BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Republican National Committee and	)	MUR: 4250
Alec Poitevint, as treasurer	)	
Haley R. Barbour	)	

GENERAL COUNSEL'S REPORT

I. BACKGROUND

This matter involves allegations of a concerted scheme by the Republican National Committee ("RNC"), orchestrated and advanced by the RNC's then Chairman Haley R. Barbour and other high ranking RNC officials, to obtain $1.6 million in prohibited foreign national funds for the express purpose of electing federal Republican candidates in the 1994 congressional elections. These funds were deposited in the RNC's non-federal account, also known as the Republican National State Elections Committee ("RNSEC"). Based on the totality of the evidence, including voluminous documentary evidence obtained from various sources and testimonial evidence provided as part of the Special Investigation of the Senate Committee on Governmental Affairs, this Office served upon Respondents RNC and Mr. Barbour separate briefs recommending probable cause to believe that Respondents knowingly and willfully violated the foreign national prohibition of the Federal Election Campaign Act of 1971, as amended ('the Act"). This Office has received separate parallel responsive briefs from Respondents.

As the following discussion will demonstrate, Respondents' reply briefs, although extensive, do not rebut the allegations in this matter or otherwise serve to excuse Respondents' violations. Accordingly, this Office now recommends that the Commission find probable cause

to believe the RNC and its treasurer, and Mr. Barbour, each knowingly and willfully violated 2 U.S.C. § 441e by accepting $1.6 million in foreign national funds.

II. ANALYSIS

Although Respondents RNC and Mr. Barbour have filed separate responsive briefs in this matter, these responses present essentially the same arguments and will be addressed in unison. As noted, these responses are extensive, advancing what at first blush appear to be a myriad of legal arguments. In fact, however, these responses advance essentially five core legal arguments, presented in various ways. Respondents argue that: a) the transfer of the funds at issue to the RNC represents repayment of a *bona fide* debt and therefore cannot be deemed a contribution, or other regulable transaction, for purposes of Act's prohibitions; b) the foreign national prohibition at Section 441e does not, and cannot constitutionally, apply to non-federal funds; c) the Commission's regulations at Section 100.7 (regulating the provision of collateral or other loan guarantees) similarly does not, and cannot constitutionally, apply to non-federal funds; d) even assuming the Section 441e prohibition applies to non-federal accounts, the Commission still must establish that the funds were directly used for a non-federal election; and e) the record in this case does not support a knowing and willful violation.

Notably, in contrast to the legal arguments, Respondents dedicate little time to discussion of the facts giving rise to the violations at issue. Aside from contesting a few discrete statements or events, Respondents all but ignore the established chain of events demonstrating the RNC's and Mr. Barbour's efforts to obtain, funnel and conceal the foreign national funds from the public record until after the 1994 elections. Moreover, even the factual arguments raised, when

viewed in context, fail to rebut the clear and extensive factual record set forth in the General Counsel's Briefs.[1]

The following discussion will first establish the facts giving rise to the violations, including Respondents' discrete challenges to these facts, as a framework from which to discuss the legal issues in this matter. Next, the report will address separately each of Respondents' five legal arguments, demonstrating why these arguments do not excuse the violations at issue or their aggravated nature. Last, the report will discuss the appropriate civil penalty for administrative resolution of this matter.

1. Factual Background

As discussed at length in the General Counsel's Briefs, in the summer of 1993, the RNC's then chairman Haley Barbour established the NPF as an ostensibly independent, issue-oriented organization. However, from its inception in 1993, the RNC was the principal financier of the NPF's activities and, by the summer of election year 1994, the RNC was owed approximately $2.1 million by the NPF. These loans to the NPF by the RNC were approved by Mr. Barbour. Desiring repayment in time for the 1994 elections, the RNC arranged the security necessary for the NPF to obtain a commercial bank loan to repay at least a portion of the outstanding balance. The security for the loan was knowingly obtained from a foreign national source -- Young Brothers Development Company, Ltd. -- Hong Kong ("YBD -- Hong Kong"). Approximately $1.6 million, of a total $2.1 million borrowed by the NPF, was earmarked for the

[1] Respondents requested and were provided with all the documentary and testimonial evidence relied upon by this Office in the General Counsel's Briefs. Presumably Respondents reviewed the entire record in formulating their response, yet chose not to address the bulk of the evidence.

RNC and transferred by the NPF to the RNC's non-federal account upon disbursement of the loan proceeds in late October 1994 -- in time for the 1994 elections.

Respondents' primarily challenge this Office's conclusion that both Mr. Barbour and the RNC knew the foreign source of the security for the loan, and that the known purpose for seeking repayment in 1994 was to make funds available to the RNC for the upcoming elections. As is separately discussed below, Respondents' do not successfully rebut any of the evidence advanced in support of the above factual conclusions, nor do they expressly challenge the series of events demonstrating Respondents' express efforts to obtain foreign funding for the NPF. [2]

a. Respondents had knowledge of foreign source of funding

Concerning the foreign source of the security, the RNC notes initially that "in 1994, the source of the [security] funds was not known to the Deputy Chief Counsel of the RNC, Thomas Josefiak, the then Executive Director of the RNC, Scott Reed, or the Chief Financial Officer of the RNC, Jay Banning." RNC Brief at 7. This statement is significant. None of these listed individuals is alleged by this Office to have been involved in the loan negotiations, yet the RNC's list fails to include Mr. Barbour or Mr. Fierce, its then Chairman and then Chief Strategist -- and the individuals most directly implicated in the transactions at issue. Consistent with the available evidence, this suggests that Messrs. Barbour and Fierce did know of the foreign source of the security in 1994.

The RNC also fails to challenge the series of events demonstrating Respondent's express interest in seeking foreign funding for the NPF. As discussed in the General Counsel's Briefs,

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[2] Respondents do challenge certain evidence cited to illustrate the close relationship between the RNC and the NPF, but do not ultimately claim that the two organizations were not closely related, or that Mr. Barbour as chairman of both organizations did not influence their activities. *See* RNC Brief at 13, n.6; Barbour Brief at 7.

the available evidence, when viewed in its entirety, establishes Mr. Barbour's and the RNC's knowledge of the foreign source of the posted security. The testimony of various individuals with direct knowledge of the events leading up to the posting of the foreign national security and the transfer of the loan proceeds to the RNC evidence a consistent pattern of events designed to infuse the RNC with funds for use in the 1994 elections. Mr. Barbour's and the RNC's involvement in the series of events at issue make it inescapable that they would have been aware of the foreign source of the posted security. It was Mr. Barbour who hand - picked Daniel B. Denning, the individual tasked with finding foreign sources of funding for the National Policy Forum ("NPF"). [3] This individual effectively replaced the NPF's then President, Michael Baroody, as the NPF's principal fundraiser.[4] Mr. Baroody had raised objections to funding the NPF with foreign funds and resigned from the NPF due to Mr. Barbour's efforts to obtain foreign sources of funding.[5] Mr. Denning was joined by the RNC's then Chief Strategist Donald Fierce in seeking foreign funding for the NPF.[6] These funds were sought for the express purpose of allowing the RNC to recoup funds previously loaned to the NPF.[7] Both these individuals

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[3] *See* General Counsel's Briefs at 10 (citing deposition and Senate testimony from the NPF's former President Michael Baroody, and deposition testimony from the NPF's former Chief Operating Officer Daniel B. Denning). (Because the factual discussions in both General Counsel Briefs are consistent, unless otherwise noted all citations to the General Counsel's Brief are to both briefs.)

[4] *See id.* at 6 and 10 (citing deposition and Senate testimony of Mr. Baroody, and deposition testimony of Mr. Denning).

[5] *See id.* at 18, n.16 (citing Mr. Baroody's resignation latter of 6/28/94.)

[6] *See id.* at 11 (citing deposition testimony from Fred Volcansek, the individual retained by Messrs. Denning and Fierce to help identify funding sources).

[7] See id. at 11 (citing deposition testimony from Mr. Volcansek, from Mr. Denning and from Scott Reed, the RNC's then Chief Operating Officer).

reported directly to Mr. Barbour.[8] At least two separate meetings concerning the security took place overseas – in Hong Kong, one of which was attended by Mr. Barbour.[9] Numerous written communications concerning the security either originated from, or were mailed to, a Hong Kong address.[10] Three separate individuals have testified that they informed Respondents' of the foreign source of security, with one individual noting that everyone was aware that the funds were coming from overseas.[11] The loan documents, clearly disclosing that the security funds had been transferred from Hong Kong, were provided to the RNC.[12] Not one of these underlying facts is effectively challenged by Respondent.

Like the RNC, Mr. Barbour ignores the series of events cited above demonstrating the express efforts to gain foreign funding for the NPF. To support his claimed lack of knowledge regarding the source of the security funds, he challenges only the four occasions cited by this Office when Mr. Barbour was informed of the foreign source of the security. The challenged occasions include: 1) an August 1994 dinner in Washington D.C. between Mr. Young and Barbour, 2) an October 1994 discussion between Mr. R Richards and Mr. Barbour, 3) an October 1994 RNC meeting attended by Messrs. Volcansek, Barbour, Fierce and Denning, and 4) a 1995 meeting between Mr. Young and Mr. Barbour in Hong Kong harbor.

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8 *See id.* at 10 (citing deposition testimony from Mr. Denning).

9 See id. 13 and 24 (citing deposition testimony from Mr. Volcansek, Mr. Young and Mr. Barbour).

10 *See id.* at 15, 16, n.14, 17 and 21 (citing communications between Mr. Barbour and Mr. Young of 8/30/94, 8/30/94, 9/19/94, and 10/10/94).

11 *See id.* at 14, 17, 19 and 24 (citing deposition testimony from Messrs. Young, Volcansek and Denning and Senate testimony from Mr. R. Richards, a representative of Mr. Young's).

12 *See id.* at 22 and n.21 (citing deposition testimony by Mr. Barbour).

In attempting to rebut the first cited instance where Mr. Barbour was directly informed of the foreign source of the security, the 1994 dinner meeting, Respondent relies on testimony by Mr. Denning, one of the dinner attendees, that he did not recall any conversations concerning the foreign source of the security funds during the meeting. Barbour Brief at 15. However, this testimony is fully consistent with this Office's conclusion. As noted in the briefs, although numerous individuals attended the dinner meeting, the conversations concerning the loan security were held between only Mr. Young and Mr. Barbour. No other party was involved – including Mr. Denning. Mr. Young has testified that he did in fact inform Mr. Barbour of the foreign source at that meeting, although Mr. Barbour has claimed no recollection of this aspect of the conversation. Mr. Young's testimony, however, is consistent with the totality of the evidence and the known events preceding this meeting, especially Mr. Barbour's previous instructions to find foreign funding to allow the NPF to repay its loan, and his conversation with Mr. R. Richards in which he referred to Mr. Young as a Chinese individual living in Hong Kong."[13]

Relying on the majority's portion of the Final Report of the Senate Investigation, Respondent next challenges Mr. R. Richard's live Senate testimony that shortly after the August 27, 1994 dinner meeting, he telephoned Mr. Barbour to relay Mr. Young's agreement to provide the requested security and at that time also personally informed Mr. Barbour of the foreign source of the security. *See* General Counsel's Briefs at 17. Respondent cites to deposition testimony provided by Mr. Richards wherein he notes that the "details of the loan transaction" were not communicated by him to Mr. Barbour, but instead conducted between the attorneys. *See* Barbour Brief at 16; Deposition of Richard Richards of June 19, 1997, at 106.

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[13] For a full discussion of the dinner meeting and the series of preceding events see the General Counsel's Briefs at 9-15.

This latter testimony was, however, related to a September 23, 1994 internal memorandum from Mr. Young's domestic counsel to Mr. Young outlining the various structural elements of the proposed loan security. Mr. Richards was specifically questioned about a portion of the memorandum concerning the technical description of the structure for the transfer of funds between the parent and domestic companies. When asked if he had communicated the "details of the loan transaction" to Mr. Barbour, Mr. Richards replied that he had not, that these issues had been handled by the attorneys. *Id.* This separate testimony, taken in its proper context, in no way contradicts Mr. Richards' Senate testimony. In this portion of the deposition, Mr. Richards was not being asked if he had ever informed Mr. Barbour of the foreign source of the security, but rather if he had ever informed Mr. Barbour of the structural details of the transfer.

Mr. Richards' testimony concerning his disclosure to Mr. Barbour of the foreign source of the security could not be more direct:

> Q. -- Did you advise Mr. Barbour at this time in the course of describing the transaction where the ultimate source of the money would come from that would be posted as collateral with the bank?
>
> A.-- Well, the only thing I told him is the money would be transferred from Young Brothers (Hong Kong) to Young Brothers (USA) for that purpose.

Testimony of Richard Richards, Committee on Senate Governmental Affairs Special Investigation – 1996 Campaign Funds, Volume 10, p. 73 (July 25, 1997). The "only thing" he disclosed to Mr. Barbour was the source of the security, not the detailed financial arrangement

for the transfer of funds. The testimony cited by Respondent does not refute Mr. Richards' clear statements.[14]

Respondent next challenges Mr. Volcansek's testimony that he discussed the foreign source of the security in an October 1994 meeting attended by Messrs. Barbour, Fierce and Denning. *See* Barbour Brief at 16-17. Mr. Barbour's Brief notes that neither of the other participants recall discussion of the funding source. These individuals' testimony is less forceful than Respondent's representation would imply. Although the response brief asserts that Mr. Fierce does not recall any such conversation, it does not support this assertion with any citation to testimony or other sworn declaration from Mr. Fierce, noting only that this would have been Mr. Fierce's testimony had this Office taken his deposition. Concerning Mr. Denning, his testimony noted only generally that he recalled no conversations with Mr. Becker concerning the foreign source; nor did he know of any other conversation between the NPF and Young Brothers concerning the source. *See* Denning Deposition at 222. This portion of his testimony did not directly address possible conversations between the Mr. Volcansek and RNC individuals concerning this issue. In fact, as discussed in the General Counsel's Briefs, when asked if "he had learned from Mr. Volcansek or from any other source" about Mr. Young's foreign national status, Mr. Denning acknowledged that he had learned from "Fred Volcansek" that Mr. Young's citizenship was in transition and that he, Mr. Denning, probably informed either Messr. Reed,

[14] In an attempt to discredit Mr. Richards' testimony, Respondent cites to Mr. Richards' acknowledgment that a portion of his letter to Mr. Barbour of 9/17/96 (addressing the impending loan default) contained inaccurate information. *See* Barbour Brief at 16, n.17. However, the portion of the letter retracted as inaccurate by Mr. Richards addressed the question of an potential *quid-pro-quo* wherein Mr. Barbour would provide business opportunities to Mr. Young in exchange for forgiveness of the loan obligation, and was made after consultation with RNC counsel. *See* Testimony of Richard Richards before the Senate Governmental Affairs Committee, at 90-91. This testimony does not contradict the testimony cited by this Office, and supported by other independent documentary and testimonial evidence, concerning the known foreign source of the security.

Barbour or Fierce of this detail. *Id.* at 146-148. Significantly, Mr. Volcansek's testimony is consistent with, and supported by, the available documentary evidence. *See generally* General Counsel's Briefs at 9-20.

Concerning the Hong Kong Harbor meeting to discuss Mr. Young's possible forfeiture of the posted security in satisfaction of the debt, Respondent, again relying on the Majority's portion of the Senate's Final Report, selectively cites testimony where Mr. Young notes that Mr. Barbour did not make "any special point" of the foreign source of the security and that Mr. Barbour may have "misunderstood" him. Respondent seems to claim that this additional testimony rebuts the conclusion that Mr. Barbour was again told of the foreign source by Mr. Young at the meeting.[15] *See* Barbour Brief at 16. The cited testimony was given during a line of questioning concerning Mr. Barbour's reaction to Mr. Young informing him that the security could not be forfeited because of its Hong Kong origin. In response to these questions, Mr. Young testified that he did not notice Mr. Barbour to be surprised or concerned to hear about the foreign source of the security – that Mr. Barbour did not make "any special point" of the source, but instead continued the conversation. *See* Young Deposition at 57-58. It is not surprising that Mr. Barbour did not exhibit a strong reaction to Mr. Young's statement because Mr. Barbour had already been informed of the foreign source on at least three previous occasions. Additionally, although Mr. Young testified that Mr. Barbour may have 'misunderstood" him, this testimony did not concern Mr. Young's statement concerning the

[15] For a full discussion of the Respondents' requests to Mr. Young for forgiveness of the loan obligations, see the General Counsel's Briefs at 23-25.

foreign source of the security, but rather his statements concerning the form of assistance Mr. Young was willing to provide in response to the forfeiture request.[16] *See id.* at 59.

Respondents fail to effectively rebut the documented instances cited in the briefs where Mr. Barbour and the RNC were informed of the Hong Kong source of the security. None of the testimony cited by Respondents contradicts the statements relied upon in the briefs' analyses. Indeed, all testimony cited in the briefs to establish the factual record in this case is consistent with the documentation concerning the knowledge of the foreign source of the posted security.[17] Not only do Respondents' fail to rebut the discrete factual conclusions they challenge, they all but ignore the series of events demonstrating Respondents' interest in obtaining, and subsequent efforts to obtain, foreign funding for the NPF, including their early efforts to replace the one individual voicing objections to seeking foreign funding for the NPF – Michael Baroody.

[16] Specifically, Mr. Barbour had requested that Mr. Young allow the posted security to be seized in satisfaction of the loan, thereby erasing the NPF's obligation to repay the loan. In response Mr. Young informed Mr. Barbour that he would consider some form of payment to the NPF separate from the security issue. It appears that Mr. Barbour initially misunderstood Mr. Young to be offering to provide the NPF the funds necessary to repay the entire loan. *See* Young Deposition at 57–60.

[17] In fact, Respondents' factual contentions, even if accurate, would not negate the violations at issue. Section 441e of the Act makes it unlawful for "any person to solicit, accept or receive" any foreign national contribution. *See* 2 U.S.C. § 441e. Unlike other provisions of the Act, Section 441e does not contain a knowing requirement *Compare* 2 U.S.C. § 441e *with* 2 U.S.C. § 441f (requiring that recipient "knowingly accept" a contribution made in the name of another). To establish a violation of Section 441e, the Commission need conclude only that Respondents were put on notice of the possible foreign source and demonstrated an insufficient regard for the potential violation. It is indisputable that the overseas meetings and correspondence, as well as the explicit comment about Mr. Young's citizenship being in transition, put Respondents on notice of the potential foreign source of the posted security. However, as will be discussed, Respondents not only had reason to suspect the security was coming from overseas, but in fact were informed on numerous occasions of its foreign origin and had reason to know that acceptance of the loan funds were prohibited by 2 U.S.C. § 441e, resulting in a knowing and willful violation of the foreign national prohibition.

b. The express purpose for seeking the foreign national security was to infuse the RNC with funds in time for use in the 1994 elections.

Respondents next challenge whether there was an expressed electoral purpose for the security provided by Mr. Young. The RNC argues that Mr. Young did not know the extent to which the NPF used the proceeds from the secured loan to repay the RNC. RNC Brief at 8. In advancing this argument, the RNC selectively cites to a single statement by Mr. Young, while ignoring the numerous documents and statements from other individuals expressly disclosing the electoral purpose behind the requested security. In the cited statement, Mr. Young, when asked if he understood that the money was being sought for the benefit of the Republican Party, responded that "as a Republican, the party means the parents needs help." *See* Young Deposition at 29-30. Counsel attempted to clarify this portion of Mr. Young's testimony, and to draw the distinction between the loan recipient, the NPF, and the ultimate beneficiary, the RNC. However, from the record it appears that the witness did not understand the line of questioning and counsel quickly moved on to a separate topic. *See generally* Young Deposition at 30-31. This isolated confused portion of testimony simply does not rebut the numerous instances cited in the General Counsel's Briefs where the electoral purpose for seeking the security is expressly disclosed, often in writing, nor the fact that the ultimate security provided was for the exact same amount as the amount the NPF owed the RNC. *See* General Counsel's Brief at 9-20. Indeed, in agreeing to provide the requested security, Mr. Young wrote Mr. Barbour noting that he would only provide $2.1 million in security, as that was the amount "urgently needed and directly related to the November Election." *See* Letter from Young to Barbour of 9/9/94.

Mr. Barbour advances essentially the same argument. Citing to the same testimony from Mr. Young discussed above, and to testimony from Mr. Benton Becker, Mr. Young's domestic

counsel, Respondent argues that Mr. Young and his representatives "were informed that no part of the Signet loan proceeds would be used for the 1994 congressional elections by either the NPF or the RNSEC." Barbour Brief at 19. In addition to imposing far too much weight on Mr. Young's imprecise testimony, Mr. Barbour distorts Mr. Becker's testimony. The portion cited focused on the representations made concerning the NPF's financial condition at the time the security was being solicited, and not the electoral purpose behind the transaction. Mr. Becker's full testimony demonstrates that he was testifying as to NPF's inability to independently qualify for funding, and the RNC's desire for repayment.

> He [Ambrous Young] informed me that he was told by Mr. Barbour that the National Policy Forum was not a part of the Republican National Committee, that it, the National Policy Forum, was not within the auspices of the Federal election laws, since it, as an organization, was not involved with Federal Elections, that it was a think tank, that it was a non-profit organization, that it was new, and that it was developing its own list of contributors, and that the RNC had been providing loan money to it for some time to sustain it, and that that loan money due the National Policy Forum now exceeded $2 million, and the RNC would have liked to have gotten that money paid back to it by the National Policy Forum, and the policy forum lacked the assets or the financial statement to acquire a loan in that amount on its own, and thus it needed a guarantor.

Becker Deposition at 31-32. Not only does Mr. Becker's full testimony not support Respondent's conclusion, his statement that the 'RNC would have liked to have gotten the money paid back" illustrates Mr. Young's understanding that the security was provided for the ultimate benefit of the RNC.

Respondent further cites to Mr. Becker's Senate Testimony wherein he notes that he was informed that the NPF was an independent think tank with no association to the election of any federal candidate. *See* Barbour Brief at 20. While this may be true, it is not material to the transaction at issue. The overwhelming majority of the evidence clearly establishes that all parties to the transaction understood that the loan security was necessary for the RNC to recoup the funds previously provided to the NPF. Indeed, Mr. Becker earlier in the day testified, under

direct questioning from the Committee's Republican Chairman, that the secured loan "freed-up money of the National Policy Forum so that they could pay off a debt they had." Becker Testimony before the Senate Governmental Affairs Committee, at 86.[18]

Contrary to Respondents' attempts to discredit the factual record in this matter, the available evidence demonstrates Mr. Barbour's and the RNC's inextricable involvement in all aspects of the loan guarantee transaction, from procuring the guarantee to reaching settlement with the guarantor after default. The weight of the evidence shows that, throughout this transaction, various RNC officials obtained knowledge of the foreign source of the collateral and that they conveyed to Mr. Young that they needed that security to assist the RNC in the upcoming elections.[19]

2. Legal Arguments

As noted in the introduction to this section of the report, Respondents advance five core legal arguments none of which negates the violations at issue for the reasons set forth below.

a. Because the receipt by the RNC of the secured funds was not a *bona fide* commercial transaction, nor involved a candidate's personal funds, the transaction is subject to the Act and the Commission is not barred from reviewing all elements of the transaction in determining its legality.

Respondents advance two related, although circular, arguments. Respondents initially argue that the activity at issue concerns nothing more than a *bona fide* commercial transaction and is, therefore, not a contribution subject to the Act's prohibitions. In characterizing the repayment as a *bona fide* commercial transaction, Respondents would have the Commission

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[18] In fact, as the loan documents and the NPF's financial condition at that time demonstrate, the funds did more than just free-up money for repayment – they were the very funds transferred to the RNC.

[19] For an abbreviated discussion of the full factual record, see the General Counsel's Briefs at 32-34.

ignore all of the events preceding the actual repayment, including the RNC's initial provision of funds to the NPF, and the solicitation and posting of the foreign national security for the NPF's repayment loan. In circular fashion, having concluded, by ignoring all essential elements of the transaction, that the loan repayment is nothing more than a *bona fide* commercial transaction, Respondents argue that the Commission, pursuant to its own precedent, is barred from considering the various events preceding the actual repayment in determining its legality.

The initial characterization of the NPF's repayment to the RNC as merely the repayment of a pre-existing *bona fide* commercial debt allows Respondents to claim that the transaction is not subject to the Act's purview, and that, even if regulable, there were no foreign national assets involved as the repayment was made by a domestic entity – the NPF.[20] In advancing this premise, Respondent RNC relies on one advisory opinion were the Commission allowed, under very specific circumstances, a political committee to engage in a business transaction with a related entity without finding that the proceeds from such transaction were regulable contributions. *See* RNC Brief at 9-11. However, Respondent's cited authority fails to support the characterization of the loan repayment as a *bona fide* commercial transaction.[21]

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[20] Although, unlike the RNC's Brief, Mr. Barbour's Brief does not expressly raise this characterization as a separate argument, many of Mr. Barbour's other arguments implicitly treat the transaction as commercial, asking the Commission to ignore the activities of "third parties" and treating the transaction as repayment of a "valid debt" in reaching its conclusions *See, e.g.*, Barbour Brief at 25-27.

[21] In a recent concurring opinion in A.O. 1999-11, three Commissioners indicated their belief that advisory opinions are not general policy statements, but rather limited statements of the application of the law to the specific facts arising in the opinion. Because Respondents raise various advisory opinions in support of their legal arguments, this report examines the application of these opinions to the allegations at issue.

In that advisory opinion, AO 1992-19, the Commission allowed a federal candidate committee to lease a computer system from the candidate's state committee, even though the state committee had purchased the system with federally prohibited money The Commission premised its conclusion on the understanding that the federal committee would pay the "usual and normal" charge for the lease of the system, cautioning that providing the system at "less than usual and normal charges will result in a contribution from the state committee to the Federal Committee." AO 1992-19, 2 Fed. Election Camp. Guide (CCH) ¶ 6060 (July 10, 1992), at 11,817. The Commission further cautioned that "[situations] where state law permits the acceptance by the state committee of contributions that would be prohibited under the Act raise the possibility of the transfer of prohibited funds . . . to the Federal Committee."[22] *Id.* In short, failure to conduct the lease transaction pursuant to "usual and normal" commercial practice would expose the federal committee to violations of the Act by accepting both excessive and prohibited funds.

It is impossible for Respondents to credibly argue that the RNC's loans to the NPF were made pursuant to "usual and normal" commercial practice, and therefore that the subsequent repayment was simply part of a *bona fide* commercial transaction. Indeed, the NPF's inability to unilaterally qualify for a commercial bank loan is at the very heart of the violations in this matter. Signet Bank, in assessing a potential NPF loan, noted that the "NPF has demonstrated the ability to lose money in every single month of 1994, and in the 14 months of their 16 month

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[22] The state committee could have demonstrated that it had sufficient funds subject to the Act's limitations and prohibitions to make such payments. *See, e.g.*, AO 1989-4, 2 Fed. Election Camp. Guide (CCH) ¶ 5559 (May 26, 1998). However, in the present matter, it is uncontested that the NPF lacked the funds necessary to make the $1.6 million repayment at issue.

existence." *See* Internal Signet Memorandum from Killoren to Stevens of 10/4/94, at 1.[23] Even Mr. Barbour's hand-picked NPF Chief Operating Officer, Dan Denning, has acknowledged in his testimony that "it didn't take a rocket scientist to realize that the NPF was not a, you know - what's the term – qualified debtor. There were few banks that were going to loan the NPF any money." Denning Deposition, at 122-123.

Despite the NPF's lack of credit worthiness, the RNC provided it with over $4.2 million in loans from 1993 through 1996, and approximately $2.1 million in loans from its inception through the 1994 elections, at only prime rate plus 1.5% interest. *See, e.g.*, Loan Agreement of May 1, 1993, Between The National Policy Forum And The Republican National Committee, at Article 1, Section 1.4. Similarly, for over a year prior to the 1994 elections, the RNC allowed the NPF to forgo repaying the majority of the loan. During this period the NPF repaid only $200,000 of the total $2,345,000 loaned – accumulating an outstanding balance of nearly $2,145,000. *See* General Counsel's Briefs at 6.

The RNC has never been in the business of loaning funds. Mr. Barbour explains that the transaction at issue reflected "the principle that like-minded organizations help each other." Barbour Brief at 11. Yet, this principle does not seem to apply beyond the NPF as the RNC lent no other organization money during the period at issue. Taking into consideration the source of the funds, the lender's close relationship to the borrower, the lack of credit worthiness of the borrower, the favorable terms of the loan, and the highly permissive administration of the loan

[23] Although the memo went on to discuss the NPF's projected 1994 net gains, the evaluating bank officer determined that any loan would need to be secured, suggesting that the best approaches might be to structure the loan with the RNC as a co-borrower, or with Young Brothers as the lender. *See id.*

obligations, the RNC's financing of the NPF cannot be deemed a *bona fide* commercial transaction.[24]

With regard to the second prong of this circular argument, having characterized the repayment as a *bona fide* commercial transaction by ignoring all events preceding the repayment, Respondents next argue that the transaction consequently involved a *bona fide* debt, barring the Commission from considering the events preceding the repayment in examining the transaction.

In advancing this argument, Respondents rely on two candidate personal fund MURs – MUR 4000 (Fisher for Senate '94) and MUR 4314 (Sherman for Congress). Both MURs, cited by Respondents, involved federal candidates who concurrently solicited contributions from the same sources for both their ongoing federal campaign and for retirement of their previous campaign debts to themselves, with the clear understanding, in at least one instance, that repayments resulting from the debt retirement contributions would be re-

[24] In an interesting application of the Commission's regulations, the RNC seems to argue that Section 100.7(a)(1)(i)(E) (governing loan repayments to political committees), although inapplicable to the transaction at issue, supports Respondents' characterization of the transaction as "commercial" simply because it envisions that political committees may make loans. However, this provision in fact illustrates that loans by political committees are not treated as purely commercial transactions outside the purview of the Act. Instead, this provision serves to regulate the terms under which loans and repayments are made to guarantee that the transaction does not serve as a subterfuge for receipt of otherwise prohibited funds. *See* 11 C.F.R. § 100.7(a)(1)(i)(E) (principal and interest repayments must be made from funds subject to the Act's prohibitions and interest payments in excess of the commercially reasonable rate shall result in a contribution).

contributed by the candidate to his ongoing campaign.[25] In these MURs the Commission concluded that the candidate's receipt of repayment for the pre-existing candidate loans rendered the funds his own personal funds and the original source of the repayments inconsequential. Accordingly, the Commission did not examine the events facilitating the repayment of the candidate loans. Respondents urge the Commission to adopt the same approach in the present case, despite the fact that this narrow line of cases is inapplicable to the transactions here at issue. In concluding that the candidate's receipt of the funds essentially cured any potential taint, the Commission relied significantly on Section 110.10, which expressly allows "unlimited expenditures" from a candidate's personal funds. *See* 11 C.F.R. § 110.1(a). To preserve that provision, the Commission reasoned that, because any funds to which a candidate has a legal right of access to or control over, such as repayments of personal loans, are deemed personal funds, and because a candidate may make unlimited expenditures from personal funds, any question regarding the source of the funds is immaterial so long as the funds qualified as personal funds under the provision. *See, e.g.*, First General Counsel's Report in MUR 4314, dated 10/15/96, at 7. However, the Commission has not extended this reasoning or conclusion beyond

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[25] MUR 4000 involved a candidate for Senate who concurrently solicited contributions for both his 1994 general election Senate campaign and for retirement of his prior campaigns' debts (1993 Texas Special Election and 1994 primary and run-off elections) to him, with the express understanding that he would "match *all* debt *retirement* contributions with new personal contributions to the General Election Campaign". *See* First General Counsel's Report in MUR 4000, dated 1/13/96, at 4-5. Similarly, MUR 4314 involved a Federal Congressional candidate who used funds from the repayment of personal loans to various state committees as contributions to his federal committee. Unlike MUR 4000, in this second matter there was no indication that the state committee contributors were aware that the funds would ultimately be contributed to the current federal campaign. *See* First General Counsel's Report in MUR 4314, dated 10/15/96, at 7-8.

the narrow reaches of Section 110.10.[26] Accordingly, the Commission's reasoning in the two matters cited by Respondents is inapplicable to the present case. Respondents should be prevented from accomplishing indirectly what they are prohibited from doing directly -- soliciting and accepting foreign national funds.[27]

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[26] For example, in AO 1996-33 the Commission did not extend the reasoning in MURs 4000 and 4314 to the situation where a Federal candidate uses surplus state committee funds to make contributions to the committees of other state officeholders, and these committees in turn contribute a equal amount to the federal candidate. The Commission noted that under those facts a violation of 11 C.F.R. § 110.3(d) (restricting transfers from candidate's non-federal committee to federal committee) results. *See* AO 1996-33, 2 Fed. Election Camp. Guide (CCH) ¶ 6213 (August 23, 1996). The Commission further concluded that where a federal candidate contributes his state funds to other officeholders' state committees, and these officeholders in turn contribute from their own personal funds an equal amount to the federal candidate, a violation of both 11 C.F.R. § 110.3 and 2 U.S.C. § 441f would result. The only significant distinction between this advisory opinion and the MURs cited by Respondents is that the transactions contemplated in the advisory opinion, like the transactions at issue in this case, did not implicate the permissive provisions of Section 110.10.

[27] Based exclusively on the conclusion that the Commission is prohibited from examining all elements of the transaction, Respondent RNC argues that there is no violation of the foreign national prohibition because the NPF, the only relevant actor in the transaction under Respondent's scenario, was not a foreign national. *See* RNC Brief at 11-13. Of course, such a restrictive view of the Commission's ability to review the transaction at issue is unsupported by law.

Similarly, Respondent argues that consideration of factors beyond the actual repayment transcends the objective inquiry contemplated by the Act, resulting in a subjective application of Section 441e and, consequently, raising issues of constitutional vagueness. *See id.* at 37-38. Relying principally on the Supreme Court's holding in Buckley v. Valeo, 424 U.S. 1, 39-44 (1976), that a clear application of the Act is necessary to avoid First Amendment infirmities, and a lower court's holding in Orloski v. FEC, 795 F.2d 156 (D.C. Cir. 1986), that an individual's subjective interpretations are an improper basis for the finding of a violation, Respondent argues that to find a violation based on factors beyond just the repayment from the NPF to the RNC, such as the solicitation and posting of the foreign national security, is equal to relying on an individual's subjective understanding of a transaction, resulting in the vague application of the Act. Respondent's reliance on these cases is misplaced. Unlike the situation in Orloski, this Office is not relying on an individual's subjective impression of the purpose behind the loan transaction; instead, this Office relies on the objective facts facilitating the loan -- information properly available for Commission consideration. Because the Act nowhere restricts the Commission's ability to review *all* aspects of the loan transaction, finding a violation based on this information cannot be considered a vague application of the Act.

b. Contrary to the district court's holding in Trie, and Respondents' related arguments, 2 U.S.C. § 441e prohibits foreign national contributions to a party committee's non-federal accounts. This application is supported by the provision's language and legislative history, and the Commission's interpretation and consistent application of the provision.

Respondents next argue that the transaction at issue did not violate the Act because it was not a federal contribution, and only federal contributions are prohibited under 2 U.S.C. § 441e. *See* RNC Brief at 14-29; Barbour Brief at 27-35. In advancing this argument, Respondents primarily rely on the district court's analysis and conclusion in United States v. Trie, 23 F. Supp.2d 55 (D.D.C. 1998).[28] As the Commission is aware, the Trie court concluded that the foreign national prohibition at Section 441e only applied to "contributions" as that term is *defined in Section 431(8) of the Act*, and thus did not apply to contributions for non-federal elections.[29] Even though the district court's opinion is applicable as binding precedent only upon

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[28] Respondents also cite extensively to Attorney General Reno's determination not to appoint an independent counsel to pursue Vice President Albert Gore, Jr. for potential violations of the Pendleton Act arising from the solicitation of contributions on government property. Respondents cite to the portion of the determination addressing the reach of the Pendleton Act to only federal elections. *See* RNC Brief at 16, n.7 and 32; Barbour Brief at 24 and 28. Distinguishing between federal and non-federal contributions, the determination noted that, because the relevant provision of the Pendleton Act expressly applied only to contributions as defined at Section 431(8) of the FECA, any solicitation of "soft money" would not result in the violation of the statute. Respondents claim that this determination supports their conclusion that the restrictive definition of "contribution" at Section 431(8) is controlling in the present case. However, unlike Section 607 of the Pendleton Act, Section 441e of the FECA does not expressly incorporate the "contribution" definition at Section 431(8) into the foreign national prohibition. *Compare* 18 U.S.C. § 607 *with* 2 U.S.C. § 441e. As will be discussed below, Section 441e's origin and legislative history clearly establish its intended reach to non-federal elections.

Respondent Barbour also cites to an internal memorandum from Craig Donsanto, the head of the Department of Justice's Election Crimes Unit, wherein he opined that "[t]he hallmark of soft money is that it falls outside the regulatory web of the FECA – 441e included." *See* Barbour Brief at 29. However, one individual's informal opinion cannot serve as authority on this issue, especially when the Department of Justice has continued to *prosecute non-federal* donations from foreign nationals, as in the Hsia and Kanchanalak matters cited below.

[29] This same court has applied this reasoning in two subsequent foreign national cases. *See* United States v. Hsia, 24 F.Supp.2d 33 (D.D.C. 1998), *rev'd and remanded*, 176 F.3d 517 (D.C. Cir. 1999) and United States v. Kanchanalak, *41 F.Supp.2d 1 (D.D.C. 1999), appeal docketed*, Nos. 99-3019 & 99-3034 (D.C. Cir. March 10, 1999). However, no other court or jurisdiction has adopted this district court's interpretation.

the parties to that particular case,[30] Respondents claim that the Commission should give "great deference" to the Trie court's discussion. *See* RNC Brief at 16; *see, also*, Barbour Brief at 30-31. To the contrary, the Commission should not follow the Trie decision because it was wrongly decided.

The Trie court relied only on the language of 2 U.S.C. § 441e in narrowing its application, finding no contrary legislative history. Trie, 23 F. Supp.2d at 60. The district court deemed Section 441e applicable to only federal elections simply because of the provision's use of the term "contribution" to describe the prohibited funds. The court reasoned that, despite the provision's clear admonishment that foreign funds were prohibited "in connection with an election to *any* political office," the provision's use of the term "contribution" meant that it related only to federal elections because of that term's narrowing definition in a separate portion of the Act. Trie, 23 F. Supp.2d at 59-60, *see also,* 2 U.S.C. §§ 441e(a) (emphasis added) and 431(8). The court failed to consider Section 441e's lineage and legislative history which firmly establish its applicability to all elections – federal and non-federal.

i) The plain language of Section 441e extends its reach to non-federal elections

Like the district court, Respondents initially argue that the plain language of 2 U.S.C. § 441e limits the provision's reach to only federal elections, and that, consequently, the "analysis need progress no further than the plain text of § 441e." *See* Barbour Brief at 30-31; *see, also*, RNC Brief at 19. Therefore, Respondents further claim, the Commission is barred from even considering the provision's legislative history in examining its reach, and any past

[30] In fact, the parties in the Trie case have settled the criminal violations. Roberto Suro, Clinton Fund-Raiser to Plead Guilty, Wash. Post, May 22, 1999 at A2.

Commission practice expanding the provision's prohibition beyond federal elections is *ultra virus* and should not be accorded any deference.

As an initial matter, Respondents' plain language argument fails to even directly address the portion of the provision giving the foreign national prohibition its broad reach and is belied by Respondents' own reliance on external factors. Section 441e prohibits foreign national contributions in connection with "an election to *any* political office or in connection with *any* primary election, convention, or caucus held to select candidates for *any* political office." 2 U.S.C. § 441e (emphasis added). Section 441e's reference to "any political office" is correctly read as applying to federal, state and local elections. In determining whether a federal provision requiring that mandatory firearm sentences "not run concurrently with *any other term of imprisonment*" applied to state imprisonment, the Supreme Court reasoned that:

> Read naturally, the word "any" has an expansive meaning, that is "one or some indiscriminately of whatever kind" . . . Congress did not add any language limiting the breadth of that word, and so we must read section 924(c) as referring to all "term[s] of imprisonment," including those imposed by state courts. There is no basis in the text for limiting section 924(c) to federal sentences.

U.S. v. Gonzalez, 520 U.S. 1, 3 (1997) (citations omitted). There is similarly no basis in the text for limiting Section 441e to only federal elections. The only way Respondents can restrict this expansive language is by importing a definition of the term "contribution" contained in a separate provision of the Act. Accordingly, in direct contrast to Respondents' conclusion, a purely facial reading of the provision suggests its application to both federal and non-federal elections.

ii) Section 441e's legislative history establishes its broad scope

In addition to arguing that Section 441e, on its face, is limited to federal elections, Respondents contend that the provision's legislative history supports such a narrow application. Section 441e, unlike other provisions of the Act, has its origins in, and essentially remains, a national security provision with broad application. The prohibition on foreign national contributions has its origin in the 1966 amendments to the Foreign Agents Registration Act of 1938 ("FARA"), 52 Stat. 631-633, codified at 22 U.S.C. §§ 611-621. The FARA was enacted to protect the country from foreign influences by requiring individuals engaging in the distribution of propaganda or other activities on behalf of foreign agents to register with the government. *See* 52 Stat. 631. Respondents do not dispute Section 441e's heritage; instead, by focusing on the FARA's use of the term "the Government," while again ignoring the expansive "any election" language in the same provision, they unilaterally conclude that this term necessarily applied only to the federal government and not to state or local governments. *See* RNC Brief at 20. However, Section 441e's history easily exposes this conclusion's weakness.

To strengthen the FARA, the 1966 amendments prohibited "any contribution of money or other thing of value" by agents of foreign principals "in connection with an election to *any* political office or in connection with *any* primary election, convention, or caucus held to select candidates for *any* political office." 18 U.S.C. § 613 (emphasis added). This is the exact same language found at 2 U.S.C. § 441e. A separate definition section limited the term "contribution" to only federal elections as applied to specifically enumerated provisions of the FARA. *See*

18 U.S.C. § 591. However, Section 441e's predecessor, Section 613, was not among the enumerated provisions.[31] This is significant as it strongly supports Congress' intent that Section 441e's predecessor, containing the exact same election language as the present provision, apply to both federal and non-federal elections.

In 1974, Section 613 was amended as part of the FECA amendments, with the prohibition on contributions from agents of foreign principals becoming a broader prohibition on foreign national contributions generally. *See* Pub. L. No. 93-443, 88 Stat. 1267. The author of the Section 613 amendment, Senator Lloyd Bentsen, asserted the provision's continued application to not only federal elections, but to all "American" elections:

> I do not think foreign nationals have any business in our political campaigns They cannot vote in our elections so why should we allow them to finance our elections? Their loyalties lie elsewhere; they lie with their own countries and their own governments. Many in this country have expressed concern over the inroads of foreign investment in this country, over the attempts by foreigners to control U.S. businesses. Is it not even more important to try to stop some of these foreigners from trying to control our politics? . . . American political campaigns should be for Americans . . .

120 Cong. Rec. S4715 (Mar. 28, 1974) (statement of Sen. Bentsen).

During floor debate, Senator Bentsen further noted Congress' concern with foreign influence over "American political candidates," and broadly stated that the provision "would ban the contributions of foreign nationals to campaign funds in American political campaigns." 120 Cong. Rec. 8782 (March 28, 1974) (statement of Senator Bentsen), reprinted in Legislative History of the Federal Election Campaign Amendments of 1974, at 264. ("I am saying that contributions by foreigners are wrong and they have no place in the American political system.").

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[31] Nothing in the relevant committee reports indicates that Congress intended for the phrase "an election to any political office" to have any meaning other than its natural one, which would include elections for federal, state and local office. *See* H.R. Rep. No. 1470, 89th Cong. 2d. Sess. (1966).

In 1976 Congress made the foreign national prohibition part of the Act. Pub. L. No. 283, 94th Cong., 2d Sess. (1976). In moving the prohibition from Title 18 to Title 2, Congress retained the broad election language of Section 613 while replacing the criminal penalties under the FARA with the civil penalty provisions of the Act. *See* 2 U.S.C. § 437g(d)(1)(A). Although the conference committee report expressly stated Congress's intent to replace the criminal penalties of the FARA with the penalty and enforcement provision's of the Act, consistent with the provision's retention of the "any political office" language, it did not explicitly state any Congressional intent to narrow the scope of the provision from all "American" elections to just federal elections. *See H.R. Conf. Rep. No 1057, 94th Cong., 2d Sess. 66 (1976).* Given that non-federal foreign national contributions had been treated as crimes for ten years under Section 613, it is doubtful that Congress would have decriminalized such conduct without making a similar express acknowledgment. *See* United States v. Wilson, 503 U.S. 329, 336 (1992) ("it is not lightly to be assumed that Congress intended to depart from a long established policy.") (internal quotation marks and citation omitted). In light of this legislative history, Senator Bentsen's reference to "American" candidates and the "American" political system, not merely federal candidates or the federal political system, plus the national security background of Section 441e, point to a broad application including state and local, not just federal, contributions.

Respondents attempt to nullify the significance of Section 441e's legislative history by questioning the meaning of Senator Bentsen's statements. In this attempt, Respondents reference Congressman Frenzel's comments regarding potential loopholes in the Act's general definition of "contribution." Respondents note that Congressman Frenzel cautioned that the potential loopholes would allow foreign nationals to circumvent the prohibition, and argue that this demonstrates the legislature's intent that the general definitions of the Act apply to Section 441e.

Respondents also argue that, because the Congressman did not express any specific concern that the definition was limited to only federal elections, he must have intended it to apply narrowly. *See* RNC Brief at 20-21; Barbour Brief at 33-34.

As noted by the Commission in AO 1987-25, Congressman Frenzel's comments do not address the scope of Section 441e; instead, the Congressman was concerned that a wholly separate portion of the Act might have been drafted inartfully, allowing for unintended loopholes in the type of transactions that would qualify as a contribution. See AO 1987-25, 2 Fed. Election Camp. Guide (CCH) ¶ 5903 (Sept. 17, 1987); H.R. Rep. No. 93-1239 at 141. These comments do not negate or undermine the broad meaning of Senator Bentsen's comments, nor can Representative Frenzel's silence on Section 441e's scope be reflective of Congressional intent.

iii) The Commission's broad application of Section 441e has been consistent and is supported by the provision's origin and legislative history

Consistent with Section 441e's origin and legislative history, the Commission in 1975 passed a regulation interpreting the statutory provision as prohibiting a foreign national from contributing in connection with "a convention, a caucus, or a primary, general, special, or runoff election in connection with *any local, State, or Federal public office*." 11 C.F.R. § 110.4(a) (emphasis added). In numerous enforcement matters since then, the Commission has consistently applied the foreign national prohibition to non-federal activity, including contributions made to the non-federal accounts of party committees. *See* MURs 2892, 3460, 4398, 4638 and 4884. In addition, the Commission has included this interpretation of Section 441e in pamphlets and other public materials. *See, e.g.*, Commission pamphlet Foreign Nationals, May 1994.

Respondents attempt to invalidate the Commission's consistent application by arguing that it has been overly broad and inconsistent. As discussed, Section 441e's plain language, direct origin, and legislative history establish its application to both federal and non-federal elections. The Commission's interpretative regulation at Section 110.4(a)(1) is fully consistent with the statute's intended scope. Moreover, as noted, the Commission's application of the statute in the enforcement context has been consistent. Indeed, Respondents can only point to two advisory opinions, AO 1987-25 and AO 1975-99, in an attempt to support their assertion; however, even those AO's provide no support for their position. Neither opinion demonstrates a deviation from the Commission's consistent practice, as neither squarely addresses the reach of Section 441e. Indeed, properly read, both opinions support the provision's applicability beyond the federal election context.

AO 1987-25 addressed whether volunteer activity by a foreign national was of sufficient value to be regulable under the Act. *See* AO 1987-25, 2 Fed. Election Camp. Guide (CCH) ¶ 5903 (Sept. 17, 1987). In determining this issue, and only this issue, the Commission looked to the provision of the Act addressing the question of value – the definition of a "contribution." Because the requester's proposed activity did not constitute something of value for purposes of the Act, the Commission determined that the volunteer activity would not be prohibited by 2 U.S.C. § 441e. This opinion did not explicitly or implicitly import the general "contribution" definition into Section 441e. As was clearly stated by the Commission in the opinion, "Congress has never expanded the Act's definition of contribution, or restricted the Act's exemptions from such definition, for purposes of the foreign national prohibition . . . the prohibition has always been applicable in connection with any election whether Federal, state, or local." *Id.* at 11,393. Thus, the Commission concluded that, "by repealing and reenacting the foreign national

prohibition as part of the Act in 1976, and by amending the definitions which govern interpretation of the term 'contribution' as used in the Act, Congress has limited the scope of the foreign national prohibition as to the meaning of the term 'contribution,' while retaining the aspect of the prohibition that extends to all elections."[32] *Id.*

Respondents' other cited authority is equally inapplicable. In AO 1975-99, the Commission determined that the prohibition on contributions from government contractors extends only to federal elections. *See* AO 1975-99, 2 Fed. Election Camp. Guide (CCH) ¶ 5171 (Dec 31, 1975) (interpreting 18 U.S.C. § 611, the predecessor to 2 U.S.C. § 441c). Respondents note that in that opinion the Commission interpreted language similar to that of 2 U.S.C. § 441e, arguing that Section 441e should be similarly curtailed. However, what Respondents ignore is that, as with its interpretation of Section 441e, the Commission relied on the purpose behind the government contractor provision from the time of its enactment in 1940 in determining its scope. Finding that the prohibition's purpose was "clearly to prohibit improper political contracts between, on the one hand, Federal contractors and, on the other hand, the Federal officials awarding the contracts," the Commission determined that the "likelihood that such contracts would result from contributions to a state campaign is too remote to warrant infringement of First Amendment rights by the application of Section 611." *Id.* at 10,114. The Commission's interpretation of Section 441e is consistent with this opinion. In interpreting the foreign national

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[32] Mr. Barbour in his brief attacks this portion of the Commission's opinion by characterizing the Commission's reasoning as requiring an "implicit repeal" of Section 431(8)'s federal election requirement as it pertains to the foreign national prohibition. Respondent notes that, absent clear Congressional intent, courts will not look favorably on such interpretive repeals. *See* Barbour Brief at 38-43. However, contrary to Respondent's characterization, the Commission in upholding Section 441e's broad scope was not so much suggesting that Congress had implicitly repealed Section 431(8), but was, instead, upholding Congress's clear intent that Section 441e apply to both federal and non-federal elections.

prohibition as applicable to federal, state and local elections, the Commission has been promoting the provision's intended purpose, as it did with Section 611.

iv) The omission of a separate definition section is not a reflection of Congressional intent

Finally, Respondents argue that, in instances where Congress has intended a provision of the FECA to apply beyond federal elections, it has explicitly broadened the provision's reach by incorporation of a separate and more expansive definition of "contribution." In this regard, Respondents point to Section 441b.[33] *See* RNC Brief at 17; *see, also*, Barbour Brief at 30. As an initial matter, an argument can be made that Section 441e does in fact contain its own definition: "any contribution of money or other thing of value, or to promise expressly to impliedly to make any such contribution." In contrast to most of the Act's other uses of "contribution" - the 441a contribution limits, the 441f prohibition on contributions in the name of another, the 441g limit on contributions of currency - which only use the term "contribution," Section 441e's prohibition applies to "contribution of money or other thing of value." Thus, even under Respondents' reasoning, Section 441e need not utilize the Section 431(8) definition of contribution limited to federal elections.

Moreover, even assuming Respondents' contention that Congress' failed to provide a separate definition section for 2 U.S.C. § 441e , this suggested omission cannot serve to restrict

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[33] Respondents also point to 15 U.S.C. 79ℓ(h), prohibiting public utility holding companies from making "any contribution whatsoever in connection with the candidacy, nomination, election or appointment of any person for or to any office or position in the Government of the United States, a State, or any political subdivision of a State . . . or any political party. *See* 15 U.S.C. 79ℓ(h)(1) and (2). Although Section 441b's definition of "contribution" does apply to this provision by reference, because Section79ℓ(h)(1) is not part of the FECA statutory framework, nor does it contain the language "election to any political office" here at issue, this provision's structure and legislative history is irrelevant to the interpretation of Section 441e.

the provision's scope absent some clear Congressional pronouncement, especially where the available legislative record established Congress' intent that Section 441e apply to all elections – federal and non-federal. Respondents are asking the Commission to draw a negative inference – to interpret alleged Congressional silence as a manifestation of the legislature's will.

Contrary to Respondents' inference, Section 441b's structure and legislative history supports the Commission's broad reading of the foreign national prohibition. Respondents, like the court in Trie on which they rely, fail to properly consider Section 441b's relevance. Section 441b contains the Act's only other use of the phrase "election to any political office," prohibiting national banks or any other corporation organized by authority of any law of Congress from contributing to "any election to any political office." *See* 2 U.S.C. § 441b(a). Section 441b has unequivocal legislative history that this language was intended to apply to federal, state and local elections:

> The effect of this provision is to make it unlawful for any corporation, [organized by authority of any laws of Congress], no matter what its character may be, to make a contribution "in connection with any election to any political office" without regard to whether the election be national, State, county, township, or municipal.

U.S. v. Clifford, 409 F.Supp. 1070, 1073 (E.D.N.Y. 1976), quoting S. Rep. No. 3065, 59th Congress, 1st Sess. 2 (1906) (upholding applicability of 18 U.S.C. § 610, predecessor to Section 441b, to state and judicial elections in the face of a challenge to its applicability beyond federal elections). Like Section 441e, the Commission's regulations interpret this provision as restricting national banks and corporations organized by authority of any law of Congress from "making a contribution in connection with *any* election to *any* political office, *including local, State and Federal offices*. 11 C.F.R. § 114.2(a) (emphasis added).

Respondents attempt to distinguish this similar section because it contains its own definition of the term "contribution," thus in their view freeing it from the Section 431(8) definition.[34] Trie at 7-8, *see also*, 2 U.S.C. § 441b(b)(2). However, the two provisions may not be so readily distinguished without regard to their similar language and legislative history. Section 441e's direct origin and legislative history, especially when viewed in light of the legislative history for the only other provision of the Act containing similarly broad language, Section 441b, demonstrates that Congress intended the "election to any political office" language to apply beyond federal elections. Moreover, this interpretation of Section 441e is supported by the fundamental principle of statutory interpretation that courts "are obliged to give effect, if possible, to every word Congress used." Reiter v. Sonotone Corp., 442 U.S. 330, 338 (1979). If the phrase "any political office" in Section 441e is to be given any effect, that language must be construed as providing Section 441e, as it does Section 441b, with its own meaning of the word "contribution."[35]

To read Section 441e as applying only federal elections, renders the phrase "any political office" superfluous and does so in the face of legislative history as to its intended scope. The statutory structure and legislative history demonstrates that Congress intended "any political office" to apply to federal, state and local elections. Section 441e's plain language needs no

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[34] In fact, rather than expanding the reach of the Section 441b prohibition beyond Federal elections, the purpose of the "contribution" definition at 2 U.S.C. § 441b(b)(2) appears to be to exempt from coverage of the prohibition certain types of corporate activity that otherwise presumably would be considered "contributions" under Section 431(8), including specific types of communications to stockholders and executive and administrative personnel and the establishment and administration of a separate segregated fund. *See* 2 U.S.C. § 441b(a)(2)(A), (B) and (C). Section 441b(a)(2) itself adds nothing to the types of elections covered under 441b, instead simply reiterating the "election to any political office" language found in the substantive portion of the provision. *See* 2 U.S.C. §441b(a).

[35] Similarly, if Congress had meant Section 441e to apply only to federal elections, it would not have been necessary to include the phrase "directly or through any other person" in the provision, given the Act's general anti-conduit provision for federal contributions at Section 441f.

interpretive gymnastics – it means exactly what is says -- that the foreign national prohibition applies to "any political office." Therefore, Respondents' statutory construction argument must fail, as must all other arguments hinging on this construction.[36]

c. The provision of security by YBD – Hong Kong was an indirect contribution as contemplated by Section 441e.

Respondents argue that, because 2 U.S.C. § 431(8), while addressing the provision of loans and loan securities, is applicable only to federal elections, the security posted in this matter cannot constitute the basis for a violation. *See* RNC Brief 11-13; Barbour Brief 25-27. As correctly noted by Respondents, Section 431(8) of the Act and its accompanying Regulation at Section 100.7(a)(1)(i) provide statutory and regulatory definitions of "contribution" in the context of federal elections. However, this does not foreclose the Commission from seeking guidance from these sources in determining what activity constitutes the indirect provision of something of value pursuant to 2 U.S.C. § 441e. As it did in AO 1987-25 to determine the value

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[36] Having erroneously concluded that Congressional intent and the provision's statutory structure mandate a restrictive application of 2 U.S.C. § 441e, Respondents advance two Constitutional arguments prohibiting the Commission's expansive reading of the provision's scope. Neither argument survives independently of Respondents' erroneous conclusion. Essentially, Respondent Barbour argues that even if the courts were to find the language of Section 441e ambiguous as to its electoral reach, because Section 441e necessarily implicates First Amendment concerns, and defines criminal activity, courts will not afford the Commission's interpretation of this statute Chevron deference. *See* Barbour Brief at 43, n.37 and 43-48. As discussed, contrary to Respondent's assertions, Section 441e is neither ambiguous nor clearly restrictive on its face. The Commission's application of the prohibition to non-federal elections is consistent with Section 441e's origin, legislative history, and most damaging to Respondent's arguments, very language. Section 441e clearly discloses its application to "an election to any political office." 2 U.S.C. § 441e. The Commission by applying the prohibition to non-federal elections is not unilaterally attempting to interpret a vague statue, but rather, reflecting Congressional intent. Accordingly, Respondent fails to make a colorable vagueness argument. Even were the provision vague on its face, a court properly presented with the statute's origin and legislative history would not lightly disturb the Commission' consistent application of Section 441e on First Amendment grounds.

Based on the same premise, and citing to the Act's preemption provision at Section 453, Respondents Barbour and the RNC also argue that the Commission's application of the prohibition raises certain Federalism concerns because Congress did not explicitly express its intention that the Section 441e pre-empt state law and the Act only provides for preemption of state laws as to federal elections. *See* RNC Brief at18; Barbour Brief at 32-33, 46; *see, also,* 2 U.S.C. § 453. However, federal law preempts all other laws in the field of national security, and as discussed, Section 441e originated from and remains a national security provision. There are no preemption concerns at issue.

of a foreign national's volunteer campaign activity, the Commission may look at the contribution definitions to determine if YBD-Hong Kong's provision of security constituted something of value for purposes of the Act. *See, supra,* p. 28-29. As clearly stated by the Commission in AO 1987-25, although the "contribution" definition's restriction as to elections language does not apply to Section 441e, one may look to this definition to determine the value of a foreign national transaction. *See* AO 1987-25, 2 Fed. Election Camp. Guide (CCH) ¶ 5903 (Sept. 17, 1987), at 11,393.[37]

The foreign national prohibition at 2 U.S.C. § 441e states that it shall be unlawful for a foreign national "directly or through any other person to make a contribution of money or other thing of value." *See* 2 U.S.C. § 441e; *see also* 11 C.F.R. § 110.4(a)(1). Clearly Section 441e prohibits not only the direct provision of something of value, but also the indirect provision of something of value.[38] The provisions of the Act describing what may constitute an indirect provision of something of value are found in the definition of the term "contribution." *See*

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[37] The Commission has consistently looked to other provisions of the Act in determining the type of activity prohibited under Section 441e. For example, to clarify that both contributions and expenditures were prohibited by foreign nationals, in 1990 the Commission added the term "expenditure" to the foreign national regulations at Section 110.4. due to concern that the absence of this restriction would allow an unintended circumvention of the Act's prohibition. The Commission noted that, "while the Act does not explicitly refer to expenditure to foreign nationals, FECA generally prohibits expenditures when it prohibits contributions by a specific category or persons, thereby ensuring that the persons cannot accomplish indirectly what they are prohibited from doing directly . . . [t]o foreclose the indirect violation of Section 441e and implement the general intent of the statute, the Commission is now revising 11 C.F.R. § 110.4(a)(1) to explicitly prohibit expenditures by as well as contributions from foreign nationals." 54 Fed Reg. 48,581 (1989).

[38] Respondents further contend that the Commission's loan security provisions cannot apply to third parties. Therefore, it cannot apply to YBD-Hong Kong's provision of the security to Signet Bank for a loan to the NPF. *See* RNC Brief at 12-13; Barbour Brief 24-26. In support of this argument, Respondents again contend that the Commission cannot look at the totality of the transaction in determining if the provision of the loan security resulted in value to the RNC. Respondents again rely only on the candidate loan cases, MURs 4314 and 4000, in support of the argument. As previously discussed, the MURs cited by Respondents have no bearing on this case. *See, supra,* pp. 18-20. The very purposes of the loan and loan security provisions is to regulate the indirect provision of value. To contend, as Respondents do, that because the value was not provided directly to the RNC there is no violation, although it is unquestionable that the RNC received value from the transaction, would be to render the Act's loan security provisions meaningless.

2 U.S.C. § 431(8)(i), *see also* 11 C.F.R. § 100.7(a)(1)(i)(A). This definition makes clear that the posting of any form of security constitutes something of value for purposes of the Act. *See* 11 C.F.R. § 100.7(a)(1)(i) (a loan constitutes a contribution, and a guarantee, endorsement or any other form of security constitutes a loan).

Because the foreign national prohibition contemplates indirect contributions through other means, and the Act provides that the provision of loan security is an indirect provision of something of value, the provision of security by YBD – Hong Kong was an indirect contribution as contemplated by Section 441e.

d. The Commission need not trace the repayment funds to specific expenditures for non-federal elections to find a violation of 2 U.S.C. § 441e.

In a separate argument, Respondent Barbour claims that, even under the Commission's reading of the foreign national prohibition as applicable to non-federal elections, the Commission must show that the funds were spent in connection with specific non-federal elections. *See* Barbour Brief at 36-38. Respondent notes that because the RNC's soft-money account is used for various "non-election related expenses," such as party building activities, donations to the building fund, and for the non-federal share of the RNC's administrative expenses, the Commission must go "beyond the [RNC] account to 'trace' the foreign national's donation" through the RNSEC to a state or local election. *Id.* at 37.

In the present matter, the RNC was in the midst of an important election campaign at the national, state and local levels. As noted, in soliciting the loan security, the RNC expressly stated that the security was necessary to assist the RNC in the upcoming elections. During the period after receipt of the $1.6 million, from late October through the November election, the

RNC transferred a total $2,084,000 to Republican state parties and Republican state gubernatorial committees. These late October and early November transfers are consistent with the expressed purpose for the requested security. In light of the forgoing, and given the lack of any countervailing evidence, it appears that the loan proceeds transferred to the RNC in late October 1994 were used for election purposes.[39]

Moreover, to adopt Respondent's suggestion, that the funds be traced to their ultimate use, would be, in effect, to render the foreign national prohibition unenforceable as applied to non-federal accounts. It is common practice for federal party committees, whose major purpose is to have their candidates elected to political office across the full spectrum of government, to transfer non-federal election funds to their affiliated state party committees for disbursement in connection with state and local elections. These funds may also be transferred to yet another state entity by the state party before being expended for the election. Under these circumstances, it would be near impossible for the Commission to properly trace prohibited non-federal funds, rendering the foreign national prohibition unenforceable as it relates to non-federal accounts and, consequently, creating a significant loophole for the infusion of foreign money into the American electoral system.

e. Knowing and willful violations

The Act provides for two levels of violations: those requiring a finding of probable cause to believe that a violation has occurred pursuant to 2 U.S.C. § 437g(a)(4)(A), and those requiring a finding of probable cause to believe that a knowing and willful violation has occurred pursuant to

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[39] The RNC had between $5 million and $8 million dollars available to its non-federal account during this period. In addition to the above described transfers, during this period the RNC also transferred $500,000 from its non-federal account to its building fund and repaid an outstanding $1.6 million loan to its non-federal account from Signet Bank.

2 U.S.C. § 437g(a)(5)(A). "Knowing and willful" violations of the Act involve actions which are undertaken "with full knowledge of all the facts and a recognition that the action is prohibited by law." 122 Cong. Rec. H3778 (daily ed. May 3, 1976). The knowing and willful standard requires knowledge that one is violating the law. FEC v. John A. Dramesi for Congress Comm., 640 F. Supp. 985 (D.N.J. 1986). A finding of a knowing and willful violation thus requires examination of both the knowledge and the intent of the respondent. As discussed in the preceding section of this report, and as is summarized below, Respondents possessed the requisite knowledge of both the law and the facts necessary for a knowing and willful finding.[40]

i) Respondents knowingly and willfully benefited from foreign loan guarantee

As discussed at length in the General Counsel's Briefs, and as highlighted in the preceding sections of this report, it is beyond dispute that Respondents were aware that the posted security for the Signet loan originated from a foreign source, that the NPF could not unilaterally qualify for a commercial loan in the amount at issue, and that the purpose of the posted security was to provide the means for the NPF to repay its debt to the RNC and thereby allow the RNC funds for use in the 1994 elections.

[40] Even where the factual record does not clearly establish a respondent's knowledge of the law and the facts giving rise to the violations, a knowing and willful violation may be inferred "from defendants' elaborate scheme for disguising" their actions and their deliberate convey[ance of] information they knew to be false to the Federal Election Commission." *Id.* "It has long been recognized that 'efforts at concealment [may] be reasonably explainable only in terms of motivation to evade' lawful obligations." *Id.* at 214, *citing* Ingram v. United States, 360 U.S. 672, 679 (1959). In this matter Respondents' efforts to delay the transfer of $1.6 million in loan proceeds to the RNC until after the general election reporting period when the public is most likely to be paying attention to the elections, further demonstrates Respondents' deliberate efforts to evade the foreign national prohibition. *See* General Counsel's Briefs at 23 (for discussion of Respondents' effort to evade pre-election disclosure).

Moreover, the RNC and Mr. Barbour knew in 1994 that the Commission interpreted 2 U.S.C. § 441e as prohibiting foreign monies intended to influence non-federal elections. Indeed, just before the YBD loan guarantee was finalized, the Commission had applied the prohibitions of this statutory provision to both federal and non-federal elections in an enforcement matter. *See* MUR 2892 (closed with conciliation agreement in July, 1994). The RNC was made aware of the disposition of this matter through publication in the Federal Election Commission Record, provided to all party committees. *See* Federal Election Commission Record, Vol. 20, Number 9 (September, 1994), at 1.

The Commission's publication entitled **"Summary of Individual 1994 Contribution Limits,"** explicitly noted that

> *Contributions from all foreign nationals* who are not resident aliens of the United States (do not hold a "green card") are *prohibited* for all political activity in the U.S., federal, state and local.

Respondents not only received a copy of this publication, but distributed it to fundraisers as guidance on the foreign national prohibition. They also distributed to potential fundraisers, during the election cycle at issue, the Commission's May, 1994 pamphlet entitled "Foreign Nationals," which again warns that "foreign nationals are prohibited from making contributions or expenditures (including independent expenditures) in connection with any U.S. election (federal, state or local), either directly or through another person." Respondents' use of these publications as legal guidance for RNC fundraisers belies any claim that they either were not

aware of, or were confused about, the Commission's interpretation of the foreign national prohibition.[41]

The RNC and Mr. Barbour also knew in 1994 that, like a direct non-federal contribution, the indirect provision of something of value by a foreign national was a violation of 2 U.S.C. 441e. As discussed, in 1994 Section 441e clearly prohibited foreign nationals from contributing either "directly or through any other person." *See* 2 U.S.C. § 441e. There should be little doubt that Respondents further knew, or should have known, that the provision of a "guarantee, endorsement or any other form of security" constituted something of value. The definitions of "contribution" in the Act and the regulations clearly disclosed that "loans" constituted something of value for purposes of the Act's limitations and prohibitions, and that the term "loan" includes "a guarantee, endorsement or any other form of security." 2 U.S.C. § 431(8)(A) and 11 C.F.R. § 100.7(a)(1), 11 C.F.R. § 100.7(a)(1)(i). Like the Commission's regulations addressing Section 441e, the Commission's regulations addressing the provision of loan guarantees and security have been published yearly in book form as a special edition of the Federal Register available to all party committees. *See, e.g.*, 1994 Edition of the Code of Federal Regulations Title 11. Respondents had every reason to know that the provision of security for a loan

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[41] Further, the very first regulations promulgated by the Commission in 1977 contained at 11 C.F.R. § 110.4(a)(1) the following prohibition:

> A foreign national shall not directly or through any other person make a contribution, or expressly or impliedly promise to make a contribution, in connection with a convention, caucus, primary, general, special, or runoff election *in connection with any local, State or Federal public office.* (emphasis added.).

In 1989 this regulation was amended to add a prohibition against foreign national expenditures, again "in connection with any local, State or Federal public office."

Since its promulgation in 1977, this regulation has been published yearly in book form as a special edition of the Federal Register available to all party committees. *See, e.g.*, 1994 Edition of the Code of Federal Regulations Title 11.

substantially earmarked for the RNC's benefit would be viewed as the indirect provision of something of value to the RNC. But for the foreign security, there would have been no loan by Signet Bank to the NPF and no repayment to the RNC.

ii) Respondents' reliance upon advice of counsel defense does not excuse or mitigate the violations at issue

Respondents argue that because the NPF retained an attorney experienced in election law to review the Signet loan transaction, and that, because the attorney, E. Mark Braden, wrote a legal opinion stating that the transaction would not violate the Act, the Commission cannot find that the Respondents in the present matter knowingly and willfully violated the Act.

On October 6, 1994, Mr. Braden sent an opinion letter to Benton Becker, domestic counsel to Mr. Young, with a copy to NPF, in which he reviewed the then-proposed Signet loan to NPF. This letter did not cite the RNC or the RNSEC as the creditor involved in the NPF debt to be paid off by means of the Signet loan. Nor did it name YBD -- Hong Kong as the origin of the collateral for this loan or cite the language of 2 U.S.C. § 441e. Neither the RNC nor YBD -- Hong Kong was even mentioned in the letter. Rather, Mr. Braden focused only upon YBD -- USA as the origin of the collateral, stating that this entity's "participation in this loan transaction as a third party provider of collateral does not conflict with any provision of any federal election or campaign financing regulation." *See* Letter from Braden to Becker of 10/6/94, at 2. The letter further opined that "the transaction does not conflict with any provision of NPF's bylaws or articles of incorporation," and that "we are not aware of any federal or state statute which would prohibit YBD -- USA, Inc. from pledging its collateral to the Bank as security for the repayment of the proposed loan by NPF." *See id.*

Thus, the opinion letter did not address the issue presently before the Commission, namely YBD -- Hong Kong's participation in the Signet Bank loan and thus in the repayment by the NPF of its loan from the RNC's non-federal account. The author of the opinion letter cited by Respondents' counsel gave no advice about the participation of YBD -- Hong Kong in the subject loan transaction or about the effects of that participation upon the RNC's acceptance of the NPF's loan repayment. In fact, Section 441e's relevance to the transaction was not even mentioned in the opinion letter. In United States v. McLennan, 563 F.2d 943, 946 (9th Cir. 1977) the court stated: "Defendants claimed that their good faith reliance upon the advice of counsel negated the fraudulent intent that was an essential element of the charge. Advice of counsel is no defense unless the defendant gave his attorney all of the facts, and *unless counsel specifically advised the course of action taken by the defendant.*" (emphasis added.)

This defense is especially inapplicable is this matter, where Respondents were aware of material facts not addressed in the legal opinion, namely, the foreign source of the posted security. Reliance on "counsel's advice obviously must be reasonable and in good faith" Safir v. Klutznick, 526 F. Supp. 921, 934 (D.D.C. 1981). The court in Safir, in overturning the Maritime Subsidy Board's mitigation of a subsidy recipient's predatory practices and reduction of the amount of the subsidy recovery, explained that "any ordinary businessman, not to mention 'astute' [recipient] shipping executives, should have known that [recipient's] concerted effort to restrain U.S. flag competition was illegal. Reliance on counsel's advice that [recipient] could lower its prices to a predatory level . . . should not operate to mitigate subsidy recoveries." *Id.* Like the shipping company in Safir, Respondents can not in good faith rely on the defense of counsel in conducting a transaction they knew was in direct conflict with Section 441e .

Respondents argue, however, that Mr. Braden had all material facts before him when he reached the legal conclusions in his written opinion, including the facts that YBD -- Hong Kong would provide

YBD -- USA with the funds to be posted as collateral for the NPF loan from Signet Bank, and that the NPF would use some of the proceeds to repay its debt to the RNSEC. In support of this argument, counsel have attached to the brief submitted on behalf of Mr. Barbour a Declaration of E. Mark Braden in which Mr. Braden states:

> Among other facts, I was aware of the following:
>
> - - -
>
> b) YBD(USA) would obtain the funds to purchase the collateral from its parent, a Hong Kong company.
>
> c) A significant portion of Signet loan proceeds would be used by NPF to repay part of NPF's existing debts to the Republican National State Election Committee.

See Declaration of E. Mark Braden, dated February 19, 1999, at 4.

It is the position of this Office that no matter what information Mr. Braden may have had when writing the opinion letter, that letter did not, as stated above, explicitly address the issue before the Commission in this enforcement matter, namely the involvement of foreign monies in the NPF repayment to the RNC. It addressed YBD-- USA's participation in the Signet loan transaction, not that of YBD -- Hong Kong; it stated that the transaction did not conflict with NPF's bylaws or articles of incorporation, not that it did not conflict with the RNC's legal responsibilities; and it addressed a pledge by YBD -- USA of security, not the original, foreign source of that security. In short, because this letter did not address any of the material elements of the violation in this matter, elements that were known to Respondents, Mr. Braden did not "specifically advise[] the course of action taken by [Respondents]," McLennan, 563 F.2d at 946, and Respondents could not have "reasonabl[y] and in good faith" relied on this advice. Safir, 526 F. Supp. at 934.

Respondents additionally allege that four sets of attorneys reviewed the transactions' legality, including RNC counsel, but fail to provide any evidence of these counsels' legal conclusions. *See* Barbour Brief at 56. The RNC, as a national party committee, retains in-house counsel versed in the FECA and the Commission' Regulations. Yet, Respondents cite to no separate legal opinions regarding the transactions, nor did Respondent RNC seek an advisory opinion regarding the transactions' legality as it has many times in the past concerning other contemplated activities.

III. DISCUSSION OF CONCILIATION AND CIVIL PENALTY

IV. STATUTE OF LIMITATIONS CONCERNS

Under the five year statute of limitations at 28 U.S.C. § 2462, the Commission may be barred from filing suit seeking monetary remedies after October 20th of this year, five years from the date the $1.6 million was transferred from the NPF to the RNC. Assuming the Commission approves the General Counsel's probable cause to believe recommendations in this matter and seeks conciliation, Respondents will be statutorily provided with a minimum thirty-day period to reach conciliation. *See* 2 U.S.C. § 437g(a)(4)(A)(i). Accordingly, this Office requests the

Commission's expeditious review of this matter. Should the Commission proceed in this matter, this Office will make all efforts to reach conciliation, or file civil suit for relief in this matter should conciliation fail, before expiration of the statute of limitations.

V. RECOMMENDATIONS

1. Find probable case to believe that the Republican National Committee and Alec Poitevint, as treasurer, knowingly and willfully violated 2 U.S.C. § 441e.

2. Find probable cause to believe that Haley R. Barbour knowingly and willfully violated 2 U.S.C. § 441e.

3. Approve the attached conciliation agreements and appropriate letters.

9/8/99
Date

Lawrence M. Noble
General Counsel

Attachments:
1. RNC Conciliation Agreement
2. Haley R. Barbour Conciliation Agreement

Staff assigned: Jose M. Rodriguez
Anne Weissenborn