



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Date: 8/31/55

✓ Microfilm
 Public Records
 Press

THE ATTACHED MATERIAL IS BEING ADDED TO CLOSED NUR 4192

95043665425



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

August 31, 1995

Richard Mayberry, Esquire
Seventh Floor
888 16th Street, N.W.
Washington, D.C. 20006

Re: MUR 4192

Dear Mr. Mayberry:

Thank you for your letter dated August 28, 1995 requesting a copy of all non-privileged attachments for the above-stated Matter Under Review. Pursuant to your request, I am enclosing a copy of attachments #1, #2, #3, #4, #7, and #8. However, because attachments #5 and #6 contain privileged information, e.g., the conciliation process, these documents are not included. See 2 U.S.C. § 437g(a)(4)(B)(i).

If you any questions concerning this matter, please contact me at (202) 219-3690.

Sincerely,

Andre G. Pineda

Andre G. Pineda

Enclosures

95043665426



FEDERAL ELECTION COMMISSION

WASHINGTON D.C. 20461

THIS IS THE BEGINNING OF MUR # 4192

DATE FILMED 9/22/95 CAMERA NO. 1

CAMERAMAN SES

95043684861

Richard Mayberry
Attorney and Counselor At Law

Seventh Floor
888 16th Street, N.W.
Washington, D.C. 20006
(202) 785-6677
Fax (202) 835-1912 or 835-8136

RECEIVED
FEDERAL ELECTION
COMMISSION
MAIL ROOM

MAR 9 4 20 PM '95

MUR 4192

March 9, 1995

By Hand

Danny L. McDonald, Chairman
Lee Ann Elliot, Vice Chairman
and
Lawrence Noble, Esquire
General Counsel

Federal Election Commission
Room 824
999 E Street, N.W.
Washington, D.C. 20463

Re: Initiation of Compliance Matter

Dear Gentlemen and Ladies:

I hereby file the original and three (3) copies of the a verified complaint [with exhibits] against President Bill Clinton, The Clinton For President Committee, and Robert A. Farmer, Bruce R. Lindsey, Treasurers.

In addition, I file the following attachments to the complaint:

- verifications of complainants
- designations of counsel

All communications between the Commission and the

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF LEGAL
COUNSEL
MAR 10 9 47 AM '95

95043684862

complainants shall be directed to me. Should you have any questions, please contact me.

Sincerely yours,

Richard Mayberry

Richard Mayberry

cc: All Complainants

9504368483

NOTARIZED VERIFICATION OF COMPLAINT

I swear under the penalty of perjury that the information contained in this complainant is true and accurate to the best of my personal knowledge, information and belief.

Signed: Alan M. Gottlieb

Print or Type Name: ALAN M. GOTTLIEB

Date: 3/7/95

STATE OF WASHINGTON

I, Debra M. Preston, a Notary Public, hereby certify that on the 7th day of March, 1995, Alan M. Gottlieb personally acknowledged that he/she signed the foregoing document as an complainant and swore to the contents of the complaint.

Debra M. Preston

Notary Public

My Commission expires: 8/5/98

NOTARIZED VERIFICATION OF COMPLAINT

I swear under the penalty of perjury that the information contained in this complainant is true and accurate to the best of my personal knowledge, information and belief.


Signed: Michael A. Siegel

Print or Type Name: MICHAEL A. SIEGEL

Date: MARCH 7, 1995

STATE OF Washington
County of Burien

I, Linda Puryear, a Notary Public, hereby certify that on the 7th day of March, 1995, Michael Siegel personally acknowledged that he/she signed the foregoing document as an complainant and swore to the contents of the complaint.


Notary Public

My Commission expires: 11/9/97
Linda Puryear WA

95043684865

NOTARIZED VERIFICATION OF COMPLAINT

I swear under the penalty of perjury that the information contained in this complainant is true and accurate to the best of my personal knowledge, information and belief.

Signed: _____

Print or Type Name: _____

Date: _____

STATE OF WASHINGTON

I, Pam McGuire, a Notary Public, hereby certify that on the 5th day of March, 1995, Todd Herman personally acknowledged that he/she signed the foregoing document as an complainant and swore to the contents of the complaint.

Pam McGuire
Notary Public

My Commission expires: 6-1-97

NOTARIZED VERIFICATION OF COMPLAINT

I swear under the penalty of perjury that the information contained in this complainant is true and accurate to the best of my personal knowledge, information and belief.

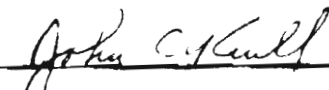
Signed: 

Print or Type Name: JOSEPH P. TARTARO

Date: MARCH 8, 1995

STATE OF New York

I, John C. Krull, a Notary Public, hereby certify that on the 8 day of March, 1995, JOSEPH P. TARTARO personally acknowledged that he/she signed the foregoing document as an complainant and swore to the contents of the complaint.


Notary Public
JOHN C. KRULL
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN ERIE COUNTY
My Commission Expires March 2, 1996

My Commission expires:

95043684867

NOTARIZED VERIFICATION OF COMPLAINT

I swear under the penalty of perjury that the information contained in this complainant is true and accurate to the best of my personal knowledge, information and belief.

Signed: Alan M. Gottlieb

EXECUTIVE DIRECTOR & TRUSTEE OF SECOND AMENDMENT FOUNDATION

Print or Type Name: ALAN M. GOTTLIEB

Date: MARCH 8, 1995

STATE OF Washington

I, Debra M. Preston, a Notary Public, hereby certify that on the 8th day of March, 1995, Alan M. Gottlieb personally acknowledged that he/she signed the foregoing document as an complainant and swore to the contents of the complaint.

Debra M. Preston

Notary Public

My Commission expires: 8/5/98

NOTARIZED VERIFICATION OF COMPLAINT

I swear under the penalty of perjury that the information contained in this complainant is true and accurate to the best of my personal knowledge, information and belief.

Signed: Ron Arnold

A SECTUTIVE VICE PRESIDENT, CENTER FOR THE DEFENSE OF FREE ENTERPRISE

Print or Type Name: RON ARNOLDDate: March 8, 1995STATE OF Washington

I, Debra M Preston, a Notary Public, hereby certify that on the 8th day of March, 1995, Ron Arnold personally acknowledged that he/she signed the foregoing document as an complainant and swore to the contents of the complaint.

Debra M Preston

Notary Public

My Commission expires: 8/5/98

STATEMENT OF DESIGNATION OF COUNSEL

Richard Mayberry, Attorney-At-Law, is hereby designated as my counsel and is authorized to receive all notifications and other communications from the Federal Election Commission and to act on my behalf before the Commission.

Alan M. Gottlieb

SIGNATURE OF COMPLAINANT

ALAN M. GOTTLIEB

PRINT OR TYPE NAME OF COMPLAINANT

12500 NE TENTH PLACE
BELLEVE WA 98005

ADDRESS

(206) 454-702

TELEPHONE

STATEMENT OF DESIGNATION OF COUNSEL.

Richard Wayberry, Attorney-At-Law, is hereby designated as my counsel and is authorized to receive all notifications and other communications from the Federal Election Commission and to act on my behalf before the Commission.

Michael A. Siegel
SIGNATURE OF COMPLAINANT

MICHAEL A. SIEGEL
PRINT OR TYPE NAME OF COMPLAINANT

KVI RADIO
1809 7TH AVENUE SUITE 200
SEATTLE, WA. 98101
ADDRESS

(206) 223-5700
TELEPHONE

95043684871

MAR 21 12 27 PM '95

STATEMENT OF DESIGNATION OF COUNSEL

Richard Mayberry, Attorney At-Law, is hereby designated as my counsel and is authorized to receive all notifications and other communications from the Federal Election Commission and to act on my behalf before the Commission.


SIGNATURE OF COMPLAINANT

Todd Eugene Herman

PRINT OR TYPE NAME OF COMPLAINANT

11203 E 36TH

SPokane WA

99206

ADDRESS


(509) 923-3077 / (509) 747-1955

TELEPHONE

95043684872

STATEMENT OF DESIGNATION OF COUNSEL

Richard Mayberry, Attorney-At-Law, is hereby designated as my counsel and is authorized to receive all notifications and other communications from the Federal Election Commission and to act on my behalf before the Commission.


SIGNATURE OF COMPLAINANT

JOSEPH P. TARTARO
PRINT OR TYPE NAME OF COMPLAINANT

199 ANDERSON PLACE
BUFFALO NY 14222

ADDRESS

(716) 885-6408

TELEPHONE

STATEMENT OF DESIGNATION OF COUNSEL

Richard Mayberry, Attorney-At-Law, is hereby designated as my counsel and is authorized to receive all notifications and other communications from the Federal Election Commission and to act on my behalf before the Commission.

Alan M. Guttlied

SIGNATURE OF COMPLAINANT
EXECUTIVE DIRECTOR AND TRUSTEE

SECOND AMENDMENT FOUNDATION

PRINT OR TYPE NAME OF COMPLAINANT

12500 NE TENTH PLACE

BELLEVUE WA 98005

ADDRESS

(206) 454 - 7012

TELEPHONE

950436848/4

STATEMENT OF DESIGNATION OF COUNSEL

Richard Mayberry, Attorney-At-Law, is hereby designated as my counsel and is authorized to receive all notifications and other communications from the Federal Election Commission and to act on my behalf before the Commission.

Ron Arnold

SIGNATURE OF COMPLAINANT

EXECUTIVE VICE PRESIDENT
CENTER FOR THE DEFENSE OF FREE ENTERPRISE

RON ARNOLD

PRINT OR TYPE NAME OF COMPLAINANT

CENTER FOR THE DEFENSE OF FREE ENTERPRISE

12500 N.E. 10TH PLACE

BELLEVUE, WA 98005

ADDRESS

206-455-5038

TELEPHONE

NOTARIZED VERIFICATION OF COMPLAINT

I swear under the penalty of perjury that the information contained in this complainant is true and accurate to the best of my personal knowledge, information and belief.

Signed: Julianne Hoy Versnel
TREASURER, AMERICAN POLITICAL ACTION COMMITTEE
 Print or Type Name: JULIANNE HOY VERSNEL

Date: March 8, 1995

STATE OF Washington

I, Debra M. Preston, a Notary Public, hereby certify that on the 8th day of March, 1995, Julianne Versnel personally acknowledged that he/she signed the foregoing document as an complainant and swore to the contents of the complaint.

Debra M. Preston

Notary Public

My Commission expires: 5/5/98

STATEMENT OF DESIGNATION OF COUNSEL

Richard Mayberry, Attorney-At-Law, is hereby designated as my counsel and is authorized to receive all notifications and other communications from the Federal Election Commission and to act on my behalf before the Commission.

Julianne Hox Versel
SIGNATURE OF COMPLAINANT

TREASURER, AMERICAN POLITICAL ACTION COMMITTEE

AMERICAN POLITICAL ACTION COMMITTEE
PRINT OR TYPE NAME OF COMPLAINANT

P.O. Box 1682
BELLEVUE, WA. 98009

ADDRESS

454-7009 (A.C. 206)
TELEPHONE

95043684877

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of

President Bill Clinton,
The Clinton For President Committee,
and Robert A. Farmer, Bruce R. Lindsey
Treasurers

MUR # 4192

Respondents.

COMPLAINT

Complainants, by and through counsel, believing a violation of statutes and regulations under the jurisdiction of the Federal Election Commission ("FEC" or "Commission") has occurred initiate this complaint pursuant to 2 U.S.C. section 437g(a)(1) and 11 C.F.R. section 111.4 against the Respondents identified below.

PARTIES

Complainant Alan Gottlieb, 12500 Northeast Tenth Place, Bellevue, WA 98005, is a citizen of the United States, member of the Republican Party, registered voter in the state of Washington, and taxpayer to, among others, the U.S. government. Gottlieb caucused in the 1992 presidential primary and voted in the 1992 general presidential election, and intends to caucus in the 1996 primary and vote in the 1996 general presidential election.

Complainant, Michael A. Siegel, 919 30th Ave South, Seattle 98144, is a citizen of the United States, registered voter in the state of Washington, and taxpayer to, among others, the U.S. government. Siegel is a member of the Democratic Party and caucused in the 1992 presidential primary and voted in the general elections. Siegel intends to caucus in the 1996 primary and vote in the 1996 general presidential election.

Complainant Todd Herman, 11203 East 36, Spokane, WA 99206, is a citizen of the United States, member of the Republican Party,

95043684878

9 5 0 4 3 6 8 4 3 7 9

registered voter in the state of Washington, and taxpayer to, among others, the U.S. government. Herman caucused in the 1992 presidential primary and voted in the 1992 general presidential election, and intends to caucus in the 1996 primary and vote in the 1996 general presidential election.

Complainant Joseph P. Tartaro, 267 Linwood Ave., Buffalo, NY 14209, is a citizen of the United States, registered voter in the state of New York, and taxpayer to, among others, the U.S. government. Tartaro is a registered Democrat and voted in the 1992 presidential primary and general elections. Tartaro intends to vote in the 1996 presidential primary and general elections.

Complainant Second Amendment Foundation, 12500 Northeast Tenth Place, Bellevue, WA 98005, is a tax-exempt public charity organized and operated to educate the American public on the issues impacting the Constitutional right to bear arms. The Foundation is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code.

Complainant Center For the Defense of Free Enterprise, 12520 Northeast Tenth Place, Bellevue, WA 98005, is a tax-exempt public charity organized and operated to educate the American public on the issues impacting free enterprise in the United States and has a specific interest in the fiscal responsibility of the federal government, misuse of tax funds, government waste, and the effectiveness of the functioning of government. The Center is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code.

Complainant American Political Action Committee ["AmeriPAC"], POB 1682 Bellevue, WA 98009, is a political committee organized and operated to promote the candidacies of individuals whose position on the issues promotes the individual civil liberties of all Americans and has a specific interest in promoting honest and lawful campaign conduct by candidates. AmeriPAC is a multi-candidate political committee registered with the Federal Election Commission. AmeriPAC has an organizational interest in equal access to campaign finance for all candidates, prevention of any candidate receiving unfair campaign advantage through violation of election laws and in fair and competitive elections administered with the same rules and regulations for all candidates.

Respondent Bill Clinton was a candidate in the Democratic primary and general election for President of the States in 1992. He is the President of the United States, and his address is The White House, 1600 Pennsylvania Avenue, NW, Washington, D.C.

Respondent Clinton For Presidency Committee [the "Clinton Committee"] is the principal campaign committee of Bill Clinton for the primary election of 1992. The Committee is registered with the Federal Election Commission and identifies its address to be POB 615, Little Rock, Arkansas 72203 on its May 22, 1992 amended Statement of Organization.

Respondent Robert A. Farmer is Treasurer, and Respondent Bruce R. Lindsey is Assistant Treasurer of the Clinton For President Committee. The Treasurers' address is the same as the Clinton Committee's address.

Other interested parties include:

The Clinton/Gore '92 Committee is the principal campaign committee of Clinton for the 1992 general election. Its address is 112 West Third Street, Little Rock, Arkansas 72203. Robert Farmer is identified on the 7/14/92 Statement of Organization as the Treasurer.

The Clinton/Gore '92 General Election Legal and Accounting and Compliance Fund [the "GELAC" or the "Clinton/Gore '92 General Election Compliance Fund"] is the committee for the general election operated to maintain compliance with federal election laws for the Clinton campaign. Its address is POB 615, Little Rock, Arkansas 72203. David Watkins is identified as the treasurer on its 5/22/92 Statement of Organization.

OVERVIEW OF COMPLAINANT

President Clinton engaged in a scheme to enhance the resources available for the promotion of his candidacy in the 1992 general election. His primary election campaign committee, the Clinton For President Committee, manipulated its post-convention cash balance and debts in order to receive public matching funds to which Clinton was not entitled and were used in the general election by the Clinton/Gore '92 General Election Compliance Fund.

9 5 0 4 3 6 8 4 9 0 1

These resources were assumedly used for legal and accounting purposes, and thus subsidized Clinton's direct electioneering and the Clinton/Gore '92 Committee's campaign efforts since additional campaign resources were not spent on compliance matters.

Specifically, in excess of \$5.8 million dollars in private contributions were solicited and received by the Clinton For President Committee. Instead of application of these funds to extinguish a campaign debt in excess of \$7 million as required by FEC regulations, the Clinton Committee intentionally and illegally diverted in excess of \$2.4 million dollars to a legal and accounting fund for the general election. This scheme enabled the Clinton Committee to receive \$2.9 million in additional matching funds to which it was not entitled.

The U.S. Treasury, and the American taxpayer has suffered damages in an amount calculated to be \$2.9 million.

This complaint alleges the Respondents' conduct constitutes a violation of chapter 95 of title 26 of the United States Code and is brought pursuant to 2 U.S.C. section 437g (a) (1).

VIOLATIONS OF FEDERAL ELECTION LAWS

The alleged conduct of the Respondents which violated statutes and regulations under the jurisdiction of the Commission, specifically the Presidential Primary Matching Payment Account Act, and the Commission regulations promulgated thereunder, is as follows:

A. The Clinton Committee solicited contributions up to and including July 17, 1992 for the primary election for the Clinton For President Committee and represented to the contributors that the contributions could be matched by federal funds. The contributions were made payable to the Clinton For President Committee and the Clinton For President Committee deposited the contributions in the Clinton For President campaign depository. Clinton was nominated on July 15, 1992 which is his date of ineligibility, or "DOI", for additional primary public financing. After the date of ineligible private contributions must be applied to a campaign's deficit before any matching funds may be received by the Clinton Committee.

Contributions deposited between July 16 and October 2, 1992 by the Clinton Committee from these solicitation totaled in excess of \$5.8 million. Of the funds collected as a result of the solicitation for the primary election, the Clinton Committee transferred \$2.4 million to the Clinton/Gore '92 General Election Compliance Fund, instead of applying them to reduce the post-convention debt. This had the effect of skewing the net balance for outstanding campaign obligations, or "NOCO" which is the basis for receiving public funds to retire the campaign debt.

Between July 16, and October 2, 1992 the Committee submitted for matching requests totaling over \$6 million. Relying on the accuracy of the submissions as being eligible to be matched, the FEC certified for payment the same amount which was paid by the U.S. Treasury.

Thus, the Clinton Committee was able to receive an additional \$2.9 million dollars to which it was not entitled under 26 U.S.C. section 9034.1. The Committee received this inflated amount because they intentional made a business decision not to apply all of their primary funds to their net outstanding campaign obligations in order to receive additional campaign resources from public funds.

See generally the FEC Report of the Audit Division, relevant sections are attached as Exhibit 1 at 78-91 and are incorporated by reference herein and the Statement of Reasons to the Final Audit Report by Commissioners Elliot, Aikens, and Potter which is attached as Exhibit 2, and is incorporated by reference herein.

The Respondent's actions to inflate the NOCO by divert post-convention contributions from use in retiring primary election debt in order to receive close to \$3 million in public funds to which Clinton was not entitled violates the Presidential Matching Funds Act, 26 U.S.C. section 9034 and 9037 and 11 C.F.R. section 9034.1 (b), and are an illegal redesignation violative of 11 C.F.R. section 9003.3(a)(1)(iii)(A) and (D).

B. As previously stated, the Clinton Committee submitted funds raised after the date of ineligibility from the referenced solicitations for matching funds for primary election debt retirement and then transferred some of these funds to the GELAC

for general election compliance. The transferred funds were indistinguishable from the funds submitted for matching with taxpayer dollars in that they were solicited by the same mailing, mailed to the same address, made payable to the same committee and received at the same time. See Statement of Reasons, Exhibit 2 at 6.

Assuming *ad arguendo* some of the contributions were not designated for the primary, the only position consistent with the letter and spirit of the Presidential Primary Matching Payment Account Act is that none of the contributions were designated for the primary. Accordingly none of these contributions are eligible for matching funds.

The act of making a submission for matching funds based upon nonmatchable contributions is in violation of 26 U.S.C. section 9034 and 9037.

THE PUBLIC INTEREST

For the American people, the following, *inter alia*, public interests are at stake in the Commission reaching a prompt determination that the Respondents violated relevant federal election laws and applying appropriate sanctions:

- a. preserve the integrity of the public financing system;
- b. punish the unfair advantage Clinton took in the 1992 general election by use of millions of extra campaign dollars;
- c. deter future candidates from manipulating their books in the 1996 presidential primaries to secure unfair competitive advantage;
- d. restitution to the U.S. Treasury of \$2.9 million;
- e. replenish the federal treasury to ensure there is sufficient funds for public financing of the 1996 presidential election; and
- f. ensure equal justice under the laws in the application of the campaign finance statutes in an even-handed manner to all persons -- even if one Respondent is the President of the United States.

For the Federal Election Commission the following, *inter alia*, public interests are at stake in the Commission reaching a prompt determination that the Respondents violated relevant federal election laws and applying appropriate sanctions:

- a. restore public confidence in the Commission's ability to make a unified nonpartisan decision directly impacting the agency's power to protect the public fisc;
- b. avoid abrogation of Congressional authority by turning a conditional grant of public funds into a flat entitlement for maximum financing; and
- c. employ proper procedure to change agency policy by implementing rulemaking, with the opportunity for public comments, on any changes the FEC will make in the public financing regulations.

The individual Complainants and the over 650,000 members, supporters and contributors of the Second Amendment Foundation, Center For the Defense of Free Enterprise, and American Political Action Committee are committed to vindication of the these interests in this case.

CIVIL PENALTY

The Respondents committed knowing and willful violations of the Presidential Primary Matching Payment Account Act. The Commission should impose pursuant to 2 U.S.C. section 437g(a)(5)(B) a penalty in an amount equal to 200% of the contributions and expenditures in the violation, or \$5.8 million.

The diversion of millions of dollars in a presidential campaign is a major campaign decision which would involve the candidate and the campaign treasurers. Each individual is responsible for the actions of the Clinton For President Committee because, upon information and belief, each either participated in the course of conduct or assented to this conduct or ratified it.

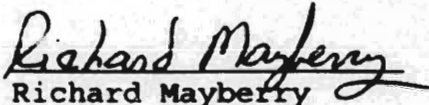
The Respondents are jointly and severally liable for the penalties.

CONCLUSION

For these reasons, all Complainants respectfully request that the Commission find that Respondents have violated the federal election laws, and impose significant penalties. Since the Commission is familiar with the underlying facts and the FEC determination of these election law violations will have a significant impact on similar campaign tactics employed by candidates in the 1996 presidential primaries, the Complainants request that this matter under review be processed on an expedited basis.

Respectfully submitted,

Date: March 9, 1995


Richard Mayberry
Counsel For Complainants

Suite 700
888 Sixteenth Street, NW
Washington, DC 20006
Telephone: 202-785-6677
FAX: 202/835/1912

Of counsel: Robert Ricker

95043684885

95043684886

**REPORT OF THE AUDIT DIVISION
ON**

Clinton for President Committee

December 27, 1994



**FEDERAL ELECTION COMMISSION
999 E STREET, N.W.
WASHINGTON, D.C.**

EXHIBIT 1

D. Receipt of Matching Funds in Excess of Entitlement

Section 9034.1(a) of Title 11 of the Code of Federal Regulations states, in part, that a candidate is entitled to matching funds for each matchable contribution except that a candidate who has become ineligible may not receive further matching payments regardless of the date of deposit of the underlying contributions if he or she has no net outstanding campaign obligations.

Section 9034.1(b) of Title 11 of the Code of Federal Regulations states that if on the date of ineligibility a candidate has net outstanding campaign obligations as defined under 11 CFR 9034.5, that candidate may continue to receive matching payments for matchable contributions received and deposited on or before December 31 of the Presidential election year provided that on the date of payment there are remaining net outstanding campaign obligations, i.e., the sum of contributions received on or after the date of ineligibility plus matching funds received on or after the date of ineligibility is less than the candidate's net outstanding campaign obligations. This entitlement will be equal to the lesser of: (1) The amount of contributions submitted for matching; or (2) The remaining net outstanding campaign obligations.

Section 9034.5(a)(2)(i) of Title 11 of the Code of Federal Regulations in defining cash on hand for purposes of a committee's Statement of Net Outstanding Campaign Obligations states that the amount includes cash on hand as of the close of business on the last day of eligibility including all contributions dated on or before that date whether or not submitted for matching.

Section 9038.2(b)(1)(i) of Title 11 of the Code of Federal Regulations states that the Commission may determine that certain portions of the payments made to a candidate from the matching payment account were in excess of the aggregate amount of payments to which such candidate was entitled. Examples of such excessive payments include payments made to the candidate after the candidate's date of ineligibility where it is later determined that the candidate had no net outstanding campaign obligations as defined in 11 CFR §9034.5.

Section 9003.3(a)(1)(iii) of Title 11 of the Code of Federal Regulations (General Election Legal and Accounting Compliance Fund-Major Party Candidate-Sources of Funds) states, in part, that funds received after the beginning of the expenditure report period but which are designated for the primary election, and contributions that exceed the contributor's limit for the primary election, may be redesignated for the legal and accounting compliance fund and transferred to or deposited in such fund if the candidate obtains the contributor's redesignation in

accordance with 11 CFR §110.1. Contributions that do not exceed the contributor's limit for the primary election may be redesignated and deposited in the legal and accounting compliance fund only if:

- (A) The contributions represent funds in excess of any amount needed to pay remaining primary expenses;
- (B) The redesignations are received within 60 days of the Treasurer's receipt of the contributions;
- (C) The requirements of 11 CFR §110.1(b)(5) and (1) regarding redesignations are satisfied; and
- (D) The contributions have not been submitted for matching.

Section 110.1(b)(2)(i) of the Code of Federal Regulations defines, in part, when a contribution is made with respect to a particular election. The provision states that in the case of a contribution designated in writing for a particular election, the election so designated.

Section 110.1(b)(4) of the Code of Federal Regulations states in part that a contribution is considered to be designated for a particular election if:

- 1) The contribution is made by check, money order, or other negotiable instrument which clearly indicates the particular election with respect to which the contribution is made;
- 2) the contribution is accompanied by a writing, signed by the contributor, which clearly indicates the particular election with respect to which the contribution is made; or
- 3) the contribution is redesignated in accordance with 11 CFR 110.1(b)(5).

The Interim Audit Report concluded that the Committee had net outstanding campaign obligations on July 15, 1992 of \$7,588,794. The Committee received private contributions totaling \$5,863,410, between July 16, and October 2, 1992. During this same period of time the Committee received matching fund payments of \$1,431,599 on August 4, 1992, \$1,786,327 on September 2, 1992, and a final payment of \$2,825,181 on October 2, 1992.

On August 21, 1992, the Committee opened a checking account known as the Suspense Account. With minor exception, the contributions from individuals deposited after August 21, were deposited into this account. Contributions deposited into this account were included in the Committee's disclosure reports. Based on our review of contributions deposited, it appears that the Committee obtained redesignation letters and subsequently transferred the majority of the contributions to the Compliance Committee. Relatively few of the contributions were in excess of

the contributors' primary election contribution limit and the Committee had remaining primary expenses to be paid. During the period when the redesignations were being sought for the contributions deposited into the Suspense Account, the Committee continued to request and receive matching fund payments based on NOCO statements that did not recognize contributions deposited into the Suspense Account. The Committee transferred to the Compliance Committee contributions totaling \$2,444,557. Of the \$2,444,557 transferred, private contributions totaling \$1,025,404 were deposited by the Committee after September 2, 1992, the date on which the Audit staff calculated that the Candidate received the last matching fund payment to which he was entitled. Those contributions deposited after September 2, 1992 are not considered in the analysis below.

In the Interim Audit Report it was explained that the Audit staff examined each deposit of contributions between July 16, and October 2, 1992 to determine the amount of primary contributions available to pay remaining primary election expenses. In making the determination, any contribution that was in excess of the contributor's primary election limit was excluded. Also excluded were any contributions that, even though deposited into a primary election account, showed a payee or other notation that suggested the contribution was meant for the general election or was in any other way designated by the contributor for the general election. Based upon our review, it was determined that contributions deposited between July 16, and September 2, 1992, totaling \$155,686, could have been transferred to the Compliance Committee.

Based on the information available at the time of the Interim Audit Report, a calculation was presented that showed that as of September 2, 1992, the Committee had received matching funds in excess of the Candidate's entitlement in the amount of \$849,172. After that date the Candidate received one matching fund payment totaling \$2,825,181 bringing the amount of matching funds received in excess of entitlement to \$3,674,353 (\$849,172 + \$2,825,181).

At the exit conference, the Committee's accountant stated that at a point the Committee determined that it was solvent and the transfers were permissible. The Audit staff noted that such a calculation worked only if the matching funds to be generated in the future were considered an accounts receivable. The Committee's accountant agreed. The Committee strongly disagreed that any repayment was due.

The inclusion of matching funds to be generated from future matching fund requests, as an asset, is not appropriate when determining remaining matching fund entitlement.

In its response to the exit conference, the Committee again explained that as of a date after the Candidate's date of ineligibility, it was determined that the Committee no longer had outstanding campaign obligations in excess of funds available to pay them.

The Committee goes on to state that "[t]he Committee disputes the auditors' assertion that these contributions could not be redesignated to GELAC. That assertion is contrary to law. Those contributors properly and legally designated those contributions in writing for GELAC pursuant to 11 CFR §110.2 7/ and the auditors cannot prohibit the Committee from maintaining those contributions in the GELAC.

"The Committee further disagrees with the auditors' method of applying contributions and matching funds to determine when there is no additional entitlement."

With respect to the propriety of the redesignations, the Interim Audit Report stated that 11 CFR §110.1 is not the relevant regulation. That regulation specifies the procedures and time limitations that apply to a redesignation when a redesignation is appropriate. As stated above, 11 CFR §9003.3(a)(1)(iii) clearly states that the redesignations pursued by the Committee were not permissible. That section states that only if no remaining primary expenses are to be paid, may primary contributions not in excess of the contributors limit be redesignated to the compliance fund. The definition of remaining primary expenses is clearly stated in 11 CFR §9034.1(b) which speaks to remaining matching fund entitlement. That definition states that remaining net outstanding campaign obligations is the candidate's net outstanding campaign obligations on the date of ineligibility less "the sum of the contributions received on or after the date of ineligibility plus matching funds received on or after the date of ineligibility." Therefore, in the case of a publicly funded candidate, the Commission's regulations concerning the receipt of public funds place limitations on a committee's ability to seek redesignations of contributions to other elections that are not contained in the more general application regulations at 11 CFR §110.1.

The Interim Audit Report also explained that the definition and the calculation of remaining entitlement to which the Committee objects enjoys a long and consistent history in Commission regulation and practice. This interpretation dates to a December 1976 memorandum to the Commission proposing an amendment to then section 134.3(c)(2) of the Commission's regulations. This proposed regulation stated that "a candidate

7/ The Committee claimed that it complied with 11 CFR §110.2. We assume that it meant section 110.1.

25043684320

shall be entitled to no further matching funds if, at time of any submission for certification, the total contributions and matching funds received after the ineligibility date equals or exceeds the net obligation outstanding on the date of ineligibility".

The 1979 Explanation and Justification of 11 CFR §9034.1 explains that for candidates who have net outstanding campaign obligations on the date of ineligibility, "[b]asically, these candidates are entitled to payments only if the private contributions received between the date of ineligibility and the date of submission are not sufficient to discharge the net debt". A simplified example of the calculation presented in the Interim Audit Report follows this explanation. Finally, it is explained that the regulation "furthers the policy that the candidate should use private contributions to discharge campaign obligations wherever possible". The 1983 Explanation and Justification for the same provision states that the section had "been revised to state that to receive matching funds after the date of ineligibility, candidates must have net outstanding campaign obligations as of the date of payment rather than the date of submission. Thus, if the candidate's financial position changed between the date of his or her submission for matching funds and the date of payment reducing the candidate's net outstanding campaign obligations, that candidate's entitlement would be reduced accordingly". This revision reinforces the requirement that private contributions received must be applied to obligations prior to the receipt of further matching funds. The 1991 Explanation and Justification for §9003.3 states that "contributions redesignated must represent funds in excess of any amount needed to pay remaining primary expenses. If this requirement is not met, the committee would have to make a transfer back to the primary account to cover such expenses".

Finally, each edition of the Commission's Financial Control and Compliance Manual For Presidential Primary Candidates Receiving Public Financing, beginning with the first in 1979, has, in some form provided, an explanation and example of the calculation contained in the Interim Audit Report and again below.

The Interim Audit Report noted that the Committee's position is inconsistent with the plain meaning of the Commission's Regulations concerning post ineligibility date matching fund entitlement as well as the long established Commission practice and policy.

The recommendation in the Interim Audit Report concerning this matter requested the Committee provide evidence demonstrating that it did not receive matching funds in excess of entitlement. Absent such a demonstration, it was stated that the Audit staff would recommend that the Commission make an initial determination that the Committee repay \$3,674,353 to the U.S. Treasury. Finally it was noted that the amount of the repayment was subject to change upon further review.

95043684891

In response to the Interim Audit Report the Committee puts forth several arguments why no repayment is due. To begin with, the Committee argues that the contributions in question were not primary contributions but rather were for the most part undesignated contributions received after the date of the primary election and, pursuant to the 11 CFR §110.1, general election contributions. As general election contributions, the Committee contends that no redesignations were necessary to transfer the contributions to the Compliance Committee. The Committee states that the redesignations were obtained by the vendor who processed contributions for the Committee without the Committee's knowledge. The explanation suggests that due to provisions in that vendor's contract, the vendor stood to gain by sending the redesignation requests.

In support of their conclusion that no repayment is due, the Committee, using its interpretation of the provisions 11 CFR §110.1, submitted a calculation of the amount that could be considered general election contributions without need of redesignations. In support of this calculation the Committee response included lists showing the deposit date, number and amount that were considered to represent general election contributions. The lists were divided into three categories; contribution checks made payable to Clinton for President with an unsigned primary contributor card attached,^{8/} contributions checks made payable to Clinton for President without a contribution card attached, and contribution checks made payable to other than Clinton for President with or without a contribution card attached. The Committee's analysis includes contributions through part of January of 1993, well beyond the relevant period for determining the amount of contributions that must be applied to the primary debt, and concludes that \$2,773,327 in contributions deposited into primary accounts are actually general election contributions. The Committee states that copies of the contribution checks supporting their analysis were available for our review at Committee Counsel's Offices.

The Committee's response goes on to state that the redesignations received serve to make clear the contributor's intent in any case where the contributor's intent is unclear from the contribution check.

^{8/} Included in this and the following category are checks that include Clinton for President in the payee. Thus checks payable to Clinton for President Committee, Bill Clinton for President, Clinton for President Campaign, and other similar combinations are included.

The Audit staff concluded that the Committee's analysis was not consistent with the provisions of 11 CFR §110.1, not consistent with the matching fund regulations and the post date of ineligibility matching fund entitlement system, and not consistent with their own treatment of these contributions.

As noted, section 110.1 of the Commission's regulations states that to be considered designated to a particular election a contribution must clearly indicate the election with respect to which the contribution is made. In the view of the Audit staff the majority of the contributions in contention are so designated. By the Committee's calculation, over \$2.2 million of the \$2.8 million in post date of ineligibility contributions were made payable to the Committee and \$1.6 million of that was photocopied with a Committee solicitation attached. The Committee and Compliance Committee have different and distinctive names, Clinton For President Committee vs. Clinton/Gore '92 General Election Compliance Fund. Each entity had its fundraising appeals that made it clear which committee was soliciting the contributions. Each committee is a separate entity, has separate accounts, files separate reports with the Commission and has different funding sources. Therefore, the Audit staff stated that a check made payable to Clinton For President is designated in writing for the primary election and, to conclude otherwise would be inconsistent with other provisions in the matching fund regulations. As explained above, the Commission's regulations have for many years held that after the date of ineligibility private contributions must be applied to a campaign's deficit before any matching funds may be received by the committee. The Staff concluded that to allow contributions solicited by, made payable to, received by, and deposited by the primary committee to be transferred wholesale to the general election compliance fund is completely inconsistent with the matching fund regulations. Rather than minimize the amount of post date of ineligibility matching funds paid to a candidate such an interpretation would encourage candidates to manipulate their contributions in such a way as to maximize their receipt of matching funds.

The Audit staff analysis also concluded that other sections of the Commission's regulations governing the matching fund program support the Commission's interpretation. In 11 CFR §9034.8(c)(7)(iv), it is clear that when dealing with joint fundraising by publicly funded campaigns, contribution checks made payable to a particular participant are considered to be earmarked or designated to that participant. The case at hand is similar. The contribution is made payable to a particular committee.

Section 9034.5(a)(2)(i) of Title 11 of the Code of Federal Regulations defines cash on hand to include all contributions dated on or before the date of ineligibility. This includes checks received and deposited after the date of ineligibility. The Committee's analysis of their contributions includes as general election contributions some contributions

95043684893

dated on or before the date of ineligibility. Finally, section 9034.2 of the Commission's regulations define in part, a matchable contribution to be one that is dated, physically received and deposited by the candidate, or any of the candidate's authorized committees, on or after January 1 of the year immediately preceding the calendar year of the Presidential election, but no later than December 31 following the matching payment period, and made payable to the candidate or his or her authorized committees. The Audit staff concluded that following the Committee's analysis none of the contributions dated after the date of ineligibility would be matchable. To match such contributions would suggest that contributions intended for the general election and transferable to the compliance fund could be matched for the primary committee.

In the opinion of the Audit staff, the Committee's own analysis was inconsistent with respect to these contributions. The lists supporting those contributions made payable to Clinton For President begin with deposits on August 6, 1992. The apparent reason is that the Committee's final matching fund submission contained contributions deposited through August 5, 1992. A sample of the contributions deposited between the date of ineligibility and August 5, 1992, was selected and examined to determine if those contribution checks were different with respect to payee or election designation. No difference was noted. Thus it appears that more significant to the Committee's analysis than an express election designation, is whether the Committee submitted the contribution for matching. Even more revealing was a review of the contributions contained on the Committee's list of contributions not made payable to Clinton For President and now considered general election contributions. First, a number of contributions are dated before the date of ineligibility and are therefore considered cash on hand for NOCO purposes. Second, a spot check of the contributions on this list dated after the date of ineligibility and deposited before August 6, 1992 indicates that the majority of the contributions were submitted for matching and matched. In the opinion of the Audit staff the Committee cannot have it both ways.

The Committee's response to the Interim Audit Report goes on to argue that in August of 1992 the Committee made a calculation of the cut-off date beyond which no further matching funds would be sought. The Committee contends that this estimate was made without benefit of hindsight or the results of the audit. As a result, the Committee states that fewer contributions were raised for the Compliance Committee than would have been the case had the Committee known the position that the Commission would take with respect to post date of ineligibility contributions. The Committee argues further that to require the Compliance Committee to transfer the funds back to the Primary Committee would result in unfairness to the Committee because it may leave insufficient amount in the Compliance Fund to pay continued general election winding down costs.

This argument appears to refer back to the Committee's response to this issue at the exit conference and its later response to the exit conference. As explained above, and in the Interim Audit Report, in the opinion of the Audit staff, the Committee's calculation was not in accordance with the Commission's current regulations or long standing practice. Therefore, for the Commission to forgo the transfer from the Compliance Committee and the recapture of matching funds in excess of entitlement from the Committee, would constitute a matching fund subsidy for the Compliance Committee. Such a subsidy would be well beyond the statutory scheme.

The Committee also objects to the application of both private contributions and matching funds as each is received rather than accounting for matching funds at the time of submission. The Committee notes two perceived problems with this system. First is the uncertainty of a committee's private contribution flow between the time a submission is made and the time matching funds are paid. The Committee contends that it is possible for a candidate's matching fund entitlement to change significantly between those two dates making the determination of when no further funds are needed impossible. The Committee suggests that a better approach would be to include matching funds in the calculation at the time of submission. As explained above and in the Interim Audit Report, the system in place furthers the goal of having campaigns, to the extent possible, pay debts after the candidate's date of ineligibility with private contributions. As for knowing when no further matching funds are needed, it is the committees that are in the best position to know if any matching fund entitlement remains. It is the committees that know on a current basis what changes may have occurred with respect to their NOCO, what contributions have been received and the amount of any pending matching fund submission.

Second, the Committee suggests that the current procedure is unfair to the candidate who processes contributions more slowly. The Committee uses as an example a case where contributions received one month are not processed until the next, causing a delay in the receipt of matching funds for those contributions. The alleged inequity that the Committee addresses occurs if the candidate is able to raise sufficient private contributions to liquidate his NOCO before having an opportunity to submit the earlier contributions and have them matched. Again, the Commission's long standing policy is to encourage committees to use private contributions to pay campaign debts. The Committee's suggestion to make the entitlement calculation at the time of submission rather than at the time of payment would maximize the receipt of matching funds, while potentially leaving the candidate with surplus private contributions received after the last matching fund submission is made.

As a final point, the Committee includes a footnote that states:

"The Committee believes that the Commission's approach in this regard is inconsistent with the legal concept of 'entitlement.' A candidate who qualifies for matching funds is entitled to receive them in an amount equal to matchable contributions raised up to 50% of the expenditure limitation. 26 U.S.C. §9034. The process would be far less costly and simpler to administer if the Commission, as envisioned by the statutory language, were to match qualifying contributions up to the 50% limitation and seek a ratio surplus repayment once all obligations have been satisfied. 26 U.S.C. §9038(b)(3). In fact, if the Commission followed the statutory scheme it may be possible to resolve the audits within the six months contemplated in the surplus repayment provision. Id."

Committee Counsel's highly optimistic analysis of the benefits of the recommended change in approach aside, it is noted that the Commission considered and rejected just such a system in the course of its 1987 amendments to the Matching Fund Regulations. More recently, a July 8, 1994, opinion by the U.S. Court of Appeals for the District of Columbia in *Lyndon H. LaRouche and LaRouche Democratic Campaign '88 v. Federal Election Commission* is relevant. In that decision the Court quotes 11 CFR §9034.1(b) concerning the application of private contributions to a candidate's NOCO and states:

"This language would appear to be dispositive. A candidate is entitled to receive post-DOI matching payments so long as net campaign obligations remain outstanding; and the regulation defines a candidate's 'remaining[NOCO]' as the difference between the amount of his original NOCO and 'the sum of the contributions received ... plus matching funds received.'... Whenever the sum of his post-DOI receipts equal the amount of his NOCO-whether those receipts be in the form of private contributions or matching payments from the public fisc-his entitlement to further matching payments comes to an end. Even if we were to find the regulation ambiguous, which we do not, we would still have to accept the Commission's interpretation of section 9034.1(b) unless we found it 'plainly inconsistent with the wording of the regulation,'... which it is not.

"Having concluded that the Commission's interpretation of its regulations is not merely reasonable, but compelling, we must determine whether the regulations, as construed, represent a permissible interpretation of the Act."

"Here, petitioners have failed to cite anything in either the language or structure of the Act that would render the Commission's interpretation of section 9033(c)(2) unreasonable. To the contrary, its provisions make it clear that Congress wished to restrict the availability of matching payments to candidates it considered viable. Thus the Act expressly limits the class of those who are eligible for funds, 26 U.S.C. § 9033, and it withdraws the eligibility of candidates who fail to receive at least ten percent of the vote in two successive primaries. Id §

9033(c)(1)(B). Under the circumstances, we fail to discern why it is impermissible for the Commission to adopt a regulation that terminates post-DOI matching payments as soon as a candidate has received sufficient funds from private and public sources to liquidate his NOCO, whether or not they are so used."

Although President Clinton did not become ineligible due to a failure to receive 10% of the vote in two consecutive primaries, once he had past the date of ineligibility the provisions of 11 CFR §9034.1 are applicable and as the Court concluded, consistent with the statutory scheme.

After considering the Committee's arguments and examining the documentation assembled by the Committee to support their calculations, the Audit staff again reviewed the composition of the \$155,686 allowance for contributions transferable to the Compliance Committee included in the Interim Audit Report calculations. That allowance included \$34,585 in excessive contributions redesignated to the Compliance Committee, \$52,357 specifically designated to the Compliance Committee by virtue of the payee or a notation on the check's memo line, and \$68,744 in contributions that were made payable to a non-specific payee (e.g., Bill Clinton, Clinton Team, Clinton Campaign, etc.) dated after the date of ineligibility and not associated with any solicitation. In further review, it was learned that many of the contributions in the non-specific payee category deposited after the date of ineligibility but on or before August 5, 1992 were submitted for matching and matched. This is in accord with the Commission's Guideline For Presentation In Good Order and Regulations which state that a matchable contribution is to be made payable to the candidate or his or her authorized committees. Thus it was apparent that the Committee treated contributions with such payees as primary contributions. The Audit staff could see no reason to challenge that treatment. The amount that calculated as transferable to the Compliance Committee from contributions received and deposited by the Committee between July 16, and September 2, 1992 was \$99,806. That amount consists of \$34,585 in redesignated excessive contributions, \$56,792 in checks made payable to or otherwise designated to the general election campaign, and \$8,429 in cash contributions identified during the review of records made available with the Committee's response to the Interim Audit Report.

For the reasons presented above, the Audit staff concluded that the Committee has received matching funds in excess of the Candidate's entitlement. Presented below is a calculation of the amount as presented to the Commission for consideration.

Net Outstanding Campaign Obligations(Deficit) at 7/15/92	(\$7,878,678)
Private Contributions (7/16/92-9/2/92)	5,275,920 ⁹ / ₉
Matching Fund Payment (8/4/92)	1,431,599
Matching Fund Payment (9/2/92)	<u>1,786,327</u>
Amount Received in Excess of Entitlement	<u>\$ 615,168</u>

Therefore, it was calculated that as of September 2, 1992, the Candidate had received matching funds in excess of his entitlement. After that date the Candidate received one additional matching fund payment in the amount of \$2,825,181 bringing the amount received in excess of entitlement to \$3,440,349 (\$615,168 + \$2,825,181).

In the report considered by the Commission the Audit staff recommended that the Commission make an initial determination that the Committee was required to repay the United States Treasury \$3,440,349 pursuant to 11 CFR §9038.2(b)(1).

During the consideration of the Final Audit Report, the Commission determined that, consistent with a similar determination in the audit of the Bush-Quayle campaign, certain amounts discussed in Section III. B. 2., General Election Expenditures, were allocable in part to the primary campaign. As a result, the amount shown on the NOCO statement as receivable from the General Committee was reduced. This adjustment causes a \$424,602 increase in the Committee's NOCO and matching fund entitlement. Further, the Commission considered the question of the application of private contributions to the Committee's remaining net outstanding campaign obligations as of the date of each matching fund payment, versus treating most post date of ineligibility contributions as containing no election designation and therefore transferable to the Compliance Committee.

⁹/ The Committee deposited private contributions totaling \$5,411,443 during the period July 16, 1992 to September 2, 1992. The private contributions noted above are net of contribution refunds totaling \$35,717, and contributions from individuals, totaling \$99,806, deposited in the primary accounts that could be transferred to the Compliance Committee (\$5,411,443 - \$35,717 - \$99,806).

A motion was made to support the Staff analysis requiring the application of private contributions to remaining net outstanding campaign obligations before the payment of further matching funds. That motion failed by a vote of three to three with Commissioners Potter, Elliott and Aikens voting in favor and Commissioners McDonald, McGarry and Thomas voting against. A second motion to consider all post date of ineligibility contributions unmatchable unless specifically designated for the primary election also failed by the same vote.

As a result of these Commission votes, only contributions deposited through August 5, 1992, the last deposit date for which contributions were submitted for matching, will be applied to the remaining net outstanding campaign obligations prior to subsequent matching fund entitlement determinations. As compared to the calculation considered by the Commission on December 15, 1994, \$1,943,403 less in private contributions is applied to the Committee's remaining net outstanding campaign obligations. Also, post date of ineligibility contributions deposited on or before that date will be considered matchable without a specific election designation. This outcome produces the following entitlement determination.

Net Outstanding Campaign Obligations (Deficit) at 7/15/92, as revised	(\$8,303,280)
Less:	
Private Contributions (7/16/92-8/5/92)	3,332,517 ^{10/}
Matching Fund Payment (8/4/92)	1,431,599
Matching Fund Payment (9/2/92)	1,786,327
Matching Fund Payment (10/2/92)	<u>2,825,181</u>
Amount Received in Excess of Entitlement	<u>\$1,072,344</u>

^{10/} The Committee deposited private contributions totaling \$3,381,102 during the period July 16, 1992 to August 5, 1992. The private contributions noted above are net of contribution refunds totaling \$22,280, and contributions from individuals, totaling \$26,305, deposited in the primary accounts that could be transferred to the Compliance Committee (\$3,381,102 - \$22,280 - \$26,305).

Therefore, as of October 2, 1992, the Candidate had received matching funds in excess of his entitlement in the amount of \$1,072,344.

Recommendation #4

Given the Commission's actions with respect to this finding, the Audit staff recommends that the Commission make an initial determination that the Candidate is required to repay the United States Treasury \$1,072,344 pursuant to 11 CFR § 9038.2(b)(1).

E. Stale Dated Committee Checks

Section 9038.6 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. The committee shall inform the Commission of its efforts to locate the payees, if such efforts have been necessary, and its efforts to encourage the payees to cash the outstanding checks. The committee shall also submit a check for the total amount of such outstanding checks, payable to the United States Treasury.

The Audit staff performed bank reconciliations through June 30, 1993 and determined that the total amount of outstanding checks was \$111,673. Of this amount, \$79,119 were for checks dated between November, 1991 and March 19, 1993.

In the Committee's response to the exit conference, it provided documentation which demonstrated that checks totaling \$9,596 were not outstanding. However, the Committee did not provide evidence which demonstrates that no liability exists for those checks still considered outstanding nor were copies presented of any negotiated replacement checks.

Therefore, in the Interim Audit Report checks totaling \$69,523 (\$79,119 - \$9,596) were considered outstanding.

In the Interim Audit Report, the Audit staff recommended that the Committee present evidence that:

- a) The checks are not outstanding (i.e., copies of the front and back of the negotiated checks); or
- b) the outstanding checks are void (copies of the voided checks with evidence that no obligation exists, or copies of negotiated replacement checks); or
- c) the Committee attempted to locate the payees to encourage them to cash the outstanding checks or provide evidence documenting the Committee's efforts to resolve these items.



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20461

Statement of Reasons

Final Audit Report of the Clinton for President Committee
Commissioners Joan D. Aikens, Lee Ann Elliott, Trevor Potter

On December 15, 1994, the Federal Election Commission considered the Final Audit Report on the Clinton for President Committee. Unfortunately, a major recommendation in this Report that required the Clinton Committee to make a substantial repayment of taxpayer funds was blocked by three Commissioners.

This unprecedented action involved the Clinton Committee's receipt of matching funds from the U.S. Treasury in excess of its entitlement. The Commission's Audit Division found, and the General Counsel agreed, that the Clinton Committee improperly diverted over a million dollars in private contributions from the Primary Committee to a separate "legal and accounting fund" for the General Election. However, the law requires these private contributions be used to pay the remaining debts of the primary committee.

The effect of this impermissible transfer was to artificially inflate the Primary Committee's debt. This caused the U.S. Treasury to make an overpayment of taxpayer funds to the Committee to cover that debt. Accordingly, the Audit Division and General Counsel recommended the Committee repay \$2.9 million to the U.S. Treasury. We voted for this recommendation because this result was clearly required by the Commission's regulations and previous presidential audits. We regretfully conclude that our three colleagues' failure to adhere to these rules, and their vote against this recommendation, can only be considered arbitrary and capricious.

I. Commission Regulations and Procedures Required
the Clinton Committee Make a Repayment

The Commission's regulations at 9034.1(b) limit the amount of public funds a candidate may receive after the nomination to the net debt outstanding at the time a matching fund payment is received. To arrive at this debt calculation, all public and private contributions are subtracted from debts outstanding. Any net debt remaining would increase the candidate's

Statement of Reasons
Clinton for President Committee
by Commissioner Joan D. Aikens,
Commissioner Lee Ann Elliott and
Commissioner Trevor Potter

Page 2

entitlement to public funds to pay the debt. The long history of this regulation makes it clear that it was designed to encourage the payment of campaign debts, to the extent possible, with private contributions.^{1/}

Commission regulations at part 9003.3(a)(1)(iii) also clearly state: Contributions that are made after the convention but which are designated for the primary election, and contributions that exceed the contributor's limit for the primary election may be redesignated for the legal and accounting compliance fund if the candidate obtains the contributor's redesignation in accordance with 11 C.F.R. 110.1. Contributions that do not exceed the contributor's limit for the primary election may be redesignated and deposited in the legal and accounting compliance fund only if:

(A) The contributions represent funds in excess of any amount needed to pay remaining primary expenses;...

^{1/} The requirement at 11 C.F.R. § 9034.1(b) that private contributions be used to pay a committee's debts was recently upheld in Lyndon H. LaRouche; LaRouche Democratic Campaign '88 v. FEC, 20 F.3d 137 (D.C. Cir. 1994). In LaRouche, the Court stated "the language (of 9034.1(b)) would appear to be dispositive. A candidate is entitled to receive post-DOI matching payments so long as net campaign obligations remain outstanding, and the regulation defines a candidate's remaining [NOCO] as the difference between the amount of his original NOCO and the sum of the contributions received...plus matching funds received... Whenever the sum of his post-DOI receipts equal the amount of his NOCO-whether those receipts be in the form of private contributions or matching payments from the public fisc - his entitlement to further matching payments comes to an end. Even if we were to find the regulation ambiguous, which we do not, we would still have to accept the Commission's interpretation of section 9034.1(b) unless we found it plainly inconsistent with the wording of the regulation, which it is not. 20 F.3d at 140 (emphasis added).

95043684902

Statement of Reasons
Clinton for President Committee
by Commissioner Joan D. Aikens,
Commissioner Lee Ann Elliott and
Commissioner Trevor Potter

Page 3

(D) The contributions have not been submitted for matching.

(emphasis added).

This regulation was approved on a 6-0 vote by the Commission after the 1986 election cycle when a similar issue arose in the Dukakis audit. This regulation was designed to more clearly state the consistent position taken by the Commission from the first publicly financed election in 1976. In noting the need for this clearer regulation, Commissioner Thomas pointed out during the Dukakis audit that:

On its face, the (former) regulation would seem to allow the redesignation of post-primary designated contributions if the primary would have a debt afterward. However, it would be inconsistent with the Commission's congressional mandate to allow a committee to, in essence, create debt that would lead to entitlement for post ineligibility matching funds. In other words a committee should not be able to claim a net debt and hence entitlement to post ineligibility matching funds if it dissipated its permissible primary contributions to do so. Taken to its extreme, a committee could redesignate all of its unmatched contributions ... and unnecessarily create a huge deficit with a resulting claim for matching funds.

The current language of 9003.3(a)(1)(iii) pertaining to redesignation of post-primary designated contributions, effective April 8, 1987, evolved from a somewhat similar provision in the previous version of 11 C.F.R. 9003.3. However, the prior version made clear that such redesignations were permissible only if the primary committee retained sufficient funds to pay its remaining debts.

Contributions which are made after the beginning of the expenditure period but which are designated for the primary election may be deposited in the legal and accounting compliance fund: provided that the candidate already has sufficient funds to pay any outstanding campaign obligations incurred during the primary campaign...
[11 C.F.R. 9003.3(a)(1)(iii) (effective July 11, 1983).]

Statement of Reasons
Clinton for President Committee
by Commissioner Joan D. Aikens
Commissioner Lee Ann Elliott and
Commissioner Trevor Potter

Page 4

Though the current language did not retain this protective phrasing, there appears to have been no intent to alter the prior approach. ... Indeed, as noted, it would be contrary to public policy to allow the creation of debt and the consequent entitlement to post ineligibility matching funds. Accordingly, the Committee should be permitted to redesignate and transfer-out to the GELAC only so much of the contributions as would not leave the Committee in a net debt position. The remaining amount in question, ... cannot be redesignated and transferred-out, must be repaid by GELAC, and must therefore be included in Committee's cash on hand figure.^{2/}

In order to clarify any ambiguity that may have occurred during the 1988 Presidential audits, the Commission revised its Presidential regulations for 1992 to make absolutely clear that public and private money be used for debt retirement, and that there is limited permissibility and several prerequisites for any redesignation of private funds. See 11 C.F.R. 9003.3(a)(1) (iii) and 9034.1(b).

II. Application of These Rules to the Clinton Committee

By splitting 3-3 on two repayment motions, the Commission failed to apply these regulations to the Clinton Committee. For example, there is no question that on the date of ineligibility (i.e., the date of Clinton's nomination, July 15, 1992), the Committee had a debt of over \$7 million. Solicitations prior to July 15 had clearly solicited funds for the primary campaign and all contributions received were made payable to the Primary Committee, and deposited into the primary account. Those solicitations reminded the contributor that the contribution could be matched. In fact, the last primary solicitation sent on July 17, which solicited funds to retire the primary debt, again reminded the contributor that the contribution could be matched.^{3/}

^{2/} Quote of Commissioner Scott Thomas from the Final Audit Report on the Dukakis for President Committee, approved by Commission 6-0.

^{3/} Subsequent solicitations were mailed for contributions to the General Election Legal and Accounting and Compliance Fund (the GELAC). Those contributions are not at issue here.

95043684904

Statement of Reasons
Clinton for President Committee
by Commissioner Joan D. Aikens,
Commissioner Lee Ann Elliott and
Commissioner Trevor Potter

Page 5

Contributions deposited by the Primary Committee from these solicitations totaled \$5,863,410 between July 16 and October 2, 1992. In that same time frame, the Committee submitted final matching requests totaling \$6,046,107. The Committee received this inflated amount because they did not apply all of their private funds to their net outstanding campaign obligations. Instead, the Primary Committee sought redesignations from their contributors and transferred \$2,444,557 to the GELAC. This is in direct contravention of the Commission's regulations governing matching funds. 9034.1(b).

In other words, the Committee took contributor checks directly in response to primary solicitations, deposited them into the primary account and submitted \$2,600,519 for matching funds while at the same time taking other contributions from the same solicitations and, claiming they were intended for the GELAC, transferred them to the Legal and Accounting Compliance Fund.

In the Final Audit report, the Audit Division correctly recommended that the candidate had exceeded his entitlement to further matching funds as of the date on which private contributions and matching funds could have retired all debts. This was in accord with the previously cited public funding regulations, their Explanation and Justification, and the Presidential Compliance Manual. The amount the Audit Division calculated the Committee received in excess of its entitlement on this issue was over \$2.9 million. The Audit Division recommended this amount must be repaid to the U.S. Treasury. The Office of General Counsel fully concurred with this recommendation.

In discussing this finding, our colleagues argued that because of the general redesignation language at 11 C.F.R. § 110.1 and the fact that the Committee had received redesignations from many of the contributors, that we should recognize the "contributors' intent" and allow the Committee to transfer the funds to the GELAC.

We believe their analysis is faulty in that it fails to take into account the specific language of the regulations concerning outstanding debts from a Presidential primary at §§ 9003.3(a)(1)(iii) and 9034.1(b).

Statement of Reasons
Clinton for President Committee
by Commissioner Joan D. Aikens,
Commissioner Lee Ann Elliott and
Commissioner Trevor Potter

Page 6

However, our colleagues' and the Committee's argument went even farther than simple redesignation. They argued that these contributions were not specifically designated for the primary in the first place but were intended for the GELAC despite the fact that some of these contributions were solicited by the Primary Committee to retire primary debt; and all specifically indicated on the solicitation that the contributions were matchable; and the checks were made to the order of the Primary Committee and were deposited in a Primary Committee account.

The result of the Commission's failure to approve Audit's recommendation left us in the impossible position of accepting the Committee's argument that contributions deposited after the convention were not primary contributions, but rather were undesignated contributions received after the primary election, and pursuant to 11 C.F.R. 110.1 were automatically general election contributions. This apparently holds true despite the fact that contributions received as part of the same solicitations were in fact deposited by the Primary Committee and matched with public funds!

Following the 3-3 split on the Audit's recommendation, which had the effect of calling these funds contributions for the GELAC, the General Counsel and Audit Division recommended that the funds received after the DOI that were matched should be declared ineligible for matching because (as our colleagues had just argued) they too were not designated for the primary. This recommendation was made because the contributions transferred by the Clinton Committee to the GELAC and the contributions that were retained by the primary committee and submitted for matching were indistinguishable in every way: they were solicited by the same mailing, mailed to the same address, made payable to the same committee and received at the same time. This motion recognized that if some of these contributions were not designated for the primary, then none were. Accordingly, the Committee would have had to make a repayment of the amount that was mismatched with public funds. Incredibly, this motion also failed on a 3-3 partisan split.

95043684906

Statement of Reasons
Clinton for President Committee
by Commissioner Joan D. Aikens
Commissioner Lee Ann Elliott and
Commissioner Trevor Potter

Page 7

And so the Committee has it both ways. Contributions the Committee received after the convention were considered primary contributions that were matched with public funds used to pay primary debts, while other contributions also received after the convention from the same solicitations were considered undesignated or redesignated to the GELAC -- all at the whim of the Committee.

We see no legal or logical way that these post convention contributions can be both matchable primary contributions and at the Committee's discretion also be undesignated contributions to the GELAC. Such a scheme allowed the Clinton Committee to manipulate its cash balance and debts to receive public money to which it was not entitled. In its 19 year history, the Commission has never tolerated such a result. The Commission's failure to demand repayment of this public money is inconsistent with Commission precedent and squarely at odds with the plain language of the statute and regulations, is arbitrary and capricious, and contrary to law. Failure to approve either of the two motions completely undermines the integrity of the Presidential Public Funding system and will place this agency in an untenable position in trying to enforce the law in future elections.

III. The Clinton Committee's Real Entitlement to Public Money.

In their Statement of Reasons, Commissioners McGarry, McDonald and Thomas make the extraordinary statement that their votes to block repayment actually "furthers the public financing concept" (emphasis in original) because it pumps more taxpayer money into the Clinton campaign than the rules allow. Their argument is that if public financing is good, then more public financing must be better. This philosophy, of course, turns Congress' limited public financing statutes for the primaries and the Commission's audit rules upside down: for in every Presidential audit, until this one, the Commission has sought to protect taxpayer funds by requiring Committees prove they were fully entitled to the matching funds they received.

Statement of Reasons
Clinton for President Committee
by Commissioner Joan D. Aikens
Commissioner Lee Ann Elliott and
Commissioner Trevor Potter

Page 8

We believe that, at a minimum, Congress should be consulted before the Commission turns a conditional grant of public funds into a flat entitlement for maximum financing. Furthermore, such a drastic change of course should be subject to the notice and comment and other protections of a rulemaking. Finally, it is grossly improper to adopt such a free-spending standard for only one candidate (the current President of the United States), while every other campaign in the same cycle has been held to a different and stricter rule. Such a singular and capricious result is inappropriate and does not "further" the concept of public financing. Instead, it destroys the public's confidence that its money will be audited in a non-partisan manner and the rules scrupulously followed when it is given to any presidential campaign.



Joan D. Aikens
Commissioner

December 29, 1994
Date



Lee Ann Elliott
Commissioner

December 29 '94
Date



Trevor Potter
Chairman

December 29, 1994
Date

95043684908



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

March 16, 1995

Richard Mayberry, Esq.
888 Sixteenth Street, N.W.
Suite 700
Washington, D.C. 20006

RE: MUR 4192

Dear Mr. Mayberry:

This letter acknowledges receipt on March 10, 1995, of the complaint filed on behalf of your clients alleging possible violations of the Federal Election Campaign Act of 1971, as amended ("the Act"). The respondent(s) will be notified of this complaint within five days.

You will be notified as soon as the Federal Election Commission takes final action on your complaint. Should you receive any additional information in this matter, please forward it to the Office of the General Counsel. Such information must be sworn to in the same manner as the original complaint. We have numbered this matter MUR 4192. Please refer to this number in all future communications. For your information, we have attached a brief description of the Commission's procedures for handling complaints.

Sincerely,

Mary L. Taksar

Mary L. Taksar, Attorney
Central Enforcement Docket

Enclosure

Procedures

95043684909



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20461

March 16, 1995

Anthony S. Harrington, Esq.
Hogan & Hartson
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109

RE: MUR 4192

Dear Mr. Harrington:

The Federal Election Commission received a complaint which indicates that your clients, President William Jefferson Clinton, Clinton for President Committee, Clinton/Gore '92 Committee ("Committees"), J. L. Rutherford, as treasurer of the Committees, Robert A. Farmer as former treasurer of the Committees, and Bruce R. Lindsey, as assistant treasurer of the Clinton for President Committee, may have violated the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint is enclosed. We have numbered this matter MUR 4192. Please refer to this number in all future correspondence.

Under the Act, your clients have the opportunity to demonstrate in writing that no action should be taken against them in this matter. Please submit any factual or legal materials which you believe are relevant to the Commission's analysis of this matter. Where appropriate, statements should be submitted under oath. Your response, which should be addressed to the General Counsel's Office, must be submitted within 15 days of receipt of this letter. If no response is received within 15 days, the Commission may take further action based on the available information.

This matter will remain confidential in accordance with 2 U.S.C. § 437g(a)(4)(B) and § 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

95043684910

Anthony S. Harrington, Esq.
Page 2

If you have any questions, please contact Alva E. Smith at (202) 219-3400. For your information, we have enclosed a brief description of the Commission's procedures for handling complaints.

Sincerely,

Mary L. Taksar

Mary L. Taksar, Attorney
Central Enforcement Docket

Enclosures

1. Complaint
2. Procedures
3. Designation of Counsel Statement

95043684911



FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

March 16, 1995

J.L. Rutherford, Treasurer
Clinton/Gore '92 General Election Compliance Fund
124 W. Capitol
Little Rock, AR 72201

RE: MUR 4192

Dear Mr. Rutherford:

The Federal Election Commission received a complaint which indicates that the Clinton/Gore '92 General Election Compliance Fund ("Committee") and you, as treasurer, may have violated the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint is enclosed. We have numbered this matter MUR 4192. Please refer to this number in all future correspondence.

Under the Act, you have the opportunity to demonstrate in writing that no action should be taken against you and the Committee in this matter. Please submit any factual or legal materials which you believe are relevant to the Commission's analysis of this matter. Where appropriate, statements should be submitted under oath. Your response, which should be addressed to the General Counsel's Office, must be submitted within 15 days of receipt of this letter. If no response is received within 15 days, the Commission may take further action based on the available information.

This matter will remain confidential in accordance with 2 U.S.C. § 437g(a)(4)(B) and § 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

95043684912

J. L. Rutherford
Page 2

If you have any questions, please contact Alva E. Smith at (202) 219-3400. For your information, we have enclosed a brief description of the Commission's procedures for handling complaints.

Sincerely,

Mary L. Taksar

Mary L. Taksar, Attorney
Central Enforcement Docket

Enclosures

1. Complaint
2. Procedures
3. Designation of Counsel Statement

95043684913

OLDAKER, RYAN & LEONARD

ATTORNEYS AT LAW

818 CONNECTICUT AVENUE, N.W.

SUITE 1100

WASHINGTON, D.C. 20006

(202) 728-1010

FACSIMILE (202) 728-4044

March 28, 1995

MAR 30 2 47 PM '95

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

Ms. Alva F. Smith, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

RE: MUR 4192

Dear Ms. Smith:

This is a request for an extension of time to respond to the complaint filed in the above-referenced matter on behalf of President William Jefferson Clinton, Clinton for President Committee, Clinton/Gore '92 Committee, Clinton/Gore '92 General Election Compliance Fund, J.L. Rutherford as Treasurer of the Committees, Robert A. Farmer as former Treasurer of the Committees, and Bruce R. Lindsey as Assistant Treasurer of the Clinton for President Committee.

In light of a number of upcoming deadlines in other matters and already set vacation plans, I am requesting an extension of twenty days from the original due date, April 4, making a response due on April 24, 1995.

I would greatly appreciate your assistance in this matter.

Sincerely,

Lyn Utrecht

Lyn Utrecht

95043684914

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF FEDERAL
COUNSEL

MAR 30 2 47 PM '95

STATEMENT OF DESIGNATION OF COUNSEL

MUR: 4192

NAME OF COUNSEL: Lyn Utrecht

Cheryl Mills

ADDRESS: Oldaker, Ryan & Leonard

White House Counsel's Office

818 Connecticut Ave., NW #1100

1600 Pennsylvania Ave., NW

Washington, D.C. 20006

Washington, D.C. 20000

TELEPHONE: (202) 728-1010

(202) 456-7000

The above-named individual/individuals is/are hereby designated as my
counsel and is authorized to receive any notifications and other communications
from the Commission and to act on my behalf before the Commission.

Bill Clinton

Date

Signature

RESPONDENT'S NAME: President William Jefferson Clinton

ADDRESS: 1600 Pennsylvania Avenue, NW

Washington, DC 20000

BUSINESS PHONE: (202) 456-1414

95043684915

STATEMENT OF DESIGNATION OF COUNSEL

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL

NUR 4192

MAR 30 2 47 PM '95

NAME OF COUNSEL: Lyn Utrecht ---- Laura Ryan Shachoy

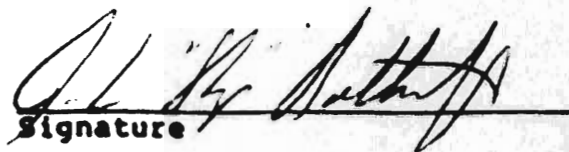
ADDRESS: Oldaker, Ryan and Leonard
818 Connecticut Avenue, NW Ste 1100
Washington, DC 20006

--- 891 High St.
Dedham, MA 02026

TELEPHONE: 202-728-1010

The above-named individual is hereby designated as my
counsel and is authorized to receive any notifications and other
communications from the Commission and to act on my behalf before
the Commission.

3/23/95
Date


Signature

RESPONDENT'S NAME:

Clinton for President Committee, Clinton/Gore '92 Committee,
Clinton/Gore '92 General Election Compliance Fund, J.L. Rutherford, as
Treasurer of the Committees, Robert A. Farmer as former Treasurer of the

ADDRESS:

Committees, Bruce R. Lindsey, as Asst. Treasurer of the Clinton for
President Committee

124 W. Capitol Avenue

Union National Bank Building, Suite 1150, Little Rock, AR 72201

HOME PHONE:

BUSINESS PHONE:

(501) 375-1290

95043684916



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

March 29, 1995

Lyn Utrecht, Esq.
Oldaker, Ryan & Leonard
818 Connecticut Avenue, N.W. #1100
Washington, D.C. 20006

RE: MUR 4192
President William Jefferson Clinton

Dear Ms. Utrecht:

This is in response to your letter dated March 28, 1995, requesting an extension until April 24, 1995 to respond to the complaint filed in the above-noted matter. After considering the circumstances presented in your letter, the Office of the General Counsel has granted the requested extension. Accordingly, your response is due by the close of business on April 24, 1995.

If you have any questions, please contact Alva E. Smith at (202) 219-3400.

Sincerely,

Mary L. Taksar (TS)

Mary L. Taksar, Attorney
Central Enforcement Docket

cc: Cheryl Mills, Esq.

Celebrating the Commission's 20th Anniversary

YESTERDAY, TODAY AND TOMORROW
DEDICATED TO KEEPING THE PUBLIC INFORMED

95043684917



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

March 29, 1995

Lyn Utrecht, Esq.
Oldaker, Ryan & Leonard
818 Connecticut Avenue, N.W. #1100
Washington, D.C. 20006

RE: MUR 4192
Clinton for President Committee, Clinton/Gore '92
Committee, Clinton/Gore '92 General Election
Compliance Fund ("Committees"), J.L. Rutherford, as
treasurer of the Committees, Robert A. Farmer as
former treasurer of the Committees, Bruce R. Lindsey,
as assistant treasurer of the Clinton for President
Committee

Dear Ms. Utrecht:

This is in response to your letter dated March 28, 1995,
requesting an extension until April 24, 1995 to respond to the
complaint filed in the above-noted matter. After considering
the circumstances presented in your letter, the Office of the
General Counsel has granted the requested extension.
Accordingly, your response is due by the close of business on
April 24, 1995.

If you have any questions, please contact Alva E. Smith at
(202) 219-3400.

Sincerely,

Mary L. Taksar (x2)

Mary L. Taksar, Attorney
Central Enforcement Docket

cc: Laura Ryan Shachoy, Esq.

Celebrating the Commission's 20th Anniversary

YESTERDAY TODAY AND TOMORROW
DEDICATED TO KEEPING THE PUBLIC INFORMED

95043684918

Apr 24 5 12 PM '95

BEFORE THE FEDERAL ELECTION COMMISSION

IN THE MATTER OF

**CLINTON/GORE '92 GENERAL ELECTION
COMPLIANCE FUND**

MUR 4192

RESPONSE TO COMPLAINT

I. INTRODUCTION

This submission is filed in accordance with 11 C.F.R. § 111.6 in response to the complaint filed by Alan Gottlieb, Michael A. Siegel, Todd Herman, Joseph P. Tartaro, Second Amendment Foundation, Center for Defense of Free Enterprise and AmeriPAC (the "Complainants") alleging violations of 26 U.S.C. §§ 9034 and 9037 11 C.F.R. 9034.1(b) and 9003.3(a)(1)(iii)(A) and (D) by Clinton/Gore '92 General Election GELAC (the "GELAC") and Clinton for President Committee (the "Primary Committee") (together, the "Committees"). The Complaint alleges that the Committees violated 26 U.S.C. §§ 9034 and 9037 11 C.F.R. 9034.1(b) and 9003.3(a)(1)(iii)(A) and (D) by transferring \$2,444,557 from the Primary Committee to GELAC and, as a result, received \$2.9 million in matching funds in excess of entitlement.

II. SUMMARY OF ARGUMENT

The Complaint should be dismissed because it fails to state a violation of the Act. In addition, principles of res judicata and collateral estoppel prevent the Commission from re-addressing this issue. In the alternative, the Commission should find no reason to believe against the Committees and dismiss the Complaint as legally and factually baseless for the reasons stated herein.

A. The Complaint should be dismissed because it fails to "describe a violation of a statute or regulation" as required under 11 C.F.R. § 111.4(d)(3) and, accordingly, is not a valid complaint. Even if the \$2.9 million in matching funds received by the Primary Committee were found to be matching funds in excess of entitlement as alleged by Complainants, such determination does not constitute a violation of law which is appropriately remedied by the enforcement provisions of the Federal Election Campaign Act of 1971, as amended ("FECA"). Rather, had the Commission made such a determination pursuant to the audit and repayment process, it would have ordered a repayment of such amount to the United States

95043684919

95043684920

Treasury in accordance with 11 C.F.R. § 9038.2. The receipt of matching funds in excess of entitlement has never been treated by the Commission as a violation of any provision of the Federal Election Campaign Act or the Primary Matching Payment Act (the "Matching Fund Act").

B. In the alternative, assuming arguendo that the receipt of matching funds in excess of entitlement were considered a "violation" for purposes of 11 C.F.R.S. 111.4(d)(3), the Complainants' position that the Primary Committee and GELAC violated 11 C.F.R. 9034.1(b) and 9003.3(a)(1)(iii)(A) and (D) by the Primary Committee's receipt of \$2.9 million in matching funds has no factual or legal basis for two reasons. First, the Commission has addressed the issue of receipt of matching funds in excess of entitlement (including the \$2.9 million referenced in the Complaint) in the course of its statutorily-mandated audits of the Primary Committee and GELAC. The Commission determined that the Primary Committee must repay the United States Treasury \$1,383,587. That is a final repayment determination and did not include the \$2.9 million which Complainants allege was in excess of entitlement. Since the issue has already been addressed and decided by the Commission, the doctrines of res judicata and collateral estoppel prevent it from being raised again.

C. Most importantly, the \$2.9 million in matching funds which Complainants allege were funds received in excess of entitlement were funds to which the Primary Committee was legally entitled. The Complaint incorrectly contends that the Primary Committee's transfer of \$2,444,557 to the GELAC of undesignated contributions received by the Primary Committee after the date of the candidate's nomination was improper because such contributions were primary contributions. As a result of the transfer, Complainants contend that the Primary Committee was able to continue to receive matching funds and received approximately \$2.9 million in funds in excess of entitlement. The Complaint incorrectly contends that such a transfer was improper. Contrary to the Complainants' position, the law is clear that these contributions were not properly designated in writing for the primary and that the transfer to GELAC was proper. Moreover, the Complaint is riddled with factual inaccuracies. Complainants' position that the funds received from July 17 to August 5, 1992 and submitted for matching were indistinguishable from the \$2,444,557 transferred to GELAC is factually incorrect.

III. SUMMARY OF FACTS

In accordance with the Matching Payment Act, Clinton for President Committee received matching funds for private contributions raised during the primary matching fund payment period in the amount of \$12,500,000, less than the maximum of \$13,800,000.00 to which the Committee was entitled under 26

9 5 0 4 3 6 8 4 9 2 1

U.S.C. § 9034(b). After the date of nomination, the Primary Committee established a suspense account into which contributions were deposited pending determination of their proper disposition. The Primary Committee properly transferred \$2,444,557.00 in contributions which had been deposited in the suspense account after the nomination. Although the Committee had received redesignations from the Primary to the GELAC for these contributions, the redesignations were unnecessary because by operation of law the contributions were GELAC contributions. In connection with the audit of the Primary Committee, the Commission issued a repayment determination in the amount of \$1,383,587 which included, *inter alia*, a repayment amount of \$1,072,344 for matching funds received in excess of entitlement. The Commission considered the issue of \$2.9 million referenced in the Complaint as well as the \$2,444,557 transfer to the GELAC when it addressed the issue of receipt of matching funds in excess of entitlement. The Commission did not find that the transfer was improper or that the \$2.9 million in matching funds were in excess of entitlement.

**IV. THE COMPLAINT MUST BE DISMISSED
BECAUSE IT IS LEGALLY AND FACTUALLY BASELESS**

1. The Receipt of Matching Funds in Excess of Entitlement Is Not A "Violation" of the Presidential Primary Matching Payment Account Act And, Therefore, Is Not Subject to An Enforcement Action

The Commission's finding that a committee had received matching funds in excess of its entitlement is not a violation. Rather, it results in a repayment determination. The Matching Fund Account was established to provide partial public financing to the campaigns of eligible presidential primary candidates. The receipt of public matching funds in excess of entitlement is addressed in the Regulations at 11 C.F.R. 9034. Eligible candidates are permitted to receive matching funds for all matchable primary contributions received prior to the date of ineligibility regardless of whether the primary campaign is operating in a surplus or deficit position. The Regulations state that, if, on the date of ineligibility, a candidate has net outstanding campaign obligations the candidate may continue to receive matching funds for contributions received and deposited on or before December 31 of the Presidential election. 11 C.F.R. 9034.1(b). The Primary Committee's statement of net outstanding campaign obligations ("NOCO") reflected a deficit position on the date of ineligibility so that pursuant to 11 C.F.R. 9034.1, the Primary Committee was entitled to continue to receive matching funds.

After the Convention, the Commission's Audit Division reviewed Committee records in accordance with 26 U.S.C. 9038 to determine whether any repayment of funds will be required. The Regulations explicitly state that

9 5 0 4 3 6 8 4 9 2 2

information obtained pursuant to an audit may be used by the Commission as the basis, or partial basis, for its repayment determinations under 11 C.F.R. 9038.2. The Regulations state that a repayment may be required where it is later determined that the candidate had no net outstanding campaign obligations as defined in 11 C.F.R. § 9034.5 as of the date of ineligibility. Accordingly, the law clearly acknowledges that the NOCO statement may be adjusted and may result in a determination that a committee had received matching funds in excess of entitlement. Such a finding by the Commission is not a finding of a violation. Rather it results in a repayment determination.

A retroactive finding of receipt of funds in excess of entitlement has never been treated as a violation of anything and we fail to see what provision would be violated. A Committee, when calculating its NOCO and thus determining a cut-off date after which no further matching funds will be sought, does not have the advantage of hindsight that the auditors have years later when re-calculating the NOCO nor can it anticipate the adjustments that the auditors would make to its accounts payable or post-election costs. Many primary presidential campaign NOCOs statements are revised by the audit division with hindsight and this frequently results in a determination that matching funds have been received in excess of entitlement.

While there are certainly some Title 26 repayment matters that may also be the subject of a Title 2 enforcement action, this is not such a case. These including knowingly exceeding state or national spending limits 11 C.F.R. 9035, 1(a)(i), and receiving prohibited or excessive contributions. There was no excessive spending here, nor was there any excessive contribution received. Thus, there was no violation.

2. The Doctrines of Res Judicata and Collateral Estoppel Prohibit the Commission from Addressing Complainants' Issues Again in the Enforcement Context

Even, assuming arguendo, that the receipt of public funds in excess of entitlement were a matter subject to the enforcement process, Complainants are estopped on the basis of res judicata and collateral estoppel from raising this issue in an enforcement action because this issue has already been addressed in the audit context and the Commission has already issued a final repayment determination. The Commission did not find that any repayment was due: no violation could have occurred.

3. **The Primary Committee Did Not Receive \$2.9 Million In Public Funds in Excess of Entitlement Because The \$2,444,557 in Contributions Received By The Primary Committee After The Date of Ineligibility Were Properly Considered GELAC Contributions**

The transfer of \$2,444,557.00 from the Primary Committee to the GELAC was a permissible and proper transfer because the contributions were in fact intended for GELAC.

A. **Under the Regulations, The Contributions Were Properly Considered as GELAC Contributions**

Under 11 C.F.R. § 110.1(b)(2)(ii) the \$2,444,557 in contributions questioned by Complainants were in fact contributions to the GELAC and no redesignations were necessary. To the extent that contributions may have been ambiguous or unclear, the Committee obtained timely statements from the contributors that these contributions were GELAC. Thus, these contributions were properly transferred to GELAC.

The Committee provided the Commission with an analysis of the funds received by the Primary Committee which demonstrated that these contributions were undesignated in accordance with 11 C.F.R. 110.1(b)(2) and, therefore, were intended for the next election.¹

The Regulations at 11 C.F.R. 110.1(b)(2)(i) provide that a contribution not designated in writing for a prior election is considered a contribution for the next election after the contribution is made. Thus, contributions received after the date of the primary or nominating convention are considered for the general election. The regulations are quite specific as to what constitutes a written designation: (1) the check or other negotiable instrument itself must clearly indicate the particular election with respect to which the contribution is made; (2) the contribution must be accompanied by a writing signed by the contributor which clearly indicates the particular election with respect to which the

The Auditors' assertion in the Interim Audit Report that these contributions were received in response to primary solicitations is factually inaccurate. Of the contributions received after the date of ineligibility and not submitted for matching, more than \$2,773,327 was neither clearly designated for primary or primary debt nor accompanied by a signed written designation for the primary or primary debt. Moreover, the timing of the receipt of the contributions confirms that they were not received in response to a solicitation. Most of these contributions were received over a month after the Convention. In addition, the Auditors' statement in the Interim Audit Report that some of the funds transferred to GELAC were also submitted for matching is a blatant misrepresentation. None of these contributions were submitted for matching. Finally, the Auditors' contention that the funds transferred to GELAC are indistinguishable from those funds submitted for matching from July 17 to August 5 is factually inaccurate.

contribution is made; or (3) the contribution is properly redesignated in accordance with 11 C.F.R. 110.1(b)(5). See 11 C.F.R. 110.1(b)(4).

Under 11 C.F.R. 100.2(b), "election" means a "general" election, "primary" election, "runoff" election, "caucus", "convention" or "special" election. The other relevant regulatory provision to this is 11 C.F.R. 9003.3(a)(1)(iii) which states, in relevant, part that:

contributions that are made after the beginning of the expenditure report period but which are **designated** for the primary election . . . may be redesignated for the legal and accounting GELAC . . .

Contributions that do not exceed the contributor's limit for the primary election may be redesignated . . . only if --(A) The contributions represent funds in excess of any amount needed to pay remaining primary expenses; (b) The redesignations are received within 60 days of the Treasurer's receipt of the contributions; (c) The requirements of 11 C.F.R. 110.1 are satisfied; and (D) The contributions have not been submitted for matching. (emphasis added)

The Complaint erroneously states that these contributions were not properly redesignated to the GELAC. However, in order to have been considered primary contributions in the first instance, the regulations required that they be **designated in writing** for the primary.

The Regulations explicitly state that only those contributions received after the debt which specifically have "primary" or "primary debt" written on the check, or have an accompanying signed contributor card designating their contribution to the primary should be treated as primary contributions. 11 C.F.R. 110.1(b)(4). In addition, the Explanation and Justification for the designation regulations at 11 C.F.R. of 110.1(b)(4) provides specifically that the contributor must sign the contributor form in order to designate a contribution to a particular election. "A question has also been raised as to whether contributions received in response to a solicitation for a particular election should be considered to be a designation for that election. Under new 110.1(b)(4), the contributor would be able to effectuate a designation by returning a preprinted form supplied by the soliciting committee that clearly states the election to which the contribution will be applied, provided that the contributor signs the form, and sends it to the committee together with the new contribution." (Federal Register, Vol. 52, No. 6, p. 763.) (emphasis added). In addition, the Explanation and Justification provides that "the timing of a contribution is of significance in several situations. For example, the date on which an undesignated contribution is made will determine whether the contribution counts against the contributor's limit for the primary or general

election." (Federal Register, Vol. 52, No. 6, p. 763).

As the Committee explained in response to the Interim Audit Report, the vendor who processed these contributions treated them as "redesignations" even though they were not. That vendors' contract had been negotiated early in the campaign by the Committee's original counsel and included an incentive for the vendor to treat contributions as though additional documentation or affidavit was necessary. Under the contract, the vendor received an additional amount per contribution for which additional documentation or an affidavit was obtained. The Committee staff did not see these contributions until well after the election, but relied solely on the vendor's expertise to handle the contributions appropriately.

To the extent that these redesignations were not totally superfluous they served to confirm that the contributor's intended these contributions to be made to the GELAC since there may have been some ambiguity in the way in which the checks were made out or in the unsigned cards that were attached to the checks.

B. The Commission's Practice and Policy Confirms That The Funds Transferred to The Compliance Fund Were Not Primary Contributions

The explicit language of the Regulations is confirmed by Commission decisions in advisory opinions, matters under review and prior audits.

1. The Commission's ruling in AO 1990-30 directly supports the conclusion that these contributions were not properly designated for the primary. In Advisory Opinion 1990-30, the Helms for Senate Committee had outstanding debt after its 1990 general election. In order to satisfy the debt, the committee solicited campaign contributions that advised contributors to designate their contributions for retirement of the campaign debt. The Committee received a considerable number of checks without the appropriate written designation thus requiring the committee to obtain redesignations. In order to eliminate the cost of the cost of this process, the committee proposed the following steps:

- a. It would state on the solicitation that the contribution would be used to pay general election debt;
- b. It would repeat the same statement on the contribution slips and include an additional line on the disclaimer stating that the funds would be used to retire general election debt; and
- c. Finally, the committee would not solicit any other contributions other than to satisfy the debt. Despite these steps, the Commission

ruled that this procedure would be inadequate to satisfy the regulations. The FEC dismissed the notion that attaching an undesignated check to the donor card would by itself be sufficient to indicate determine intent, even though the card and solicitation state specifically that the contributions are being requested to retire campaign debt. AO 1990-30 states explicitly that in order to confirm donor intent, the regulations require that the contributor's signature appear on the same document that contains the words of designation, i.e. the check or the contributor slip.

Commission policy and practice recognizes the importance of donor intent. The determination of whether a contribution is designated for a particular election turns on the contributor's donative intent. (See General Counsel's Legal Analysis accompanying Clinton for President Draft Final Audit Report.)

The Commission has also ruled that the date of a contribution is determinative of donor intent. (See MUR 1491 in which the Commission determined that an undesignated contribution made on the date of a primary runoff election must be attributed to the primary election because it was made during the primary election. See also, MURs 1492, 1638.)

And, further, the payee of a check has never been considered adequate evidence of proof of donor intent. In MUR 2139, checks were made payable to a political committee that held a fundraiser to benefit a candidate committee. Despite the fact that the checks were made payable to the political committee, the Commission ruled that the contributions had to be attributed to the candidate committee because of donor intent. In addition, a loan guarantee made after a candidate's primary election was deemed to be a general election contribution despite the fact that \$25,000 of the loan was to be used to pay off a \$25,000 loan taken during the primary to purchase media for the primary election.

C. Equitable Principles Dictate That The
\$2,444,557 Transfer To The Compliance
Fund Be Considered General Election Contributions

Equitable considerations also dictate that the \$2,444,537 transfer be deemed proper and, accordingly, that the \$2.9 million not be treated as funds received in excess of entitlement.

A finding of reason-to-believe by the Commission in this case would also result in disparate treatment of incumbents and challengers. Because incumbents often use a similar name for both primary committees and GELAC committees, checks made payable to them often have identical names. This gives them a great deal of discretion as to how to attribute contributions. In this case, clearly the \$2,444,557 represented contributions from contributors who intended to contribute

to the general election, although the payees listed may not have included Al Gore's name. Individuals contributing at that time clearly intended to make a general election contribution.² During the period that this money was received, President Clinton and Vice-President Gore were actively campaigning for the general election, conducting fundraising events, giving speeches and travelling on high visibility bus trips. In addition, most of this money was received more than a month after the Convention.

Finally, in no other instance has the Commission pursued an enforcement action where the complainant has alleged that the respondents received matching funds in excess of entitlement after a final repayment determination has been issued. This Complaint provides no basis for doing so in this instance.

CONCLUSION

For the reasons stated herein, Clinton for President Committee and Clinton/Gore '92 General Election Compliance Fund request that the Commission dismiss the Complaint because (1) it is insufficient under 11 C.F.R. § 111.4(d)(3) or (2) that principles of res judicata or collateral estoppel prevent the Commission

² The signed contributor forms clarify that these contributors were specifically notified that these contributions were for GELAC and were not for primary activity.

95043684927

from re-addressing this issue; or, in the alternative that there is no reason-to-believe that the Committees violated 26 U.S.C. §§ 9034 and 9037 and 11 C.F.R. 9034.1(b) and 9003.3(a)(1)(iii)(A) and (D).

Respectfully submitted,

Lyn Utrecht (lar)

Lyn Utrecht
Oldaker, Ryan & Leonard
818 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20006
(202) 728-1010

Laura A. Ryan

Laura A. Ryan
7 Acorn Lane
Dedham, Massachusetts 02026
(617) 329-0250

Counsel
Clinton for President Committee
Clinton/Gore General Election Compliance Fund
President William Jefferson Clinton
Robert A. Farmer
Bruce R. Lindsey

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR 4192

STAFF MEMBERS:

Andre G. Pineda
Peter Blumberg

COMPLAINANTS: Alan Gottlieb
Michael A. Siegel
Todd Herman
Joseph P. Tartaro
Second Amendment Foundation
Center for the Defense of Free Enterprise
American Political Action Committee

RESPONDENTS: William J. Clinton
Clinton for President Committee, and
J.L. "Skip" Rutherford, as Treasurer
Clinton-Gore '92 General Election Compliance Fund,
and J.L. "Skip" Rutherford, as Treasurer

RELEVANT STATUTES/REGULATIONS:

2 U.S.C. § 434(b)(3)(A)
2 U.S.C. §§ 437g(a)(1) and (5)(B)
26 U.S.C. §§ 9034, 9037 and 9038
26 U.S.C. § 9041
11 C.F.R. § 104.14(a) and (d)
11 C.F.R. § 110.1(b)(4)(i)-(iii)
11 C.F.R. §§ 111.4(a) and (d)(1)-(4)
11 C.F.R. §§ 9003.3(a)(1)(i) and (iii)
11 C.F.R. § 9032.1(c)
11 C.F.R. § 9034.1
11 C.F.R. §§ 9034.5(a)(1) and (2)
11 C.F.R. § 9037
11 C.F.R. § 9038.1
11 C.F.R. §§ 9038.2(b)(i) and (iii)
11 C.F.R. §§ 9038.2(c)(2)-(4) and 9038.2(h)

FEDERAL AGENCIES CHECKED: None

95043684929

I. GENERATION OF MATTER

This matter was generated by a complaint filed by Alan Gottlieb, Michael A. Siegel, Todd Herman, Joseph P. Tartaro, the Second Amendment Foundation, the Center for the Defense of Free Enterprise, and the American Political Action Committee ("the Complainants") alleging that President William J. Clinton and his authorized committees for the 1992 presidential election, Clinton for President and Clinton/Gore '92 General Election Legal and Compliance Fund ("the Respondents"), violated the public financing provisions. Attachment 1.

The Clinton for President Committee ("the Primary Committee") is the authorized committee of President Clinton for his campaign for the Democratic nomination in the 1992 Presidential elections.¹ The Primary Committee received \$12,536,135 in public funds for the purpose of President Clinton seeking the 1992 Democratic Party nomination. Pursuant to 26 U.S.C. § 9038(a) and 11 C.F.R. § 9038.1(a)(1), the Commission conducted an audit and examination of the Primary Committee's receipts, disbursements and qualified

1/ The Committee registered with the Commission as the Clinton Exploratory Committee on August 21, 1991. On October 10, 1991, the Committee filed an amended Statement of Organization to change its name to the Clinton for President Committee.

95043684930

campaign expenses. On December 27, 1994, the Commission approved the Final Audit Report on the Primary Committee.^{2/}

The Clinton/Gore '92 Committee ("the General Election Committee") is the authorized committee of President Clinton and Vice-President Albert Gore.^{3/} The General Election Committee received \$55,240,000 in public funds for the purpose of electing President Clinton and Albert Gore to the offices of President and Vice President, respectively, of the United States. The Clinton-Gore '92 General Election Compliance Fund ("Compliance Fund or GELAC") is the authorized general election legal and accounting compliance fund for the General Election Committee.^{4/} Pursuant to 26 U.S.C. § 9007(a) and 11 C.F.R. § 9007.1(a)(1), the Commission conducted an audit and examination of receipts, disbursements, and qualified campaign expenses of the General Election Committee and the Compliance Fund. On December 27, 1994,

^{2/} On February 13, 1995, the Commission made a final determination that President Clinton and the Primary Committee must repay \$1,342,728 to the United States Treasury. On this same date, the Commission also made a final determination that President Clinton and the Primary Committee must pay \$40,859 to the United States Treasury for stale-dated checks. On January 30, 1995, President Clinton and the Primary Committee submitted a \$1,383,587 check made payable to the United States Treasury. This check represented the full amount owed to the United States Treasury.

^{3/} The General Election Committee registered with the Commission on July 17, 1992.

^{4/} The Compliance Fund registered with the Commission on May 26, 1992.

95043684931

the Commission approved the Final Audit Report on the General Election Committee and the Compliance Fund.^{5/}

II. FACTUAL AND LEGAL ANALYSIS

A. Final Audit Report

The proposed Final Audit Report on the Primary Committee presented to the Commission by the Audit Division noted that as of July 15, 1992, the candidate's date of ineligibility, the Primary Committee had net outstanding campaign obligations totaling \$7,878,678. Attachment 3 at 95. However, between July 16, 1992 and September 2, 1992, the Primary Committee received contributions totaling \$5,275,920. Id. Of this amount, the Primary Committee transferred \$1,419,153 to the Compliance Fund.^{6/} Id. at 86. The proposed Final Audit Report concluded that the majority of the transferred contributions were designated for the Primary Committee, rather than the General Election Committee,

^{5/} On June 1, 1995, the Commission made a final determination that President Clinton and the General Election Committee must repay \$84,421 to the United States Treasury. Clinton-Gore '92 Statement of Reasons supporting the Final Repayment Determination. On this same date, the Commission also made a final determination that President Clinton and the General Election Committee must pay \$24,640 to the United States Treasury for stale-dated checks. Id. On January 30, 1995, President Clinton and the General Election Committee submitted a \$109,061 check made payable to the United States Treasury. This check represented the full amount owed to the United States Treasury.

^{6/} The Audit Division did not consider \$1,025,404 in private contributions that were transferred to the Compliance Fund after September 2, 1992. This is the date that the Audit Division calculated as the Committee no longer having net outstanding campaign obligations. Attachment 3 at 86. Therefore, the Committee was no longer entitled to matching payments. 11 C.F.R. § 9034.1(b).

95043684932

because such contributions were solicited, made payable to, received, deposited, and reported by the Primary Committee.^{7/} Id. at 90.

The Primary Committee received matching fund payments of \$1,431,599, \$1,786,327, and \$2,825,181 on August 4, 1992, September 2, 1992 and October 2, 1992, respectively. Id. at 95. By transferring \$1,419,153 to the Compliance Fund, the Primary Committee received additional matching fund payments because the Primary Committee's Statement of Net Outstanding Campaign Obligations ("NOCO Statement") continued to show net outstanding campaign obligations. Id. at 87-95. Therefore, the Final Audit Report presented to the Commission by the Audit Division concluded that the Primary Committee received \$3,440,349 [(\$5,275,920 + \$1,431,599 + \$1,786,327 + \$2,825,181) - \$7,878,678] in excess of (the candidate's entitlement.

The proposed Final Audit Report recommended that the Commission make an initial determination that the Committee repay

7/ The Final Audit Report noted that the Primary Committee's final matching fund submission contained contributions deposited through August 5, 1992. Attachment 3 at 91. The Primary Committee transferred monies to the Compliance Fund from contributions that were deposited on or after August 6, 1992. Id. Therefore, the Audit Division sampled contributions from the final matching fund submission and compared them with those contributions that were designated as Compliance Fund contributions to determine whether these contribution checks had different payee or election designation information. Id. The Audit Division noted no difference. Id.

95043684933

95043684934

\$3,440,349 to the United States Treasury.^{8/} A motion supporting the Audit Division's recommendation failed by a three to three vote. Id. The Commission cannot take any action under the Presidential Primary Matching Payment Account Act unless it has the affirmative vote of 4 members.^{9/} 2 U.S.C. § 437c(c). Therefore, the Commission was unable to make an initial determination that the Committee repay \$3,440,349 [(\$5,275,920 + \$1,431,599 + \$1,786,327 + \$2,825,181) - \$7,878,678] to the United States Treasury for receiving funds in excess of its entitlement.

B. Complaint and Response

The Complainants assert that "President Clinton engaged in a scheme to enhance the resources available for the promotion of his candidacy in the 1992 general election" and that the Primary Committee "manipulated its post-convention cash balance and debts in order to receive public matching funds to which [President] Clinton was not entitled and were used in the general election by the [Compliance Fund]." Attachment 1 at 3. The Complainants

^{8/} During the Commission's consideration of the proposed Final Audit Report, the Commission decreased the amount of non-qualified campaign expenses for the primary that was paid to benefit the general election. Attachment 3 at 68. This results in a \$424,602 increase in the Committee's matching fund entitlement and a corresponding decrease in the recommended repayment. Attachment 3 at 95. Therefore, the adjusted repayment amount recommended by the Audit Division would have been \$3,015,747 (\$3,440,349 - \$424,602).

^{9/} A second motion to consider all post date of ineligibility contributions unmatchable unless specifically designated for the primary election also failed by a three to three vote. Attachment 3 at 96.

contend that the Respondents' actions violated 26 U.S.C. §§ 9034 and 9037 and 11 C.F.R. § 9003.3(a)(1)(iii)(A) and (D). The Complainants raise three points in support of their allegations.

First, the Complainants contend that between July 16, 1992 and October 2, 1992, the Primary Committee submitted matching fund requests for over \$6 million, which it asserts were granted by the Commission based on the accuracy of the Committee's NOCO Statement. Id. The Complainants claim that the Primary Committee deposited private contributions in excess of \$5.8 million between July 16, 1992 and October 2, 1992. Id. at 5. However, the Complainants allege that the Primary Committee transferred \$2.4 million of these contributions to the Compliance Fund rather than applying these contributions to reduce the debts remaining after the candidate's date of ineligibility. Id.

Second, the Complainants claim that the Primary Committee received funds which it was not entitled to receive. By transferring such monies to the Compliance Fund, the Complainants state this action "had the effect of skewing the . . . 'NOCO' which is the basis for receiving public funds to retire the [primary] campaign debt." Id. at 5. The Complainants argue that the "respondent's actions to inflate the NOCO by divert[ing] post convention contributions from use in retiring primary election debt in order to receive close to \$3 million in public funds to which Clinton was not entitled violates the Presidential Matching Funds Act, 26 U.S.C. section[s] 9034 and 9037 and are an illegal

95043684935

violation of 11 C.F.R. section[s] 9003.3(a)(1)(iii)(A) and (D)." Id.

9 5 0 4 3 6 8 4 9 3 6
Third, the Complainants contend that the Primary Committee violated the public financing provisions by having certain contributions matched after the date of ineligibility that should not have been matched. The Complainants note that the contributions transferred to the GELAC were received by the Primary Committee in response to primary solicitations. Id. at 5-6. The Complainants assert that these contributions are similar to the contributions that were submitted for matching by the Primary Committee after the date of ineligibility. Id. Therefore, the Complainants argue that if the contributions transferred to the GELAC were not designated for the Primary Committee (but actually intended for the GELAC), then similarly designated contributions received after the date of ineligibility should not have been matched for public funds. Id. Thus, the Complainants contend that "the act of making a submission for matching funds based upon non-matchable contributions is a violation of 26 U.S.C. section[s] 9034 and 9037." Id. at 6.

The Complainants contend that because "the respondents committed knowing and willful violations of the Presidential Primary Matching Payment Account Act, the Commission should impose pursuant to 2 U.S.C. § 437g(a)(5)(B) a penalty in an amount equal to 200% of the contributions and expenditures in violation or \$5.8 million." Id. at 7.

9 5 0 4 3 6 8 4 9 3 7

The Respondents assert that the Commission should dismiss the complaint because it fails to "describe a violation of a statute or regulations' as required under 11 C.F.R. § 111.4(d)(3)." Attachment 2 at 1. The Respondents claim that the receipt of funds in excess of a candidate's entitlement is a repayment matter rather than a violation of the Federal Election Campaign Act of 1971, as amended, ("FECA") or the Presidential Primary Matching Payment Account Act. Id. at 1-4. The Respondents argue that the Commission did not make a repayment determination on this matter in the audit and repayment context and that "a retroactive finding of receipt of funds in excess of entitlement has never been treated as a violation of anything and [they] fail to see what provision would be violated." Id. at 4. The Respondents assert that "while there are certainly some Title 26 repayment matters that may also be the subject of a Title 2 enforcement action, this is not such a case . . . There was no excessive spending [by the Committee], nor was there any excessive contribution received [by the Committee]." Id.

The Respondents contend that the complainants are estopped from pursuing their complaint based on res judicata and collateral estoppel principles. Id. Specifically, the Respondents claim that because the complaint arises from the Commission's repayment matters, the Commission has already addressed these matters in the audit and repayment context. Id. Therefore, the Respondents assert that because no repayment was due to the United States Treasury stemming from the receipt of public funds in excess of

its entitlement, no violation of this provision could have occurred. Id.

Finally, the Respondents argue that the transfer of \$2,444,557 from the Primary Committee to the GELAC was a permissible and proper transfer because the contributions were intended for the GELAC. Id. at 5. Specifically, the Respondents assert that these contributions "were undesignated in accordance with 11 C.F.R. § 110.1(b)(2) and, therefore, were intended for the next election." Id. The Respondents further assert that the contributions in question were not received in response to primary solicitations, and that contributions transferred to GELAC were distinguishable from those submitted for matching. Id. at 1. The Respondents assert that even though its vendor processed these contributions as "redesignations," such contributions were not "redesignations." Id. at 7.

C. Legal Framework

Every candidate who has been notified by the Commission that he or she has successfully satisfied eligibility and certification requirements is entitled to receive payments under 26 U.S.C. § 9037 and 11 C.F.R. § 9037. 26 U.S.C. § 9034(a) and 11 C.F.R. § 9034.1(a). During the candidate's period of eligibility, the candidate is entitled to receive public funds to the extent that he or she receives matchable contributions.^{10/} 11 C.F.R.

^{10/} The total amount of payments to which a candidate is entitled to receive shall not exceed 50 percent of the expenditure limitation applicable under 2 U.S.C. § 441a(b)(1)(A). 26 U.S.C. § 9034(b) and 11 C.F.R. § 9034.1(d).

95043684938

9 5 0 4 3 6 8 4 9 3 9

§ 9034.1(a). However, after the candidate's date of eligibility, the candidate is only entitled to public funds for matchable contributions if on the date of ineligibility, the candidate has net outstanding campaign obligations.^{11/} 11 C.F.R. § 9034.1(b). Net outstanding campaign obligations are the difference between the total of all outstanding obligations for qualified campaign expenses as of the candidate's date of ineligibility plus estimated necessary winding down costs, less cash on hand as of the close of business on the last day of eligibility, including all contributions dated on or before that date whether or not submitted for matching. 11 C.F.R. § 9034.5(a)(1) and (2).

Within 15 days after the candidate's date of ineligibility, the candidate shall submit a NOCO Statement. 11 C.F.R.

§ 9034.5(a). The NOCO Statement will reflect the candidate's financial status as of the date of ineligibility and it will show whether the candidate has net outstanding campaign obligations. Explanation and Justification for Regulations on Presidential Primary Matching Funds, 46 Fed. Reg. 5229 (Feb. 4, 1983).

Each treasurer of a political committee shall file reports of receipts and disbursements and sign such reports. 2 U.S.C. § 434(a)(1). Each individual having the responsibility to file a required report or statement shall also sign the original report or statement. 11 C.F.R. § 104.14(a). Each treasurer of a

^{11/} A candidate must repay the amount of public funds that are received in excess of the amount needed to satisfy the net outstanding campaign obligations. 26 U.S.C. § 9038(b)(1) and 11 C.F.R. § 9038.2(b)(1)(i).

political committee, and any other person required to file any report or statement under the Commission's regulations and under the Act shall be personally responsible for the timely and complete filing of the report or statement and for the accuracy of any information or statement contained in it. 11 C.F.R.

§ 104.14(d). Such reports and statements include NOCO Statements.^{12/} Explanation and Justification for Regulations on Presidential Primary Matching Funds, 52 Fed. Reg. 20670 (June 3, 1987).

95043684940
In order to be eligible to receive public funds for the general election, a major party candidate must certify to the Commission that he or she will not accept private contributions to defray qualified campaign expenses. 26 U.S.C. § 9003(b)(2). However, a major party candidate may establish a legal and accounting compliance fund and accept private contributions into the fund if such contributions are received and disbursed in accordance with 11 C.F.R. § 9003.3. 11 C.F.R. § 9003.3(a)(1)(i). Pursuant to 11 C.F.R. § 9003.3(a)(1)(ii), private contributions received during the matching payment period that are remaining in the primary committee's accounts, which are in excess of any

^{12/} The Notice of Proposed Rulemaking for revisions to the public financing regulations "included a sentence in paragraph (a) of [section 9034.5] requiring treasurers to sign all statements of net outstanding campaign obligations ("NOCO Statements"). This sentence was removed from the final regulations as unnecessary since treasurers are required to sign all reports and statements filed with the Commission under 11 C.F.R. § 104.14." 52 Fed. Reg. 20670 (June 3, 1987). Therefore, NOCO Statements are included as reports and statements which a treasurer must sign.

9 5 0 4 3 6 8 4 9 4 1

amount needed to pay primary expenses or repay the Presidential Primary Matching Payment Account, may be transferred to the legal and accounting compliance fund without regard to contribution limitations.^{13/} However, contributions that are made after the beginning of the expenditure report period and are designated for the primary, but which exceed the contribution limitation for the primary, may be transferred to or deposited in the legal and accounting compliance fund if the candidate obtains the contributor's redesignation in accordance with 11 C.F.R. § 110.1.^{14/} 11 C.F.R. § 9003.3(a)(1)(iii). Pursuant to 11 C.F.R. § 110.1(b)(4)(i)-(iii), a contribution shall be considered to be designated in writing for a particular election if: (1) the contribution is made by check, money order, or other negotiable instrument which clearly indicates the particular election with respect to which the contribution is made; (2) the contribution is accompanied by a writing, signed by the contributor, which clearly indicates the particular election with respect to which the contribution is made; or (3) the contribution is redesignated in accordance with 11 C.F.R. § 110.1(b)(5).

^{13/} The matching payment period for candidates seeking the nomination of a party which nominates its Presidential candidate at a national convention begins "January 1 of the calendar year in which a Presidential general election is held" and it ends "the date on which the party nominates its candidate." 11 C.F.R. § 9032.6.

^{14/} In the case of a major party candidate, the expenditure report period begins on September 1 before the general election or the date major party chooses its nominee and the period ends 30 days after the general election. 11 C.F.R. § 9002.12(a).

Contributions that do not exceed the contributor's limit for the primary may be redesignated and deposited in a legal and accounting compliance fund only if: (1) the contributions represent funds in excess of any amount needed to pay remaining primary expenses; (2) the redesignations are received within 60 days of the treasurer's receipt of the contributions; (3) the requirements of redesignations rules have been satisfied; and (4) the contributions have not been submitted for matching. 11 C.F.R. § 9003.3(a)(1)(iii)(A)-(D).

D. Discussion

The Complainants contend that the Respondents violated the public financing provisions by: (1) transferring funds to the GELAC when primary debts were remaining and (2) receiving funds in excess of entitlement after the candidate's date of ineligibility; or (3) submitting matching contributions to the Commission after the candidate's date of ineligibility that should not have been matched. The Office of General Counsel agrees with the Complainants' first point. However, the Complainants' second point stems from the passive acceptance of public funds after the date of ineligibility. The third point is merely an alternative to the second point which assumes that the private contributions received after the date of ineligibility were not designated for the Primary Committee. This Office believes that the focus of this enforcement action should be on the affirmative act of submitting a misleading NOCO Statement of the Commission.

95043684942

As of July 15, 1992, the candidate's date of ineligibility, the Primary Committee had a deficit of \$8,303,280. Attachment 3 at 96. Therefore, the Primary Committee was required to pay its primary expenses before it could transfer or redesignate any private contributions to the Compliance Fund.^{15/} 11 C.F.R. §§ 9003.3(a)(1)(iii); see also, 11 C.F.R. § 9034.1(b). The transfer of \$1,419,153 from the Primary Committee to the Compliance Fund was not in accordance with 11 C.F.R. § 9003.3(A)(1)(iii) because such contributions were primary contributions which the Primary Committee should have applied towards the reduction of its primary expenses. The Respondents claim that the transfer was permissible. The Respondents contend that the contributions were originally intended for the Compliance Fund, and, therefore, the Primary Committee was not required to satisfy its primary debts before the funds were provided to the Compliance Fund.

The determination of whether a contribution is designated for a particular election turns on the contributor's donative intent. See Advisory Opinion ("AO") 1990-30. In this office's view, the \$1,419,153 in contributions transferred to the Compliance Fund by the Primary Committee were contributions designated to the Primary election since they were made payable to "Clinton for President" or a similar entity, and were solicited, received, deposited and

^{15/} Pursuant to 11 C.F.R. § 9002.12(a), the expenditure report period for President Clinton began on July 15, 1992, the date he was nominated as the 1992 Democratic Party nominee for the Office of President of the United States.

9 5 0 4 3 6 8 4 9 4 4

reported by the Primary Committee when it had net outstanding campaign obligations. Attachment 3 at 90; see also, 11 C.F.R. § 110.1(b)(4)(i). Further, the Audit Division sampled contributions from the Primary Committee's final matching fund submission with those contributions that were designated as Compliance Fund contributions to determine whether these contribution checks had different payee or election designation information. Attachment 3 at 91. No difference was noted.^{16/} Id. Therefore, it is the view of this office that the contribution checks demonstrate that the contributors intended to give the contributions to the Primary Committee. Thus, the Office of General Counsel recommends that the Commission find reason to believe that the Clinton for President Committee, its treasurer, J.L. "Skip" Rutherford, William J. Clinton, the Clinton-Gore '92 General Election Compliance Fund, and J.L. "Skip" Rutherford, as Treasurer, violated 11 C.F.R. § 9003.3(a)(1).

The Primary Committee cannot apply the GELAC transfer and designation rules in a manner that will allow it to arbitrarily claim that certain contributions are matchable primary contributions^{17/} and reverse its position to increase its

^{16/} Although the Respondents contend that "the [a]uditors' contention that the funds transferred to GELAC are indistinguishable from those funds submitted for matching from July 17 to August 5 is factually inaccurate," they provide no basis for this assertion. See Attachment 2, note 1.

^{17/} The Respondents assert that "only those contributions received after the debt which specifically have "primary" or "primary debt" written on the check . . . should be treated as primary contributions." Attachment 2 at 6. Contrary to these

entitlement to public funds by claiming that similarly designated contributions are intended for the GELAC.^{18/} By transferring \$1,419,153 to the Compliance Fund rather than applying private contributions towards its remaining primary expenses, the Primary Committee received \$3,015,747 [(\$5,275,920 + \$1,431,599 + \$1,786,327 + \$2,825,181) - \$8,303,280] in matching funds that it was not entitled to receive. Attachment 3 at 87-96.

The Primary Committee received these public funds only because its NOCO Statements reflected net outstanding campaign obligations. Attachment 4, see also, 11 C.F.R. § 9034.1(b). Therefore, the Primary Committee, its Treasurer, and the candidate had a duty to submit NOCO Statements that accurately reflected the Committee's outstanding obligations and assets.^{19/} See 11 C.F.R. § 104.14(d). The duty to submit NOCO Statements that are as

(Footnote 17 continued from previous page)
assertions, 11 C.F.R. § 110.1(b)(4)(i) does not require the words "primary" or "primary debt" to appear on a check for such a contribution to be designated for a primary election.

^{18/} The Respondents assert that a reason to believe finding by the Commission would result in disparate treatment of incumbents and challengers. Attachment 2 at 8. Specifically, the Respondents assert that "because incumbents often use a similar name for both primary committees and GELAC committees, checks made payable to them often have identical names . . . this gives them a great deal of discretion as to how to attribute contributions." Id. Although this Office recognizes that incumbent office holders often have similar names for their primary and GELAC committees, nothing prohibits challengers from doing the same.

^{19/} Pursuant to 11 C.F.R. § 9034.5(a), the candidate and committee are required to file the NOCO Statement. See 11 C.F.R. § 9032.1(c). The treasurer also has a duty to file the NOCO Statement. 11 C.F.R. § 104.14(a).

95043684945

accurate as possible is important to the public financing system. The significance of this process is demonstrated by the fact that the payment of public funds based on NOCO statements is the only area of public financing where the Commission may temporarily suspend the payment of public funds, prior to an audit and examination, to avoid an overpayment.^{20/} 11 C.F.R. § 9034.5(g)(1).

9 5 0 4 3 6 8 4 9 4 6

The Primary Committee submitted its NOCO Statements reflecting net outstanding campaign obligations for which it should have used the private contributions to satisfy. See 11 C.F.R. § 9034.1(b). The private contributions that were ultimately transferred to the Compliance Fund were available to the Primary Committee. However, the Primary Committee did not apply the private contributions to the primary debt and, therefore, it submitted NOCO Statements that were an inaccurate picture of the candidate's financial status. Therefore, the Office of General Counsel recommends that the Commission find reason to believe that the Clinton for President Committee, and J.L. "Skip" Rutherford, as Treasurer, and William J. Clinton violated 11 C.F.R. §§ 104.14(d) and 9034.5(a).

The Respondents argue that a candidate's receipt of matching funds in excess of his entitlement is a repayment matter that may not also be the subject of an enforcement action. Hence, the

^{20/} In other situations where the candidate receives funds in excess of entitlement, the Commission will have already certified the funds and will only seek redress after the audit and examination has been completed. 11 C.F.R. §§ 9038.2(b)(1)(ii) and (iv).

95043684947

Respondents argue that no enforcement action can be taken against the Committee for the receipt of matching funds which exceed the amount that a candidate is entitled to receive. See 26 U.S.C. § 9038(b)(1) and 11 C.F.R. § 9038.2(b)(1). However, the violation in this matter does not involve the act of receiving the public funds, but the act of submitting misleading NOCO Statements to the Commission. Furthermore, the Commission is not precluded from pursuing an enforcement action arising from violations of the public financing provisions that require repayments to the United States Treasury.^{21/} Reagan Bush Committee v. FEC, 525 F. Supp. 1330, 1337 (D.D.C. 1981). For example, the Commission may pursue a Committee for incurring expenses in excess of the state and overall expenditure limitations. 2 U.S.C. § 441a(b)(1)(A).

^{21/} Contrary to the Respondent's assertions, the Commission's failure to make a repayment determination does not preclude the Commission from acting upon the complaint based on res judicata and collateral estoppel principles. See Attachment 2, p. 4. This Office recognizes the difficulty presented in pursuing this matter given the outcome in the repayment context. See MUR 3708 (Following a court order, the Commission pursued enforcement action against committee after the Commission was unable to approve an advisory opinion sought by the committee). However, the Commission failed to reach a decision on the repayment recommendation on a 3-3 vote. Thus, there is no binding determination that would preclude a Commission decision in this matter. In any event, the repayment process and enforcement process involve separate and distinct procedures. Compare 2 U.S.C. § 437g(a) and 26 U.S.C. § 9038(b); see Reagan Bush Committee v. FEC, 525 F. Supp. 1330, 1337 (D.D.C. 1981). Therefore, by statutory design, a Commission decision to pursue an enforcement action is not precluded by its decision not to seek a repayment based upon the same facts. The analysis in this report is consistent with the analysis contained in this Office's comments on the proposed Final Audit Report for the Committee which contained the initial repayment determination. See Legal Comments on the Final Audit Report on the Clinton for President Committee, dated November 3, 1994.

However, exceeding the expenditure limitation is also a basis for repayment. 11 C.F.R. § 9038.3(b)(2)(ii)(A). As long as the public financing provision is similar to the act of exceeding the expenditure limitation, the Commission may pursue an enforcement action for apparent violations of the provision. The requirements that the Committee incur expenses within a limitation and submit accurate NOCO Statements are similar in that they both place an affirmative duty on the Committee.

III. Discussion of Conciliation and Civil Penalty

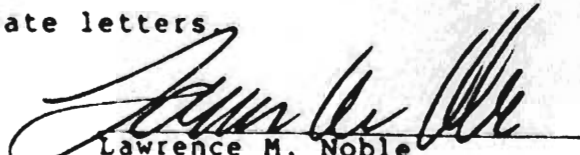
95043684248

RECOMMENDATIONS

1. Find reason to believe that the Clinton for President Committee, and J.L. "Skip" Rutherford, as treasurer, the Clinton-Gore '92 General Election Compliance Fund, and J.L. "Skip" Rutherford, as treasurer, and William J. Clinton violated 11 C.F.R. § 9003.3(a)(1);
2. Find reason to believe that the Clinton for President Committee, and J.L. "Skip" Rutherford, as treasurer, and William J. Clinton violated 11 C.F.R. §§ 104.14(d) and 9034.5(a);
3. Enter into conciliation with the Clinton for President Committee, and J.L. "Skip" Rutherford, as treasurer, the Clinton-Gore '92 General Election Compliance Fund, and J.L. "Skip" Rutherford, as treasurer, and William J. Clinton prior to a finding of probable cause to believe;
4. Approve the attached proposed Conciliation Agreement;
5. Approve the appropriate letters.

Date

7/27/95


Lawrence M. Noble
General Counsel

Attachments:

1. Complaint dated March 9, 1995
2. Respondents' response to complaint dated April 24, 1995
3. Final Audit Report on Clinton for President Committee approved by the Commission on December 27, 1995
4. Primary Committee NOCO submissions
5. Proposed Conciliation Agreement for President Clinton and the Clinton for President Committee
6. Proposed Conciliation Agreement for Clinton-Gore '92 General Election Compliance Fund
7. Proposed Factual and Legal Analysis for President Clinton, the Clinton for President Committee
8. Proposed Factual and Legal Analysis for the Clinton-Gore '92 General Election Compliance Fund


95043684949



FEDERAL ELECTION COMMISSION
WASHINGTON DC 20461

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARJORIE W. EMMONS/BONNIE J. ROSS 
COMMISSION SECRETARY

DATE: AUGUST 2, 1995

SUBJECT: MUR 4192 - FIRST GENERAL COUNSEL'S REPORT
DATED JULY 27, 1995.

The above-captioned document was circulated to the
Commission on Friday, July 28, 1995 at 12:00.

Objection(s) have been received from the
Commissioner(s) as indicated by the name(s) checked below:

Commissioner Aikens	_____
Commissioner Elliott	<u>XXX</u>
Commissioner McDonald	<u>XXX</u>
Commissioner McGarry	_____
Commissioner Potter	_____
Commissioner Thomas	_____

This matter will be placed on the meeting agenda
for Tuesday, August 8, 1995.

Please notify us who will represent your Division before
the Commission on this matter.

95043684950

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 4192
William J. Clinton;)
Clinton for President Committee)
and J.L. "Skip" Rutherford as)
Treasurer;)
Clinton-Gore '92 General Election)
Compliance Fund, and J.L. "Skip")
Rutherford, as Treasurer)

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the
Federal Election Commission executive session on August 16,
1995, do hereby certify that the Commission took the
following actions in MUR 4192:

1. Failed on a vote of 3-3 to pass a motion to -
 - a) Find reason to believe that the Clinton for President Committee, and J.L. "Skip" Rutherford, as treasurer, the Clinton-Gore '92 General Election Compliance Fund, and J.L. "Skip" Rutherford, as treasurer, and William J. Clinton violated 11 C.F.R. § 9003.3(a)(1);
 - b) Find reason to believe that the Clinton for President Committee, and J.L. "Skip" Rutherford, as treasurer, and William J. Clinton violated 11 C.F.R. §§ 104.14(d) and 9034.5(a);

(continued)

95043684951

- 9 5 0 4 3 6 8 4 9 5 2
- c) Enter into conciliation with the Clinton for President Committee, and J.L. "Skip" Rutherford, as treasurer, the Clinton-Gore '92 General Election Compliance Fund, and J.L. "Skip" Rutherford, as treasurer, and William J. Clinton prior to a finding of probable cause to believe;
 - d) Approve the proposed Conciliation Agreement as recommended in the General Counsel's report dated July 27, 1995;
 - e) Approve the appropriate letters as recommended in the General Counsel's July 27, 1995 report.

Commissioners Aikens, Elliott, and Potter voted affirmatively for the motion; Commissioners McDonald, McGarry, and Thomas dissented.

2. Decided by a vote of 6-0 to close the file without any further action and send appropriate letters.

Commissioners Aikens, Elliott, McDonald, McGarry, Potter, and Thomas voted affirmatively for the decision.

Attest:

8-21-95
Date

Marjorie W. Emmons
Marjorie W. Emmons
Secretary of the Commission



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

August 25, 1995

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Richard Mayberry, Esquire
Seventh Floor
888 16th Street, N.W.
Washington, D.C. 20006

Re: MUR 4192

Dear Mr. Mayberry:

The Federal Election Commission ("Commission") has reviewed the allegations contained in your complaint dated March 9, 1995. On August 16, 1995, the Commission considered your complaint, but was equally divided on whether to find reason to believe that: (1) William J. Clinton, the Clinton for President Committee ("the Primary Committee"), and J.L. "Skip" Rutherford, as treasurer, the Clinton-Gore '92 General Election Compliance Fund ("the GELAC"), and J.L. "Skip" Rutherford, as treasurer, violated 11 C.F.R. § 9003.3(a)(1), and (2) William J. Clinton, the Primary Committee, and J.L. "Skip" Rutherford, as treasurer, violated 11 C.F.R. §§ 104.14(d) and 9034.5(a).

Accordingly, on August 16, 1995, the Commission closed the file in this matter. A Statement of Reasons providing a basis for the Commission's decision will follow. The Federal Election Campaign Act allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

If you have any questions, please contact Andre G. Pineda, the attorney assigned to this matter, at (202) 219-3690.

Sincerely,

Lawrence M. Noble
General Counsel

Kim Bright-Coleman

By: Kim Bright-Coleman
Associate General Counsel

Enclosure
General Counsel's Report
Certification

95043684953



FEDERAL ELECTION COMMISSION

WASHINGTON D.C. 20461

August 25, 1995

Lyn Utrecht, Esquire
Oldaker, Ryan and Leonard
818 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20006

Re: MUR 4192

Dear Ms. Utrecht:

On March 16, 1995, the Federal Election Commission ("the Commission") notified Mr. Anthony S. Harrington, Esquire, of a complaint alleging that President William J. Clinton, the Clinton for President Committee ("the Primary Committee"), the Clinton/Gore '92 Committee ("the General Committee"), Robert A. Farmer, treasurer for both the Primary and General Committees, and Bruce R. Lindsey, assistant treasurer of the Primary Committee, violated certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). On March 16, 1995, the Commission also notified the Clinton/Gore '92 General Election Compliance Fund ("the GELAC"), and J.L. Rutherford, as treasurer, of a complaint alleging that the GELAC and Mr. Rutherford violated certain sections of the Act.

On August 16, 1995, the Commission considered the complaint but was equally divided on whether to find reason to believe that: (1) William J. Clinton, the Primary Committee, and J.L. "Skip" Rutherford, as treasurer, the GELAC, and J.L. "Skip" Rutherford, as treasurer, violated 11 C.F.R. § 9003.3(a)(1), and (2) William J. Clinton, the Primary Committee, and J.L. "Skip" Rutherford, as treasurer, violated 11 C.F.R. §§ 104.14(d) and 9034.5(a). Accordingly, the Commission closed its file in this matter. This matter will become part of the public record within 30 days. Should you wish to submit any materials to appear on the public record, please do so within ten (10) days of your receipt of this letter. Please send such materials to the General Counsel's Office.

95043684954

Letter to Lyn Utrecht
MUR 4192
Page -2-

If you have any questions, please contact Andre G. Pineda,
the attorney assigned to this matter at (202) 219-3690.

Sincerely,

Lawrence M. Noble
General Counsel

Kim Bright-Coleman

BY: Kim Bright-Coleman
Associate General Counsel

cc: Laura A. Ryan
Laura Ryan Shachoy
Cheryl Mills

95043684955

Richard Mayberry
Attorney and Counsellor At Law

Seventh Floor
888 16th Street, NW
Washington, D.C. 20006
(202) 785-8577
Fax (202) 835-1912

RECEIVED
FEDERAL ELECTION
COMMISSION
MAIL ROOM

AUG 29 9 22 AM '95

August 28, 1995

By FAX to 202-219-1043 and FCM

Andre G. Pineda, Esquire
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 4192

Dear Mr. Pineda:

On August 16, 1995 the Commission closed the above matter. Attached to the August 25, 1995 FEC letter [which I received today] to me notifying me of this determination, shows attachments 1-8 to the First General Counsel's Report.

This letter will confirm my verbal request of you today for the following:

1. Attachments 2 and 4. This there appears no privilege attaching to these documents, release at the earliest possible date, is requested.
2. Attachments 7-8. Since some privileged may attach to part of these documents, release as soon as possible after their review privilege.
3. For a record to the dismissal, I request a clean copy of all attachments not subject to privilege recognizing I may already have some of these attachments.

I believe, except for item 3 above, this reflects our discussion in which I advised you of the need for these documents in order to evaluate possible judicial review of the Commission's dismissal of this action.

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

AUG 29 10 02 AM '95

95043684956

Andre G. Pineda, Esquire
Office of General Counsel
Federal Election Commission
August 28, 1995
Page 2

In addition, I would appreciate the courtesy of a telephone call to notify me when the Statement of Reasons will be available to me.

I thank you for your assistance in this matter.

Sincerely yours,

Richard Mayberry

Richard Mayberry

95043684957

V. Convery



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

MEMORANDUM

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

FROM: *AWB* Marjorie W. Emmons/Lisa R. Davis *LRD*
Secretary of the Commission

DATE: September 19, 1995

SUBJECT: Statement of Reasons for MUR 4192.

Attached is a copy of the Statement of Reasons in MUR 4192 signed by Commissioners McDonald, McGarry and Thomas. This was received in the Commission Secretary's Office on September 18, 1995 at 4:51 p.m.

cc: V. Convery

95043684908



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

In the Matter of)

Clinton for President Committee, and)
J.L. "Skip" Rutherford, as treasurer)

Clinton-Gore '92 General Election)
Compliance Fund, and)
J.L. "Skip" Rutherford, as treasurer)

William J. Clinton)

MUR 4192

STATEMENT OF REASONS

CHAIRMAN DANNY LEE MCDONALD
COMMISSIONER JOHN WARREN MCGARRY
COMMISSIONER SCOTT E. THOMAS

On August 16, 1995, by a 3-3 vote, the Federal Election Commission declined to approve the General Counsel's recommendation to find reason to believe that the Clinton for President Committee ("the Committee") and the Clinton-Gore '92 General Election Compliance Fund ("Compliance Fund") violated 11 C.F.R. §§104.14(d), 9003.3(a)(1) and 9034.5(a). At issue was whether the Committee could transfer to the compliance fund \$1,419,153 in undesignated contributions which it had received after the primary election. Based upon the Commission's regulations and prior Commission decisions, we concluded that the transfer was permissible under existing law and therefore voted against the General Counsel's recommendations.

I.

The Presidential Primary Matching Payment Account ("the Act"), 26 U.S.C. §§9031-9042, was enacted in 1974 to provide partial federal financing for the campaigns of qualifying presidential primary candidates. See Buckley v. Valeo, 424 U.S. 1, 89 (1976). Eligible candidates may receive payments from the Act to match individual contributions up to \$250, see 26 U.S.C. §§9034(a) and 9037, subject to an overall ceiling of 50% of the expenditure limitation contained in 2 U.S.C. §441a(b)(1)(A). See 26 U.S.C. §9034(b). For the 1992 presidential primary campaign, the maximum entitlement that any candidate could receive in matching funds was \$13,810,000. The 1992 Clinton Primary Committee received \$12,536,135 in matching funds.

95043684259

After the conclusion of the primary campaign, the Commission audited the Clinton for President Committee as required by 26 U.S.C. §9038.¹ On December 27, 1994, the Commission approved its Final Audit Report on the Committee and made an initial determination that the Committee must pay \$1,383,587 to the United States Treasury. The Committee did not dispute this determination, and it thus became final. 11 C.F.R. §9038.2(c)(1). On January 30, 1995, the Committee submitted a check payable to the United States Treasury for \$1,383,587.

A large portion of the Committee's repayment (\$1,072,344) resulted from its receipt of matching funds in excess of its entitlement. Under the Act, a candidate may receive matching funds after the candidate's date of ineligibility "to defray qualified campaign expenses incurred before the date upon which such candidate becomes ineligible." 26 U.S.C. §9033(c)(2).² Because many of the expenses the Committee included as net outstanding campaign obligations were determined through the audit not to be qualified campaign expenses, see 11 C.F.R. §9034.4(b), the Commission ordered the repayment of matching funds that corresponded to such non-qualified debt.

By a 3-3 vote, the Commission did not approve an audit staff recommendation to seek a repayment in addition to the \$1,383,587 already required of the Committee.³

¹ The Act requires the Commission to conduct a "thorough examination and audit" of the campaign finances of every publicly funded candidate after the campaign for the nomination ends. 26 U.S.C. §9038(a). If the Commission finds during its audit that "any portion of the payments . . . from the matching payment account was in excess of the aggregate amount of payments" to which the candidate was entitled, the Commission must notify the candidate, and the candidate must pay to the Secretary of the Treasury an amount equal to the amount of excess payments. 26 U.S.C. §9038(b).

² Candidates who remain eligible to receive matching funds throughout the campaign for the nomination become ineligible on the date the party nominates its presidential candidate. See 26 U.S.C. §9033(c)(1); 11 C.F.R. §§9032.6, 9033.5. Thus, the ineligibility date for the Primary Committee was July 15, 1992.

The Commission's regulations explain that if, on the date of ineligibility, a candidate has "net outstanding campaign obligations" ("NOCO"), see 11 C.F.R. §9034.5(a):

that candidate may continue to receive matching payments for matchable contributions received and deposited on or before December 31 of the Presidential election year provided that on the date of payment there are remaining net outstanding campaign obligations, i.e., the sum of contributions received on or after the date of ineligibility plus matching funds received on or after the date of ineligibility is less than the candidate's net outstanding campaign obligations.

11 C.F.R. §9034.1(b)

³ It is not unusual for the Commission to split 3-3 on audit repayment matters. In considering the Final Repayment determination for the Bush/Quayle '92 Committees, for example, our three colleagues voted against a recommendation that the Bush/Quayle '92 Primary Committee make a repayment to the United States Treasury for failure to produce adequate supporting documentation for certain expenses claimed to be primary-related. As a result, the

Specifically, the Commission did not include in the NOCO calculation (as Committee assets) contributions totalling \$1,419,153 which had been received after the candidate's date of ineligibility, placed in an escrow account, and later transferred to the Clinton Compliance Fund. These funds, as we explain more fully later, were not designated by the donors as contributions to the Committee. Nor were they submitted for primary matching funds. After receipt and before transfer to the Compliance fund, they were verified in writing by the donors as Compliance Fund donations. Having not treated this amount as a reduction of the Committee's primary matching fund entitlement, the Commission then unanimously approved the resulting repayment determination of \$1,383,587. No action was filed challenging or seeking judicial review of this final Commission determination. See 26 U.S.C. §§9036 and 9041.

On March 9, 1995, Alan Gottlieb, Michael A. Siegel, Todd Herman, Joseph P. Tartaro, the Second Amendment Foundation, the Center for the Defense of Free Enterprise, and the American Political Action Committee ("complainants") filed a complaint with the Federal Election Commission against the Clinton Committee, the Compliance Fund, its treasurer, and William J. Clinton ("respondents"). The complaint generally tracked the rejected analysis of the audit staff and alleged that the Committee "manipulated its post-convention cash balance and debts in order to receive public matching funds to which Clinton was not entitled and were used in the general election by the Clinton/Gore '92 General Election Compliance Fund." Complaint at 3. More specifically, the complaint alleged:

[I]n excess of \$5.8 million dollars in private contributions were solicited and received by the Clinton for President Committee. Instead of application of these funds to extinguish a campaign debt in excess of \$7 million as requested by FEC regulations, the Clinton Committee intentionally and illegally diverted in excess of \$2.4 million dollars to a legal and accounting fund for the general election. This scheme enabled the Clinton Committee to receive \$2.9 million in additional matching funds to which it was not entitled.

Complaint at 4.

On August 16, 1995, the Commission considered the General Counsel's Report which recommended that the Commission find reason to believe that the respondents violated 11 C.F.R. §9003.3(a)(1)⁴ by transferring \$1,419,153⁵ in post-primary

amount in question was not included in the repayment determination approved by the Commission

⁴ The relevant portion of this provision, quoted in its entirety at n.6, deals with "[c]ontributions that are made after the beginning of the [general election] expenditure report period but which are designated for the primary election." 11 C.F.R. §9003.3(a)(1)(iii) (emphasis added).

⁵ The General Counsel's Report explains the difference between the \$2.4 million figure cited in the complaint and the \$1,419,153 figure as follows.

contributions to the Compliance Fund. The General Counsel's Report argued these funds were contributions designated for the Committee that should have been applied towards the reduction of NOCO. The General Counsel's Report also recommended, as a consequence of their first recommendation, that the Commission find reason to believe the Committee and William J. Clinton violated 11 C.F.R. §§104.14(d) and 9034.5(a) by submitting NOCO statements that did not accurately reflect the Committee's outstanding obligations and assets. A motion to approve the Office of General Counsel's recommendations failed. Three Commissioners supported the recommendation and three Commissioners (the undersigned) opposed.

II.

The General Counsel's Report concludes that "the transfer of \$1,419,153 from the Primary Committee to the Compliance Fund was not in accordance with 11 C.F.R. §9003.3(A)(1)(iii) [sic] because such contributions were primary contributions which the Primary Committee should have applied towards the reduction of its primary expenses." General Counsel's Report at 15.

We cannot support this conclusion, first of all, because it conflicts with the findings of the Commission in its Final Audit Report. The factual and legal determinations which the Commission previously made in the Final Audit Report on the Clinton Primary Committee are binding upon the Commission's actions in MUR 4192. Under the heading of "Finality of determinations," 26 U.S.C. §9036(b) plainly states:

[A]ll determinations made by it [the Commission] under this chapter are final and conclusive, except to the extent that they are subject to examination and audit by the Commission under Section 9038 and judicial review under Section 9041.

26 U.S.C. §9036(b) (emphasis added). Having examined a set of facts and made a "final and conclusive" legal determination as to those facts in a final audit report, the Commission cannot now arbitrarily abandon those previous audit findings and reach a wholly different conclusion in an enforcement context.

The precise issue of whether 11 C.F.R. §9003.3(a)(1)(iii) precluded transferring the \$1,419,153 in question to the Compliance Fund was resolved by the Commission's 3-3 vote and the resulting repayment determination. The audit staff specifically argued

The Audit Division did not consider [as primary campaign assets] \$1,025,404 in private contributions that were transferred to the Compliance Fund after September 2, 1992. This is the date that the Audit Division calculated as the Committee no longer having net outstanding campaign obligations. Attachment 3 [of General Counsel's Report] at 86.

General Counsel's Report at 4 n.6. In essence, there is no basis for questioning whatsoever the transfer of contributions that could no longer be applied to primary debt retirement.

9 5 0 4 3 6 8 4 9 6 3

at the Final Audit Report stage: "11 C.F.R. §9003.3(a)(1)(iii) clearly states that the redesignations pursued by the Committee were not permissible." Final Audit Report at 85. That approach was rejected by the undersigned, and hence by the Commission, because the contributions at issue were not technically "designated for the primary election" and, therefore, were not subject to §9003.3(a)(1)(iii). See Statement of Commissioners McDonald, McGarry, and Thomas regarding Clinton Campaign Audit. (December 16, 1994).

On the basis of the "final and conclusive" determination in the Final Audit Report, we, therefore, cannot find that there was a violation of 11 C.F.R. §9003.3(a)(1)(iii). The Final Audit Report totals for the amount of post-nomination private contributions received by the Committee and the amount received in excess of entitlement are predicated on a rejection of the application of §9003.3(a)(1)(iii) to the funds at issue. The Final Audit Report findings demonstrate that the \$1,419,153 in transferred funds were not considered "primary contributions which the Primary Committee should have applied towards the reduction of its primary expenses." General Counsel's Report at 15. These determinations are conclusive and binding upon the Commission in its consideration of MUR 4192. We do not believe Congress ever intended the enforcement process to be used as a tool for appealing or second-guessing the audit process. Accordingly, we voted against the General Counsel's recommendations, all of which depend on a rejected construction of 11 C.F.R. §9003.3(a)(1)(iii).

III.

Even if the factual findings and legal conclusions of the Final Audit Report were to be completely disregarded, we still could not agree with the General Counsel's recommendation that the Commission find reason to believe that the respondents violated 11 C.F.R. §9003.3(a)(1)(iii).⁶ The General Counsel's Report argues that the

⁶ In its entirety, that provision states:

(iii) Contributions that are made after the beginning of the expenditure report period but which are designated for the primary election, and contributions that exceed the contributor's limit for the primary election, may be redesignated for the legal and accounting compliance fund and transferred to or deposited in such fund if the candidate obtains the contributor's redesignation in accordance with 11 C.F.R. §110.1. Contributions that do not exceed the contributor's limit for the primary election may be redesignated and deposited in the legal and accounting compliance fund only if—

(A) The contributions represent funds in excess of any amount needed to pay remaining primary expenses.

(B) The redesignations are received within 60 days of the Treasurer's receipt of the contributions.

(C) The requirements of 11 C.F.R. 110.1(b)(5) and (1) regarding redesignations are satisfied; and

(D) The contributions have not been submitted for matching

9 5 0 4 3 6 8 4 9 6 4

respondents violated 11 C.F.R. §9003.3(a)(1)(iii) by transferring to the Compliance Fund \$1,419,153 in private contributions instead of applying them towards NOCO reduction. The fundamental question presented here is whether the transferred contributions, which were made after the primary election,⁷ were in fact "designated for the primary election." If these contributions were not designated for the primary election, their transfer would not be prohibited by 11 C.F.R. §9003.3(a)(1)(iii) and, accordingly, there would not be a violation of that provision. Under Commission regulations and Commission precedent, we conclude that these contributions were not designated for the primary election.

The General Counsel's Report argues that the contributions at issue here were designated to the Primary election simply because "they were made payable to 'Clinton for President' or a similar entity, and were solicited, received, deposited and reported by the Primary Committee when it had net outstanding campaign obligations." General Counsel's Report at 15-16. In support of this legal conclusion, the General Counsel's Report relies on an implied contributor intent theory. Not only does the Office of General Counsel's standard entirely ignore the correct legal standard set out at 11 C.F.R. §110.1(b)(4), but it is directly contrary to established Commission precedent.

"Commission regulations set out rules to determine the election for which a contribution is made." Advisory Opinion 1990-30, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶6006. Those regulations provide that if a contribution is not designated in writing by the donor for a particular election, the contribution is considered to be made with respect to the next election. 11 C.F.R. §110.1(b)(2)(ii). The regulations further provide that if the contribution is designated for a particular election by the donor in writing, it is made for the election so designated. 11 C.F.R. 110.1(b)(2)(i). Commission regulations state that "a contribution shall be considered to be designated in writing for a particular election if--

(i) The contribution is made by check, money order, or other negotiable instrument which clearly indicates the particular election with respect to which the contribution is made; or

(ii) The contribution is accompanied by a writing, signed by the contributor, which clearly indicates the particular election with respect to which the contribution is made; or

All contributions so redesignated and deposited shall be subject to the contribution limitations applicable for the general election, pursuant to 11 C.F.R. 110.1(b)(2)(i)

11 C.F.R. §9003.3(a)(1)(iii) (emphasis added)

⁷ This case is thus unlike other cases, such as the Dukakis For President Final Audit, where the Commission dealt with contributions which were received before the primary election. Clearly, those contributions, if undesignated, would be considered primary election contributions. See 11 C.F.R. §110.1(b)(2)(ii). By contrast, the contributions at issue in MUR 4192 were received after the primary election.

(iii) The contribution is redesignated in accordance with 11 C.F.R. §110.1(b)(5).

11 C.F.R. §110.1(b)(4).

Applying the standards of 11 C.F.R. §110.1(b)(4), it is clear that the contributions at issue in MUR 4192 were not "designated in writing" for the primary election. None of the transferred contributions indicated on the face of the written instrument that they were being made for a particular election. 11 C.F.R. §110.1(b)(4)(i). Nor were any of the contributions accompanied by a signed writing indicating that they were being made for the primary election. 11 C.F.R. §110.1(b)(4)(ii). Finally, the contributions at issue were not redesignated for the primary. (In fact, to be cautious, the Committee secured written redesignation of these receipts as Compliance Fund donations.) Because the regulatory requirements of 11 C.F.R. §110.1(b)(4) were not met, these contributions cannot be viewed as designated for the primary election.

As a result, there can be no violation of 11 C.F.R. §9003.3(a)(1)(iii). In addition, there can be no violation of 11 C.F.R. §§104.14(d) and 9034.5(a) for submitting NOCO Statements that did not accurately reflect the Primary Committee's outstanding obligations and assets.

Our reading of §110.1(b)(4) is confirmed by Commission precedent. In Advisory Opinion 1990-30, *supra*, the Commission rejected an "implied contributor intent" theory identical to the one advanced in the General Counsel's Report. In so holding, the Commission emphasized that it is the "Commission[s] regulations [which] set out rules to determine the election for which a contribution is made." *Id.*

In Advisory Opinion 1990-30, the Helms Committee had asked whether it would satisfy the designation requirements and could treat post-election contributions as debt retirement contributions if it: (1) included in its solicitation mailings a notice to potential contributors that their donations would be used to pay off 1990 general election debt; (2) provided the same notice on contribution slips enclosed in the solicitation; (3) included an additional line on the disclaimer⁸ stating that funds received would be used for 1990 debt elimination; and (4) indicated that it would not be soliciting for any other purpose. And much like the facts present in MUR 4192, the checks would be received, deposited and reported by the committee serving as the vehicle for the prior election. After discussing the requirements of §110.1(b)(4), the Commission stated:

Based on the foregoing, the Commission concludes that the Committee will not meet the designation requirements if it takes the steps proposed. The proposed steps would satisfy some of the elements of a clear designation. In order to confirm donor

⁸ The law requires a political committee soliciting contributions to include a disclaimer saying that the committee paid for the communication. 2 U.S.C. §441d(a)(1); 11 C.F.R. §110.11(a)(1)(i).

signature appear on the same document that contains the words of designation, i.e., the check or the contributor slip.

Advisory Opinion 1990-30 at 11,671 (emphasis added).

Advisory Opinion 1990-30 is squarely on point with MUR 4192 and is dispositive.⁹ Indeed, the opinion rejects precisely the sort of legal analysis devised in the General Counsel's Report. Applying the requirements of 11 C.F.R. §110.1(b)(4), Advisory Opinion 1990-30 plainly directs that there has to be very clear, express, written evidence signed by the contributor indicating that a contribution was, in fact, designated for a prior election in order for that contribution to be so designated. The Opinion plainly rejects the notion that a contribution received after the primary can be called a primary contribution simply on the basis that it was "solicited, received, deposited and reported by the Primary Committee when it had net outstanding campaign obligations." General Counsel's Report at 15-16. Moreover, the Opinion demonstrates that the evidence of designation has to be something more than the fact that the check is made out to the "Helms Committee" or in the instant matter, "Clinton for President."¹⁰ Similarly, the fact that some of the contributions may have been accompanied by return cards sent out by the Committee is not dispositive because such cards, apparently, were not signed by the donors. Under §110.1(b)(4) and Advisory Opinion 1990-30, evidence of primary designation is simply not present in MUR 4192.¹¹ Because the General Counsel's Report has failed to demonstrate that respondents transferred designated primary contributions as the term is defined by Commission regulations and precedent, we cannot find that there was a violation of §9003.3(a)(1).

⁹ Despite its obvious significance, the General Counsel's Report makes but one brief reference to Advisory Opinion 1990-30 ("The determination of whether a contribution is designated for a particular election turns on the contributor's donative intent. See Advisory Opinion ('AO') 1990-30.") General Counsel's Report at 15. Inexplicably, the General Counsel's Report fails to discuss, much less follow, the Opinion's holding that the contributor's donative intent is determined only by applying the strict requirements of §110.1(b)(4). The Office of General Counsel's failure to discuss §110.1(b)(4) in any meaningful way fatally flaws its legal recommendations.

¹⁰ As the Final Audit Report noted, the checks at issue in this matter included payee notations such as "Bill Clinton for President," "Clinton for President Campaign," and "other similar combinations." Final Audit Report at 87 n 8. Such generic references cannot be said to designate the contributions for the primary election. The fact that the Compliance Fund had its own distinct name is irrelevant. To the extent there was any ambiguity regarding the status of the undesignated contributions at hand, we note that the Committee obtained proper signed redesignations for the Compliance Fund before making the transfers.

¹¹ We note that under 2 U.S.C. §437f(c), any advisory opinion rendered by the Commission may be relied upon by "any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered." 2 U.S.C. §437f(c)(1)(B). Given the virtually identical facts between Advisory Opinion 1990-30 and MUR 4192, it seems clear that respondents fall within the safe harbor provisions of §437f(c)(1)(B).

9 5 0 4 3 6 8 4 9 6 7

The General Counsel's Report also apparently argues that since some of the Committee's other post-DOI receipts were submitted for matching funds, this demonstrates that the post-DOI receipts transferred to the compliance fund were primary contributions. General Counsel's Report at 16. This analysis misses the mark in several respects. To begin with, as we point out, *supra*, the Commission's rules for determining whether a contribution has been designated for a particular election are found at 11 C.F.R. §110.1(b)(4). In resolving this issue, the rules for determining whether a contribution is matchable, *see* 11 C.F.R. §§9034.2 and 9034.3, are irrelevant. In addition, there is no evidence that any undesignated receipts transferred to the Compliance Fund and at issue in this case were also submitted for matching funds. Finally, even if the rules of matchability were somehow relevant, those rules are far different than the strict requirements of §110.1(b)(4). As explained in the Commission's Guideline for Presentation in Good Order:

An immediately matchable contribution is one that is drawn on an individual's personal account and is signed by the identified accountholder. The Written Instrument bears a full date (month, day, year) reflecting that it was written on or after January 1, 1991, but not later than December 31, 1992 (provided it was also deposited on that date) and it is made payable to the candidate or an authorized committee for a presidential campaign. It has identical numerical and written amounts.

FEC Guideline for Presentation in Good Order, 43 (August, 1991). Unlike §110.1(b)(4), there is no requirement in the matchability regulations that the check or other written instrument contain express words of designation. Thus, it is possible that a check could satisfy the Commission's matchability regulations but not the §110.1(b)(4) designation requirements.¹²

For all of the above reasons, we voted against the General Counsel's recommendations to find that the respondents violated 11 C.F.R. §§104.14(d), 9003.3(a)(1) and 9034.5(a).

IV.

At the time of the filing of the complaint in this matter, the Commission was reviewing its regulations governing public financing of presidential primary and general election candidates. Those regulations have now been revised. 60 Fed. Reg. 31854 (June 16, 1995). As part of these changes, "new language has been added to resolve questions regarding depositing designated and undesignated contributions in the GELAC." *Id.* at 31856. Through the rulemaking process, therefore, the Commission

¹² As a matter of policy and practice the Commission has taken this approach. The rules and regulations governing the public funding process are cumbersome enough. To excessively restrict the matchability of post-nomination contributions would prove counter-productive if the result was to drive the candidate towards more private fundraising and less reliance on the very public funding that Congress has created to free campaigns from the *quid pro quo* environment.

has sought to resolve the legal issue which divided it in MUR 4192 and provide new rules for future presidential primary committees—rules that were not applicable to the respondents in this matter.

We strongly believe that there was not a violation under the old rules. This question, in fact, was decided at the "final and conclusive" audit determination. It now is time for the Commission to move on and prepare for the 1996 Presidential campaign. See Dukakis v. FEC, 53 F.3d 361 (D.C. Cir. 1993) (Commission is time barred from imposing repayment obligation after expiration of statutory notification period, see 26 U.S.C. §9038(b)(1-3).).

9-18-95
Date

Danny Lee McDonald
Danny Lee McDonald
Chairman

9-18-95
Date

John Warren McGarry
John Warren McGarry
Commissioner

9/18/95
Date

Scott E. Thomas
Scott E. Thomas
Commissioner

95043684968



FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20461

MEMORANDUM

TO: Commissioners
Staff Director Surina
General Officer Noble
Press Officer Harris

FROM: *MUR* Marjorie W. Emmons/Lisa R. Davis *(L.R.D.)*
Secretary of the Commission

DATE: September 21, 1995

SUBJECT: Statement of Reasons for MUR 4192.

Attached is a copy of the Statement of Reasons in MUR 4192 signed by Commissioners Aikens, Elliott, and Potter. This was received in the Commission Secretary's Office on Wednesday, September 20, 1995 at 4:26 p.m.

Attachment
cc: V. Convery, OGC

95043684969



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20461

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
William J. Clinton) MUR 4192
Clinton for President Committee)
J.L. "Skip" Rutherford, as Treasurer)
Clinton-Gore '92 General Election)
Compliance Fund)
J.L. "Skip" Rutherford, as Treasurer)

STATEMENT OF REASONS

Commissioner Joan D. Aikens
Commissioner Lee Ann Elliott
Commissioner Trevor Potter

On August 15, 1995, the Commission declined by a vote of 3-3 to find reason to believe that the Clinton for President Committee, and J.L. "Skip" Rutherford, as treasurer, the Clinton-Gore '92 General Election Compliance Fund, and J.L. "Skip" Rutherford, as treasurer, and William J. Clinton violated 11 C.F.R. § 9003.3(a)(1). The Commission also declined by a vote of 3-3 to find reason to believe that the Clinton for President Committee, and J.L. "Skip" Rutherford, as treasurer, and William J. Clinton violated 11 C.F.R. §§ 104.14(d) and 9034.5(a). These violations involve improper transfer of contributions from the Primary Committee to the Compliance Fund, and the submission of misleading Statement of Net Outstanding Campaign Obligations ("NOCO Statements") inaccurately reflecting the Committee's outstanding obligations.

By way of background, on December 15, 1994, the Commission considered almost identical issues with regard to the proposed Final Audit Report on the Primary Committee. In that Report, the Audit Division noted that as of July 15, 1992, the candidate's date of ineligibility, the Primary Committee had net outstanding

95043684970

campaign obligations totaling \$7,878,678. Between July 16, 1992 and September 2, 1992, the Primary Committee received contributions totaling \$5,275,920, and transferred \$1,419,153 of this amount to the Compliance Fund. The Primary Committee received matching fund payments of \$1,431,599, \$1,786,327, and \$2,825,181, on August 4, 1992, September 2, 1992 and October 2, 1992, respectively. Therefore, the Report concluded that the Primary Committee received \$3,440,349 [(\$5,275,920 + \$1,431,599 + \$1,786,327 + \$2,825,181) - \$7,878,678] in excess of the candidate's entitlement, and recommended that the Commission make an initial determination that the Committee repay \$3,440,349 to the United States Treasury.

A motion supporting the Audit Division's recommendation for the Final Audit Report failed by a 3-3 vote. A second motion to consider all post date of ineligibility contributions unmatchable unless specifically designated for the primary election also failed by a 3-3 vote. Timely Statements of Reasons were written by both the declining and supporting Commissioners addressing the reasons for the vote.

Because the recommendations at the enforcement phase upon which the Commission split 3-3 are virtually identical to the recommendation in the proposed Final Audit Report that the Commission split 3-3, we hereby adopt the Statement of Reasons we wrote concerning the proposed Final Audit Report. That Statement of Reasons was signed by the undersigned Commissioners on December 29, 1994, and is found at Attachment A. The Statement of Reasons written by the declining Commissioners concerning the proposed Final Audit Report is dated December 16, 1994, and is found at Attachment B because it is referred to in our Statement of Reasons in Attachment A.

9-20-95
Date

9-19-95
Date

9-19-95
Date

Joan D. Aikens
Joan D. Aikens
Commissioner

Lee Ann Elliott
Lee Ann Elliott
Commissioner

Trevor Potter
Trevor Potter
Commissioner

95043684971



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

Statement of Reasons

**Final Audit Report of the Clinton for President Committee
Commissioners Joan D. Aikens, Lee Ann Elliott, Trevor Potter**

On December 15, 1994, the Federal Election Commission considered the Final Audit Report on the Clinton for President Committee. Unfortunately, a major recommendation in this Report that required the Clinton Committee to make a substantial repayment of taxpayer funds was blocked by three Commissioners.

This unprecedented action involved the Clinton Committee's receipt of matching funds from the U.S. Treasury in excess of its entitlement. The Commission's Audit Division found, and the General Counsel agreed, that the Clinton Committee improperly diverted over a million dollars in private contributions from the Primary Committee to a separate "legal and accounting fund" for the General Election. However, the law requires these private contributions be used to pay the remaining debts of the primary committee.

The effect of this impermissible transfer was to artificially inflate the Primary Committee's debt. This caused the U.S. Treasury to make an overpayment of taxpayer funds to the Committee to cover that debt. Accordingly, the Audit Division and General Counsel recommended the Committee repay \$2.9 million to the U.S. Treasury. We voted for this recommendation because this result was clearly required by the Commission's regulations and previous presidential audits. We regretfully conclude that our three colleagues' failure to adhere to these rules, and their vote against this recommendation, can only be considered arbitrary and capricious.

I. Commission Regulations and Procedures Required the Clinton Committee Make a Repayment

The Commission's regulations at 9034.1(b) limit the amount of public funds a candidate may receive after the nomination to the net debt outstanding at the time a matching fund payment is received. To arrive at this debt calculation, all public and private contributions are subtracted from debts outstanding. Any net debt remaining would increase the candidate's

ATTACHMENT A

95043684972

Statement of Reasons
Clinton for President Committee
by Commissioner Joan D. Aikens,
Commissioner Lee Ann Elliott and
Commissioner Trevor Potter

Page 2

entitlement to public funds to pay the debt. The long history of this regulation makes it clear that it was designed to encourage the payment of campaign debts, to the extent possible, with private contributions.^{1/}

Commission regulations at part 9003.3(a)(1)(iii) also clearly state: Contributions that are made after the convention but which are designated for the primary election, and contributions that exceed the contributor's limit for the primary election may be redesignated for the legal and accounting compliance fund if the candidate obtains the contributor's redesignation in accordance with 11 C.F.R. 110.1. Contributions that do not exceed the contributor's limit for the primary election may be redesignated and deposited in the legal and accounting compliance fund only if:

(A) The contributions represent funds in excess of any amount needed to pay remaining primary expenses;...

1/ The requirement at 11 C.F.R. § 9034.1(b) that private contributions be used to pay a committee's debts was recently upheld in Lyndon B. LaRouche; LaRouche Democratic Campaign '88 v. FEC, 28 F.3d 137 (D.C. Cir. 1994). In LaRouche, the Court stated "the language (of 9034.1(b)) would appear to be dispositive. A candidate is entitled to receive post-DOI matching payments so long as net campaign obligations remain outstanding, and the regulation defines a candidate's remaining [NOCO] as the difference between the amount of his original NOCO and the sum of the contributions received...plus matching funds received... Whenever the sum of his post-DOI receipts equal the amount of his NOCO-whether those receipts be in the form of private contributions or matching payments from the public fisc - his entitlement to further matching payments comes to an end. Even if we were to find the regulation ambiguous, which we do not, we would still have to accept the Commission's interpretation of section 9034.1(b) unless we found it plainly inconsistent with the wording of the regulation, which it is not. 28 F.3d at 140 (emphasis added).

95043684973

Statement of Reasons
Clinton for President Committee
by Commissioner Joan D. Aikens,
Commissioner Lee Ann Elliott and
Commissioner Trevor Potter

Page 3

(D) The contributions have not been submitted for matching.

(emphasis added).

This regulation was approved on a 6-0 vote by the Commission after the 1988 election cycle when a similar issue arose in the Dukakis audit. This regulation was designed to more clearly state the consistent position taken by the Commission from the first publicly financed election in 1976. In noting the need for this clearer regulation, Commissioner Thomas pointed out during the Dukakis audit that:

On its face, the (former) regulation would seem to allow the redesignation of post-primary designated contributions if the primary would have a debt afterward. However, it would be inconsistent with the Commission's congressional mandate to allow a committee to, in essence, create debt that would lead to entitlement for post ineligibility matching funds. In other words a committee should not be able to claim a net debt and hence entitlement to post ineligibility matching funds if it dissipated its permissible primary contributions to do so. Taken to its extreme, a committee could redesignate all of its unmatched contributions ... and unnecessarily create a huge deficit with a resulting claim for matching funds.

The current language of 9003.3(a)(1)(iii) pertaining to redesignation of post-primary designated contributions, effective April 8, 1987, evolved from a somewhat similar provision in the previous version of 11 C.F.R. 9003.3. However, the prior version made clear that such redesignations were permissible only if the primary committee retained sufficient funds to pay its remaining debts.

Contributions which are made after the beginning of the expenditure period but which are designated for the primary election may be deposited in the legal and accounting compliance fund; provided that the candidate already has sufficient funds to pay any outstanding campaign obligations incurred during the primary campaign...
[11 C.F.R. 9003.3(a)(1)(iii) (effective July 11, 1983).]

25043684974

**Statement of Reasons
Clinton for President Committee
by Commissioner Joan D. Aikens
Commissioner Lee Ann Elliott and
Commissioner Trevor Potter**

Page 4

Though the current language did not retain this protective phrasing, there appears to have been no intent to alter the prior approach. ... Indeed, as noted, it would be contrary to public policy to allow the creation of debt and the consequent entitlement to post ineligibility matching funds. Accordingly, the Committee should be permitted to redesignate and transfer-out to the GELAC only so much of the contributions as would not leave the Committee in a net debt position. The remaining amount in question, ... cannot be redesignated and transferred-out, must be repaid by GELAC, and must therefore be included in Committee's cash on hand figure.^{2/}

In order to clarify any ambiguity that may have occurred during the 1988 Presidential audits, the Commission revised its Presidential regulations for 1992 to make absolutely clear that public and private money be used for debt retirement, and that there is limited permissibility and several prerequisites for any redesignation of private funds. See 11 C.F.R. 9003.3(a)(1) (iii) and 9034.1(b).

II. Application of These Rules to the Clinton Committee

By splitting 3-3 on two repayment motions, the Commission failed to apply these regulations to the Clinton Committee. For example, there is no question that on the date of ineligibility (i.e., the date of Clinton's nomination, July 15, 1992), the Committee had a debt of over \$7 million. Solicitations prior to July 15 had clearly solicited funds for the primary campaign and all contributions received were made payable to the Primary Committee, and deposited into the primary account. Those solicitations reminded the contributor that the contribution could be matched. In fact, the last primary solicitation sent on July 17, which solicited funds to retire the primary debt, again reminded the contributor that the contribution could be matched.^{3/}

^{2/} Quote of Commissioner Scott Thomas from the Final Audit Report on the Dukakis for President Committee, approved by Commission 6-0.

^{3/} Subsequent solicitations were mailed for contributions to the General Election Legal and Accounting and Compliance Fund (the GELAC). Those contributions are not at issue here.

95043684975

Statement of Reasons
Clinton for President Committee
by Commissioner Joan D. Aikens,
Commissioner Lee Ann Elliott and
Commissioner Trevor Potter

Page 5

Contributions deposited by the Primary Committee from these solicitations totaled \$5,863,410 between July 16 and October 2, 1992. In that same time frame, the Committee submitted final matching requests totaling \$6,046,107. The Committee received this inflated amount because they did not apply all of their private funds to their net outstanding campaign obligations. Instead, the Primary Committee sought redesignations from their contributors and transferred \$2,444,557 to the GELAC. This is in direct contravention of the Commission's regulations governing matching funds. 9034.1(b).

In other words, the Committee took contributor checks directly in response to primary solicitations, deposited them into the primary account and submitted \$2,600,519 for matching funds while at the same time taking other contributions from the same solicitations and, claiming they were intended for the GELAC, transferred them to the Legal and Accounting Compliance Fund.

In the Final Audit report, the Audit Division correctly recommended that the candidate had exceeded his entitlement to further matching funds as of the date on which private contributions and matching funds could have retired all debts. This was in accord with the previously cited public funding regulations, their Explanation and Justification, and the Presidential Compliance Manual. The amount the Audit Division calculated the Committee received in excess of its entitlement on this issue was over \$2.9 million. The Audit Division recommended this amount must be repaid to the U.S. Treasury. The Office of General Counsel fully concurred with this recommendation.

In discussing this finding, our colleagues argued that because of the general redesignation language at 11 C.F.R. § 110.1 and the fact that the Committee had received redesignations from many of the contributors, that we should recognize the "contributors' intent" and allow the Committee to transfer the funds to the GELAC.

We believe their analysis is faulty in that it fails to take into account the specific language of the regulations concerning outstanding debts from a Presidential primary at §§ 9003.3(a)(1)(iii) and 9034.1(b).

95043684976

Statement of Reasons
Clinton for President Committee
by Commissioner Joan D. Aikens,
Commissioner Lee Ann Elliott and
Commissioner Trevor Potter

Page 6

However, our colleagues' and the Committee's argument went even farther than simple redesignation. They argued that these contributions were not specifically designated for the primary in the first place but were intended for the GELAC despite the fact that some of these contributions were solicited by the Primary Committee to retire primary debt; and all specifically indicated on the solicitation that the contributions were matchable; and the checks were made to the order of the Primary Committee and were deposited in a Primary Committee account.

The result of the Commission's failure to approve Audit's recommendation left us in the impossible position of accepting the Committee's argument that contributions deposited after the convention were not primary contributions, but rather were undesignated contributions received after the primary election, and pursuant to 11 C.F.R. 110.1 were automatically general election contributions. This apparently holds true despite the fact that contributions received as part of the same solicitations were in fact deposited by the Primary Committee and matched with public funds!

Following the 3-3 split on the Audit's recommendation, which had the effect of calling these funds contributions for the GELAC, the General Counsel and Audit Division recommended that the funds received after the DOI that were matched should be declared ineligible for matching because (as our colleagues had just argued) they too were not designated for the primary. This recommendation was made because the contributions transferred by the Clinton Committee to the GELAC and the contributions that were retained by the primary committee and submitted for matching were indistinguishable in every way: they were solicited by the same mailing, mailed to the same address, made payable to the same committee and received at the same time. This motion recognized that if some of these contributions were not designated for the primary, then none were. Accordingly, the Committee would have had to make a repayment of the amount that was mismatched with public funds. Incredibly, this motion also failed on a 3-3 partisan split.

25043684977

**Statement of Reasons
Clinton for President Committee
by Commissioner Joan D. Aikens
Commissioner Lee Ann Elliott and
Commissioner Trevor Potter**

Page 7

And so the Committee has it both ways. Contributions the Committee received after the convention were considered primary contributions that were matched with public funds used to pay primary debts, while other contributions also received after the convention from the same solicitations were considered undesignated or redesignated to the GELAC -- all at the whim of the Committee.

We see no legal or logical way that these post convention contributions can be both matchable primary contributions and at the Committee's discretion also be undesignated contributions to the GELAC. Such a scheme allowed the Clinton Committee to manipulate its cash balance and debts to receive public money to which it was not entitled. In its 19 year history, the Commission has never tolerated such a result. The Commission's failure to demand repayment of this public money is inconsistent with Commission precedent and squarely at odds with the plain language of the statute and regulations, is arbitrary and capricious, and contrary to law. Failure to approve either of the two motions completely undermines the integrity of the Presidential Public Funding system and will place this agency in an untenable position in trying to enforce the law in future elections.

III. The Clinton Committee's Real Entitlement to Public Money.

In their Statement of Reasons, Commissioners McGarry, McDonald and Thomas make the extraordinary statement that their votes to block repayment actually "furthers the public financing concept" (emphasis in original) because it pumps more taxpayer money into the Clinton campaign than the rules allow. Their argument is that if public financing is good, then more public financing must be better. This philosophy, of course, turns Congress' limited public financing statutes for the primaries and the Commission's audit rules upside down: for in every Presidential audit, until this one, the Commission has sought to protect taxpayer funds by requiring Committees prove they were fully entitled to the matching funds they received.

95043684978

Statement of Reasons
Clinton for President Committee
by Commissioner Joan D. Aikens
Commissioner Lee Ann Elliott and
Commissioner Trevor Potter

Page 8

We believe that, at a minimum, Congress should be consulted before the Commission turns a conditional grant of public funds into a flat entitlement for maximum financing. Furthermore, such a drastic change of course should be subject to the notice and comment and other protections of a rulemaking. Finally, it is grossly improper to adopt such a free-spending standard for only one candidate (the current President of the United States), while every other campaign in the same cycle has been held to a different and stricter rule. Such a singular and capricious result is inappropriate and does not "further" the concept of public financing. Instead, it destroys the public's confidence that its money will be audited in a non-partisan manner and the rules scrupulously followed when it is given to any presidential campaign.

Joan D. Aikens
Joan D. Aikens
Commissioner

December 29, 1994
Date

Lee Ann Elliott
Lee Ann Elliott
Commissioner

December 29 '94
Date

Trevor Potter
Trevor Potter
Chairman

December 29, 1994
Date

95043684919



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT OF COMMISSIONERS McDONALD, MCGARRY,
AND THOMAS REGARDING CLINTON CAMPAIGN AUDIT

We write this short statement to explain our principal reasons for disagreeing with the staff's recommendation to treat about \$1.5 million in funds raised by the Clinton campaign after the nomination as primary committee assets. The staff's recommendation would have resulted in an additional repayment obligation in that amount on the theory that the primary campaign debt was \$1.5 million smaller and matching funds given to the campaign to pay its debts should be returned.

First, as a matter of law, this is a case of first impression. The Commission has never addressed whether contributions coming in after the nomination with some indications they were intended for the primary, but without the specific signed writing required for proper designation as such (see 11 C.F.R. §110.1(b)(4) and Advisory Opinion 1990-30, 2 Fed. Elec. Camp. Fin. Guide (CCH) § 6006), must be treated as primary campaign assets. The staff felt that because the checks were made payable to various names such as "Clinton for President Campaign," the legal requirement for a proper designation as a primary contribution was met. We think the regulation and advisory opinion cited necessitate clearer words of designation for a particular election than that. Also, we disagree that the solicitation materials which appear to have generated some of the contributions at issue satisfy the designation standard without a contributor's signature. Maybe the regulation and advisory opinion shouldn't have been made so strict, but the signature requirement is there.

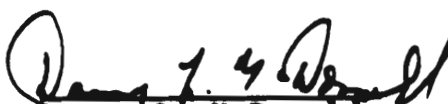
Second, assuming the contributions at issue didn't have to be treated as primary assets, we faced the policy issue of whether the Clinton campaign should be forced to treat them as such nonetheless. Because the actual intent of these post-nomination donors was ambiguous at best, because the technical requirements for designation as primary donations were not met, and because the use of public funds (rather than private contributions) to pay campaign expenses is the very essence of the public funding program, we felt it inappropriate to account for these funds in a way that would deprive the Clinton campaign of the use of public funds to pay legitimate post-primary debts. The funds at issue, which came in after the nomination, which

subsequent to receipt were confirmed in writing by the donors to be intended for the general election legal and accounting compliance fund (GELAC), and which were not submitted for primary campaign matching funds, shouldn't be reconfigured as primary campaign assets, we believe.

The staff was of the view that if we don't treat the funds moved to the GELAC as primary assets, we should treat other post-nomination contributions submitted for primary matching as non-matchable and recoup any associated matching funds. This struck us as a "Catch 22" argument. In our view, the contributions submitted for matching can and should be treated differently. First, the Clinton campaign concedes that such contributions must apply as a primary asset, thereby reducing post-nomination entitlement for matching funds. Further, the Commission's longstanding practice, apparently, has been to treat such contributions as matchable even though the technical requirements for written designation have not been met.

What is the impact of our approach? Taxpayer funds, rather than privately raised dollars, are used to pay primary campaign expenses-- a result that furthers the public financing concept. The funds at issue are left available to the GELAC to pay for complying with the many complexities of the law-- again a result that furthers the public financing concept because it insures that candidates continue to opt for public rather than private financing.

Our approach does not undermine the responsibility of the agency to insure that public funds are not spent for things that have no relation to the primary campaign or that are not properly documented. Hundreds of thousands of dollars in the Clinton and Bush campaigns are being treated as non-qualified for these reasons. Nor does our approach undermine our review of campaigns to insure that the state-by-state and overall spending limits are adhered to by the publicly funded campaigns. The audit reports demonstrate this. All our approach does is allow the use of more public funding dollars to pay for legitimate primary campaign expenses of a publicly funded campaign. As a matter of policy, we think that is a better result than the alternative.


Danny L. McDonald
Vice Chairman

 
John Warren McGarry
Commissioner


Scott E. Thomas
Commissioner

12-16-94
Date

12/16/94
Date

12/16/94
Date

95043684931



FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

THIS IS THE END OF MUR # 492

DATE FILMED 9/22/95 CAMERA NO. 1

CAMERAMAN SES

95043684982



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

Date: 9/29/95

☒ Microfilm
☐ Public Records
☐ Press

THE ATTACHED MATERIAL IS BEING ADDED TO CLOSED MUR 4192

95043692228



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

Sep 28 5 08 PM '95

MEMORANDUM

TO: THE COMMISSION

FROM: SCOTT E. THOMAS
COMMISSIONER

RE: MUR 4192 STATEMENT OF REASONS

DATE: SEPTEMBER 28, 1995

In the Statement of Reasons for MUR 4192, dated Sept. 18, 1995, and signed by Chairman McDonald and Commissioners McGarry and Thomas, the last line of page 7 was inadvertently omitted. Please substitute the attached page 7 which contains the omitted last line:

intent. however, regulations require that the contributor's

95043692229

signature appear on the same document that contains the words of designation, i.e., the check or the contributor slip.

Advisory Opinion 1990-30 at 11,671 (emphasis added).

Advisory Opinion 1990-30 is squarely on point with MUR 4192 and is dispositive.⁹ Indeed, the opinion rejects precisely the sort of legal analysis devised in the General Counsel's Report. Applying the requirements of 11 C.F.R. §110.1(b)(4), Advisory Opinion 1990-30 plainly directs that there has to be very clear, express, written evidence signed by the contributor indicating that a contribution was, in fact, designated for a prior election in order for that contribution to be so designated. The Opinion plainly rejects the notion that a contribution received after the primary can be called a primary contribution simply on the basis that it was "solicited, received, deposited and reported by the Primary Committee when it had net outstanding campaign obligations." General Counsel's Report at 15-16. Moreover, the Opinion demonstrates that the evidence of designation has to be something more than the fact that the check is made out to the "Helms Committee" or in the instant matter, "Clinton for President."¹⁰ Similarly, the fact that some of the contributions may have been accompanied by return cards sent out by the Committee is not dispositive because such cards, apparently, were not signed by the donors. Under §110.1(b)(4) and Advisory Opinion 1990-30, evidence of primary designation is simply not present in MUR 4192.¹¹ Because the General Counsel's Report has failed to demonstrate that respondents transferred designated primary contributions as the term is defined by Commission regulations and precedent, we cannot find that there was a violation of §9003.3(a)(1).

⁹ Despite its obvious significance, the General Counsel's Report makes but one brief reference to Advisory Opinion 1990-30 ("The determination of whether a contribution is designated for a particular election turns on the contributor's donative intent. See Advisory Opinion ('AO') 1990-30.") General Counsel's Report at 15. Inexplicably, the General Counsel's Report fails to discuss, much less follow, the Opinion's holding that the contributor's donative intent is determined only by applying the strict requirements of §110.1(b)(4). The Office of General Counsel's failure to discuss §110.1(b)(4) in any meaningful way fatally flaws its legal recommendations.

¹⁰ As the Final Audit Report noted, the checks at issue in this matter included payee notations such as "Bill Clinton for President," "Clinton for President Campaign," and "other similar combinations." Final Audit Report at 87 n 8. Such generic references cannot be said to designate the contributions for the primary election. The fact that the Compliance Fund had its own distinct name is irrelevant. To the extent there was any ambiguity regarding the status of the undesignated contributions at hand, we note that the Committee obtained proper signed redesignations for the Compliance Fund before making the transfers.

¹¹ We note that under 2 U.S.C. §437f(c), any advisory opinion rendered by the Commission may be relied upon by "any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered." 2 U.S.C. §437f(c)(1)(B). Given the virtually identical facts between Advisory Opinion 1990-30 and MUR 4192, it seems clear that respondents fall within the safe harbor provisions of §437f(c)(1)(B).



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

V. Convey
RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

SEP 28 5 00 PM '95

MEMORANDUM

TO: THE COMMISSION

FROM: SCOTT E. THOMAS *ST*
COMMISSIONER

RE: MUR 4192 STATEMENT OF REASONS

DATE: SEPTEMBER 28, 1995

In the Statement of Reasons for MUR 4192, dated Sept. 18, 1995, and signed by Chairman McDonald and Commissioners McGarry and Thomas, the last line of page 7 was inadvertently omitted. Please substitute the attached page 7 which contains the omitted last line:

intent, however, regulations require that the contributor's

9504369221

(iii) The contribution is redesignated in accordance with 11 C.F.R. §110.1(b)(5).

11 C.F.R. §110.1(b)(4).

Applying the standards of 11 C.F.R. §110.1(b)(4), it is clear that the contributions at issue in MUR 4192 were not "designated in writing" for the primary election. None of the transferred contributions indicated on the face of the written instrument that they were being made for a particular election. 11 C.F.R. §110.1(b)(4)(i). Nor were any of the contributions accompanied by a signed writing indicating that they were being made for the primary election. 11 C.F.R. §110.1(b)(4)(ii). Finally, the contributions at issue were not redesignated for the primary. (In fact, to be cautious, the Committee secured written redesignation of these receipts as Compliance Fund donations.) Because the regulatory requirements of 11 C.F.R. §110.1(b)(4) were not met, these contributions cannot be viewed as designated for the primary election.

As a result, there can be no violation of 11 C.F.R. §9003.3(a)(1)(iii). In addition, there can be no violation of 11 C.F.R. §§104.14(d) and 9034.5(a) for submitting NOCO Statements that did not accurately reflect the Primary Committee's outstanding obligations and assets.

Our reading of §110.1(b)(4) is confirmed by Commission precedent. In Advisory Opinion 1990-30, *supra*, the Commission rejected an "implied contributor intent" theory identical to the one advanced in the General Counsel's Report. In so holding, the Commission emphasized that it is the "Commission[s] regulations [which] set out rules to determine the election for which a contribution is made." *Id.*

In Advisory Opinion 1990-30, the Helms Committee had asked whether it would satisfy the designation requirements and could treat post-election contributions as debt retirement contributions if it: (1) included in its solicitation mailings a notice to potential contributors that their donations would be used to pay off 1990 general election debt; (2) provided the same notice on contribution slips enclosed in the solicitation; (3) included an additional line on the disclaimer⁸ stating that funds received would be used for 1990 debt elimination; and (4) indicated that it would not be soliciting for any other purpose. And much like the facts present in MUR 4192, the checks would be received, deposited and reported by the committee serving as the vehicle for the prior election. After discussing the requirements of §110.1(b)(4), the Commission stated:

Based on the foregoing, the Commission concludes that the Committee will not meet the designation requirements if it takes the steps proposed. The proposed steps would satisfy some of the elements of a clear designation. In order to confirm donor intent, however, regulations require that the contributor's

⁸ The law requires a political committee soliciting contributions to include a disclaimer saying that the committee paid for the communication. 2 U.S.C. §441d(a)(1); 11 C.F.R. §110.11(a)(1)(i).

signature appear on the same document that contains the words of designation, i.e., the check or the contributor slip.

Advisory Opinion 1990-30 at 11,671 (emphasis added).

Advisory Opinion 1990-30 is squarely on point with MUR 4192 and is dispositive.⁹ Indeed, the opinion rejects precisely the sort of legal analysis devised in the General Counsel's Report. Applying the requirements of 11 C.F.R. §110.1(b)(4), Advisory Opinion 1990-30 plainly directs that there has to be very clear, express, written evidence signed by the contributor indicating that a contribution was, in fact, designated for a prior election in order for that contribution to be so designated. The Opinion plainly rejects the notion that a contribution received after the primary can be called a primary contribution simply on the basis that it was "solicited, received, deposited and reported by the Primary Committee when it had net outstanding campaign obligations." General Counsel's Report at 15-16. Moreover, the Opinion demonstrates that the evidence of designation has to be something more than the fact that the check is made out to the "Helms Committee" or in the instant matter, "Clinton for President."¹⁰ Similarly, the fact that some of the contributions may have been accompanied by return cards sent out by the Committee is not dispositive because such cards, apparently, were not signed by the donors. Under §110.1(b)(4) and Advisory Opinion 1990-30, evidence of primary designation is simply not present in MUR 4192.¹¹ Because the General Counsel's Report has failed to demonstrate that respondents transferred designated primary contributions as the term is defined by Commission regulations and precedent, we cannot find that there was a violation of §9003.3(a)(1).

⁹ Despite its obvious significance, the General Counsel's Report makes but one brief reference to Advisory Opinion 1990-30 ("The determination of whether a contribution is designated for a particular election turns on the contributor's donative intent. See Advisory Opinion ('AO') 1990-30.") General Counsel's Report at 15. Inexplicably, the General Counsel's Report fails to discuss, much less follow, the Opinion's holding that the contributor's donative intent is determined only by applying the strict requirements of §110.1(b)(4). The Office of General Counsel's failure to discuss §110.1(b)(4) in any meaningful way fatally flaws its legal recommendations.

¹⁰ As the Final Audit Report noted, the checks at issue in this matter included payee notations such as "Bill Clinton for President," "Clinton for President Campaign," and "other similar combinations." Final Audit Report at 87 n.8. Such generic references cannot be said to designate the contributions for the primary election. The fact that the Compliance Fund had its own distinct name is irrelevant. To the extent there was any ambiguity regarding the status of the undesignated contributions at hand, we note that the Committee obtained proper signed redesignations for the Compliance Fund before making the transfers.

¹¹ We note that under 2 U.S.C. §437f(c), any advisory opinion rendered by the Commission may be relied upon by "any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered." 2 U.S.C. §437f(c)(1)(B). Given the virtually identical facts between Advisory Opinion 1990-30 and MUR 4192, it seems clear that respondents fall within the safe harbor provisions of §437f(c)(1)(B).

9504 369 2233



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Date: 9/29/95

☒ Microfilm
☐ Public Records
☐ Press

THE ATTACHED MATERIAL IS BEING ADDED TO CLOSED MUR 4192

9504369224



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Date: 10/4/95

☒ Microfilm
☐ Public Records
☐ Press

THE ATTACHED MATERIAL IS BEING ADDED TO CLOSED MUR 4192

05043692271



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20461

September 21, 1995

**Richard Mayberry, Esquire
Seventh Floor
888 16th Street, N.W.
Washington, D.C. 20006**

Re: MUR 4192

Dear Mr. Mayberry:

Enclosed please find a Statement of Reasons from Chairman McDonald, Commissioner McGarry and Commissioner Thomas explaining their votes against the recommendations of the Office of General Counsel for the above-stated case. This document will be placed on the public record as part of the file of MUR 4192.

If you have any questions, please contact me at (202) 219-3690.

Sincerely,

A handwritten signature in dark ink, appearing to read "Andre G. Pineda", is written over a horizontal line.

**Andre G. Pineda
Attorney**

**Enclosure
Statement of Reasons**

95043692272



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20461

September 21, 1995

Lyn Utrecht, Esquire
Oldaker, Ryan and Leonard
818 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20006


Re: MUR 4192

Dear Ms. Utrecht:

Enclosed please find a Statement of Reasons from Chairman McDonald, Commissioner McGarry and Commissioner Thomas explaining their votes against the recommendations of the Office of General Counsel for the above-stated case. This document will be placed on the public record as part of the file of MUR 4192.

If you have any questions, please contact me at (202) 219-3690.

Sincerely,


Andre G. Pineda
Attorney

Enclosure
Statement of Reasons

cc: Laura A. Ryan
Laura Ryan Shachoy
Cheryl Mills

95043692273



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

September 25, 1995

Lyn Utrecht, Esquire
Oldaker, Ryan and Leonard
818 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20006

Re: MUR 4192

Dear Ms. Utrecht:

Enclosed please find a Statement of Reasons from Commissioners Aikens, Elliott and Potter explaining their votes for the above-stated case. This document will be placed on the public record as part of the file of MUR 4192.

If you have any questions, please contact me at (202) 219-3690.

Sincerely,

A handwritten signature in dark ink, appearing to read "Andre G. Pineda", is written over a horizontal line.

Andre G. Pineda
Attorney

Enclosure
Statement of Reasons

cc: Laura A. Ryan
Laura Ryan Shachoy
Cheryl Mills

95043692274



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

September 25, 1995

Richard Mayberry, Esquire
Seventh Floor
888 16th Street, N.W.
Washington, D.C. 20006

Re: MUR 4192

Dear Mr. Mayberry:

Enclosed please find a Statement of Reasons from Commissioners Aikens, Elliott and Potter explaining their votes for the above-stated case. This document will be placed on the public record as part of the file of MUR 4192.

If you have any questions, please contact me at (202) 219-3690.

Sincerely,

A handwritten signature in cursive script, appearing to read "Andre G. Pineda".

Andre G. Pineda
Attorney

Enclosure
Statement of Reasons

05043692275



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20461

October 3, 1995

Lyn Utrecht
Oldaker, Ryan and Leonard
818 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20006

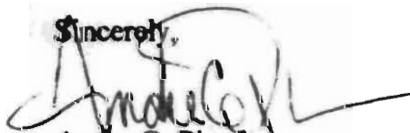
Re: MUR 4192

Dear Ms. Utrecht:

Enclosed please find an addendum to the Statement of Reasons issued by Chairman McDonald, Commissioner Thomas and Commissioner McGarry for the above-stated case from Commissioner Thomas. This document will be placed on the public record as part of the file of MUR 4192.

If you have any questions, please contact me at (202) 219-3690.

Sincerely,



Andre G. Pineda
Attorney

Enclosure

Addendum to Statement of Reasons

cc: Laura A. Ryan
Laura Ryan Shachoy
Cheryl Mills

9 5 0 4 3 6 9 2 2 7 6



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

October 3, 1995

Richard Mayberry
888 16th Street
Seventh Floor
Washington, D.C. 20006

Re: MUR 4192

Dear Mr. Mayberry:

Enclosed please find an addendum to the Statement of Reasons issued by Chairman McDonald, Commissioner Thomas and Commissioner McGarry for the above-stated case from Commissioner Thomas. This document will be placed on the public record as part of the file of MUR 4192.

If you have any questions, please contact me at (202) 219-3690.

Sincerely,

A handwritten signature in black ink, appearing to read "Andre G. Pineda".

Andre G. Pineda
Attorney

Enclosure

Addendum to Statement of Reasons

95043692277



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

Date: 9/29/95

☒ Microfilm
☐ Public Records
☐ Press

THE ATTACHED MATERIAL IS BEING ADDED TO CLOSED MUR 4192

95043692202



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Date: 9/29/95

☒ Microfilm
☐ Public Records
☐ Press

THE ATTACHED MATERIAL IS BEING ADDED TO CLOSED MUR 4192

95043692203



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

Sep 28 5 00 PM '95

V. Conroy

MEMORANDUM

TO: THE COMMISSION

FROM: SCOTT E. THOMAS
COMMISSIONER *[Signature]*

RE: MUR 4192 STATEMENT OF REASONS

DATE: SEPTEMBER 28, 1995

In the Statement of Reasons for MUR 4192, dated Sept. 18, 1995, and signed by Chairman McDonald and Commissioners McGarry and Thomas, the last line of page 7 was inadvertently omitted. Please substitute the attached page 7 which contains the omitted last line:

intent, however, regulations require that the contributor's

9504 369 2284

(iii) The contribution is redesignated in accordance with 11 C.F.R. §110.1(b)(5).

11 C.F.R. §110.1(b)(4).

Applying the standards of 11 C.F.R. §110.1(b)(4), it is clear that the contributions at issue in MUR 4192 were not "designated in writing" for the primary election. None of the transferred contributions indicated on the face of the written instrument that they were being made for a particular election. 11 C.F.R. §110.1(b)(4)(i). Nor were any of the contributions accompanied by a signed writing indicating that they were being made for the primary election. 11 C.F.R. §110.1(b)(4)(ii). Finally, the contributions at issue were not redesignated for the primary. (In fact, to be cautious, the Committee secured written redesignation of these receipts as Compliance Fund donations.) Because the regulatory requirements of 11 C.F.R. §110.1(b)(4) were not met, these contributions cannot be viewed as designated for the primary election.

As a result, there can be no violation of 11 C.F.R. §9003.3(a)(1)(iii). In addition, there can be no violation of 11 C.F.R. §§104.14(d) and 9034.5(a) for submitting NOCO Statements that did not accurately reflect the Primary Committee's outstanding obligations and assets.

Our reading of §110.1(b)(4) is confirmed by Commission precedent. In Advisory Opinion 1990-30, *supra*, the Commission rejected an "implied contributor intent" theory identical to the one advanced in the General Counsel's Report. In so holding, the Commission emphasized that it is the "Commission[']s regulations [which] set out rules to determine the election for which a contribution is made." *Id.*

In Advisory Opinion 1990-30, the Helms Committee had asked whether it would satisfy the designation requirements and could treat post-election contributions as debt retirement contributions if it: (1) included in its solicitation mailings a notice to potential contributors that their donations would be used to pay off 1990 general election debt; (2) provided the same notice on contribution slips enclosed in the solicitation; (3) included an additional line on the disclaimer⁸ stating that funds received would be used for 1990 debt elimination; and (4) indicated that it would not be soliciting for any other purpose. And much like the facts present in MUR 4192, the checks would be received, deposited and reported by the committee serving as the vehicle for the prior election. After discussing the requirements of §110.1(b)(4), the Commission stated:

Based on the foregoing, the Commission concludes that the Committee will not meet the designation requirements if it takes the steps proposed. The proposed steps would satisfy some of the elements of a clear designation. In order to confirm donor intent, however, regulations require that the contributor's

⁸ The law requires a political committee soliciting contributions to include a disclaimer saying that the committee paid for the communication: 2 U.S.C. §441d(a)(1); 11 C.F.R. §110.11(a)(1)(i).

signature appear on the same document that contains the words of designation, i.e., the check or the contributor slip.

Advisory Opinion 1990-30 at 11,671 (emphasis added).

Advisory Opinion 1990-30 is squarely on point with MUR 4192 and is dispositive.⁹ Indeed, the opinion rejects precisely the sort of legal analysis devised in the General Counsel's Report. Applying the requirements of 11 C.F.R. §110.1(b)(4), Advisory Opinion 1990-30 plainly directs that there has to be very clear, express, written evidence signed by the contributor indicating that a contribution was, in fact, designated for a prior election in order for that contribution to be so designated. The Opinion plainly rejects the notion that a contribution received after the primary can be called a primary contribution simply on the basis that it was "solicited, received, deposited and reported by the Primary Committee when it had net outstanding campaign obligations." General Counsel's Report at 15-16. Moreover, the Opinion demonstrates that the evidence of designation has to be something more than the fact that the check is made out to the "Helms Committee" or in the instant matter, "Clinton for President."¹⁰ Similarly, the fact that some of the contributions may have been accompanied by return cards sent out by the Committee is not dispositive because such cards, apparently, were not signed by the donors. Under §110.1(b)(4) and Advisory Opinion 1990-30, evidence of primary designation is simply not present in MUR 4192.¹¹ Because the General Counsel's Report has failed to demonstrate that respondents transferred designated primary contributions as the term is defined by Commission regulations and precedent, we cannot find that there was a violation of §9003.3(a)(1).

⁹ Despite its obvious significance, the General Counsel's Report makes but one brief reference to Advisory Opinion 1990-30 ("The determination of whether a contribution is designated for a particular election turns on the contributor's donative intent. See Advisory Opinion ('AO') 1990-30.") General Counsel's Report at 15. Inexplicably, the General Counsel's Report fails to discuss, much less follow, the Opinion's holding that the contributor's donative intent is determined only by applying the strict requirements of §110.1(b)(4). The Office of General Counsel's failure to discuss §110.1(b)(4) in any meaningful way fatally flaws its legal recommendations.

¹⁰ As the Final Audit Report noted, the checks at issue in this matter included payee notations such as "Bill Clinton for President," "Clinton for President Campaign," and "other similar combinations." Final Audit Report at 87 n.8. Such generic references cannot be said to designate the contributions for the primary election. The fact that the Compliance Fund had its own distinct name is irrelevant. To the extent there was any ambiguity regarding the status of the undesignated contributions at hand, we note that the Committee obtained proper signed redesignations for the Compliance Fund before making the transfers.

¹¹ We note that under 2 U.S.C. §437f(c), any advisory opinion rendered by the Commission may be relied upon by "any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered." 2 U.S.C. §437f(c)(1)(B). Given the virtually identical facts between Advisory Opinion 1990-30 and MUR 4192, it seems clear that respondents fall within the safe harbor provisions of §437f(c)(1)(B).