



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

Republican National Committee  
and Alec Poitevint, as Treasurer

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MURs 4382 and 4401

STATEMENT OF REASONS  
BY VICE CHAIRMAN DAVID M. MASON AND  
COMMISSIONERS BRADLEY A. SMITH AND DARRYL R. WOLD

This Statement of Reasons explains the basis for our vote on March 14, 2001 against the General Counsel's recommendation that the Commission find probable cause to believe that the Republican National Committee and its treasurer (the "RNC") violated 2 U.S.C. §§ 434(b) and 441a(a)(2)(A).

Procedural Background

This matter arose out of a complaint filed on June 12, 1996 by Donald L. Fowler, then-National Chair of the Democratic National Committee, which was designated as MUR 4382. That complaint alleged numerous violations by Dole for President, Inc.,<sup>1</sup> and its treasurer (the "Dole Committee"), including allegations that the Dole Committee had shifted various costs to the RNC.<sup>2</sup>

Based largely on information developed during the course of the Commission's audit of the Dole Committee, on February 22, 2001 the General Counsel recommended that the Commission find probable cause to believe that the RNC had violated the Act by paying and not reporting \$135,743 for salaries and expenses of 12 RNC staff members

<sup>1</sup> This committee was Senator Dole's committee during the presidential primary campaigns. The complaint named the respondent as "Dole for President Primary Committee, Inc."

<sup>2</sup> For purposes of the violations alleged in MUR 4382 against the Dole Committee, which are not in issue here, the Commission considered MUR 4382 together with another MUR, designated as MUR 4401. MUR 4401 arose out of a complaint filed by a Janet Strawder on June 26, 1996. The only respondent in that matter was the Dole Committee. (First General Counsel's Report, April 11, 1997, p. 6.)

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who the General Counsel contended worked on behalf of Senator Dole's campaign. The General Counsel concluded that those payments constituted contributions to the Dole Committee in excess of the \$5,000 limit of 2 U.S.C. § 441a(a)(2)(A), and were required to be reported under 2 U.S.C. § 434(b).

We could not agree that the facts presented to the Commission and the legal analysis advanced in the General Counsel's probable cause brief were sufficient to establish probable cause to believe that the work performed by the 12 individuals in question, while employed by the RNC, constituted a contribution to the Dole Committee.

### Factual Background

The General Counsel's probable cause brief identified 12 individuals who had been employed by the Dole Committee to do advance work for the Dole candidacy during the primary campaigns, 11 of whom were on the Dole Committee payroll through the end of March, 1996. Beginning in April, these 12 individuals were employed by the RNC. One of them left the RNC in June, but the RNC employed the remaining 11 until the Republican National Convention in mid-August, when they left the RNC and went onto the payroll of the Dole general election committee. During the approximately four and one-half month period that the RNC employed these individuals, from April until about mid-August, the RNC paid \$135,743 in compensation and expenses for them.<sup>3</sup>

According to the General Counsel's brief, an examination of the Dole Committee's records showed that the 12 individuals who were employed by the RNC during that four and one-half month period of time (approximately 135 days) appeared on itineraries for Senator Dole's travel in some capacity as advance staff between 8 and 68 days. The brief therefore concluded that these individuals continued to do advance work for the Dole Committee, while on the RNC payroll, and that the full amount of their cost therefore constituted a contribution to the Dole Committee.

The General Counsel's brief noted that, in the majority of cases, the itineraries included both party-sponsored events and Senator Dole's campaign events. The brief did not, however, attempt to allocate the salaries and expenses for the 12 RNC staff members between the party events and the non-party events, or, for that matter, between travel days (between 8 and 68 of the 135 days in the relevant period) and non-travel days.

The itineraries for Senator Dole's travel available from the audit of the Dole Committee permitted a more detailed analysis of the staff time and activities to be done.<sup>4</sup>

<sup>3</sup> Although not mentioned in the General Counsel's probable cause brief or report to the Commission recommending a probable cause finding, a review of the underlying material by a Commissioner's office disclosed that the compensation and expenses for 2 of the 12 was apparently shared between the Dole Committee and the RNC during this time, with each committee paying a portion.

<sup>4</sup> Much of this information from the itineraries was in fact set out by the Commission's Audit Division in a lengthy and detailed chart. Copies of these charts were provided to the Commissioners under a cover

Those itineraries listed, for each day, the cities visited, the mode of transportation, and, significantly for present purposes, the names and functions of individuals either on the trip or serving as contacts from their respective offices (including both those employed by the RNC and those not), and the names of the events in each city. The names of the events are brief, but give a good indication of the nature of the event. That indication was reinforced in some cases by the identity and affiliation of other persons shown as present at the event.

Based on this information, the events on the itineraries fell into two categories relevant to the legal analysis of this matter. One category consisted of Republican Party-related events, which included those described as "Victory '96" (which other information provided in the audit disclosed were fund-raising events for the RNC), and those listed as "GOP Convention" or "GOP Unity Rally" or similar nomenclature indicating the party-related nature of the event. The other category consisted of those events that did not appear to be party-related, but were civic or industry-based, and therefore appeared to be Dole campaign events. Virtually every trip during the entire period in question included a mix of both categories of events, and usually several of each.

#### The General Counsel's Legal Analysis

The General Counsel's probable cause brief analyzed the facts under the provisions in the Commission's regulations at 11 C.F.R. § 110.8, subdivision (e). (GC Brief, pp. 2, 5.) Subdivision (e) generally permits a political party to pay the expenses of a candidate at party-building events, but includes a rebuttable presumption that events occurring during an election year are not party-related, but are for the purpose of influencing the candidate's election.

The General Counsel's brief summarized its conclusion under this analysis by saying:

"Although events sponsored by the RNC, and state and local parties may have included activities for the Republican party, the candidate appeared at these events, and all the events occurred after January 1 of the election year. Therefore, it is presumed that the candidate's appearance was for the purpose of influencing the candidate's election. 11 C.F.R. § 110.8(e). Although the RNC asserts that the Dole Committee and the RNC paid their appropriate portions of the advance staff costs, the RNC did not submit information to rebut the presumption that the candidate appearances were not [sic] for the purpose of influencing the election . . . ." (GC Brief, p. 5.)<sup>5</sup>

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memorandum from the Staff Director dated March 14, 2001, referring to the Excel spreadsheets attached to the memorandum.

<sup>5</sup> The brief undoubtedly meant to refer to the presumption in subdivision (e) that candidate appearances during an election year are for the purpose of influencing the election.

Relying on this analysis, including the presumptions it found in § 110.8(e), the General Counsel's probable cause brief took the position that the full \$135,743 cost of the staff members during the entire time they were on the RNC payroll should be considered a contribution to the Dole Committee.<sup>6</sup>

The General Counsel's brief, however, did not appropriately apply the provisions of § 110.8, subdivision (e), to the facts.

Subdivision (e), in paragraph (1), provides that a political party may pay the expenses of a candidate who is engaged in party-building activity, "without the payment being considered a contribution to the candidate."<sup>7</sup> The availability of subdivision (1) is conditioned on two factors: (i) the event must be "a bona fide party event or appearance;" and (ii) no aspect may be "for the purpose of influencing the candidate's nomination or election."

What paragraph (1) permits, however, may be taken away by paragraph (2), subparagraph (ii), which provides that, notwithstanding paragraph (1), "an event or appearance occurring on or after January 1 of the year of the election is presumptively for the purpose of influencing the candidate's election, and any contributions or expenditures are governed by the contribution and expenditure limitations [of the Act]." Paragraph (2) also provides, however, in subparagraph (iii), that the presumption in subparagraph (ii) "may be rebutted by a showing to the Commission that the appearance or event was . . . party-related . . ."

It is apparent from the information provided to the Commission in the Audit Division's charts, and available in the itineraries themselves, that a number of the events on each trip were "party-related," as explained above. They were fund-raising events for the RNC; they were party conventions; they were party rallies. The General Counsel did not provide any information raising doubts about the party-related nature of those events.

<sup>6</sup> The General Counsel's report to the Commission recommending finding probable cause acknowledged that the amount considered to be a contribution would have been reduced if the RNC had submitted information demonstrating that the employees performed RNC-related duties, in addition to the advance work. (GC Rpt #5, p. 3, fn. 6.) The General Counsel did not explain why the RNC should have the burden of affirmatively making that showing.

<sup>7</sup> Subdivision (e), paragraph (1) is worded in terms of permitting a political party to "make reimbursement for" certain expenses of a candidate. In this matter, the RNC did not "reimburse" the Dole Committee for the costs in question, but instead paid those costs directly. The General Counsel did not address this distinction in the briefs or reports, so apparently did not attach any significance to it. Notwithstanding the regulation's use of the term "reimburse," it would seem that what a political party could pay for indirectly, by reimbursement to a candidate committee, it could pay for directly by, in this case, utilizing its own staff. Stated another way, it would be inconsistent for the Commission to interpret the Act as making the direct payment of a category of expenses by a party a contribution to a candidate, when the Commission had promulgated a regulation that said that a party's reimbursement of that category of expenses to a candidate would not be a contribution.

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The party-related nature of those events, therefore, effectively rebuts the presumption in paragraph (2), subdivision (ii), that the events were campaign events.

That brings the analysis back to the requirements of paragraph (1) of subdivision (e). The General Counsel's probable cause brief did not point to any evidence that the party-related events did not, in fact, meet the conditions specified in paragraph (1), subparagraphs (i) and (ii), for a party event to be eligible under that paragraph.<sup>8</sup>

With no facts to the contrary presented in the General Counsel's probable cause brief, we could find no basis for concluding that the respective party events were not eligible party-building activity under paragraph (1).

It appears, therefore, that § 110.8, subdivision (e), permitted the RNC to pay the salaries and expenses of the 12 staff members in question, to the extent that they worked on the party-related events listed in the itineraries, without those payments being considered a contribution to the Dole Committee.

#### Analysis of the Staff Time

In light of the fact that virtually all of the trips included both party-related events and non-party events, the question remains whether the RNC staff did in fact work on the non-party campaign events, as well as on the party-related events. If they did so, that time would constitute a contribution to the Dole Committee, regardless of the provisions of § 110.8, subdivision (e).

The RNC vigorously asserted that the individuals in question "were employed by the RNC following their work for the Dole Committee to work solely on behalf of the RNC in connection with RNC, not Dole Committee activities." (Response of the RNC, 1/31/01, p. 1.) Likewise, the Dole Committee asserted the same division of labor, in its response to the Commission's finding of reason to believe against the Dole Committee (letter dated August 1, 1997, from Dole Committee counsel Kenneth A. Gross, at page 7):

<sup>8</sup> In discussion during the meeting at which the Commission considered this matter, the General Counsel's office appeared to suggest that the RNC had the burden to show that party events met the requirements of paragraph (1). We cannot agree. The only proper application of paragraph (1) would be to put the burden on the Commission to at least initially come forward with evidence that the conditions were not met. The opposite approach, to put the burden on the party committee to show that the conditions were met, would put the party in the position of having to prove a negative, at least as to subparagraph (ii) — that is, that no aspect of the event was for the purpose of influencing the candidate's nomination or election. Proving a negative would put a virtually impossible burden, with no starting point and no stopping point, on the party committee, and would make the availability of subdivision (e) largely illusory. There is also a substantial question of vagueness in the wording of subparagraph (ii), which renders its application at all somewhat questionable. Virtually every party event at which a candidate appears could be construed as having the effect, at least in part, of influencing attendees in favor of the candidate's nomination or election. It is far from clear what conditions have to be satisfied to say that "no aspect" of a party event was for the purpose of influencing the candidate's election.

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"When Senator Dole attended Republican Party functions, DFP [Dole for President, Inc., the "Dole Committee" herein] paid all of his travel costs and the RNC paid the portion of the advance costs that related to the RNC event. . . . If Senator Dole went on trips to attend both DFP and RNC events, then DFP and RNC shared the cost of advance personnel and DFP paid all of Senator Dole's travel cost." (Citing to the affidavit dated July 29, 1996 by Allen Haywood, the Dole Committee's comptroller.) Substantiating the assertions by both these committees that advance staff costs were allocated between party events and Senator Dole's campaign events is the fact that the RNC and the Dole Committee apparently shared the actual costs of compensation and expenses for 2 of the 12 advance staff members during this period of time (see fn. 3, *supra*).

The General Counsel's probable cause brief did not provide any analysis of the records that would refute the assertions by the two committees, or otherwise shed light on this issue, because the brief relied completely on the presumptions it found in § 110.8, subdivision (e) to reach the conclusion that all of the events were for the purpose of influencing Senator Dole's election.<sup>9</sup>

To determine whether the information available to the Commission nevertheless could support a finding of probable cause to believe that the RNC staff worked on non-party events for Senator Dole, Commissioner Wold's office analyzed itineraries for four of the trips identified in the chart prepared by the Audit Division.<sup>10</sup> One of these trips had been selected at random by the Audit Staff in response to Commissioner Wold's request to provide a sample itinerary. The other three were selected by his office because they appeared from the chart to be representative of the trips in general -- they were multi-day, they had a mix of a number of party-related and non-party events, and they occurred several weeks apart. The detailed results of that analysis were included in Commissioner Wold's memorandum to the Commissioners dated March 12, 2001, which is part of the record in this matter.

In summary, that analysis showed that on these four trips, there were 29 party-related events (plus 2 "call-ins" to state party conventions), and 20 non-party events. The staff listed on the itineraries consisted of various of the 12 RNC staff members identified in connection with the trips a total of 37 times, and non-RNC staff identified a total of 131 times. Consistent with this over-all ratio, on each of the trips the RNC staff was far outnumbered by non-RNC staff. Thus, even though the events on the trips were weighted

<sup>9</sup> The General Counsel's probable cause brief did not clearly advance the alternative analysis that RNC staff in fact did work on Dole campaign events, but appeared to rest the case on the presumptions that it applied to the effect that all of the events were campaign events. That raises the question whether the RNC was sufficiently put on notice that it should address the alternative analysis in its response, and whether that would prevent the Commission from basing a probable cause finding on that analysis. (It may at least explain why the RNC did not provide a more detailed factual response describing the duties of the advance staff.) Rather than rest on that procedural posture alone, however, this Statement of Reasons also addresses the lack of sufficient evidence to support a probable cause finding based on that alternative analysis.

<sup>10</sup> Copies of these itineraries, among others, were provided to the Commissioners under a second memorandum from the Staff Director dated March 14, 2001.

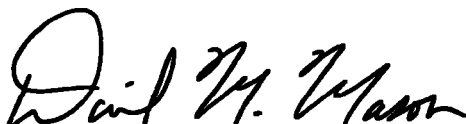
heavily toward party-related events, the RNC staff comprised only a fraction of the advance staff that assisted with the trips. As a general proposition, therefore, the facts do not suggest that it was likely that the RNC staff performed services for non-party events.

It is not possible for the most part to tell from the itineraries which staff in fact performed duties in connection with any particular event on the trips. The itineraries show that most of the staff -- both RNC and non-RNC -- traveled with Senator Dole's entourage the entire time during each trip. That, however, appears due to the fact that the entire entourage traveled together on the Dole Committee's plane between stops on each trip, and to the logistical impracticality, if not the impossibility, of repeatedly splitting up an entourage during the travel days, depending on which event was being attended. If an employee of the RNC occasionally was the only advance staff at a non-party event, or occasionally assisted with a non-party event, the cost of that time would be very difficult to identify from the information available to the Commission, and would not appear to be material in amount in any case. That occasional circumstance certainly would not support a determination that the Commission has probable cause to believe that a material amount of the cost of RNC staff constituted a contribution to the Dole Committee, let alone that the full amount of salaries and expenses of 12 staff members over a four and one-half month period of time did so.

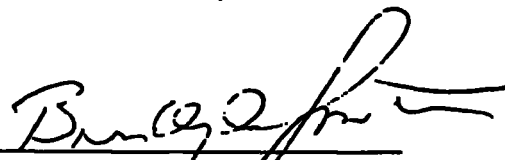
#### Conclusion

We could not find probable cause to believe that the RNC made a contribution to the Dole Committee. It appeared that the Commission's interpretation of the Act reflected in 11 C.F.R. § 110.8, subdivision (e), permitted the RNC to pay the costs of its staff in doing advance work on the party events that Senator Dole attended, and there was insufficient evidence to indicate that the RNC staff in fact did any significant advance work on Senator Dole's campaign events.

June 11, 2001

  
David M. Mason, Vice-Chairman

  
Darryl R. Wold, Commissioner

  
Bradley A. Smith, Commissioner