for vehicles that were not used by them. The cost of catering was pro rated based on the number of *traveling press*. However, allowances were made for uncertainty and press preferences, resulting in only the more significant cases being adjusted, for example, the cost of catering a barbecue for 500 people, which DK had billed in its entirety to the approximately 20-25 press traveling with Secretary Kemp. Alternatively, 90 meals for 80 press would not have been prorated. Finally, DK failed to provided any documentation to support either its examples or to document specific items disallowed and which DK feels could have been billed to the Press. These differences may be the result of DK accommodating local press in determining the level of services to provide; however, these additional costs cannot be billed to the traveling press.

Next, DK's response stated that if something was not on the schedule, the auditors assumed that it was not for the Press and disallowed the cost. The example cited was where no time was scheduled for filing by the Press, then the cost of the press filing center was not allowed. DK explained that services provided to the press were dictated by circumstances on the ground and not on the schedule. DK noted that although a staff person attempted to be as current as possible, the schedule is only as accurate as what the staff person knew at the point in time it was last printed. The schedule (itinerary) is the only evidence available. As such, unless DK can document that time was made available for the Press to use the filing center, or provide other evidence that the filing center was

used by the Press, the Audit staff stands by its determination that the Press can not be billed for services acquired but not made available to them. It was acknowledged that costs which could not be associated with press travel were not allowed.

The response stated that DK felt, in some cases, security was deemed necessary for a press filing center, either for crowd control during an event or for security prior to an event. Usually, the press risers were front and center and members of the press would complain if people from the crowd came into the press area. Also, according to DK, security was required prior to an event to prevent theft and vandalism. DK's explanation seems to reinforce the position that these security costs were more event related and not provided to accommodate the Press. Again, DK failed to identify and document specific examples.

DK's narrative continued by noting that the auditors disallowed generators. DK explained that power was needed to run laptop computers, lights, or for the mult-box and other audio equipment necessary in the filing center; and, that the Press was billed separately from that used by the campaign for the event. However, DK's arguments were not supported by documentation, itineraries or other evidence detailing specific events or applicable travel legs where the exclusion was in error.

Noting that the "...auditors usually disallowed sound cost when it exceeded several hundred dollars," the response explained that such costs could exceed this threshold. The response noted that the auditors also disallowed all lighting and explained that the press would be billed for those situations where the lighting would not be there just for the event; for example, an outdoor event. Further, allowing the press to be responsible for their own lighting needs would have created logistical problems. The Audit staff did not disagree that sound costs could exceed several hundred dollars; however, this was not the standard by which it was determined whether amounts were billable to the Press. DK appeared to be confusing this with the fact that only those travel legs that resulted in several hundreds of dollars being billed to each press person for filing center costs were reviewed in detail. In addition, there may have been legitimate press lighting requirements. However, based on the documentation available, the Audit staff's exclusion of certain sound and lighting costs remained unchanged.

DK noted that the auditors allowed only one-half of the cost for luggage trucks and suggested it should be billed proportionally based on the number of travelers. DK was mistaken. Absent specific examples, the Audit staff maintained that these costs were allocated proportionately as suggested.

Similarly, DK argued that pipe and drape costs disallowed by the auditors were used at some events to cordon off a press filing area from the crowd. Again, no documentation was provided, nor specific examples cited, and absent such additional information, no adjustment was made.

Lastly, although DK expressed its concern over various miscellaneous costs excluded by the auditors, such as bellhop tips, fencing for filing centers and room rental costs; it failed once more to provide examples and documentation to support specific costs excluded. Generally, the Audit staff allowed press related tips and fencing proportionately, if documentation was available.

Prior to preparation of the Memorandum the documentation provided by DK was reviewed and the calculations adjusted accordingly. In the Memorandum each aircraft was discussed separately. The Memorandum concluded that with respect to the Dole aircraft, DK had received excess reimbursements from the Secret Service in the amount of $20,429 and had received excess reimbursements from the Press in the amount of $565,669. With respect to the Kemp aircraft, the Memorandum concluded that DK had received excess reimbursements from the Press in the amount of $315,672

Additionally, the Memorandum noted that this matter also impacts expenditures subject to the overall spending limitation. The amounts that were determined to be in excess of cost associated with Press travel could not be used, as it was by DK, to offset expenditures subject to the spending limitation. Similarly, any amount determined to be in excess of the cost of transportation provided to the Secret Service could not be used to offset expenditures subject to the spending limitation. The Audit staff adjusted the analysis of expenditures subject to the spending limitation presented in the Memorandum accordingly. Additionally, the amounts were recognized as payable on the Statement of Net Outstanding Qualified Campaign Expenses (NOQCE) included with the Memorandum.

In the Memorandum, the Audit staff recommended that DK submit documentation to demonstrate that excessive reimbursements had not been received from the Press. Absent such a demonstration, the Audit staff would recommend that the Commission determine that DK was required to refund, on a pro rata basis, the excessive reimbursements it had received from the Press , as well as, any amount determined to be refundable to the Secret Service. Further, these amounts would be added to DK's expenditures subject to the spending limitation.

In its response to the Memorandum, DK states that the amount which the Audit Staff has established as the permissible hourly rate to charge the Press is unfairly low. The actual hourly cost of operating the aircraft was higher as demonstrated by the enclosed material. Based on this correct cost, DK charged the Press 110% of the cost of operating the aircraft as permitted under 11 CFR §9004.6.

Additionally, DK's response states that:

> "The attached documents also establish that all of the expenses attributed by Dole/Kemp to the Press were for services or facilities provided for the exclusive use of the Press as permitted under11 CFR §9004.6. As the Audit Staff acknowledges, Commission regulations explicitly entitle a Presidential campaign

committee to incur expenses on behalf of the press for travel, food, and ground services and facilities. Id. The following briefly summarizes the types of documents which are attached.

"These documents provide specific examples of the expenditures for security, pipe & drape, audio visual equipment, generators and other ground services needed or requested by the Press. For example, lighting at outdoor daytime events was necessary to ensure clear pictures for the Press. This would not have been done had the Press not required it. See statement of Kim Fuller at Exhibit 4.

"The attached documents also explain that Dole/Kemp reasonably estimated the transportation and catering requirements of the Press [1/]. These estimates were based on anticipating press needs and responding to express Press complaints about the inadequacy and inferiority of services while maintaining the flexibility required by event logistics. For example, when simultaneous events were scheduled, DK could not predict which members of the Press would attend which event. Thus, additional means of transportation to and food at those events were necessary. In other instances, extra food was ordered in response to on the spot Press complaints about insufficient quantities of food. It would be unreasonable and unfair to require that a committee underestimate anticipated Press attendance or ignore Press complaints. Thus, the Audit Staff should recognize that these expenses were legitimately charged to the Press.(Text of footnote omitted)

"Finally, Dole/Kemp has explained that many costs that could have been legitimately passed onto the Press were paid by Dole/Kemp. See Exhibit 3. Thus, Dole/Kemp had no need or incentive to fabricate Press expenses with such legitimate but unreimbursed expenses available to it.

"Thus no amount must be refunded to the Press or added to Dole/Kemp's expenditures subject to the spending limit."

In the statement from Kim Fuller, Director of Press Advance for DK, referenced in the response, she states that she has done this type of work for the past nine years, including press advance for the Bush White House. The statement notes that the amount and type of facilities and transportation which were provided were adjusted over time based on interaction with, and the needs of the Press. She explains that each event would not necessarily have a filing center, but there would be a filing center in every city. Even if there was no specific filing time noted on the schedule, the standard procedure was to always provide at least one filing opportunity in each city. In some cases, press filing centers were wired for sound and video, as some press would cover these events from there. The number of telephone lines increased over time not only as a result of an increase in the number of Press, but also as a result of the limited filing time available in some instances. With respect to vehicles, she states that the guiding rule was to plan on two seats for each person, one for the person and one for their equipment. However, in some circumstances, when some press would go directly to an event, and others would go

directly to the filing center, even a 40 seat bus would not be sufficient for 20 people with these two separate destinations.

Much of DK's response consists of narratives which restate many of the arguments advanced previously and are discussed above. With respect to the hourly rates used to bill aircraft costs, the response notes that DK's disagrees with the hourly rates used by the Audit staff, but fails to provide any specific errors in the calculations with respect any of the aircraft.

In discussing services and facilities provided to the Press, DK provides no support for its argument that the Press specifically requested that certain ground services be provided. Further, the statement by Kim Fuller fails to note any specific examples where the Audit staff was incorrect in its assessment of costs billable to the Press or where there are errors in the analysis. Additionally, a copy of an agreement between the White House Travel Office (WHTO) and the White House Correspondents' Association was obtained. This agreement specifies which costs were billed to the Press for travel in 1996. While this agreement has no regulatory effect, it does represent an "arm's-length" agreement covering an identical travel program. The agreement states, in part, that the press will **NOT** be billed for "[s]ite expenses such as lighting, press risers, pipe and drape, unless the item is ordered by the news organization itself, and the specific news organization (e.g. TV Pool) will be billed." Not only is this agreement consistent with many of the Audit staff's conclusions, if it had been followed by DK, the amount billed to the Press would have been less than that allowed by the Audit staff. For example, DK billed substantial amounts for press risers that would not have been billed by the WHTO.

With respect to the refund due the Secret Service, the response notes that DK has fully documented that all Secret Service reimbursements are legitimate under 11 CFR §9004.6. It goes on to say that DK has attached documents and accompanying explanations that establish that it has not received sufficient reimbursements from the Secret Service for costs associated with the Dole, Kemp and Mrs. Dole's aircraft. The accompanying documentation states that after receiving the Memorandum, DK requested information on the airplane costs that may be in question. It goes on to state that although the Audit staff has not yet identified to DK any items that may be in question with respect to the Dole aircraft, they have provided such information for the Kemp aircraft. The Audit staff takes exception to that statement. At the conference held at the conclusion of fieldwork, the Audit staff provided computer diskettes to DK which contained information for each aircraft detailing those costs which were accepted and those costs which were not.

The response did contain some additional documentation that had not been available previously. That documentation was reviewed and the Audit staff's calculations were adjusted accordingly. It was also learned that since the calculations presented in the Memorandum, DK has, with the help of a collection agency, collected an additional $171,228 from the Press.

Each aircraft is discussed separately below. For ease of presentation, Senator Dole's aircraft and the accompanying Press aircraft are treated as one.

1. Excess Reimbursements from the Secret Service and the Press Aboard the Dole Aircraft

DK billed the Secret Service $526,449 for travel aboard the aircraft utilized by Senator Dole and $48,731 for travel aboard the additional aircraft utilized by the Press. The Secret Service, after its review of the amount billed for each leg flown by its personnel, reimbursed DK only $484,378 and $47,132, respectively. Based on our review, the amounts that could have been billed to the Secret Service were $421,772 for the Dole aircraft and $43,983 for the Press aircraft. Therefore, DK has received excess reimbursements from the Secret Service in the amount of $62,606 ($484,378 - $421,772) relative to the Dole aircraft, and $3,148 ($47,132 - $43,984) relative to the Press aircraft. However, because the Secret Service paid the lesser of its share of the aircraft cost, or first class airfare, without access to its calculations, the amounts remain an approximation. The amount of any excess reimbursement that is eventually determined, should be refunded to the Secret Service.[11] This is a larger amount than was presented in the Memorandum. The increase in the amount is due in large part to a reduction in the hourly rate used to determine the amount which could have been billed. The reduction is due to the correction of a flaw in the original calculation. The 10% mark-up allowed for the press had inadvertently been applied to the Secret Service.

Utilizing its workpapers, it was determined that DK billed the Press traveling aboard the aircraft utilized by Senator Dole and the accompanying press plane, a total of $7,679,690. Through August, 1998, DK had received reimbursements from the press totaling $7,701,413 and reported outstanding press accounts receivable of $189,480.[12] Based on the revised analysis, the Audit staff calculated that the correct billable amount (cost plus 10%) was $6,845,976. Therefore, DK received excess reimbursements from the Press in the amount of $855,437 ($7,701,413 - $6,845,976). Again this amount is larger than that presented in the Memorandum. The increase in the amount is due to additional reimbursements received by DK and, as with the Secret Service, a flaw in the original calculation. In the case of the Press, the 10% mark-up was inadvertently applied twice.

2. Excess Reimbursements from the Press Traveling Aboard the Kemp Aircraft

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[11] For two other aircraft on which Secret Service personnel traveled, the amount reimbursed was less than the amount determined to be billable. However, the cost for some of the legs may exceed the first class airfare. Therefore, the results of our work for all four aircraft will be provided to appropriate Secret Service personnel when it becomes final.

[12] The amount collected, when added to the reported accounts receivable, exceeds the amount reflected in DK's billing workpapers. No explanation for the difference has been found.

DK billed the Press traveling aboard the aircraft utilized by Secretary Kemp a total of $1,846,476. Through August 1998, DK had received reimbursements of $1,902,793. Using the additional information provided with the response to the Memorandum, the Audit staff calculated that the amount that DK could have billed the Press (cost plus 10%) was $1,604,703. Therefore, DK received excess reimbursements from the Press in the amount of $298,090 ($1,902,793 - $1,604,703). This amount is less than that presented in the Memorandum. The difference is the result of additional costs that were documented.

As explained above, Press and Secret Service reimbursements received by DK were reported as offsets to expenditures subject to the limitation. As a result, the amounts that were received in excess of the maximum amount billable to the Press and the Secret Service must be refunded and applied to the spending limitation. The amounts to be refunded and added to limitation are $1,153,527 for the Press and $65,754 for the Secret Service. Also as previously noted, the Secret Service may determine that a different amount is due. Further, any additional collections from the Press will increase the refund amount due. The Audit staff has adjusted its analysis at Finding III.C., Expenditure Limitation, by these amounts. Additionally, these amounts are recognized as payable on the Statement of Net Outstanding Qualified Campaign Expenses (NOQCE) presented at Attachment 1.

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Recommendation

The Audit staff recommended that the Commission determine that DK is required to refund $65,754 to the Secret Service and, on a pro rata basis, $1,153,527 ($855,437 + $298,090) to the Press. It was further recommended that the Commission determine that these amounts should be added to DK's expenditures subject to the spending limitation.

The Commission approved the Staff recommendation.

C. EXPENDITURE LIMITATION

Sections 441a(b)(1)(B) and (c) of Title 2 of the United States Code state, in relevant part, that no candidate for the office of President of the United States who is eligible under section 9003 of Title 26 to receive payments from the Secretary of the Treasury may make expenditures in excess of $20,000,000 as adjusted for the increases in the Consumer Price Index.

Section 9007(b)(2) of Title 26 of the United States Code states that if the Commission determines that the eligible candidates of a political party and their authorized committees incurred qualified campaign expenses in excess of the aggregate payments to which the eligible candidates of a major party were entitled under section

9004, it shall notify such candidates of the amount of such excess and such candidates shall pay to the Secretary of the Treasury an amount equal to such amount.

Section 9004.4(a) of Title 11 of the Code of Federal Regulations, in part, limits the use of such payments to expenditures for the following purposes: to defray qualified campaign expenses; to repay loans that meet the requirements of 11 CFR §100.7(a)(1) or §100.7(b)(11) or to otherwise restore funds used to defray qualified campaign expenses; and to restore funds used in accordance with 11 CFR §9003.4 for qualified campaign expenses incurred prior to the beginning of the expenditure report period.

Section 9003.4(a) of Title 11 of the Code of Federal Regulations states, in relevant 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 or her general election campaign. Examples given include expenditures for establishing financial accounting systems, and organizational planning.

To further clarify the rule at 11 CFR §9003.4(a), Section 9034.4(e)(1) of Title 11 of the Code of Federal Regulations establishes the general rule for allocating expenses between the primary and general elections for candidates who receive public funding in both. The rule states that any expenditure for goods or services that are used exclusively for the primary election campaign are attributable to primary election limitations; and, any expenditure for goods or services that are used exclusively for the general election campaign shall be attributed to general election limitations. Sections 9034.4(e)(2) through (7) address the attribution of the following expenses between the primary and general campaigns:

- Overhead expenditures and payroll costs incurred in connection with state or national campaign offices shall be attributed according to when usage occurs or the work is performed. Expenses for 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 campaign preparations;

- Campaign materials, such as bumper stickers, campaign brochures, buttons and pens, that are purchased by the primary election campaign committee and later transferred to and used by 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;

- For media communications that are broadcast or published before and after the date of the candidate's nomination, 50% of the media production costs shall be attributed to the primary election limits and 50% to the general election limits.

Distribution costs, such as air time and advertising space in newspapers shall be attributed depending when the communication is distributed or broadcast;

- Campaign communications such as solicitation costs shall be attributed depending on the purpose of the solicitation. If the solicitation is for both the primary committee and the GELAC, the costs will be attributed 50% to each. Other campaign communications shall be attributed based upon the date of broadcast, publishing or mailing;

- Travel costs shall be attributed according to when the travel occurs. If it occurs on or before the date of the candidate's nomination it will be considered 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 general election campaign preparations shall be considered a general election expense even if it occurs before the candidate's nomination.

Read together 11 CFR §§9003.4(a) and 9034.4(e) require that expenses paid before the candidate's date of nomination in relation to the general election must be for goods and services that are exclusively for the general election.

Further, 11 CFR §9003.4(b), in relevant part, limits the sources of funds used to make expenditures prior to the expenditure report period to: a candidate obtaining a loan which meets the requirements for loans in the ordinary course of business; borrowing from his or her legal and accounting compliance fund; use of the candidate's personal funds up to his or her $50,000 limit; and, for a candidate who has received federal funding under 11 CFR part 9031 et seq., borrowing from his or her primary election committee(s) an amount not to exceed the residual balance projected to remain in the candidate's primary account(s) on the basis of the formula set forth at 11 CFR §9038.3(c).

Section 9004.9(d)(1) of Title 11 of the Code of Federal Regulations states, in part, that the term capital asset means any property used in the operation of the campaign whose purchase price exceeded $2000 when acquired by the committee. The fair market value of capital assets may be considered to be the total original cost of such items when acquired less 40% to account for depreciation.

The expenditure limitation for the 1996 general election for the office of President of the United States is $61,820,000.

Based on a reconciliation of the DK's bank records to its reported activity through December 31, 1997, the Audit staff determined that DK disbursed $84,930,086. From this figure was deducted: loan repayments $4,096,289; the purchase of Certificates of Deposit from the DFP, $1,856,524; offsets to operating expenditures $14,000,112; net reimbursements from the GELAC $2,601,302 for compliance related expenditures; non-qualified campaign expenses subject to repayment of $32,694; additional offsets to

operating expenditures collected from January 1, 1998 through September 30, 1998 of $192,097; and, added $41,007 to this figure for wind down expenses incurred by DK from January 1, 1998 through September 30, 1998 to arrive at operating expenditures subject to the limitation of $62,192,075.

In addition, the following adjustments are necessary.

1. Amounts Due DK from the DFP

The Memorandum included accounts receivable of $751,236 owed to DK by DFP. This amount included payments by DK for: a supporter list acquired from DFP, $378,774; expenses relative to a telephone system, $18,628; media production expenses, $106,204; primary expenses paid by DK, $207,378; interest earned by DK but received by DFP, $10,230; undocumented assets purchased from DFP, $28,546; and, DFP occupancy costs paid by DK $1,476. Each of these matters is discussed below and any change in the amounts resulting from DK's response to the Memorandum or the Commission's consideration of the audit report are noted. DK's response to the Memorandum simply refers to the DFP response to the same issues in its Memorandum.

a. 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 it was concluded that DFP and DK regard the lists as capital assets and were 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 it 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 debts.

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 names. 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, DFP, despite numerous requests, had not provided any documentation which established the number of names contained on the supporter list or documented its cost calculation.

For these reasons, the supporter lists were not considered to be capital assets. Therefore the proper valuation of the lists is fair market value. Information gathered to date 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 DFP.

In DFP's 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.

DFP responded 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 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.[13] 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 CTL which establishes the total number of names on the list as 876,087.[14] Accordingly, the Staff concluded that the estimated fair market value at which the list could have been transferred to DK is not more than $87,609 (876,087 names multiplied by $100.00 per thousand names). Therefore, the Staff determined that DFP owes DK $291,165 ($378,774 - $87,609), DK has made a contribution to DFP in that amount, and DK may deduct the amount from its expenditures subject to the spending limitation.

During its consideration of the DFP audit report, 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. Telephone System

On March 30, 1995, DFP signed a contract with NTFC to lease a telephone system. The system provided by this lease was initially installed at the headquarters office in Washington, D.C. In the contract, DFP agreed to make seventeen payments to NTFC. Title to the telephone system remained with NTFC. In October 1995, the lease was amended, the telephone system was divided, and the equipment was moved. Some equipment was sent to Iowa and some to Florida.[15]

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

14 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.

15 The Iowa system was later returned to Washington, DC and the lease was assumed by New Century Media.

On March 15, 1996, DFP moved out of its state headquarters office in Tallahassee, Florida. On March 27, 1996, technicians arrived to remove the phone system, but discovered it missing.

DFP sold this telephone system to DK for 60% of $18,200, the value DFP placed on the system, or $10,920, and reported the amount as an offset to the spending limitation. In July 1997, DFP repurchased the telephone system from DK for 60% of $10,920, the amount that it received the previous year, or $6,552. DFP received $10,920 from DK for the period August 22, 1996 through July 27, 1997 and still owes DK $4,368 (the 1996 sales price of $10,920 less the 1997 repurchase price, $6,552).

The recommendation in the DFP's Memorandum invited DFP to demonstrate that the analysis presented above was inaccurate. In response, DFP states that it does not dispute that the missing telephone system should not have been sold to, and repurchased from DK and that it owes DK $4,368.

On May 30, 1995, DFP signed a capital lease [purchase] agreement with NTFC (Lease #48972) to finance the acquisition of a telephone system for its national headquarters office. DFP agreed in this contract to make sixteen payments of $19,304 for equipment valued at $273,200. At the completion of the contract, DFP would be permitted to purchase the system for one dollar. On August 22, 1996, DFP sold this telephone system to DK. DFP valued the system at $282,000 and received 60% of that amount, or $169,200. DFP has not explained this higher valuation of the telephone system. DFP inflated the phone system value by $8,800 ($282,000 - $273,200). As such, the over valuation of $5,280 ($8,800 x 60%), should be returned to DK.

In a letter dated July 18, 1997, a representative of Line Two Communications (LTC) agreed to broker the sale of this telephone system for a guaranteed minimum price of $110,500. This was apparently agreed to when the letter was signed by the Assistant Treasurer for both DFP and DK on July 23, 1997. On July 28, 1997, DK deposited a check dated July 24, 1997 for $130,000 from Telpro, Inc., the purchaser of the telephone system.

Also on July 28, 1997, DFP reported repurchasing the telephone system from DK for $101,520 ($169,200 x 60%) and reported the purchase as an exempt compliance expense. The Audit staff concludes that DFP could not repurchase the telephone system. First, DFP has not demonstrated any legitimate winding down purpose for the repurchase. Second, the documentation available states that DK had previously sold the telephone system to a third party. LTC necessarily negotiated the sale with DK and not DFP because DK had purchased DFP's interest in the system on August 22, 1996. As already noted, the commitment to sell the equipment was signed on July 23, 1997. The Telpro, Inc. check, dated July 24, 1997, indicates that the sale was made on that date. Consequently, after July 24, 1997, DK no longer owned the telephone system and could no longer transfer it to DFP. The $130,000 realized from the sale of the

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telephone system was transferred to DFP on July 31, 1997 with the explanation that it had been mistakenly deposited to the DK account. DFP purchased an asset from DK that it no longer owned, and received a transfer from DK of the proceeds of its sale of the asset. These transactions need to be reversed by DFP paying DK $8,980 ($130,000-$121,020).

As with the other sections of this finding, DFP was invited to disprove the analysis presented above. Regarding the overvaluation of the equipment, DFP simply notes that the proper valuation is $308,864, the sum of the 16 lease payments. This is a greater value than used at the time of the sale to DK, $282,000, or the cost of the equipment specified in the lease contract, $273,200. Using this higher value, DFP concludes that after the sale to DK and the repurchase by DFP, DK owes DFP $6,647. Not only is the cost of an asset not established by the sum of the lease payments made on it, DFP didn't make all the payments. The RNC made two, one has not been made yet, and portions of two others were made by the GELAC. In the Staff analysis, the cost used in the Memorandum, $273,200 remained unchanged.

DFP explained its repurchase of the telephone system by stating that it was to provide telephone service to the staff and auditors during the winding down period. However, that explanation does not explain why the system then owned by DK which was also winding down was more appropriately a DFP asset. DFP also contends that the telephone system was actually transferred to DFP shortly after the election, long before it was sold to the third party. It then goes on to explain that the transaction went unrecorded for eight months until the third party sale was completed. No evidence to support this explanation is provided. DFP does agree to reverse the transaction as suggested in the Memorandum if that is the preferred course of action, however it notes that after its recalculation of the sale amount the effect is immaterial. If all of DFP's calculations are accepted, the conclusion is correct. However, as explained in the Staff analysis the calculations in the Memorandum and the $8,980 net payment due DK shown in the Memorandum were unchanged.

As a result of these transactions, in the report presented to the Commission the Staff adjusted expenditures subject to the spending limitation by $18,628 ($4,368 + $5,280 +$8,980).

Adjustments to this finding were necessitated by the Commission's action on DFP's audit report. Finding III.A.2. in that report concerns expenditures by the RNC believed by the Staff to be primary in character. As a result the Staff had concluded that they represented in-kind contributions to DFP rather than coordinated expenditures [2 U.S.C. §441a(d)] on behalf of DK. The Commission accepted the RNC's characterization of those expenditures. Included among those disbursements were two payments made by the RNC on Lease #48972 for DFP's headquarters telephone system.

The valuation of the telephone system when transferred to DK has been reduced by the two payments made by the RNC. Since these payments are

considered coordinated expenses they are not considered part of DFP's basis in the telephone system. As a result the amount that DFP could receive from DK when the system was sold is reduced. In the Staff analysis, the overvaluation of the telephone system was $5,280. That amount is now $25,770. The total amount due DK from DFP has been revised to $39,118 ($4,368 + $25,770 + $8,980).

When the Commission considered the Staff recommendation with respect to this matter during the discussion of the DFP audit report, the revised amounts had been determined. As a result the Commission approved the Staff's revised recommendation that DFP must pay DK $39,118 related to the sale, repurchase, and valuation of two of the telephone systems discussed above.

c. Media Production

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.

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 focus group 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.

In DFP's 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.

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. 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."

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 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.

In the DFP audit report, the staff recommended and the Commission agreed 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. Further, the Commission determined that DFP is required to return the amounts to DK.

d. Primary Expenses Paid by DK

A review of disbursements, totaling about $416,000, incurred by DK during the period June 17, 1996 through August 14, 1996 indicated that

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$207,378 were primary related and benefited DFP. These costs included: telephone service and equipment, $58,786; office furniture and equipment, $80,288; utilities, $36,173; collateral materials, $6,588; headquarters security, $11,552; supplies, $8,550; convention related expenses, $4,186; and, miscellaneous expenses, $1,255. The analysis of expenditures in the Memorandum showed this amount, $207,378, due from the DFP.

In DFP's 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 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. ... 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. ... 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."

As noted in the citations above, §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.

The documentation provided 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 explains that 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 is 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. The documentation provided does not support a case for exclusive general election activity but does confirm that the disbursements were incurred prior to the nomination.

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.

Having failed to establish that the expenses enumerated above related exclusively to the general election, overhead expenses of $207,378, paid by DK in the primary period, are primary expenses attributed to 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.

During the consideration of the DFP audit report, 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.

e. Undocumented Assets Sold to DK

As a result of our review of a group of assets sold by DFP to DK at a value of $52,601, the Audit staff identified $8,546 in assets whose acquisition by DFP was not supported by documentation. In addition, a copier included in this sale had been over valued by $20,000. Therefore DFP owes DK $28,546.

In DFP's response to its Memorandum it did not contest this calculation.

During its consideration of the DFP audit report, the Commission adopted the Staff recommendation that DFP is required to repay $28,546 to DK.

f. Occupancy Costs

In February 1995, 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 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.[16] In the review of the headquarters rent, three problems 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.

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

DK paid rent of $29,110 in July which is during the primary period. Also documentation indicated that DK paid $21,779 for renovations of the 10th floor of campaign headquarters prior to the date of nomination. This amount represented 50% of the total cost with the other half being paid by the RNC. In addition, DK paid miscellaneous occupancy costs such as electrical work and invoices for adding and changing locks during the primary period. These miscellaneous expenses totaled $13,758.

All security deposits paid in the primary period should have been paid by DFP. The outstanding deposits should then have been transferred to DK. DFP paid $104,362 of the $124,657 paid in the primary period for security deposits. DK paid one security deposit of $20,295 on June 1, 1996 which made up the balance of DFP's deposit liability.[17] DFP did not transfer any security deposits to DK at the beginning of the general election campaign. On February 21, 1997, DK reimbursed DFP $29,100 for one security deposit. Security deposit refunds totaling $77,060 have been received by DK. Included in these refunds are deposits that were made by, or should have been made by DFP. In the Memorandum it was concluded that DFP is owed $47,960 by DK ($77,060 of DFP paid deposits less the DK transfer of $29,100).[18]

Finally, the security deposits earned interest while outstanding. Since DFP paid or should have paid these deposits the interest earned is due DFP. Interest totaling $6,406 and $647 has been received by DK and the GELAC respectively.

These issues were discussed with DK and DFP representatives. Subsequently, they noted that "many of the payments in question fall under the headings 'bright line'. The committees believe that rent and build-out expenses incurred in preparation for the General Election were properly paid by the General or Compliance Committees." No other information or documentation was submitted.

In the Memorandum a chart was presented that summarized the adjustments discussed above. The net of the various amounts due to and due from DFP was $1,476 due to DFP. DK and DFP were invited to demonstrate that this calculation was incorrect.

In its response to the Memorandum, DFP objected to the finding's conclusion that payments made for occupancy expenses paid by DK in the primary period were primary expenses. DFP also questioned the amount of the deposits and interest owed DFP by DK.

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17 DK correctly paid an additional security deposit of $8,815 on September 19, 1996.

18 The DFP is carrying as a receivable a security deposit it made to Union Center Plaza Associates, for $56,764.70. This amount was included in the refunds paid to DK.

DFP contends that the tenth floor "...was used by Dole/Kemp in the general presidential election and was used exclusively by persons working for the general election campaign." It offers, as proof positive, that the tenth floor was the site of exclusive general election activity, the memorandum from Andrea Mack, the campaign's former Deputy Director of Administration, in which she describes the preparations beginning in June 1996 for the general election campaign and states that the office expansion, office preparation, and equipment acquisition was for the exclusive benefit of the general campaign. Accordingly, DFP, assumes but never states, that it was also proper for DK to also make payments for the rent and renovation of the tenth floor. This conclusion is apparent from DFP's version of the chart presented in the Memorandum. On DFP's version, it shows that it owes no reimbursements and received no in-kind contributions.

Beginning in June and running through the date of Senator Dole's nomination in mid August of 1996, DFP certainly was engaged in preparations for the general election. DFP was also certainly engaged in the candidate's primary campaign and planning for the convention. Accordingly, 11 CFR §9034.4(e)(3) states that unless the campaign can establish through documentation that a discrete group of employees occupying a discrete portion of campaign headquarters were engaged exclusively in general election preparation, all salary and overhead expense up to the date of nomination is an expense of the primary.

In fact, there is evidence that the tenth floor was never used by any Dole staff engaged solely in general activity during the primary period. DFP's notations on the July 18, 1996 invoice for the tenth floor renovations sent to the RNC to be paid from coordinated funds identified the share to be paid as that of the primary. This reference indicates an awareness on the part of DFP that the tenth floor was used, prior to Senator Dole's nomination, for primary related activity. Testimony of senior DFP staff members establishes that they had offices on the tenth floor in the primary period and while occupying offices on that floor, were paid exclusively by DFP. Further, after resigning from the Senate, Senator Dole's office was on the tenth floor. He was at that time a candidate for the nomination. Given that DFP cannot make a claim that the tenth floor was used exclusively by the general election campaign in the primary period, the rent and renovations occurring as they did in the primary period were obligations of DFP and paid by the RNC and DK.

DFP states that DK owes it $27,664 for rent deposits paid by DFP and refunded to DK. The Audit staff agrees. The calculation has been amended to show the refund already received by DFP.

Rather than attributing the interest received by DK but due to DFP according to which committee paid the rent deposit or which should have paid the deposit, DFP has assigned slightly less interest to DFP and more to DK. In spite of the fact that it is not apparent why DFP allocated interest this way, the effect of the change is relatively minor reduction in the amount due to DFP. The difference is $2,197 ($6,406 -

$4,209). The outcome of retaining additional interest in the general campaign is as follows: an increase in the amount of interest net of taxes which is refundable to the United States Treasury by DK and, an increase of $2,197 in the amount due DK from DFP ($3,673 - $1,476). The Audit staff accepts DFP's calculation.

The net effect of the transactions discussed above is an amount due to DK from DFP of $32,773. During the Commission's consideration of the DFP audit report, it approved the Staff recommendation that DFP should transfer $32,773 to DK, and that the transfer should be reported by both committees.

Summary of Amounts Due From DFP	
a. Supporter List Expenses	($228,774)
b. Telephone System Expenses	($39,118)
c. Media Production Expenses	($106,204)
d. Primary Expenses Paid by DK	($138,743)
e. Undocumented Assets Sold to DK	($28,546)
f. Occupancy Costs	($32,773)
Total	$(574,158)

2. Amounts due DFP from DK

During the review of the DFP's vendor files, disbursements made by DFP were found that appear to be for the benefit of the general election campaign and are discussed below.

a. AV Atlantic Payments

During May, 1997 DFP transferred $80,316 to DK. This transfer was made in error to correct an AV Atlantic (one of the campaign's air charter vendors) payment thought to have been paid from a DK account. In addition, DFP paid AV Atlantic for leased equipment used on aircraft operated by DK, $6,350. Therefore, DK owes DFP $86,666 ($80,316 + 6,350). This amount has been included in expenditures subject to the spending limitation. Neither DFP nor DK commented on this correction in their responses to the Memoranda.

b. Telephone Expenses

During fieldwork, the Audit staff identified a $20,000 refund from Bell Atlantic, deposited by DK, which was the result of an expenditure made by DFP. Additionally, as a result of materials submitted subsequent to conclusion of fieldwork, refunds received by DK from Ameritech, $1,500, and from Bell Atlantic, $4,645, were determined to have resulted from DFP expenditures. Again neither committee commented on these items. Finally, two payments for DK telephone service

were paid by DFP in June of 1998. The two payments total $10,870. These amounts are due to DFP and $37,015 is applicable to DK's spending limitation..

c. Travel Expenses

DFP paid $3,688 for hotel rooms at a Holiday Inn in Pittsburgh, PA for the period August 16 through August 18, 1996. These are qualified, general election expenses associated with Senator Dole's travel and should have been paid by DK. As such, this amount is due DFP and has been included in determining expenditures subject to the spending limitation. As with the previous two sections, DK did not comment on this expense.

Summary of Amounts Due to DFP	
a. Payments Relative to AV Atlantic	$86,666
b. Telephone Expenses	$37,015
c. Travel Expenses	$3,688
Total	$127,369

3. Accounts Payable Reported as of September 30, 1998

The Memorandum noted that DK had accounts payable totaling $1,028,481, as of December 31, 1997. Included in accounts payable is a debt owed to the DFP of $202,767 representing the amount still due as a result of DK's sale of a Certificate of Deposit (CD) to DFP on November 25, 1996 (See finding II.A.2.a. above). This CD had already been redeemed by DK when it was sold to DFP. Since this transaction merely represents money owed on an exchange of assets (CDs for cash), it is not applicable to the spending limitation and the Audit staff has excluded it from the amount of debt outstanding. Also included in accounts payable was a debt owed to DFP, totaling $31,208, as a result of a transfer of assets. This debt was paid by DK on November 25, 1996 and has been excluded from Accounts Payable. Therefore, the Audit staff has added $794,506 ($1,028,481 - $202,767 - $31,208) to operating expenditures for outstanding obligations as of June 30, 1997.

No comment on this calculation was offered by DK in its response to the Memorandum. However, as a result of DFP's response to its Memorandum and a review of DK's records for the period January 1, to September 30, 1998, the following adjustments were made. DFP's response provided documentation which indicated that a portion of amounts owed to NTFC, for a telephone lease, represented a debt owed by DK (See Report of the Audit Division on Dole for President, Inc. Section III.C.4.). As such, this amount ($1,519), adjusted for a permissible compliance exemption, resulted in a $1,261 increase in accounts payable at December 31, 1997.

Based on the response to the Memorandum and reported activity through September 30, 1998, the adjustment to operating expenditures, for debt outstanding to entities other than DFP, has been revised to $830,497.

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4. Excessive Reimbursements Received from the GELAC

From a review of the DK and GELAC disbursement databases, the Audit staff determined that $1,740,301 could have been allocated to exempt compliance under the alternative allocation method of campaign payroll, payroll taxes, overhead and other accounting costs.

However, during the expenditure report period, the GELAC also incurred qualified campaign expenses which totaled $1,686,733 and should have been paid by DK. In addition, the GELAC made 11 transfers to DK for allocable expenses which totaled $874,000 and received five transfers from DK, correcting overpayments of allocable expenses by the GELAC, which totaled $256,000.

Based on the above transactions DK received excessive reimbursements from the GELAC totaling $564,432 ($1,686,733 - $1,740,301 + $874,000 - $256,000). DK's response to the Memorandum made no comment on this calculation.

5. Accounts Receivable from the GELAC

Reimbursements received from the Secret Service were less than the amounts billed for Secret Service personnel traveling on the aircraft used by Mrs. Dole, $13,193; Secretary Kemp, $3,333; and, the Press Plane, $1,091. The total amount of these underpayments by the Secret Service is $17,617; and DK can be reimbursed by the GELAC for this amount (See 11 CFR §9003.3(a)(2)(i)(H)).

As the result of additional information submitted by DK and the revision of the calculation of DK's cost of providing transportation to the Secret Service, some of these amounts have been revised. The revised amounts are: Mrs. Dole's aircraft, $13,193; and, Secretary Kemp's aircraft, $4,081, for a total of $17,274. No amount may be reimbursed for Senator Dole's aircraft or for the Press Plane.

In response to the Memorandum, DK argues that all amounts that were billed to the Secret Service were permissible and that the reimbursements received were substantially less than its cost. If that assertion were accepted the amounts discussed here would be substantially larger. The subject of DK's billings for travel on campaign aircraft is discussed at length in Finding III.B. above.

Further, the Memorandum concluded that offsets to operating expenditures received by the GELAC for vendor refunds and the sale of assets, totaling $11,608, resulted from either expenditures originally paid by DK or assets purchased and used by DK. These moneys should be returned to DK by the GELAC. Additionally, wind down costs paid by DK totaling $13,227 may be reimbursed by the GELAC. No comment on this conclusion was contained in DK's response to the Memorandum.

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Based on reported activity through September 30, 1998, the adjustment to operating expenditures has increased by $41,007 for additional wind down costs incurred by DK which may be reimbursed by the GELAC to a total of $83,116.

6. <u>DK Expenses Paid by Kemp for Vice President</u>

In the Memorandum it was explained that as a result of an audit of Kemp for Vice President, the Audit staff identified expenditures for pictures, film, photo processing and room service costs in San Diego, totaling $8,011 which occurred after the date of the candidate's nomination and, for this reason, were determined to be applicable to general election limitations. As a result of information received from Kemp for Vice President, these expenses are no longer considered to be attributable to the DK spending limitation.

7. <u>Reversal of Asset Purchase (Other Than Telephone Systems)</u>

On July 28, 1997, DK sold assets, to include two phone systems, to DFP for $166,427. This transfer is not recognized because it represents a repurchase of assets which had been previously sold to DK by DFP at a time both DK and DFP are winding down. The adjustment for the phone systems is addressed at Section III. C.1.b. above. The remaining adjustment to expenditures subject to the spending limitation of $58,355, represents assets other than the two phone systems.

In response to section III.C.1.b., DK agrees to reverse the sale of the telephone systems. No comment is made with respect to assets other than the telephone systems. Further, no demonstration of a primary campaign winding down purpose for this transaction has been made and, therefore, no change to the conclusion reached in the Memorandum is warranted.

Shown below is Audit staff's analysis of expenditures subject to the limitation after considering DK's response to the Memorandum:

Expenditures Subject to the Spending Limitation as Determined by the Audit Staff at September 30, 1998

Disbursements from Inception through December 31, 1997	$84,930,086
LESS:	
Loan Repayment	($4,096,289)
Purchase of DFP CD's	($1,856,524)
Offsets to Operating Expenditures	($14,000,112)
Reimbursements from the GELAC for Compliance Expenditures	($2,601,302)
Non-Qualified Campaign Expenses Subject to Repayment (See Finding III.D.1. below)	$0
Wind down Disbursements (1/1/98 - 9/30/98)	$41,007
Accounts Receivable Collected (1/1/98 - 9/30/98)[19]	($192,097)
Adjusted DK Expenditures Subject to the Spending Limitation	$62,224,769
Add: In-Kind Contribution from the RNC for Media Expenses (See Finding III.A.)	$0
Less: Amounts Receivable from DFP (See Finding III..C.1., page 46)	($574,158)
Add: Amounts Payable to DFP (See Finding III.C.2., page 47)	$127,369
Add: Accounts Payable at 9/30/98 (See Finding III.C.3., page 47)	$830,497
Add: Excess Reimbursements from the GELAC (See Finding III.C.4., page 48)	$564,432
Less: Amounts Receivable from the GELAC (See Finding III.C.5., page 48)	($83,116)
Add: Reversal of Asset Purchase (See Finding III..C.7., page 49)	$58,355
Add: Press/USSS Collections in Excess of Costs (See Finding III.B., page 31)	$1,219,281
Adjusted Expenditures Subject to the Limitation	$64,367,429
Less: Limitation (2 U.S.C. §441a(b)(1)(B))	($61,820,000)
Amount Over the Spending Limitation	$2,547,429 [20]

[19] As of September 30, 1998, DK reported accounts receivable of $11,245. The remaining amount represents outstanding billings to the Press, which, if collected, would require an equal amount to be refunded (See Finding III.B.).

[20] The Audit staff determined that the value of capital assets transferred from the DFP to DK totaled $148,345. In addition, other capital assets purchased amounted to $29,828. The compliance related portion of these assets was calculated to be $33,800. Therefore, the cost basis of these assets to DK is $144,373 ($148,345 + $29,828 - $33,800). Adjusting for depreciation, the value of these capital assets was determined to be $86,624 ($144,373 x .60). The sale of assets would result in a reduction of amount in excess of the spending limitation.

Based on the above analysis, DK has exceeded the limitation at 2 U.S.C. §441a(b)(1)(B) in the amount of $2,547,429.

At the conference held at the conclusion of fieldwork, these matters were presented to DK representatives, who disagreed with the Audit staff's treatment of many of these items.

In the Memorandum it was recommended that DK provide evidence that the expenditure limitation has not been exceeded. The amount calculated in the Memorandum was $2,217,762. Absent such evidence it was stated that the Audit staff would recommend that the Commission make a determination that an equal amount is payable to the United States Treasury..

In addition to its comments on individual topics discussed above, DK's observed that to the extent that it has exceeded its spending limitation, any such amount could not be more than $250,000. No supporting calculations were provided to demonstrate the derivation of that estimate.

Recommendation

The Audit staff recommended that the Commission determine that DK had incurred qualified campaign expenses in excess of the spending limitation at 2 U.S.C. §441a(b)(1)(B) in the amount of $14,035,577 and that pursuant to 26 U.S.C. §9007(b)(2), an equal amount was repayable to the United States Treasury.

The Commission adopted the Staff recommendation that it determine DK has incurred qualified campaign expenses in excess of the spending limitation and an equal amount is repayable to the United States Treasury. However, as a result of Commission action on the DFP audit report[21] and on other findings in this report, the amount in excess of the spending limitation and repayable is $2,547,429 [22].

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21 For a full presentation of the issues in the DFP audit report affecting this finding, see Agenda Documents 98-87 and 99-49, at Findings III.A.4., III.B.2., III.C., III.D., and 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. Also see the explanations of Commission action above and at section III.D.1. below.

22 The amount voted by the Commission was $2,535,225. The differences are an addition of $32,694 for expenses that the Staff had recommended be considered non-qualified campaign expenses but the Commission accepted as qualified (See Finding III.D.1. below). This amount was shown as a credit to the spending limitation to avoid a double repayment. That credit is no longer necessary. Also, as a result of the Commission's action on the Telephone System Expenses section (Finding III.C.1.b.), an additional $20,490 is due to DK from DFP. This amount is a credit to the spending limitation. The net effect is an amount in excess of the spending limitation of $2,547,429 ($2,535,225+$32,694-$20,490).

D. Apparent Non-Qualified Campaign Expenses

Section 9002(11) of Title 26 of the United States Code defines, in part, the term "qualified campaign expense" as an expense incurred by the candidate of a political party for the office of President, by the candidate of a political party for the office of Vice President, or by an authorized committee of the candidates of a political party for the offices of President and Vice President to further the election of either or both of such candidates to such offices.

Section 9007(b)(4) of Title 26 of the United States Code states, in part, that if the Commission determines that any amount of any payment made to the eligible candidates of a political party was used for any purpose other than to defray the qualified campaign expense with respect to which such payment was made, it shall notify such candidates of the amount so used, and such candidates shall pay to the Secretary of the Treasury an amount equal to such amount.

Section 9004.4(b)(3) of Title 11 of the Code of Federal Regulations states, in part, that any expenditures incurred after the close of the expenditure report period, as defined in 11 CFR §9002.12, are not qualified campaign expenses except to the extent permitted under 11 CFR §9004.4(a)(4).

Section 9004.4(a)(4)(i) of Title 11 of the Code of Federal Regulations states, in relevant part that, costs associated with the termination of candidate's general election campaign such as 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.

1. Lost Equipment

Payments for the replacement of leased equipment that had been lost or stolen were questioned as non-qualified campaign expenses[23].

The Staff recommended that the Commission determine that $32,694 is repayable to the U.S. Treasury pursuant to 26 U.S.C. §9007(b)(4).

The Commission rejected the Staff recommendation and determined that $32,694 will instead be considered as a qualified campaign expense, and directed the Staff will to make the appropriate adjustment to the expenditures subject to limitation.

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[23] For the full presentation and discussion of this issue see Agenda Documents 98-88 and 99-50, Finding III.D.1. 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.

2. DFP Expenses Paid by DK

Finding III.C.1., Amounts Due DK from the DFP, details expenditures made by DK which have been determined to be for DFP expenses. As such, these expenses were not incurred to further the election of a candidate of a political party for the office of President or Vice President and can not be considered qualified campaign expenses under 26 U.S.C. §9002(11). These items are as follows:

Summary of Non-Qualified Campaign Expenses		
Finding III.C.1.a.	Supporter List Expenses	$228,774
Finding III.C.1.b.	Telephone System Expenses	$39,118
Finding III.C.1.c.	Media Production Expenses	$106,204
Finding III.C.1.d.	Primary Expenses Paid by DK	$138,743
Finding III.C.1.e.	Undocumented Assets Sold to DK	$28,546
Finding III.C.1.f.	Occupancy Costs	$32,773
	Total	$ 574,158 [24]

DFP's response to these matters, as presented above at Finding III.C.1., Amounts Due DK from the DFP, failed to demonstrate that these expenditures were qualified campaign expenses of DK. It should be noted that this section provides for a $574,158 accounts receivable due DK from DFP and adjusts the calculation of expenditures subject to the overall limitation by this amount. Therefore, should DFP transfer funds to DK for all, or a portion of these items, any repayment requested below would be reduced by a similar amount.

Recommendation

The Audit staff recommended that, absent a reimbursement from DFP, the Commission determine that an amount equal to the amount of these disbursements was repayable to the U.S. Treasury pursuant to 26 U.S.C. §9007(b)(4).

The Commission adopted the Staff recommendation. As noted above the revised amount is $574,128.

E. INCOME EARNED BY DK

Section 9004.5 of Title 11 of the Code of Federal Regulations states, in relevant part, that the investment of public funds or any use of public funds that results in income is permissible, provided that an amount equal to all net income derived from such use, less Federal, State and local taxes paid on such income, shall be paid to the Secretary.

[24] The amount presented to the Commission was $553,668. Due to Commission action on the Telephone System Expenses section (Finding III.C.1.b.), an additional $20,490 is due to DK from DFP. The increase is $20,490.

2. DFP Expenses Paid by DK

Finding III.C.1., Amounts Due DK from the DFP, details expenditures made by DK which have been determined to be for DFP expenses. As such, these expenses were not incurred to further the election of a candidate of a political party for the office of President or Vice President and can not be considered qualified campaign expenses under 26 U.S.C. §9002(11). These items are as follows:

Summary of Non-Qualified Campaign Expenses		
Finding III.C.1.a.	Supporter List Expenses	$228,774
Finding III.C.1.b.	Telephone System Expenses	$39,118
Finding III.C.1.c.	Media Production Expenses	$106,204
Finding III.C.1.d.	Primary Expenses Paid by DK	$138,743
Finding III.C.1.e.	Undocumented Assets Sold to DK	$28,546
Finding III.C.1.f.	Occupancy Costs	$32,773
	Total	$ 574,158 [24]

DFP's response to these matters, as presented above at Finding III.C.1., Amounts Due DK from the DFP, failed to demonstrate that these expenditures were qualified campaign expenses of DK. It should be noted that this section provides for a $574,158 accounts receivable due DK from DFP and adjusts the calculation of expenditures subject to the overall limitation by this amount. Therefore, should DFP transfer funds to DK for all, or a portion of these items, any repayment requested below would be reduced by a similar amount.

Recommendation

The Audit staff recommended that, absent a reimbursement from DFP, the Commission determine that an amount equal to the amount of these disbursements was repayable to the U.S. Treasury pursuant to 26 U.S.C. §9007(b)(4).

The Commission adopted the Staff recommendation. As noted above the revised amount is $574,128.

E. INCOME EARNED BY DK

Section 9004.5 of Title 11 of the Code of Federal Regulations states, in relevant part, that the investment of public funds or any use of public funds that results in income is permissible, provided that an amount equal to all net income derived from such use, less Federal, State and local taxes paid on such income, shall be paid to the Secretary.

[24] The amount presented to the Commission was $553,668. Due to Commission action on the Telephone System Expenses section (Finding III.C.1.b.), an additional $20,490 is due to DK from DFP. The increase is $20,490.

Section 9007.2(b)(4) of Title 11 of the Code of Federal Regulations states that if the Commission determines that a candidate received any income as a result of an investment or other use of payments from the fund pursuant to 11 CFR §9004.5, it shall so notify the candidate, and such candidate shall pay to the United States Treasury an amount equal to the amount determined to be income, less any Federal, State or local taxes on such income.

DK earned interest totaling $38,289 on certificates of deposit held to secure letters of credit that satisfied DK's deposit requirements with its telephone and other vendors. In addition, certificates of deposit purchased from DFP that secured letters of credit serving as security deposits for vendors utilized by both DFP and DK earned interest in the amount of $12,997 while in DK's possession (see Finding II.A.2.). Further, DK received $6,576 in interest on moneys maintained in an escrow account with AV Atlantic, one of DK's air charter vendors, and $1,849 from the Secret Service. The Secret Service paid DK interest for any travel billing that was not paid on a timely basis.

At a conference held at the conclusion of fieldwork, the Audit staff provided DK representatives with a schedule of the interest income.

Prior to the conclusion of fieldwork, the Audit staff had not been presented with any evidence of any taxes paid relative to this income. Therefore, when the Memorandum was prepared, it appeared that a payment to the United States Treasury in the amount of $59,711 was warranted.

In the Memorandum, the Audit staff recommended that DK provide documentation to demonstrate that the interest should not be considered income, or submit copies of the relevant tax returns showing any Federal, State or local income taxes paid on this income. Absent such demonstration, the Audit staff stated that it would recommend that the Commission make a determination that $59,711 is payable to the United States Treasury.

In its response to the Memorandum, DK provided copies of income tax returns filed on behalf of DFP for 1996 and on behalf of DK for 1997. Also included with DK's response was a photocopy of a check in the amount of $13,201dated March 12, 1998. This check was used to pay DK's 1997 tax liability. DK has not provided any further documentation on these matters, despite several requests.

Additionally, DK's response notes that "[w]ith regard to monies maintained in escrow accounts, Dole/Kemp's calculations in the response to Press billing findings and recommendations show that the Secret Service underpaid the Committee for travel expenses. Therefore, Dole/Kemp simply applied payments characterized as 'interest' by the Secret Service to outstanding or underpaid bills. Thus, such payments are not properly characterized as interest."

Of the interest income reported on DFP's 1996 tax return, $2,767 in reported interest income appears to be the interest earned on a certificate of deposit which was redeemed by DK. No documentation has been provided to establish that DFP's 1996 tax liability has been paid. Absent evidence that income taxes have been paid on the $2,767, the entire amount is due to the U.S. Treasury. In 1996, DK had additional interest income of $18,060. No evidence has been submitted to establish that any taxes have been paid on this amount. Therefore, the entire amount is due to the U.S. Treasury.

On DK's 1997 tax return, it reported income of $37,818. DK paid taxes on this income of $13,201. The Audit staff calculated that DK earned interest income totaling $38,414 in 1997, including that received from the Secret Service. Therefore, a payment of $25,213 ($38,414 - $13,201) to the United States Treasury is required.

The Audit staff is not persuaded by DK's arguments that the Secret Service payments are not properly characterized as interest. As noted in finding III.B., the Secret Service follows a well known policy concerning the maximum amount that it will pay for travel on campaign aircraft. Because DK believes that it should have been paid more than the Secret Service policy allows, does not convert the interest payments into additional travel reimbursements in violation of that policy. These amounts are included in the above payment determinations. Additionally, DK earned $470 interest from the Secret Service in 1998, which is also required to be repaid to the United States Treasury.

Recommendation

The Audit staff recommended that the Commission determine that $46,510 ($20,827 + $25,213 + $470) was payable to the United States Treasury pursuant to 2 U.S.C. §9004.5.

The Commission approved the Staff recommendation..

F. STALE-DATED CHECKS

Section 9007.6 of Title 11 of the Code of Federal Regulations states 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.

Based on the Audit staff's bank reconciliations, 90 checks to creditors totaling $27,728 have been issued by DK but have not been negotiated.

Also, 30 contributor refund checks, totaling $16,318, were issued by the GELAC but not negotiated.

At a conference held at the conclusion of fieldwork, DK representatives were provided with schedules of the stale-dated checks. DK representatives agreed to review their records and provide additional and ongoing information in an effort to resolve these items.

In the Memorandum, the Audit staff recommended that DK provide evidence that the above noted checks are not outstanding by providing copies of the front and back of the negotiated checks along with bank statements, or that the outstanding checks are void by providing either copies of the voided checks with evidence that no obligation exists, or copies of negotiated replacement checks. Absent such information, the Audit staff stated that it would recommend the Commission determine that stale-dated checks totaling $44,046 ($27,728 + $16,318) are payable to the United States Treasury.

In response to the Memorandum, DK's states that, with respect to checks with a face value of $1,000 or less, the failure to negotiate the check indicates an intent to make a contribution to DK. Because donations of personal services and personal travel expenses are exempt under 11 CFR §100.7(b), stale checks of $1,000 or less having to do with such personal services or travel need not be repaid to the Treasury. Thus, only $20,984 must be repaid to the Treasury. Although not detailed in its narrative, DK on a supporting schedule provided notes that no balance is due relative to two checks payable to AT&T. Finally, the response notes that DK does not dispute the $16,318 payment for stale dated GELAC checks.

DK provided no evidence in its response that the stale dated outstanding checks identified in this finding were either negotiated or void and that no obligation exists. Instead, predicated on the undemonstrated assumption that the payee intended donate personal services or travel costs, DK calculates that a portion of the stale dated outstanding checks do not require a payment to the U.S. Treasury.

Section 9007.6 of the Code of Federal Regulations makes no such assumption. If statements from the payees of the stale dated checks had been provided to support DK's contention an allowance would be appropriate. No such evidence has been provided. Further, with respect to the two checks payable to AT&T, no statement has been provided from the vendor or any reconciliation of DK's account with AT&T indicating these amounts are not due. As a result, the Audit staff's position remains unchanged. DK's third quarter 1998 disclosure report shows that a number of the checks that DK acknowledges are stale and payable to the U.S. Treasury, have been voided, the amount added back to DK's available cash and subsequently disbursed.

Recommendation

The Audit staff recommended that the Commission determine that DK was required to pay $44,046 to the United States Treasury pursuant to Section 9007.6 of Title 11 of the Code of Federal Regulations.

The Commission approved the Staff recommendation.

G. Summary of Amounts Due to the U.S. Treasury

Finding No.	Finding Title	Amount
III.C.	Expenditure Limitation	$2,547,429
III.D.	Non-qualified Expenditures	
	1. Lost Equipment	
	2. DFP Expenses Paid by DK	574,158
III.E.	Income Earned by DK	46,510
III.F.	Stale-Dated Checks	44,046
Total Amount Due to the U.S. Treasury		$3,212,143

DOLE/KEMP '96, INC.
STATEMENT OF NET OUTSTANDING QUALIFIED CAMPAIGN EXPENSES AT DECEMBER 5, 1996 a/
(As Determined by the Audit Staff as of September 30, 1998)

ASSETS			
Cash			$1,021,119
Accounts Receivable			
Dole for President Committee, Inc.b/		$ 574,158	
Dole/Kemp Compliance Committee, Inc.c/		83,116	
Refunds Received (12/6/96 to 9/30/98) d/		2,885,890	3,543,164
Capital Assets e/			86,624
TOTAL ASSETS			$4,650,907
LIABILITIES			
Accounts Payable			
Payments for Qualified Campaign Expenses (12/6/96 to 9/30/98)		$4,339,842	
Outstanding Accounts Payable at 9/30/98 f/	358,593		
US Airways (See Finding II.A.)	340,781	699,374	
Secret Service (See Finding III.B.)		65,754	
Press (See Finding III.B.)		1,153,527	
Dole/Kemp Compliance Committee, Inc. (See Finding III.C.)		564,432	
Dole for President (See Finding III.C.)		387,480	
Total Accounts Payable			7,210,409
Payments for Wind Down Expenses g/			54,234
Payable to U.S. Treasury (See Finding III.E. - Income Earned)			46,510
TOTAL LIABILITIES			$7,311,153
NOQCE SURPLUS/(DEFICIT)			$(2,660,246)

DOLE/KEMP '96, INC.
FOOTNOTES TO NOQCE STATEMENT

a/ All figures are rounded to the nearest dollar.

b/ This figure represents DFP expenses paid by DK.

c/ This figure represents refunds due DK which were deposited by the GELAC ($11,608); uncollectible Secret Service travel costs which may be reimbursed by the GELAC ($17,274); and wind own costs incurred by DK ($54,234).

d/ The Audit staff has not included $11,245 reported by DK as outstanding accounts receivable from the Press. Based on Finding III.B., collection of any of these amounts will result in an equal amount becoming refundable to the Press.

e/ The value of computers and related equipment transferred to DK was determined to be $178,173. Under 11 CFR §9035.1(c) an alternative allocation of costs to exempt compliance is allowed. The compliance portion of legal, accounting, and national offices is 18.97% or $33,800. Under 11 CFR §9004.9(d)(1), capital assets are allowed to be depreciated and presented on the NOQCE at 60% of its fair market value or cost. Based on this, the Audit staff calculated capital assets to be $86,624 ($178,173 - 33,800 x 60%).

f/ As a result of the Dole for President response to its Exit Conference Memorandum, $1,261 due to NTFC is owed by DK and is included in this figure. (see Audit Report on Dole for President, Inc. Finding III. C.4.)

g/ Dole for President, Inc. paid 100% of the $2,141,602 of shared wind down costs incurred from 12/6/96 to 7/31/98. Fifty percent of such costs should be attributable to DK and, as such, are reimbursable by the GELAC and not currently recognized on this statement. In addition, a review of DK's post 12/5/96 disbursements identified $54,234 which had been incurred for wind down related costs which may be reimbursed by the GELAC.

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/Kemp '96, Inc. and Dole/Kemp '96 Compliance Committee, Inc. (LRA # 506)

The Office of General Counsel is reviewing the proposed Audit Report on Dole/Kemp '96, Inc. ("the General Committee") and Dole/Kemp '96 Compliance Committee, Inc. ("the GELAC") submitted to this Office on September 18, 1998. This Office will submit comments to you as they are prepared. If you have any questions concerning our comments, please contact Peter Blumberg, the lead attorney assigned to these matters. 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.[1]

[1] Additionally, because the proposed Audit Report 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).

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I. DOLE/KEMP PROHIBITED CONTRIBUTION-US AIRWAYS CREDIT (II.A.1.)[2]

We agree with your conclusion that the General Committee received a contribution from US Airways as a result of an extension of credit. However, we recommend that the Report be clarified on two points. First, the Report indicates that the Committee received invoices from US Airways and made payments on a regular basis through mid-October, 1996. We recommend that you include additional information as to when payments began and how often they were made through mid-October in order to show US Airways' prior practice for extending credit to the General Committee. *See* 11 C.F.R. § 116.3(C)(2); *see also* 14 C.F.R. § 374a.4(a)(1) and (2).[3] If US Airways did not adhere to its established terms for extending credit to the General Committee after mid-October, then it appears that US Airways did not extend credit in its ordinary course of business. 11 C.F.R. § 116.3(c)(2).

Second, the Report indicates that the Committee provided a generic letter dated December 4, 1996 noting that late charges would be assessed on outstanding balances, effective January 1, 1997. We recommend that you include information regarding whether or not such late charges were assessed. If no late charges were assessed, and applying late charges is in the ordinary course of US Airways business, this would lend support to the argument that US Airways did not follow its ordinary practice for extending credit. 11 C.F.R. § 116.3(c).

II. EXCESSIVE PRESS AND UNITED STATES SECRET SERVICE REIMBURSEMENTS (III.B.)

We agree with the conclusions in this section. The proposed Audit Report recommends that the General Committee refund $65,754 to the Secret Service and $1,165,457 to the press for excessive reimbursements it had collected from these organizations. The Audit Division's recommendation is based, in part, on the conclusion that certain costs associated with press filing, security, generators, sound and lighting,

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

[3] US Airways is engaged in the commercial airline industry, a regulated industry. 49 U.S.C.A. § 40101 *et seq*. The Commission may rely on the regulations prescribed by other Federal agencies to determine whether extensions of credit by the entities regulated by those Federal agencies were made in the ordinary course of business. 11 C.F.R. § 116.3(d). We recommend that the Audit Division revise the Audit Report to include references to the regulations governing extensions of credit by commercial airlines. If US Airways did not submit a statement to the General Committee at least once a month, no later than the second business day following the last day of the billing period covered by the statement, then US Airways may not have complied with 14 C.F.R. § 374.4(a)(1) and (2). Further, US Airways should have ceased providing services to the General Committee in light of its "overdue indebtedness" pursuant to 14 C.F.R. § 374a.4(a)(4)(i) and (ii); 14 C.F.R. § 374a.4(a)(5)(ii).

luggage trucks, pipe and drape, and other miscellaneous items were not ground costs. The Audit Report states that the Audit staff's review of documentation in support of amounts billed to the press indicated that some of these costs were event related, not ground costs and other services as permitted under section 9004.6. In specifically discussing the various costs and concluding that they are not reimbursable under 11 C.F.R. § 9004.6, the Audit Report also appears to rely on the fact that the Committee failed to provide documentation and specific examples to establish that costs billed to the press were not excessive or "made available" to the press.

This Office agrees with the Audit Report conclusion that the General Committee has failed to provide documentation and specific examples to establish that costs billed to the press were not excessive. This requirement is consistent with the purpose of section 9004.6, which is to eliminate the possibility for the subsidizing of a campaign by the media or other individuals through the charging of higher than pro rata shares for the use of candidate-supplied transportation. *See Explanation and Justification for* 11 C.F.R. § 9004.6, 45 Fed. Reg. 43376 (Sept. 5, 1980). The need for such documentation is amplified in instances where the costs charged to the press are associated with items (here, costs of security, pipe and drape, lighting) that do not appear to be closely related in nature to the examples of "ground services or facilities" delineated in section 9004.6, *i.e.*, air travel, ground transportation, housing, meals, telephone service, and typewriters. If the General Committee cannot establish that the services provided to the press were, in fact, related to transporting the press or assisting in the performance of their work obligations, then this may be indicative of the General Committee's attempt to use the costs for the services as a mechanism to subsidize the campaign and lower the amount subject to the overall expenditure limitation. *Id.*; 11 C.F.R. § 9004.6(a) (reimbursements received from the press are deducted from the overall expenditure limitation).[4]

[4] While the Audit Report concludes that the costs are not reimbursable based on the General Committee's failure to identify and provide documentation of the services, the Report states that certain costs appear to be event-related and not ground costs, and therefore not reimbursable under section 9004.6. The Office of General Counsel does not believe that there should be a *per se* rule that certain services do not constitute "ground services" or facilities pursuant to Section 9004.6. A review of the Explanation and Justification for section 9004.6 and Commission advisory opinions provides no specific guidance as to what all is encompassed by these terms. A committee may be able to demonstrate that services, including those addressed in the Audit Report, could be required by the press in given circumstances and could fall within the category of "ground services or facilities."

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III. OTHER RECOMMENDATIONS

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

Misstatement of Financial Activity (II.B.)

Stale-dated Checks (III.E.)

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

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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.

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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.[1] 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 with one election to secure the obligations of another committee in connection with a

[1] 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.

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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)").[2] 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 expenditure report period. 11 C.F.R. § 9003.4. Such expenditures may include, but are

[2] 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.

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."[3]

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

[3] 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 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.

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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),[1] 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.[*]

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[1] 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.[2] 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."[3]

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.[4] Moreover, this Office concurs that, as a result, and in combination with other findings that add expenditures to the overall expenditure limitation, the Primary Committee

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[2] 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.

[3] 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.

[4] *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).

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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."[5] 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 commitments from the candidate." 424 U.S. 1, 47 (1976). The reverse is equally true – the

[5] 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.

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.[6] 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.[7] However, in

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6 *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).

7 *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.[8]

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.).[9] 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

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[8] *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").

[9] 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.

campaign are coordinated expenditures pursuant to 2 U.S.C. § 441a(a)(7)(B)(i). According to the 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."[10] *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."[11] 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

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[10] 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.

[11] 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.[12] 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."[13]

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[12] 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*.

[13] 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

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.[14] 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-

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the 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)."

[14] 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),[15] 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

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15 *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).

message. The texts contain phrases such as "Tell President Clinton you won't be fooled again" 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.[16] 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.[17]

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

[16] 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.

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

election limitations provide guidance for the attribution of the media expenditures, consistent 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

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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,[18] 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

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

media expenditures were used exclusively for the primary or exclusively for the general 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.[19] *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.[20] 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).[21] 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

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[19] 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.

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

[21] 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

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.[22] 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

[22] 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.

is defined 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.[23] 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).

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[23] 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.[24] 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).[25] 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.[26] 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

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

[25] 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).

[26] 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.

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.

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.[27]

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.[28] *Cf.* Buchanan Statement of Reasons at 23 (Aug. 1, 1995) (winding down costs require some specificity).

[27] 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.

[28] *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.[29] 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.

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[29] 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/Kemp '96, Inc. and Dole/Kemp '96 Compliance Committee, Inc. The Commission approved the report on June 3, 1999. As noted on page 3, of the attached report, the Commission may pursue any of the matters discussed in an enforcement action.

In accordance with 11 CFR §§9007.2(c)(1) and (d)(1), the Commission has made a determination that a repayment to the Secretary of the Treasury in the amount of $3,212,143 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 §9007.2(c)(2)(i) 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 §9007.2(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 Alex Boniewicz 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

Attachment:

Audit Report

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 10, 1999

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

Dear Mr. Haywood:

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Sincerely,

Robert J. Costa
Assistant Staff Director
Audit Division

Attachments:

Audit Report

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CHRONOLOGY

DOLE/KEMP '96, INC.
AND
DOLE?KEMP '96 COMPLIANCE COMMITTEE, INC.

Audit Fieldwork	4/21/97 - 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, 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

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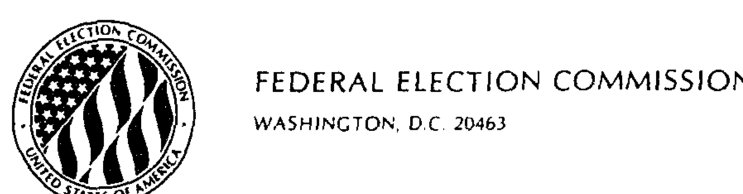

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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.

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$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

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[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

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[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]

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[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.

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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."

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[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.

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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

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[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]

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[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 by F.J.D.

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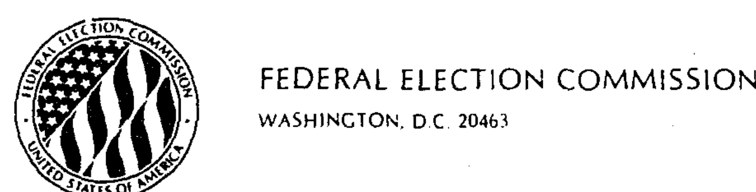

MEMORANDUM

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"

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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

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[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

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[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]

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[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

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[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 Vice Chairman	Date 6/24/99	Lee Ann Elliott Commissioner	Date 6-24-99
David M. Mason Commissioner	Date 6/24/99	Karl J. Sandstrom Commissioner	Date 6/24/99