

FEDERAL ELECTION COMMISSION
SECRET

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM
For Meeting of: ~~AUG 8 1996~~
AUG 22, 1996

August 1, 1996

MEMORANDUM

TO: The Commission

THROUGH John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Latchfield
Associate General Counsel

SUBJECT: Draft AO 1996-30

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 8, 1996

Attachment

DRAFT

1
2 **ADVISORY OPINION 1996-30**

3
4 **Robert F. Bauer**
5 **Perkins Coie**
6 **607 Fourteenth Street, NW**
7 **Washington, D.C. 20005-2011**

8
9 **Dear Mr. Bauer:**

10
11 **This responds to your letter dated July 11, 1996, requesting an advisory opinion**
12 **on behalf of the Democratic Senatorial Campaign Committee and the Democratic**
13 **Congressional Campaign Committee ("the Committees") concerning application of the**
14 **Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission**
15 **regulations to proposed independent expenditures by the Committees on behalf of their**
16 **1996 candidates for the United States Senate and the United States House of**
17 **Representatives.**

18 **Your request indicates that it is submitted because of the recent United States**
19 **Supreme Court decision in *Colorado Republican Federal Campaign Committee v.***
20 ***Federal Election Commission* ("*Colorado*"), 116 S. Ct. 2309 (1996). The request also**
21 **relates the factual background regarding the proposed expenditures by the Committees**
22 **and states, in pertinent part, as follows:**

23 **The Committees have made plans for the selection of a number of**
24 **House and Senate candidates who the Committees might support with**
25 **independent expenditures advocating their election or the defeat of their**
26 **opponents in the general election. To date, neither of the Committees**
27 **have discussed, or otherwise communicated this proposal to any of the**
28 **candidates in question. Moreover, the Committees have selected the**

1 candidates on the basis of a number of factors which will not be disclosed
2 to these or any other candidates.

3 * * * *

4 In the case of each candidate under consideration by the
5 Committees for these independent expenditures, the Committees would
6 assert the following about the history of relationship and contacts with the
7 candidates. The Committees have maintained continuous contact with
8 these candidates' campaigns and key fundraising and other consulting
9 agents. For example, the Committees have communicated with these
10 candidates' polling firms about polling information and its strategic
11 implication for message, allocation of campaign resources, and advertising
12 strategy. The Committees have also communicated with these candidates'
13 media advisors about the proposed strategic direction of its advertising.
14 On a virtually daily basis, the Committees' senior management have
15 communicated with senior management of the campaigns and the
16 candidate about advertising, fundraising and other related issues.

17 These contacts have included face-to-face meetings, telephone
18 conversations, and exchanges of written and electronic mail
19 communications. The candidates have visited party committee
20 headquarters for meetings and party committee representatives from time-
21 to-time have visited candidates in their home states. The Committee staffs
22 have had numerous telephone conversations with various members of the
23 campaign staff, consultants, and other agents of the campaigns on any

1 number of questions affecting campaign operations, staffing, tactics and
2 strategy.

3 In some but not all instances, the Committees use the same
4 consultants as the candidates in developing strategy or improving
5 committee operations for the benefit of its candidates, including the
6 candidates under consideration for this "independent expenditure" effort.

7 In some instances, the Committees communicate with the consultants
8 about the candidates; in other cases, the Committees utilize those same
9 consultants for their own purposes and do not communicate directly with
10 those consultants about any matters directly bearing on their separate
11 representation of those candidates.

12 • • • •

13 Under the circumstances and the facts as set forth in their request, the Committees
14 ask if they "may properly establish and maintain independence for purposes of making
15 independent expenditures within the meaning of the recently decided Colorado
16 Republican case?" The request poses several questions that are set forth with the same
17 text used in the request, except where designated by brackets. The Commission's
18 responses follow each question or cluster of questions.

19 (1) Are the requirements of 11 CFR Part 109 which apply to all
20 other "independent expenditure" activity by political committees
21 applicable to the party committees?

22 (2) If not, what regulations govern "independent expenditure"
23 activities by political parties?

1 Responding to questions (1) and (?), the Commission concludes that the
2 Committees' purported independent expenditures are subject to the same conditions and
3 requirements as those made by any other person, such as individuals and non-party
4 political committees. This result follows from the plurality Supreme Court opinion
5 delivered by Justice Breyer (joined by Justices O'Connor and Souter) holding that:

6 The independent expression of a political party's views is 'core' First
7 Amendment activity no less than is the independent expression of
8 individuals, candidates, or other political committees. [Citation
9 omitted.] *Colorado* at 2316.

10

11 We therefore believe that this Court's prior case law controls
12 the outcome here. We do not see how a Constitution that grants to
13 individuals, candidates, and ordinary political committees the right to
14 make unlimited independent expenditures could deny the same right to
15 political parties. *Colorado* at 2317.

16
17 Accordingly, the Committees would be subject to all the conditions and
18 requirements that govern whether an independent expenditure so qualifies, or is instead a
19 contribution (in kind) subject to the limits of §441a. See 2 U.S.C. §441(a)(7)(B) and 11
20 CFR Part 109. The independent expenditure reporting rules also apply to the
21 Committees. This includes the requirement that written and signed certifications (under
22 penalty of perjury) must be submitted in the Committees' reports to indicate whether any
23 reported "independent expenditure is made in cooperation, consultation, or concert with,

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1 or at the request or suggestion of, any candidate or any authorized committee or agent of
2 such committee... ." 2 U.S.C. §434(b)(6)(B)(iii). See the relevant statutory definitions in
3 2 U.S.C. §431(17) and §431(18); also, see the 24 hour pre-election reporting provisions
4 of 2 U.S.C. §434(c)(2) and the disclaimer provisions of 2 U.S.C. §441d(a)(3). Several
5 Commission regulations implement the cited sections of the Act and govern the making
6 and reporting of independent expenditures by the Committees. The regulations would
7 apply in the same manner and to the same extent as applicable to other political
8 committees that are not authorized campaign committees of any Federal candidate. 11
9 CFR 100.8(a)(3), 100.16, 100.17, 104.3(b)(3)(vii)(A), (B) & (C), 104.4, 104.5(g),
10 106.1(a), Part 109, and 110.11(a)(1)(iii).

11 (3) May a party [each of the Committees] undertake "independent
12 expenditures" on behalf of a candidate while it continues with day-to-day contacts
13 with the same candidate campaign? Or are the Committees required to suspend
14 all other communications of strategic significance with candidates if the
15 Committees are preparing or considering "independent expenditure" activities for
16 those candidates?

17 Responding to this question, the Commission concludes that, given all of the facts
18 and circumstances related in the request and with regard to the candidates involved in the
19 relationships described above, the Committees could not satisfy the requisite conditions
20 for conducting independent expenditure activity in support of their candidates in the 1996
21 election cycle, including expenditures to advocate the defeat of candidates who are the
22 1996 election cycle opponents of the Committees' favored candidates. The basis for this
23 conclusion is the Committees' description of their coordinated and cooperative campaign

1 activities with their candidates that have already occurred in the 1996 election cycle and
2 before the Supreme Court's decision on June 26, 1996.

3 Specifically, although the request states that the Committees have not discussed or
4 otherwise communicated the particular independent expenditure proposals with or to any
5 of the candidates who may be supported, the Committees have been involved in general
6 coordination with the candidates, including maintaining continuous contact with the
7 candidates' campaigns and with their key fundraising and other consulting agents. For
8 example, Committee personnel have communicated with their candidates' polling firms
9 about polling information and the strategic implications of that information for message,
10 allocation of campaign resources and campaign advertising strategy. Also,
11 communications by the Committees have been made to media advisors of their
12 candidates about the proposed strategic direction of the Committees' advertising. In
13 addition, on virtually a daily basis, senior management of the Committees have
14 communicated with senior management personnel of their candidates' campaigns and the
15 candidates themselves about advertising, fundraising and other related issues.¹ Visits
16 either at the Committees' offices by candidates or by the Committees' personnel with
17 candidates in their home states have also occurred. Further, Committee staffs have had
18 numerous telephone conversations with their candidates' campaign staffs, consultants and
19 other agents on many questions affecting campaign operations, staffing, tactics and
20 strategy. Moreover, in some (but not all) instances, the Committees use the same
21 consultants as their candidates to develop strategy or improve the Committees' operations

¹ These contacts have been in face-to-face meetings, telephone conversations, and via exchanges of written and electronic mail communications.

1 for the benefit of its candidates, including those candidates who are under consideration
2 for the "independent expenditure" effort.²

3 Considered in their totality, the extensive consultation, cooperation and
4 coordination activities by the Committees with their candidates (as described above) that
5 have already occurred in the 1996 election cycle would preclude the Committees from
6 demonstrating that the proposed expenditures in support of those candidates could qualify
7 as independent expenditures under the Act and Commission regulations. 2 U.S.C.
8 §441a(a)(7)(B). 11 CFR 109.1. In these circumstances it would make no difference if the
9 Committees now suspend all further communications of strategic significance with
10 candidates who may be the subject of independent expenditures by the Committees.³

11 Thus, the Committees' situation is very different and distinguishable from that
12 before the Court in *Colorado*. Noting the testimony in the case, the Court cited general
13 descriptions of the State party's practice to coordinate campaign strategy with its
14 candidates, and then concluded that such a practice does not "conflict with, or cast doubt
15 upon, the uncontroverted direct evidence that this advertising campaign was developed by
16 the Colorado Party independently and not pursuant to any general or particular

² In some instances, the Committees communicate with these consultants about the candidates, while in others the Committees use the same consultants for the Committees' own purposes and do not communicate directly with them about any matters directly bearing on the consultants' separate representation of those candidates. See *Federal Election Commission v. National Conservative Political Action Committee*, 647 F. Supp. 987, 995 (S.D.N.Y. 1986) where court indicated that coordination was established when multicandidate committee and candidate developed and implemented nearly identical campaigns through use of a common political consultant, regardless of whether those campaigns took place during the primary or general election season

³ See Advisory Opinion 1996-1 wherein the Commission concluded that contacts made between candidates' campaigns and agents of a trade association, with respect to its membership endorsements of those candidates and when the association PAC might consider independent expenditures in their campaigns, would be disqualifying coordination if such contacts "became the means by which information is passed regarding the candidate's plans, projects or needs with a view toward having an expenditure made."

1 understanding with a candidate.” *Colorado* at 2315 (emphasis added). In the situation
2 presented in the Committees’ request, the campaign advertising program will be
3 developed with at least a “general . . . understanding” with the candidates or their
4 campaign personnel.

5 (4) Does it matter whether in a particular case the Committees’
6 communication with a candidate or his or her campaign on strategic matters
7 took place within days if not hours of the “independent expenditure”
8 campaign or was suspended around the time that the “independent
9 expenditure” advertising was (a) conceived, or (b) prepared, or (c)
10 conducted--that is paid for and distributed to the voting public through the
11 chosen medium?

12 Responding to this question, the Commission concludes that, while in some
13 circumstances the timing of the Committees’ communications with a candidate or the
14 campaign’s other personnel could be a factor to consider, the time intervals would not be
15 relevant here given the facts presented and discussed above in the answer to question (3).
16 It is significant here that, in Advisory Opinion 1984-30, the Commission considered the
17 effect of cooperation and coordination, occurring in the context of a committee’s
18 contributions (in kind) to candidates in their primary election campaigns, on the
19 committee’s ability to support those same candidates with independent expenditures in
20 their general election campaigns. The Commission concluded that the primary election
21 contacts would raise the (rebuttable) presumption that committee expenditures supporting
22 those candidates in the general election would be based on information about the

1 candidate's plans, projects, or needs. Advisory Opinion 1984-30, citing Advisory
2 Opinion 1979-80.

3 (5) If restrictions do apply to the communications between the
4 Committees and candidates who will be the focus of "independent
5 expenditures," do the Committees have an obligation to advise all of their
6 staff in writing, and the candidates to advise their staff also in writing, that
7 communications between the parties and campaigns should be suspended
8 or held in abeyance to preserve for the Committees the opportunity to
9 make independent expenditures if they so choose?

10 In response to question (5), the Commission concludes that, if the Committees are
11 considering independent expenditures in factual situations (other than those discussed in
12 question 3 above) where they have not had disqualifying consultation and coordination
13 contacts with their candidates, the Committees' written instructions to their staffs to cease
14 and desist from all communications with the target campaigns would be a relevant factor
15 in determining whether Committee expenditures will, in fact, be considered independent.
16 Likewise, it would be a relevant factor if the Committees provide written instructions to
17 their candidates saying that they should convey the same directions to their own
18 campaign personnel. See *Democratic Senatorial Campaign Committee v. Federal*
19 *Election Commission* ("DSCC"), 745 F. Supp. 742 (D.D.C. 1990) [In reviewing the
20 Commission's dismissal of an administrative complaint presenting independent
21 expenditure activity, the court noted the significant fact that the PAC chairman had
22 directed its consultants "not to say anything at all" about a Senate election in Florida to
23 other PAC personnel, since those consultants had advised the Florida candidate who was

1 also subject of same PAC's independent expenditure program, although conducted with
2 the advice of different consultants.]

3 (6) May the Committees erect a "Chinese Wall" to permit certain staff,
4 segregated from other staff of the Committees, to work on "independent expend-
5 iture" campaigns--to design the expenditures, to request all checks needed for
6 that purpose and to take all of their steps to produce and distribute the advertise-
7 ment to the public--while other staff remain free to communicate with the
8 campaign on any and all issues through the completion of the "independent
9 expenditure" advertising?

10 In response to question (6), the Commission may not express an opinion because
11 the request does not present a specific and fully described situation wherein the nature
12 and scope of the asserted segregation (erecting a "Chinese Wall") of some of the
13 Committees' personnel from other personnel has been presented. Furthermore, the
14 circumstances related in the request appear to negate the possibility that such a barrier is
15 currently in place or could be erected at this point in the 1996 election cycle. Therefore,
16 as to this question, the request in its present form only presents a general question of
17 interpretation in a hypothetical factual context. The advisory opinion process may not be
18 used to address such questions. 11 CFR 112.1(b), 112.1(c).

19 (7) May the Committees make Section 441a(d) coordinated expenditures
20 on behalf of a candidate at the same time that it is making "independent expend-
21 itures" on the same candidate's behalf? If they are conducted simultaneously,
22 must a "Chinese Wall" be established to separate those staffs involved in the

1 coordinated expenditures from those staffs involved in the independent
2 expenditures?

3 The Commission notes its responses to the other questions above. Beyond that,
4 this question presents a very general inquiry without a specific and fully described factual
5 context. See 11 CFR 112.1(b), 112.1(c). For the same reasons cited in response to
6 question (6), the Commission may not issue an advisory opinion addressing question (7).

7 This response constitutes an advisory opinion concerning the application of the
8 Act, or regulations prescribed by the Commission, to the specific transactions or activities
9 set forth in your request. See 2 U.S.C. §437f.

10 Sincerely,

11 Lee Ann Elliott
12 Chairman
13

14 Enclosures (AOs 1996-1, 1984-30 and 1979-80)