

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE, N. W.

P.O. BOX 7566

WASHINGTON, D.C. 20044-7566

(202) 662-6000

TELEFAX (202) 662-6291

WRITER'S DIRECT DIAL NUMBER

LECONFIELD HOUSE

CURZON STREET

LONDON W1Y 8AS

ENGLAND

TELEPHONE 071-495-5655

TELEFAX 071-495-3101

BRUSSELS CORRESPONDENT OFFICE

44 AVENUE DES ARTS

BRUSSELS 1040 BELGIUM

TELEPHONE 32-2-549-5230

TELEFAX 32-2-502-1528

August 26, 1997

The Hon. John Warren McGarry
Chairman
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Matter Under Review 4378

Dear Chairman McGarry:

This letter responds on behalf of the National Republican Senatorial Committee ("NRSC") to your letter dated June 27, 1997, and the attached Factual and Legal Analysis ("Analysis"). The Commission granted the NRSC an extension of time until today, August 26, 1997, in which to respond.

I. INTRODUCTION

This matter arises from a complaint filed on behalf of Senator Max Baucus and the Friends of Max Baucus '96' ("the Baucus complaint"). The Baucus complaint alleged that the NRSC made disbursements for radio and television advertisements in coordination with then Montana Lieutenant Governor Dennis Rehberg's campaign for the U.S. Senate seat held by Senator Max Baucus. As a result of these disbursements, the Baucus complaint alleged, the NRSC exceeded the limit on coordinated expenditures imposed by 2 U.S.C. § 441a(d). The Baucus complaint also alleged that the NRSC impermissibly used non-federal funds to finance the radio and television advertisements at issue. In addition, the Baucus complaint alleged that the NRSC failed to report the disbursements as coordinated expenditures.

The NRSC responded to this complaint on July 10, 1996. This response included a factual account of each of the advertisements at issue, an account that was confirmed through supporting affidavits of Rehberg's campaign manager as well as the media buyer who placed the NRSC advertisements.

The Hon. John Warren McGarry
August 26, 1997
Page 2

On June 17, 1997, the Commission found "reason to believe" that the NRSC advertisements violated provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"), specifically 2 U.S.C. §§ 434(b), 441a(f), and 441b. This finding was based, in part, on a Factual and Legal Analysis which found, among other things, that "the NRSC's response leaves a number of questions unanswered." Analysis at 22.

With this response, the NRSC today provides additional factual information and legal argument that should put to rest the questions that the Analysis deemed "unanswered." While this information and argument is entirely consistent with the information provided by the NRSC in its initial response to the Baucus complaint, it is here provided at a level of detail that the pace of events during the June and July 1996 campaign season simply did not permit. Based on this additional factual information, we respectfully submit that the Commission should find no probable cause and close this file.

II. THE REHBERG COMMITTEE ADVERTISEMENTS

Before addressing the NRSC advertisements, it is necessary to dispose of a lingering factual issue: the allegation that the NRSC financed a Rehberg radio advertisement that was sometimes broadcast during the primary campaign with the disclaimer, "Paid for by the National Republican Senatorial Committee." See Analysis at 7 (quoting the text of the ad).

Notwithstanding the disclaimer, the NRSC simply did not pay for this advertisement. NRSC Response at 5. Nor did the NRSC authorize the use of its name in connection with this advertisement, as is demonstrated by the attached Affidavit of Fred Davis, ¶ 8 (attached as Exhibit A). Rather, the NRSC adhered to its long-standing policy of not becoming involved in contested Republican primaries. Id.

As the NRSC has explained, and as the attached Supplemental Affidavit of Mike Pieper, ¶ 3 ("Pieper Supp. Aff.") (attached as Exhibit B) demonstrates, the Rehberg Committee prepared and paid for this advertisement entirely on its own initiative with no cooperation, coordination, consultation, or other contacts of any kind with the NRSC. The company that produced the advertisement prepared two versions -- one with the Rehberg Committee's disclaimer and

The Hon. John Warren McGarry
August 26, 1997
Page 3

one with the NRSC's disclaimer. Id. at 5-6; see also Davis Aff., ¶¶ 5 and 7. As discussed below, some radio stations incorrectly used the version of the advertisement with the NRSC's disclaimer. NRSC Response at 6. Immediately after becoming aware of the fact that some stations were broadcasting a version of the advertisement with the NRSC's disclaimer, the Rehberg Committee campaign manager immediately acted to notify the stations that these versions should be taken off the air. Pieper Supp. Aff., ¶ 4.

Although the NRSC submitted much of this information in what the Analysis describes as a "detailed denial," Analysis at 23, the Analysis states that "questions remain, particularly with regard to how the production company was sufficiently informed to prepare two versions of the advertisement." Id. at 24. The Analysis also raises a question about the identity of the company that produced the advertisement. Id. at 23.

As set forth in the attached affidavit of Fred Davis, the Rehberg Committee advertisements, including the advertisement at issue, were produced by a production company named Strategic Perception, Inc. Davis Aff., ¶ 6. This company is located in Hollywood, California and routinely produces political advertisements for candidates across the United States. Id., ¶¶ 1-2. Fred Davis was the employee of Strategic Perception responsible for the production of the Rehberg advertisements. Id., ¶¶ 1-2.

As Mr. Davis attests, the preparation of duplicate advertisements that differ only in the disclaimer attached at the end is a common practice in the political advertising industry. Id., ¶ 7. Producers produce the disclaimer with almost the same care and attention that they produce the main text of the advertisements. Id., ¶ 3. They carefully control the voice, tone, and pace of the disclaimer to insure that it is (1) intelligible; and (2) consistent with the production of the main text of the advertisement. Id.

In Mr. Davis's experience, it is common for the committee paying for an advertisement to change with little or no notice. Id., ¶ 4. If the committee paying for an advertisement changes suddenly and an alternative disclaimer has not already been produced, the advertisement must be delayed until a new disclaimer can be produced. Id. Also, producing disclaimers separately is more expensive than producing them together at the same time that the text of the advertisement is produced. Id., ¶ 4. As a veteran of

The Hon. John Warren McGarry
August 26, 1997
Page 4

political advertising, Mr. Davis knew that if Mr. Rehberg won the Republican primary, as was widely anticipated, any change in the financing of the advertisement would likely be from the Rehberg Committee to the NRSC. Id., ¶¶ 5 and 7. As Mr. Davis attests, he therefore produced two versions of the disclaimer at the same time that he produced the main text of the advertisement. Id., ¶ 7. He did so without any direction, input, or other communication with, to, or from the NRSC. Id., ¶ 8.^{1/}

In sum, the NRSC did not pay for the Rehberg campaign's radio advertisements. The sole suggestion to the contrary -- the fact that one of the advertisements bore an NRSC disclaimer -- was the result of radio stations mistakenly broadcasting the wrong version of the advertisement.

III. THE NRSC'S ADVERTISEMENTS WERE NOT COORDINATED EXPENDITURES

Assuming that the Act's limitations on coordinated expenditures are constitutional, which the NRSC disputes,^{2/} the Analysis concludes that whether political party expenditures are limited by 2 U.S.C. § 441(a)(d) "involves a two-pronged test." Analysis at 20. One prong of this test is whether the language of the advertisements renders them "expenditures" subject to limitation under FECA; the other

^{1/} The NRSC notes that the disclaimer would be incorrect if the NRSC had, in fact, paid for the advertisements. This is just further evidence that the NRSC had nothing to do with the disclaimer.

^{2/} The Supreme Court's recent decision, Colorado Republican Federal Campaign Committee v. FEC, ___ U.S. ___, 116 S.Ct. 2309, 2321 (1996), remanded the case to the Tenth Circuit to determine whether the Act's limits on coordinated party expenditures is constitutional. Although the plurality of Justices were unwilling to reach this question, four Justices were willing to reach this question and hold the limitations unconstitutional. 116 S.Ct. at 2323 (Kennedy, J., concurring in the judgment and dissenting in part); 116 S.Ct. at 2330 (Thomas, J., concurring in the judgment and dissenting in part). The NRSC hereby challenges the constitutionality of the Act's limitations on coordinated party expenditures and reserves the right to reassert this challenge in subsequent proceedings.

The Hon. John Warren McGarry
August 26, 1997
Page 5

prong is whether the advertisements were coordinated. As the Analysis observes, "[i]f the answer to either question is 'no,' a prong is missing and the expenditures made for the communication would not be limited by Section 441a(d)." Analysis at 21. That is, so long as a communication is not an "expenditure," the NRSC may pay for it even if it is coordinated with a candidate. Conversely, so long as a communication is not coordinated with a candidate, the NRSC may pay for it even if it is an "expenditure."

The NRSC advertisements at issue here do not satisfy either prong of this test.

A. The NRSC Advertisements Do Not Contain An "Electioneering Message," Much Less Express Advocacy.

The first, and threshold, question is whether the disbursements rise to the level of "expenditures" that may be limited under the Act. As the Analysis rightly observes, unless the communications are "expenditures," they may not be limited by 2 U.S.C. § 441a(d).

The Analysis asserts that a communication is an "expenditure" under 2 U.S.C. § 441a(d) if it contains an "electioneering message"; that is, a communication that is intended either to diminish or garner support for a clearly identified candidate. Analysis at 24. The NRSC strongly disputes this assertion. There is simply no basis for this assertion in the Act, judicial opinions interpreting the Act, or the Commission's own precedent.

The pertinent statute, 2 U.S.C. § 441a(d), limits political party "expenditures in connection with the general election campaign of candidates for Federal office." (Emphasis added.) Thus, Section 441(a)(d) adopts the same "in connection with" formulation of the definition of expenditures adopted in Section 441b. Time and again, courts have held that Section 441b limitations on political committee "expenditures" can survive constitutional scrutiny only if the phrase "in connection with" limits "expenditures" to disbursements financing communications that expressly advocate the election or defeat of a clearly identified candidate. E.g. FEC v. Massachusetts Citizens For Life, Inc., 479 U.S. 238, 249 (1986). To constitute express advocacy, the expenditures must "use language such as 'vote for,' 'elect,' 'support,' etc." E.g., id. at 249. Courts have repeatedly

The Hon. John Warren McGarry
 August 26, 1997
 Page 6

rejected attempts to impose broader limitations on expenditures as "totally meritless." FEC v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45, 53 (2d Cir. 1980) (en banc); see also FEC v. Christian Action Network, Inc., 110 F.3d 1049, 1052 (4th Cir. 1997). Indeed, no judicial opinion that has adopted any broader definition of "expenditure" by a committee has ever survived appeal. See FEC v. Colorado Republican Federal Campaign Committee, 59 F.3d 1015 (10th Cir. 1995), vacated by, 116 S.Ct. 2309 (1996). The Analysis offers no reason -- let alone a constitutionally cognizable one -- for defining the term "expenditure" as used in Section 441a(d) any differently than the term is defined in Section 441b.

The Analysis' heavy reliance on the Tenth Circuit's opinion, FEC v. Colorado Republican Federal Campaign Committee, 59 F.3d 1015 (10th Cir. 1995), as authority for a broader definition of "electioneering message" is egregiously misplaced. The Supreme Court of the United States expressly vacated the Tenth Circuit's judgment in Colorado Republican Federal Campaign Committee v. FEC, ___ U.S. ___, 116 S.Ct. 2309, 2321 (1996). It is black letter law that a Supreme Court "decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect." O'Connor v. Donaldson, 422 U.S. 563, 578 n.2 (1975); see also, e.g., County of Los Angeles v. Davis, 440 U.S. 625, 634 n.6 (1979); Fleet Aerospace Corp. v. Holderman, 848 F.2d 720, 721 n.1 (6th Cir. 1988). While "[a] decision may be reversed on other grounds, . . . a decision that has been vacated has no precedential authority whatsoever." Durning v. Citibank, N.A., 950 F.2d 1419, 1424 (9th Cir. 1991) (emphasis added). The Commission simply cannot proceed in good faith by relying on the Tenth Circuit's vacated decision.

Nor can a broader definition of electioneering be justified by Commission precedent. To the contrary, that precedent requires that an "electioneering message" contain express words of advocacy. In Advisory Opinion 1984-15, for example, both proposed advertisements concluded with express words of advocacy -- "Act today to preserve tomorrow. Vote Republican" and "Vote Republican." Advisory Opinion 1984-15, 1 Fed. Election Camp. Fin. Guide (CCH), ¶ 5766, at 11,067-3. Similarly, some of the advertisements discussed in Advisory Opinion 1985-14 included the admonition, "Vote Democratic." Advisory Opinion 1985-14, 1 Fed. Election Camp. Fin. Guide (CCH), ¶ 5819, 11,182. At any rate, Advisory Opinion 1985-14 held that the proposed advertisements were not subject to the limitations of Section 441a. Id. at 11,186. The opinion

The Hon. John Warren McGarry
August 26, 1997
Page 7

contains no finding that the advertisements at issue satisfied the "electioneering message" test.

For several reasons, the communications at issue here were not expenditures under either the express advocacy test required by Supreme Court precedent or the unconstitutional "electioneering message" test that the Analysis adopts. The advertisements plainly cannot satisfy the express advocacy standard. They did not urge viewers to "vote against," "defeat," or "oppose" Baucus. Similarly, they did not urge voters to "vote for," "elect," or "support" Rehberg. There are simply no words urging viewers to take any action with respect to any election whatsoever.

In addition, the advertisements did not contain an "electioneering message." Unlike the proposed advertisements discussed in Advisory Opinions 1984-15 and 1985-14, none of the advertisements urged viewers to "Vote Republican" or, for that matter, to vote for or against anyone else. The advertisements contained no reference at all to any of Baucus' potential challengers and did not refer in any way to the general election -- then some five to six months away.

The Analysis concedes that at least part of the advertisements "look like issue advocacy." *Id.* at 25. In fact, the advertisements were exactly what they "look like" -- legislative advocacy. They accurately described Baucus' positions on several specific legislative issues that were then before the Senate, criticized Baucus' positions on those issues, and urged voters to call Baucus and urge him to change his position.^{3/} The Analysis does not dispute that the advertisements accurately stated Baucus' position on the legislative issues in question. Analysis at 24. The Analysis likewise does not dispute the NRSC's "evidence that the timing of the advertisements coincided with Senate floor debates in April and May, 1996, on those issues." *Id.* The Analysis concedes that the advertisements "ended with calls for action involving particular legislative issues," *id.*, not electoral issues. Although the Analysis does not dispute the NRSC's

^{3/} The NRSC's initial response contained detailed information including the text of the advertisements; the timing of the advertisements in relation to the Senate calendar; the accuracy of the advertisements; and the financing of the advertisements. Because we understand that the Analysis does not dispute this evidence, we will not repeat it here, although it is incorporated by reference.

The Hon. John Warren McGarry
August 26, 1997
Page 8

evidence that its legislative advocacy advertisements concerned specific legislative issues actually pending or soon to be pending before the Senate, the Analysis also fails to recognize its significance. The fact that each advertisement discussed bona fide issues currently before or soon to be before the U.S. Senate placed the advertisements even more squarely within the core First Amendment activity that Section 441a cannot limit.

The primary basis for the Analysis' conclusion that the advertisements were "expenditures" subject to the limits of Section 441a(d), is that the advertisements:

"were critical of [Baucus] as an incumbent U.S. Senator; they cited his office, referred to him as 'liberal Max Baucus;' and included negative statements about events which occurred during his tenure such as salary and tax increases." Analysis at 24.

Such characteristics, however, cannot convert an otherwise clear piece of legislative advocacy into an expenditure subject to the Act. Most importantly, political speech, including legislative advocacy is "core speech" protected by the First Amendment. The United States Supreme Court has been unwavering in its requirement that any definition of expenditures be clear, precise, and limited lest it deter the exercise of unregulated speech. As several courts have made clear, the oft-rejected "electioneering message" test fails this standard. Massachusetts Citizens for Life, Inc., 479 U.S. at 249. It is exactly because the First Amendment requires clear, bright lines that the elastic "electioneering message" test repeatedly fails.

Second, the characteristics of the advertisements cited in the Analysis are each necessary components of effective legislative advocacy. A viewer would have little reason to call Max Baucus unless the advertisements "cited his office." A viewer would also have little basis on which to predict Baucus' vote on upcoming issues unless the advertisements identified his ideology and cited Baucus' position on previous, similar issues. And casting such things as Baucus' votes on salary and tax increases in a critical light is an important means of persuading viewers that these are issues that the viewers should care enough about to write down a phone number and call their Senator.

The Hon. John Warren McGarry
August 26, 1997
Page 9

The only other basis of the Analysis' conclusion that the NRSC advertisements were "electioneering" appears to be an erroneous "controversial advertising campaign report" that was prepared and placed in a public file by one of the television stations that broadcast one of the advertisements. This report, however, was not prepared by the NRSC or its media buyer. Supplemental Affidavit of Dwight Sterling, ¶ 3 ("Sterling Supp. Aff.") (attached as Exhibit C). Rather, the report was prepared by the President and General Manager of KRTV with no guidance or direction from the NRSC or its media buyer. Id. Upon learning of the General Manager's error, the NRSC's media buyer alerted the Manager to his possible mistake. Id. The Manager acknowledged his mistake by cancelling his previous report and preparing a revised report that accurately described the purpose of the advertisement -- "The passage of the G.O.P. Balanced Budget Proposal. Asks viewers to call Senator Baucus and support the measure." Id. The Manager's erroneous report is absolutely no indication of the NRSC's intent or purpose in preparing, producing, and broadcasting the advertisement.

In sum, the NRSC's advertisements cannot be deemed "electioneering," much less "express advocacy." The advertisements therefore do not satisfy the "expenditure" prong of the Commission's two-pronged test.

B. The NRSC Advertisements Were Not Coordinated with the Rehberg Committee.

The second question is whether the NRSC advertisements were made in coordination with the Rehberg Committee.

The Commission's regulations nowhere define "coordination." The Analysis purports to find a definition for coordination within 11 C.F.R. 109.1(b)(4). That regulation, however, concerns the level of cooperation, prior consent, or consultation that is sufficient to place an expenditure outside the scope of an "independent expenditure." 11 C.F.R. 109.1(b)(4), which was promulgated under the authority of 2 U.S.C. § 431(17), does not define the level of coordination required to render an expenditure subject to the limits of 2 U.S.C. § 441a. 11 C.F.R. 109.1 does not even use the words "coordinated" or "coordination." Nor is there any reason to suppose that the level of cooperation, consent, or consultation that is sufficient to render an expenditure "not-independent" will be sufficient to render it "coordinated."

The Hon. John Warren McGarry
August 26, 1997
Page 10

The Commission may not simply graft a regulation promulgated in the independent expenditure context into an enforcement proceeding involving allegedly coordinated expenditures.

Even assuming arguendo that 11 C.F.R. 109.1(b) is relevant to determining whether an expenditure is subject to the limitations of 2 U.S.C. § 441a, the NRSC's legislative advocacy advertisements do not meet the standard of "coordination" required by that regulation. Under 11 C.F.R. 109.1(b), an expenditure is "made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of the candidate" where there is "arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication." 11 C.F.R. 109.1(b)(4). An expenditure may be presumed to be coordinated when it is "[b]ased on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents with a view toward having an expenditure made," 11 C.F.R. 109.1(b)(4)(i)(A), or made by or through an officer or agent of the candidate's committee, 11 C.F.R. 109.1(b)(4)(i)(B).

Here, there is no evidence of coordination. To the contrary, the NRSC's initial response emphatically denied any such coordination. NRSC Response at 5 and 6. Further, the Rehberg Committee's Campaign Manager unequivocally stated in a sworn affidavit that "the NRSC's legislative advocacy advertisements were not coordinated with the Rehberg campaign nor were the Rehberg advertisements coordinated with the NRSC in any way." Affidavit of Mike Pieper, ¶ 3. Although the Analysis acknowledges that both the NRSC and the Rehberg Committee denied coordinating the NRSC advertisements, the Analysis complains of the NRSC's use of the word "executed." See NRSC Response at 6 (the NRSC advertisements "were not executed in consultation with the Rehberg Committee"). According to the Analysis, "the word 'execution' can . . . be read as limiting the denial only to aspects of the production and possibly the content of the advertisements, leaving room for consultation on the need for such advertisements." Analysis at 22. The NRSC did not intend the word "execution" to have such a strained, limited meaning. Lest there be any confusion, however, Mr. Pieper's supplemental affidavit makes clear that there was no consultation between the Rehberg Committee and the NRSC on the "need" for the legislative advocacy advertisements. Pieper Supp. Aff., ¶ 5. Id. The sole communication between the NRSC and the Rehberg Committee

The Hon. John Warren McGarry
August 26, 1997
Page 11

concerning the advertisements of which we are aware came after the advertisements were broadcast when the Rehberg Committee sought copies of the advertisements and supporting documentation so that it could respond to press inquiries about the accuracy of the advertisements. Id.

The Analysis' finding of "evidentiary support for a preliminary finding of coordination" appears to be based on nothing more than evidence that (1) Mr. Rehberg travelled to Washington to meet "with NRSC officials prior to, or simultaneously with, the broadcasts of the NRSC's Baucus advertisements" and (2) "the [NRSC's] silence on the nature and content of" these visits. Analysis at 23. This "evidence" cannot support a preliminary finding of coordination.

The existence of a mere "opportunity" to exchange information cannot be sufficient to give rise to a presumption of coordination. Even assuming that 11 C.F.R. 109.1(b) applies (which the NRSC disputes), for a presumption of coordination to arise under that regulation there must be evidence that the advertisements were "[b]ased on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents with a view toward having an expenditure made." 11 C.F.R. 109.1(b)(4)(i)(A). Thus, the regulation requires not just the opportunity for the exchange of information, but an actual exchange of information. Branstool v. FEC, No. 92-0284 (WBB) at 10 n.5 (D.D.C. Apr. 4, 1995) (memorandum granting summary judgment). In this case, there is no evidence that any such information actually was exchanged.

Courts in similar contexts also have required more than the mere opportunity for "coordination." Indeed, courts have required more than the mere exchange of information to prove coordination to further an unlawful objective. Rather, courts typically require "a conscious commitment to a common scheme designed to achieve an unlawful objective." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) (quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980)). In light of these decisions and the Supreme Court's decision in Colorado Republican, a presumption of coordination based on nothing other than the mere opportunity for the exchange of information would be unconstitutional. Accordingly, the NRSC disputes the validity of 11 C.F.R. 109.1(b)(4)(i)(A), even if (contrary to fact) the Analysis had applied it properly.

The Hon. John Warren McGarry
August 26, 1997
Page 12

Further, the Analysis' interpretation would produce an unreasonable presumption of coordination in the case of virtually any legislative advocacy disbursement by a national political committee. Every Democratic and Republican Member of Congress -- including Senator Baucus -- is a member of his or her party's Senatorial or Congressional Campaign Committee. Every Democratic or Republican Member of Congress meets -- often frequently -- with other members of his or her Senatorial or Congressional Campaign Committee. Such meetings are, however, nothing more than "general descriptions of party practice" and "do not refer to the advertising campaign at issue here or to its preparation." 116 S.Ct. at 2315 (Breyer, J.). Just as that Supreme Court recently rejected "general descriptions of party practice" as a basis for imposing a general presumption of coordination, the mere fact of a meeting between a candidate and his party's Senatorial or Congressional Campaign Committee cannot be a sufficient basis for a preliminary finding of coordination.

Further, the Analysis' interpretation is not supported by Commission precedent. Advisory Opinion 1984-30 did not involve mere "meetings" or "opportunities." Instead, it involved a multi-candidate committee that concededly "cooperated, consulted, and communicated, with the candidates and their committees on campaign strategy and needs with respect to the 1984 primary elections and [the multi-candidate political committee's] in-kind contributions." Advisory Opinion 1984-30, 1 Fed. Election Camp. Fin. Guide (CCH), ¶ 5775, at 11,092. The in-kind contributions included the "donation of time of [the committee's] staff" and "the provision of political consulting services by a third party." Id. In this case, there is no evidence that the NRSC "cooperated, consulted, and communicated, with the candidate [or his committee] on campaign strategy and needs." Nor is there any evidence that the NRSC contributed staff to the candidate's committee or contributed political consulting services by a third party.

Nor can the NRSC's "silence on the nature and content of Mr. Rehberg's contacts with the NRSC," Analysis at 23, give rise to a presumption of coordination. First of all, the statement is not accurate. Far from being "silent" on the issue, the NRSC stated, for example, that "The Rehberg Committee had no prior knowledge of, and w[as] not asked to consent to, the NRSC's own legislative advocacy program." NRSC Response at 5. Moreover, the Analysis' mischaracterization of the NRSC's response would be at most relevant to the question whether a presumption of coordination

The Hon. John Warren McGarry
August 26, 1997
Page 13

has been rebutted once that presumption has arisen. It cannot be relevant to the question whether the presumption should arise in the first place. Otherwise, the presumption of coordination would arise from nothing other than the fact that candidates -- including virtually every incumbent Member of Congress -- meet with other members or staff of their Senatorial or Congressional Campaign Committees. Such an automatic presumption would be invalid under Colorado Republican -- "An agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." 116 S.Ct. at 2319 (Breyer, J.); see also 116 S.Ct. at 2321 (Kennedy, J. concurring in the judgment and dissenting in part).^{4/}

IV. CONCLUSION

Because the advertisements in question do not satisfy either prong of the Analysis' two-pronged test, they were not "coordinated expenditures" and did not place the NRSC in violation of 2 U.S.C. § 441a(d). Similarly, the NRSC did not violate 2 U.S.C. § 434(b) by failing to report the disbursements as "coordinated expenditures." Further, the NRSC did not violate 2 U.S.C. § 441b by paying for its legislative advocacy advertisements, in part, with non-federal funds.

For the foregoing reasons, the NRSC respectfully requests that the Commission find no probable cause to believe

^{4/} There is also no evidence whatsoever that the NRSC's legislative advocacy advertisements were made by or through an officer or agent of the Rehberg campaign. Indeed, the Analysis does not make any attempt to justify its preliminary finding of coordination based on the criteria set forth in 11 C.F.R. 109.1(b)(4)(i)(B).

The Hon. John Warren McGarry
August 26, 1997
Page 14

that the NRSC violated any provision of the Federal Election Campaign Act, and close the file in this matter.

If you have any questions about this response,
please contact Bobby R. Burchfield at (202) 662-5350.

Sincerely,

A handwritten signature in dark ink, appearing to read "Michael Dawson". The signature is fluid and cursive, with the first name "Michael" and last name "Dawson" clearly distinguishable.

Bobby R. Burchfield
Michael A. Dawson

Craig M. Engle
NRSC General Counsel

Of Counsel

MEMPHIS

SENT BY:Xerox Telecopier 702-26-97 : 1:39PM :

3102741114

: # 2

Received: 8/28/97: 8:58AM: 007500 => STRATEGIC PERCEPTION; #2

FROM

09.26.1997 13:11

P.02

BEFORE THE FEDERAL ELECTION COMMISSION

City of Hollywood)
State of California)

In re: MUR 4378

AFFIDAVIT OF FRED DAVIS

Fred Davis, first being duly sworn, deposes and says:

1. I am Fred Davis. I am employed by Strategic Perception, Inc., a Hollywood, California company that produces radio and television advertisements for political candidates across the United States. I personally have been involved in the production of hundreds of political advertisements for radio and television. Unless otherwise specified, I have personal knowledge of the matters set forth in this affidavit.

2. As a political advertisement production company, Strategic Perception routinely produces not just the main text of a political advertisement but also the disclaimer that advertisements are required, as a matter of federal law, to carry.

3. The disclaimer is produced with almost the same degree of care and attention with which the main text of the advertisement is produced. The production company typically produces the disclaimer with careful attention to the voice, tone, style, and pace of the person speaking the disclaimer. The production of the disclaimer is important to ensure that the words of the disclaimer are intelligible. In addition,

FROM

00.26.1997 13:12

P.03

- 2 -

the production of the disclaimer is important to ensure that the tone and nature of the disclaimer does not detract from the main text of the advertisement. The production of the disclaimer is particularly important because it is the last component of the advertisement that the listener hears. A good advertisement can be ruined by a poorly produced disclaimer.

4. It has been my experience that the disclaimer will sometimes change in the course of a campaign. When I first began producing political advertisements I would often produce only one disclaimer. I discovered that this practice was undesirable. If the committee paying for the advertisement changed over the course of the campaign, it was necessary to produce another disclaimer. This was less efficient and more costly than producing the disclaimer at the same time that the main text of the advertisement was produced. Sometimes the advertisement would have to be delayed while I produced a new disclaimer. Also, the advertisement would have to be delayed as a new tape with the new disclaimer was delivered to radio and television stations in the targeted media markets.

5. To avoid these inefficiencies, expenses, and delays, I soon learned to prepare for the possibility of a change in the financing of an advertisement by preparing more than one disclaimer. Based on the nature of the race (Senatorial or Congressional), I now prepare two disclaimers

FROM

08.26.1997 13:12

P.04

- 3 -

for each advertisement -- one with the candidate committee's disclaimer and one with the appropriate Senatorial or Congressional Committee disclaimer. In other words, I now make double disclaimed versions of every advertisement I produce for every campaign.

6. During the 1996 election cycle my company, Strategic Perception, Inc., was retained by the Rehberg Committee to produce a number of television and radio advertisements. I was the employee primarily responsible for producing these advertisements.

7. As is my standard practice, I produced two versions of the advertisements -- one with a Rehberg Committee disclaimer and one with a National Republican Senatorial Committee disclaimer. I chose to do this to avoid inefficiencies and delay if the financing of the advertisements changed. Based on my experience in many senatorial races, I knew that if the financing of the advertisement changed, the chances were that the NRSC would be the new financing committee.

8. I did not prepare the NRSC disclaimer at the direction or suggestion of the NRSC. Nor did I inform the NRSC that I was preparing a version of the Rehberg Committee advertisement with the NRSC disclaimer. I did not otherwise consult, coordinate, or act in concert with the NRSC during

SENT BY: Xerox Telecopier 702-28-97 ; 1:41PM ;

3102741114

5

Received: 8/28/97 10:00AM

88.26.1997 13:12

P.05

FROM

- 4 -

the conception, design, production, editing, timing, finance
or broadcast of the Rehberg advertisements.

The above is true and correct to the best of my
knowledge, information and belief.



Fred Davis

Signed and sworn to before me
this 26th day of August, 1997


Notary Public

My commission expires: Feb 19, 1998

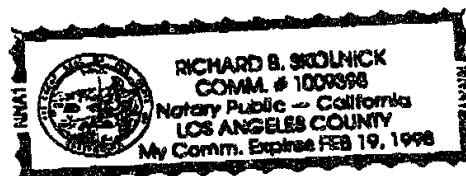


EXHIBIT B

99.04.393.0237

BEFORE THE FEDERAL ELECTION COMMISSION

City of Billings)

State of Montana)

In re: MUR 4378

SUPPLEMENTAL AFFIDAVIT OF MIKE PIEPER

Mike Pieper, first being duly sworn, deposes and says:

1. My name is Mike Pieper. During the 1996 election cycle, I was the Campaign Manager for Montanans for Rehberg ("the Rehberg Committee"). Unless otherwise specified, I have personal knowledge of the facts set forth below.

2. During the primary, the Rehberg Committee retained Strategic Perception, Inc. to produce radio advertisements further introducing Dennis Rehberg to Montana voters and beginning to draw contrasts between Rehberg and his likely Democratic opponent, Max Baucus. Fred Davis of Strategic Perception, Inc. had principal responsibility for preparing the radio advertisements. The text of that advertisement is attached as Exhibit A to this affidavit.

3. The Rehberg Committee made the decision to retain Strategic Perception, Inc. and produce the radio advertisement entirely on its own initiative, without any prompting, guidance, direction, discussion, or any contact whatsoever with the National Republican Senatorial Committee ("the NRSC"). There were simply no contacts of any kind between the Rehberg campaign and the NRSC regarding production

- 2 -

between the Rehberg campaign and the NRSC regarding production or any other aspect of the Rehberg Committee's advertisement.

4. I understand that some radio stations in Montana broadcast a version of a Rehberg Committee radio advertisement that bore a NRSC disclaimer instead of a Rehberg Committee disclaimer. They did so mistakenly. The pre-primary Rehberg advertisement in question was in fact paid for entirely by the Rehberg Committee. The NRSC did not pay for this or any other of our pre-primary radio advertising. Once we discovered the error, I took immediate actions to correct it. In particular, I directed our media buyer to contact the radio stations and tell them that they were broadcasting the wrong version of the advertisement.

5. The first time I saw the NRSC advocacy advertisements was when they were broadcast over the public airwaves. I had no contact whatsoever with the NRSC regarding its legislative advocacy advertisements prior to their broadcast. Accordingly, the NRSC's advertisements were not made with my cooperation. I did not consent to the advertisements -- indeed, I would not have consented to these advertisements. Nor did I consult with the NRSC on the preparation of the advertisements. Further, there was absolutely no consultation between me or, to my knowledge, any member of the Rehberg Committee and the NRSC regarding any need for such advertisements. I made no requests or

AUG 26 '97 08:48AM COM MAN HILL

- 3 -

suggestions to the NRSC with respect to the legislative advocacy advertisements prior to their broadcast. After the advertisements were broadcast, I requested only that the NRSC send me copies of the advertisements and the documentary back-up for the advertisements so that I could respond to press inquiries about the accuracy of the advertisements.

The above is true and correct to the best of my knowledge, information and belief.


Mike Pieper

Signed and sworn to before me
this 26 day of August, 1997


Notary Public

My commission expires: 8/1/98

AUG-26-97 10:58

4084437138

P.05

R-745

Job-152

AUG 26 '97 08:49AM COM MAN HILL

P.5329

P05

08-20-97 04:11PM

TO 6626291

P015/025

[Western guitar with gospel humming background throughout]

Dennis Rehberg: "November 3 seems a long way away. That's when we'll elect a new senator for Montana."

"I'm Denny Rehberg and I want to be that Senator."

"I've lived in Montana all my life. My kids go to school here."

"For the last five years I've served as your Lieutenant Governor."

"Marc Racicot and Denny Rehberg have done things I'm proud of."

"But this election is really about the future."

"It's about being firm in convictions. And not being something different around election time."

"It's about getting government off our backs. And it's about making government affordable again."

"I want you to watch the Denny Rehberg campaign and how it's conducted."

"No misleading ads. No hiring below the belt."

"I want you to understand how different Denny Rehberg and Max Baucus really are."

"I want you to know how Montana and America can once again be."

Announcer: "Paid for by Montanas for Rehberg."

EXHIBIT C

2420 "363" 40" 60

BEFORE THE FEDERAL ELECTION COMMISSION

City of Alexandria)
Commonwealth of Virginia)

In re: MUR 4378

SUPPLEMENTAL AFFIDAVIT OF DWIGHT STERLING

Dwight Sterling, first being duly sworn, deposes and says:

1. My name is Dwight Sterling. I am President of Multi Media Services Corporation, which is a creative consulting and media buying firm that has served many political committees across the country, including the National Republican Senatorial Committee ("the NRSC"). Unless otherwise specified, I have personal knowledge of the facts set forth in this affidavit.

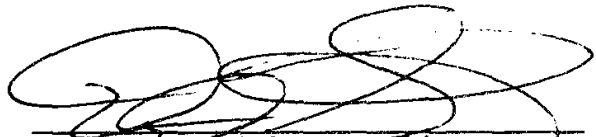
2. During the 1996 election cycle, I was retained by the NRSC to provide creative consulting and media buying services to the NRSC. These included media buying for the NRSC's legislative advocacy advertisements in Montana.

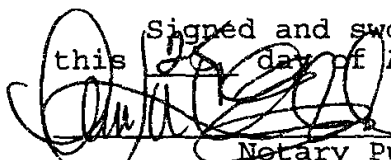
3. One of the television stations with which I placed the NRSC's legislative advocacy advertisements was KRTV in Great Falls, Montana. As I later learned, KRTV prepared a "controversial advertising campaign report" regarding one of these advertisements. This report was not submitted by me or the NRSC to KRTV. Rather, the report was prepared entirely by KRTV staff. In fact, I believe the report was prepared by the President and General Manager of KRTV, William L. Preston.

KRTV prepared the report with absolutely no guidance or direction from me or, to my knowledge, anyone from the NRSC.

4. The original report described the advertisements as "television ads for: The defeat of Senator Max Baucus on his re-election campaign for 1996." (A copy of the original report is attached as Exhibit A to this Affidavit.) As soon as I became aware that the station manager had incorrectly described the purpose of the advertisement, I contacted him and called his attention to the report. Mr. Preston acknowledged that the report was erroneous by cancelling the report and replacing it with a revised report. See Fax cover sheet from Bill Preston to Dwight Sterling, May 24, 1996 (attached as Exhibit B). This revised report accurately described the purpose of the advertisement: "The passage of the G.O.P. Balanced Budget Proposal. Asks viewers to call Senator Baucus and support the measure." (Attached as Exhibit C.)

The above is true and correct to the best of my knowledge, information and belief.


Dwight Sterling

Signed and sworn to before me
this 20 day of August, 1997

Notary Public
My commission expires: 11/30/99