



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
) MUR 6502
Nebraska Democratic Party, et al.)
)

**STATEMENT OF REASONS
OF VICE CHAIR ELLEN L. WEINTRAUB AND
COMMISSIONERS CYNTHIA L. BAUERLY AND STEVEN T. WALTHER**

The Nebraska Democratic Party (“NDP”), a state party committee,¹ ran a series of television and radio advertisements featuring Senator Ben Nelson in July and September 2011. The ads featured audio and video clips of Senator Nelson discussing his work in the Senate and various policy issues. The Chairman of the Nebraska Republican Party filed a complaint alleging that the ads violated the Act’s limits on party coordinated communications and/or other types of in-kind contributions.² The Office of General Counsel (“OGC”) recommended that the Commission find no reason to believe that the ads violated the relevant provisions of the Act.³ We supported OGC’s recommendation because the record did not contain sufficient information that the ads were “for the purpose of influencing” a Federal election, as required by the Act.⁴

¹ NDP was previously known as the “Nebraska State Democratic Central Committee.”

² The ads cost over \$450,000 in total, which would have exceeded the applicable \$126,100 limit on party coordinated communications (equal to 2 cents for every voting age citizen of Nebraska), *see* 2 U.S.C. § 441a(d)(3)(A)(i), and the generally applicable \$5000 contribution limit for political parties, *see id.* § 441a(a)(2)(A).

³ *See* First General Counsel’s Report (“FGCR”) at 13.

⁴ The Commission voted unanimously to find no reason to believe that NDP violated 2 U.S.C. §§ 441a(a) and 441a(d) or that Ben Nelson 2012 (“Nelson Committee”) and Senator Ben Nelson violated 2 U.S.C. § 441a(f). *See* Certification in MUR 6502, dated July 10, 2012 (“July 10 Cert.”). The Complaint also alleged that NDP’s ads contained legally insufficient disclaimers. *See* 2 U.S.C. § 441d; 11 C.F.R. § 110.11. Although NDP admitted that it had omitted certain information from the disclaimer in one of its ads, it represented that the omission was inadvertent. *See* NDP Response at 4. Consistent with past practice, OGC recommended dismissal based on the Commission’s prosecutorial discretion, with a letter of caution. *See* FGCR at 14; *Heckler v. Chaney*, 470 U.S. 821 (1985). We supported this recommendation as well, as did all of our colleagues. *See* July 10 Cert.

12044320529

The Act defines a "contribution" to include "any gift, subscription, loan, advance or deposit of money or anything of value made by any person *for the purpose of influencing any election for Federal office.*"⁵ An expenditure made for the purpose of influencing a Federal election is treated as a contribution when made "in cooperation, consultation, or concert with, or at the request or suggestion of," a candidate, his or her authorized political committee, or their agents.⁶

All contributions to candidates are subject to the limits and prohibitions of the Act. Contributions to candidates by state and local party committees are generally subject to a \$5000 limit;⁷ however, in a Senate race, a party committee may spend up to "2 cents multiplied by the voting age population of the State" on "party coordinated communications."⁸ Our regulations set forth a three-prong test for determining whether a communication is a party coordinated communication: (1) the communication is paid for by a political party committee; (2) the communication satisfies at least one of three content standards set forth in 11 C.F.R. § 109.37(a)(2); and (3) the communication satisfies at least one of the conduct standards set forth in 11 C.F.R. § 109.21(d).⁹

In this case, there is no dispute as to the payment and conduct prongs; only the content prong is at issue.¹⁰ The content prong requires one of three circumstances to be present: 1) republication, dissemination or distribution of candidate campaign materials; 2) a public communication containing express advocacy; or 3) a public communication that refers to a clearly identified Federal candidate, that was publicly distributed or disseminated within 90 days before a primary or general election, and that was directed to voters in the relevant jurisdiction.¹¹ We concur fully with the OGC's application of each of these standards,¹² and therefore supported the recommendation that NDP's ads were not party coordinated communications under our regulations.¹³

However, even though an ad may not be covered by our coordination regulations, it may still be a contribution under the Act. As we have previously explained in the context of non-party coordinated communications, the Commission's coordination regulations "do[] not

⁵ 2 U.S.C. § 431(8)(A)(i) (emphasis added).

⁶ *Id.* § 441a(a)(7)(B).

⁷ *Id.* § 441a(a)(2)(A).

⁸ *Id.* § 441a(d)(3)(A)(i); 11 C.F.R. § 109.37(a).

⁹ *See* 11 C.F.R. § 109.37.

¹⁰ FGCR at 10; *see also* NDP Response at 2-3; Nelson Committee Response at 3.

¹¹ 11 C.F.R. § 109.37(a)(2)(i)-(iii).

¹² *See* FGCR at 10-13.

¹³ *See* July 10 Cert.

forestall application of the statutory definition of 'contribution'. . . ."¹⁴ Thus, for example, if NDP had conceded that its ads were election-related, the fact that the ads do not meet the content prong of section 109.37(a) would not have prevented them from being treated as contributions. The Act does not in fact permit another result, and the Commission has no authority to negate its clear requirements by regulation.¹⁵

Here, however, the record does not indicate that NDP's ads were "for the purpose of influencing" a Federal election. On the contrary, NDP denies that the ads were intended to influence the 2012 election.¹⁶ The ads were designed to inform Nebraskans about issues before Congress and featured Senator Nelson because he was the only Nebraska Democrat directly involved in the Federal debate.¹⁷ Moreover, the ads stopped running several months before the primary election and more than a year before the general election was scheduled to take place.¹⁸ Nor do the ads themselves make any reference to an election, through the use of express advocacy or its functional equivalent, or otherwise.¹⁹ Finally, to the extent there is any overlap between the ads and statements by Senator Nelson's campaign, the common themes consist only of generic slogans, such as the exhortation not to balance the budget "on the backs of seniors," which are common throughout our political discourse.²⁰

The main evidence in the record to suggest that the ads were "for the purpose of influencing" a Federal election is the fact that Senator Nelson, then a candidate,²¹ appears in them to discuss Federal policy. Senator Nelson's appearance in the ads is certainly relevant to our analysis, but not necessarily dispositive, particularly in the case of ads produced and aired by a political party committee like NDP. As the Supreme Court has recognized, while candidates plainly have a close association with political parties, the "parties . . . perform functions more

¹⁴ Advisory Opinion Request 2011-23 (American Crossroads), Statement of Chair Cynthia L. Bauerly and Commissioner Ellen L. Weintraub, Dec. 1, 2011, *available at* http://www.fec.gov/members/weintraub/statements/AO_2011-23_American_Crossroads_CLB_ELW_Statement.pdf; *accord* Advisory Opinion Request 2011-23 (American Crossroads), Statement of Commissioner Steven T. Walther, Dec. 1, 2011 at 2-3, *available at* http://www.fec.gov/members/walther/statements/Walther_Statement_AO_2011-23_American_Crossroads.pdf.

¹⁵ *See FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) (Commission may not through rulemaking or adjudication construe the Act in a manner "inconsistent with [its] statutory mandate or that frustrate[s] the policy that Congress sought to implement"); *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008) (striking down previous coordinated communication regulations as inconsistent with the Act).

¹⁶ *See* NDP Response at 2; Nelson Committee Response at 2.

¹⁷ *Id.*

¹⁸ The ads ran from mid-July to mid-September 2011. Nelson Committee Response at 1; NDP Response at 1; *accord* Factual & Legal Analysis (NDP) ("F&LA") at 2; Complaint at 3.

¹⁹ F&LA at 2-4.

²⁰ *See id.* at 12-13.

²¹ Senator Nelson filed a Statement of Candidacy with the Commission in 2006. *See* F&LA at 2. On December 27, 2011, he announced that he would not seek reelection, *id.* at n.3; he was not a candidate in the May 15, 2012 primary election.

12044320531

complex than simply electing candidates.”²² The task of a party is to advocate for “its members’ views about the philosophical and governmental matters that bind them together,” with the hope of “creating a government that voters can instruct and hold responsible for subsequent success or failure.”²³ A party’s major officeholders thus are central to its mission, regardless of their status as candidates. Not only are such individuals expected to be leaders of their parties; they also frequently act as party spokespersons representing the common views of party members.

Senator Nelson exemplifies this party/officeholder relationship. Without question, he is one of the most successful Democratic officeholders in Nebraska. Not only has he twice been elected to the Senate, he also served two terms as the state’s governor. Currently, he is the only Democratic statewide elected official and the only Democratic member of the state’s congressional delegation. He is uniquely situated as the state’s only Federal elected official who can speak to all of the issues of concern to members of the state Democratic party. Thus, under these circumstances, Senator Nelson’s advocacy of issues affecting Nebraskans at the Federal level would appear to be the most powerful and persuasive of any Democratic voice in Nebraska; indeed, it is difficult to imagine who else could speak as effectively for NDP on these issues. It therefore requires more than Senator Nelson’s appearance in NDP’s ads to discuss issues before Congress to convince us that the ads were “for the purpose of influencing” a Federal election.

²² *FEC v. Colorado Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 449 (2001).

²³ *FEC v. Colorado Republican Fed. Campaign Comm. (Colorado I)*, 518 U.S. 604, 616-16 (1996) (Breyer, J.) (controlling opinion); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 216 (1986) (political parties translate “common principles ... into concerted action, and hence to political power in the community”).

12044320532

MUR 6502 (Nebraska Democratic Party)
Statement of Reasons of Vice Chair Weintraub and Commissioners Bauerly and Walther

Nevertheless, this was a close case. Any lingering doubts that we had were properly resolved in NDP's favor, given that NDP was still required to pay for its ads with "hard" money subject to the limitations and prohibitions of the Act – thereby minimizing any increased risk of *quid pro quo* corruption.²⁴ For these reasons, we supported OGC's recommendation.

8/15/12
Date

Ellen L. Weintraub
Ellen L. Weintraub
Vice Chair

8/15/12
Date

Cynthia Bauerly
Cynthia L. Bauerly
Commissioner

8/15/12
Date

Steven T. Walther
Steven T. Walther
Commissioner

²⁴ Although the ads were not "for the purpose of influencing" a Federal election, they still qualify as "Federal election activity" ("FEA"), because they were public communications that referred to a "clearly-identified candidate for Federal office" and that "promot[ed] or support[ed]" him. See 2 U.S.C. § 431(20)(A)(iii); *id.* § 441i(b) (state and local party committees must pay for FEA with hard money).

12044320533