In the Matter of

Rhode Island Republican Party and	)	
Merrill C. Drew, as treasurer	)	**MUR 5369**
Lincoln Chafee for U.S. Senate and	)	
William R. Facente, as treasurer	)	

STATEMENT OF REASONS

COMMISSIONER SCOTT E. THOMAS

In MUR 5369, the General Counsel's Report recommended the Commission find reason to believe the Rhode Island Republican Party ("the Party Committee") made, and the Lincoln Chafee for U.S. Senate Committee ("the Chafee Committee") received, an excessive coordinated party expenditure in violation of the Federal Election Campaign Act, as amended ("the Act"). In reaching this conclusion, the General Counsel's Report presented considerable evidence suggesting that expenditures made by the Party Committee in support of Senator Chafee were coordinated with the Chafee campaign. The General Counsel's Report recommended the Commission investigate this matter.

Chair Weintraub and Commissioners Mason, Smith, and Toner rejected the legal analysis and recommendations of the General Counsel's Report. They believed there was insufficient evidence of coordination and inadequate notice to respondents that their activity constituted a violation of the Act. As a result, they voted to find no reason to believe that respondents violated the Act.

The undersigned agreed with the General Counsel's legal analysis and reason to believe recommendation. In my view, the evidence of coordination presented in the General Counsel's Report more than justified a reason to believe finding. Indeed, if the use of a common vendor described in the General Counsel's Report is accurate and legally permissible according to a majority of the Commission, the Act's contribution limits will be seriously threatened.

Although the facts and the law support a reason to believe finding in this matter, I could not support the recommendation to conduct an investigation and possibly pursue civil penalties. In view of the Commission's inconsistent history in enforcing (or, more

accurately, not enforcing) the coordinated party expenditure provisions of the Act, I believe it would be inappropriate to single out these particular respondents in an enforcement action. I had hoped, however, that by making a reason to believe finding here, the Commission would send a signal to the regulated community that the activity at issue in MUR 5369 raised serious questions of coordination and that the Commission would, once again, enforce this important provision of the Act.

I.

During the 2000 United States Senate race in Rhode Island, the Party Committee made over $114,000 in expenditures on advertisements in support of Senator Lincoln Chafee. The Party Committee made these expenditures for advertising time and production costs to McAuliffe Media and Pilgrim Films, and initially reported these expenditures as generic operating expenditures on its 2000 October Quarterly Report. After several requests for additional information regarding these expenditures from the Commission's Reports Analysis Division, the Party Committee stated the expenditures were actually "Uncoordinated Expenditure[s] for [a] Federal Level Election." *See* General Counsel's Report (Attachment 2).

Over the next year, the Reports Analysis Division attempted to discern the nature of these expenditures and assist the party in properly reporting them. At the end of that time, the Party Committee still had not amended its reports. As a result, the Reports Analysis Division referred the matter to the Office of General Counsel for an apparent reporting violation.

In light of the Party Committee's uncertainty on how to report the questioned expenditures and their failure to amend the original October Quarterly Report, the Office of General Counsel sought to rule out that the expenditures were coordinated and not independent. The Act limits the contributions that may be made by political party committees to or on behalf of candidates for federal office. For the most part, such contributions are limited to $5,000 per election. *See* 2 U.S.C. § 441a(a)(2)(A). For Senate races, the national party and its senatorial committee counterpart share an overall $17,500 limit for the election cycle. *See* 2 U.S.C. § 441a(h).

Apart from the contribution allowances, the Act permits the national and state committees of the political parties to make so-called coordinated expenditures in connection with the general election campaigns of the parties' candidates. *See* 2 U.S.C. § 441a(d); 11 C.F.R. § 110.7. The dollar limitations on coordinated party expenditures are determined by a set formula.[1] National party committees in the 2000 election cycle

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[1] Section 441a(d) provides in pertinent part:

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions. . .

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—
(A) in the case of a candidate for election to the office of Senator, or

could make coordinated expenditures of up to $67,560 for a United States Senate candidate in Rhode Island. The state party also could spend a like amount on party coordinated expenditures.[2]

Taken together, the state party's contribution and coordinated expenditure allowances, and the national party's contribution and coordinated expenditure allowances provide a healthy role for the party structure. When the combined limits are exceeded by a party committee, the additional amounts are treated as excessive contributions. This stems from the language of 2 U.S.C. § 441a(a)(7)(B)(i) which treats any expenditure made "in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees , or their agents" as a contribution. Once the special ("Notwithstanding any other provision of law") coordinated expenditure allowance of §441a(d) is used, the contribuion limits apply.

The Act also requires that political party committees report all contributions or coordinated expenditures made under § 441a(a), (d) and (h) to aid in monitoring adherence with these limits. 2 U.S.C. § 434(b)(6)(B). Candidate committees must report the receipt of contributions, but not allowable party coordinated expenditures. 2 U.S.C. § 434(b)(3)(B); *see also* FEC Campaign Guide for Congressional Candidates and Committees (2002), p.26.

On May 20, 2003, the Office of General Counsel submitted a report for Commission consideration that contained a factual and legal analysis of the issues raised in MUR 5369. The report found the expenditures for the Party Committee's advertisement in Rhode Island may have constituted coordinated party expenditures on behalf of the Chafee campaign: "It appears to this Office that there is reason to believe the expenditures at issue were coordinated with the Chafee Committee." General Counsel's Report at 12. In reaching this finding, the report pointed out that the Party Committee and the Chafee campaign used the same media strategist and ran advertisements during the same time period featuring the same messages and similar language.

In summary, the General Counsel's Report stated "[I]f the expenditures in question are found to be coordinated, it appears that [the Party committee] will have made, and the Chafee Committee will have received, an excessive contribution of at least $42,229 and as much as $109,789."[3] The report concluded "the available information

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of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000. . . .

[2] FEC Record at 14-15 (March, 2000). As is often the practice of both major parties, the congressional campaign committee of the party could be authorized by the national and state party committees to expend their respective § 441a(d)(3) allowance on their behalf. *See FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981)("*FEC v. DSCC*").

[3] Footnote 15 of the General Counsel's Report explained:

indicates that the disbursements at issue were unreported coordinated expenditures in excess of the [Party] Committee's coordinated spending authority and were, as such, excessive contributions to the Chafee Committee." General Counsel's Report at 14. Based upon the foregoing, the report recommended the Commission find reason to believe that the Party Committee violated 2 U.S.C. § 441a(a)(2)(A) by making, and that the Chafee Committee violated 2 U.S.C. § 441a(f) by receiving excessive in-kind contributions. In addition, since the Party Committee did not report any of these disbursements as in-kind contributions, the report recommended the Commission find reason to believe the Party Committee violated 2 U.S.C. § 434(b). Finally, the report recommended the Commission investigate this matter.

A motion to adopt the Office of General Counsel's reason to believe recommendations but take no further action and close the case failed to secure the four affirmative votes needed. 2 U.S.C. § 437g(a)(2). Commissioners Thomas and McDonald supported the motion while Chair Weintraub and Commissioners Mason, Smith and Toner opposed. The Commission then voted 4-2 to find no reason to believe any violations occurred. Chair Weintraub and Commissioners Mason, Smith and Toner voted in the affirmative, while Commissioners Thomas and McDonald opposed.

II.

This case presented commissioners with an opportunity to put behind years of bad decisions in the area of party coordinated expenditures. Beginning in 1999, several commissioners veered from the long-established approach of the agency when determining whether certain coordinated communications should be treated as subject to the limits set forth at 2 U.S.C. § 441a(d). Four commissioners announced in connection with certain 1996 presidential audits that they would not follow the analysis set forth in Advisory Opinion 1985-14, which applied the 'in connection with' and 'for the purpose of influencing' statutory terms (at 2 U.S.C. §§ 441a(d) 431(9)(A)) under the 'electioneering message' moniker.[4] No majority guidance was given regarding what analysis was to be used instead. Shortly thereafter, in MUR 4378 involving coordinated NRSC ads attacking 1996 Senate candidate Max Baucus, those same four commissioners

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> The $109,798 figure is calculated by subtracting the allowable $5,000 direct contribution limit from the $114,789 expenditure. The $42,229 figure is calculated by subtracting both the $5,000 direct contribution limit and the $67,560 coordinated contribution limit from the $114,789 expenditure. The larger number would apply if the [Party Committee] is found to have assigned its coordinated spending authority to the RNC prior to making the expenditures in question. The available information indicates that the [Party Committee] assigned all of its coordinated spending authority to the Republican National Committee ("RNC"), leaving the Committee able to make only contributions subject to the 441(a) limitations and rendering any additional coordinated expenditures excessive contributions.

General Counsel's Report at 13 n.15.

[4] *See* Statement of Reasons of Commissioners Sandstrom, Elliott, Mason, and Wold in Audits of Dole for President Inc., Clinton/Gore `96 Primary Committee Inc., *et al*. (June 24, 1999). *Compare* Statement for the Record of Commissioner Thomas in Audits of Clinton/Gore and Dole/Kemp Campaigns (July 1999), fec.gov/members/thomas.

voted against finding violations of the coordinated expenditure limit, relying on their earlier pronouncement that the 'electioneering message' concept was dead.[5] A long list of strange votes in various enforcement cases followed.[6]

The most unfortunate part of this is that several election cycles of profligate soft money spending for hard-hitting candidate-specific ads have drifted by with virtually no response from the FEC. It didn't have to be this way. Had the Commission voted to treat those 1996 cycle ads as violations, there would not have been the flood of soft money for similar ads in the 2000 and 2002 election cycles.[7] Had the Commission voted to treat the 2000 cycle ads as violations, at least there would not have been a flood of soft money used for such ads in the 2002 cycle.[8]

While I myself have noted the Commission's scattered votes on the aforementioned enforcement cases warrant prosecutorial discretion in terms of launching investigations of coordination and seeking penalties, I always have taken the position that commissioners should come out of the fog and vote to find these obvious coordinated expenditures to be such. Unless a majority of commissioners votes to find 'reason to believe' or 'probable cause to believe' these situations cross the line, the regulated community can argue such coordinated expenditures are unlimited and payable only with hard money. Only with such votes can the agency signal that notwithstanding the preceding confusion, from this point on the law covers these circumstances.[9]

In this case, four of my colleagues even went out of their way to vote to find 'no reason to believe' any violation occurred. This suggests they believed as a matter of law there was no violation. As noted later, the evidence of coordination here is very strong, and the content in the ad leaves no doubt this was "in connection with" and "for the purpose of influencing" a specific election. It is hard for me to conceive of a legal basis for saying at the 'reason to believe' stage this conduct did not constitute coordinated expenditure activity.

Some of my colleagues have clung to a concept—never embraced by a court of law—that coordinated party expenditures covered by § 441a(d) require 'express

[5] *See* Statement of Reasons of Commissioners Thomas and McDonald in MUR 4378 (Aug. 9, 1999), fec.gov/members/thomas.
[6] *See* Statement of Reasons of Commissioner Thomas in MUR 4994 (Dec. 19, 2001), fec.gov/members/thomas, which outlines the post-`98 tortured history in this area.
[7] The votes on the first 1996 cycle matters came too late to give guidance for the 1998 cycle.
[8] See Statement of Reasons of Commissioner Thomas in MUR 4994 (Dec. 19, 2001).
[9] While it is true that a vote to find 'reason to belive' a violation occurred in the instant matter would come too late to affect 2002 cycle activity, and that 2004 cycle activity will be covered by the FEC's new party coordinated expenditure rules, there is still value in casting judgment on activity that in hindsight was plainly across the line. Parties should not be able to make unfettered claims their actions were legal when they were not.

advocacy.' Indeed, several court decisions point in the opposite direction.[10] In my view, there never has been a plausible reason for voting 'no reason to believe' or 'no probable cause to believe' because the coordinated ads in question do not contain express advocacy.

The impact of litigation in Colorado Republican Party matter should not be overstated either.[11] The Commission unanimously approved a statement during the litigation to the effect that no one should assume the coordinated expenditure limits were not fully enforceable.[12] Party committees took a risk if they proceeded with clearcut coordinated expenditures hoping the Supreme Court ultimately would find the statute unconstitutional. Even more plain was that party committees outside the Tenth Circuit had no basis whatsoever to assume the circuit court's May 5, 2000 ruling against the statute offered any protection. As a matter of law, the litigation in the Colorado Republican Party case in no way precluded commissioners voting to find 'reason to believe' or 'probable cause to believe' when confronted with apparent violations.

III.

As discussed above, at issue in MUR 5369 was whether party-paid television advertisements in Rhode Island, clearly intended to influence elections to the United States Senate and apparently coordinated with the parties' nominees for United States Senator, constituted contributions or coordinated party expenditures subject to the limitations of 2 U.S.C. §§ 441a(a), (d) and (h). The Office of General Counsel presented

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[10] For example, the Supreme Court in *Buckley* plainly stated that its "express advocacy" test did not apply to coordinated expenditures. When analyzing former 18 U.S.C. § 608(e), the independent expenditure limit struck down in *Buckley*, the Court plainly stated:

> The parties defending § 608(e)(1) contend that it is necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of *paying directly for media advertisements or for other portions of the candidate's campaign activities*. They argue that expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. Yet *such controlled or coordinated expenditures are treated as contributions* rather than expenditures under the Act. [footnote omitted]. Section 608(b)'s contribution ceilings . . . prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions. *By contrast, § 608(e)(1) limits expenditures for express advocacy of candidates made totally independently of the candidate and his campaign*.

424 U.S. at 46, 47 (emphasis added). *See Buckley* at 78-80 (defining coordinated expenditures as "contributions" and defining non-coordinated "expenditures" covered by former 2 U.S.C. §434(e) to reach only communications containing express advocacy.). *See also FEC v. Christian Coalition*, 52 F. Supp.2d 45, 86 (D.D.C. 1999)("Expressive coordinated expenditures are not limited to 'express advocacy'" in light of *Buckley*); *McConnell v. FEC*, 251 F. Supp.2d 176, 249 (D.D.C. 2003)(three-judge court)("Plaintiffs also contend that 'the First Amendment limits the coordination concept to express advocacy,' and for that reason Section 202 should be found unconstitutional. Chamber/NAM Br. At 12. Although Plaintiffs cite to FEC Commissioner Smith for support, *id*., this view has been rejected by courts in this Circuit").

[11] *See FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001), for a summary of this seemingly endless saga.

[12] *See FEC Record*, p. 6 (July 2000). In pertinent part, the Statement explained: "[A]nyone who chooses to act in contravention of section 441a(d)(3)—within or without the Tenth Circuit—before the Supreme Court rules in *Colorado* could be subject to liability for violating the statute if the *Colorado* decision is reversed."

considerable evidence regarding apparent coordination between the Rhode Island Republican Party and the Chafee campaign. General Counsel's report at 7-9. Based upon its findings, the Office of General Counsel recommended the Commission find reason to believe respondents violated various provisions of the Act and conduct an investigation of this matter primarily directed at proving coordination.

I agreed with the Office of General Counsel's 'reason to believe' recommendations. I believe the General Counsel's Report presented facts indicating that the Party Committee's advertising campaign may have been coordinated with the Chafee Committee. In my view, virtually simultaneous expenditures to a common media strategist and ads that involved similar themes and similar language are sufficient to meet the low threshold of reason to believe.

First, it is clear the Party Committee and the Chafee Committee used the same media vendor during the 2000 general election for the United States Senate. The General Counsel's Report points out the Party Committee's "expenditures in question—for 'Production/Ad Time' and 'Production Costs'—were made to McAuliffe Message Media ("McAuliffe") and Pilgrim Films."[13] General Counsel's Report at 7. The General Counsel's Report further points out that "Chafee Committee disclosure reports revealed that McAuliffe was also Sen. Lincoln Chafee's media strategist." *Id.* The Commission has long held the existence of a common media vendor will jeopardize the independence of an expenditure. *See FEC v. National Conservative Political Action Committee, ("NCPAC")* 647 F.Supp. 987 (S.D.N.Y. 1986)(Court finds there was coordination where NCPAC, an "independent" committee, used the same vendor as the candidate committee that was aided by NCPAC's expenditures). *See also* Advisory Opinion 1979-80, 1 Fed. Elec. Camp. Fin Guide (CCH) ¶ 5469 ("the time-buyer's continued work for NCPAC would compromise NCPAC's ability to make independent expenditures in opposition to the Democratic candidate."); Advisory Opinion 1982-20, 1 Fed. Elec. Camp. Fin Guide (CCH) ¶ 5665.

Second, it is clear the Party Committee and the Chafee Committee were using the same media strategist during the same time period. This is not an instance, for example, where a campaign had used a media strategist in the 2000 election cycle and the Party Committee used the same media strategist in the 2002 election cycle. The General Counsel's Report indicates both entities made payments to McAuliffe Media during the same time period. Indeed, it appears the Chafee Committee made over $450,000 in payments to McAuliffe Message Media at the same time the Party Committee was making $114,000 in payments to McAuliffe Message Media.

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[13] In a footnote, the Office of General Counsel notes that "McAuliffe Media and Pilgrim Films appear to be the same entity. *See Ad Spotlight Extra*, National Journal's Congress Daily, July 14, 2000." General Counsel's Report at 7 n.6.

RHODE ISLAND REPUBLICAN PARTY

PAYEE	COMMITTEE'S DESCRIPTION OF PURPOSE	DATE	AMOUNT
McAuliffe Media	**Production/Ad time**	**8/28/2000; 8/25/2000**	**$106,210.00**
Pilgrim Films	**Production Costs**	**9/10/2000**	**$8579.00**
		Total:	**$114,789.00**

LINCOLN CHAFEE FOR U.S. SENATE

PAYEE	COMMITTEE'S DESCRIPTION OF PURPOSE	DATE	AMOUNT
McAuliffe Message Media	**Media Placement**	**8/30/2000**	**$59,780.00**
McAuliffe Message Media	**TV Media Purchase**	**9/06/2000**	**$88,000.00**
McAuliffe Message Media	**TV Media Buy**	**9/12/2000**	**$66,000.00**
McAuliffe Message Media	**TV Media Buy**	**9/14/2000**	**$22,000.00**
McAuliffe Message Media	**TV Media Buy**	**9/20/2000**	**$110,000.00**
McAuliffe Message Media	**TV Media Buy**	**9/26/2000**	**$110,000.00**
		Total	**$455,780.00**

General Counsel's Report at 8. Moreover, it appears "[at] the time of the [Party Committee's] expenditures—late-August 2000—the Chafee Committee had been working with McAuliffe Message Media for at least six months." General Counsel's Report at 7-8.

Finally, it appears the media strategist used by the Party Committee and the Chafee campaign produced similar advertisements with similar messages and similar language for both the Party Committee and the Chafee campaign. Illustrating the common message of the Chafee campaign, the General Counsel's Report discussed the scripts from two advertisements entitled "Undaunted" and "Tradition." "Undaunted" was paid for by the Chafee Committee, while "Tradition" was paid for by the RIRP (emphases added):

> "Undaunted": A man of reason and moderation, *independent* minded and forward looking, Senator Lincoln Chafee's character and leadership is working for Rhode Island. A sense of duty and exemplary executive experience, Chafee knows how to get things done. Undaunted in his efforts – protecting our environment, pushing for a *patients' bill of rights*, Medicare *prescription drug coverage for all beneficiaries.* A man of conviction, a leader. Senator Lincoln Chafee – *a tradition of trust.*
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> "Tradition": For Lincoln Chafee hard work, integrity, and caring for others aren't just political slogans – *they're a tradition.* Senator Lincoln Chafee puts those values to work every day. For a social security lock box that stops politicians from raiding the trust fund. Ending the marriage tax penalty on working couples. He voted against his own party for a real *patients' bill of rights* and a *prescription drug benefit* that gives seniors the drugs they need at a price they can afford. Tell Senator Chafee to keep up his *independent* fight for Rhode Island.

General Counsel's Report at 8-9 (emphasis added). With its emphasis on "tradition," "patient's bill of rights," "prescription drug benefits," and "independent" leadership, the common use of these words and phrases in the twin advertisements quoted above does not appear to be coincidental; rather, it appears to be the work of a common media strategist incorporating the message and theme of his candidate/client into the advertisement of his party committee/client.

The timing of the disbursements by the Rhode Island Republican Party, the similarity of the content of the advertisements, and the use of a common media strategist lead me to agree with the General Counsel's recommendation to find reason to believe there was coordination in this matter. In so finding, I am mindful of the fears expressed by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976)("*Buckley*"). In *Buckley*, the Supreme Court upheld limits on contributions to federal candidates but ruled a similar limitation on independent expenditures was unconstitutional. The Court recognized, however, that its ruling created many opportunities for evasion of the contribution limitations. If a would-be spender could pay for a television advertisement provided by a candidate, for example, this "coordination" would convert what is supposed to be an "independent" expenditure into nothing more than a disguised contribution. Indeed, the *Buckley* Court warned the contribution limitations would become meaningless if they could be evaded "by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities." *Id*. at 46.

In order to "*prevent attempts to circumvent the Act through* prearranged or *coordinated* expenditures amounting to disguised contributions," *id*. at 47 (emphasis added) the *Buckley* Court treated "coordinated expenditures. . . as contributions rather than expenditures." *Id.* at 46-47 (emphasis added). Thus, the *Buckley* Court drew a specific distinction between expenditures made "*totally independently* of the candidate and his campaign" and "coordinated expenditures" which could be constitutionally regulated. The Court defined "contribution" to "include not only contributions made directly or indirectly to a candidate, political party, or campaign committee . . . but also *all* expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." *Id.* at 78 (emphasis added). By failing to find coordination in a matter such as this, where the timing, content, and use of a common media strategist strongly suggest that expenditures were not made "totally independently" of the candidate, a majority of the Commission has missed an important opportunity to enforce the contribution limitations of the Act.

IV.

In *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado II")***,** the Supreme Court upheld the coordinated expenditure limitation for party committees. The Court held that "a party's coordinated expenditures, unlike expenditures *truly independent*, may be restricted to minimize circumvention of contribution limits." 533 U.S. at 465 (emphasis added). As a result, party committees cannot spend unlimited amounts on political advertisements coordinated with candidates.

In issuing its ruling in *Colorado II*, the Court warned that experience "demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced." 533 U.S. at 457. I voted to find reason to believe in this matter to demonstrate that candidates, donors, and parties could not circumvent the contribution limits through the simple device of hiring a common media strategist to create similar advertisements with common themes, messages and language. Unfortunately, a majority of the Commission may have left the regulated community with the opposite impression.

August 25, 2003	**/ s /**
Date	Scott E. Thomas Commissioner