AGENDA DOCUMENT NO. 12-79

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

AGENDA ITEM

MEMORANDUM

For Meeting of 11-15-12

SUBMITTED LATE

TO: The Commission

FROM: Anthony Herman AH
General Counsel

BY: Daniel Petalas DP
Associate General Counsel for Enforcement

Kathleen Guith KG
Deputy Associate General Counsel for Enforcement

Jin Lee JL
Attorney

SUBJ: MUR 3620 (Democratic Senatorial Campaign Committee) --
Request to Modify Conciliation Agreement

I. INTRODUCTION

MUR 3620, initiated 20 years ago, concerned allegations that the Democratic Senatorial Campaign Committee ("DSCC") violated the earmarking provisions of the Federal Election Campaign Act, as amended (the "Act"), and Commission regulations. *See* 2 U.S.C. § 441a(a)(8); 11 C.F.R. §§ 102.8, 110.6(b)(2)(iii), (c)(1). In August 1995, the Commission and the DSCC entered into a Conciliation Agreement ("Agreement"), resolving those allegations. In July 2010, the DSCC submitted a request to modify certain on-going remedial measures that the Agreement requires the DSCC to undertake. *See* Letter to Thomasenia Duncan, General Counsel, from Marc Elias (July 7, 2010) ("DSCC Request"), Attach. 1. The DSCC argues that changes in factual circumstances and the law since 1995 justify modification of these provisions.

As set forth below, this Office believes, based on the unique circumstances presented here, that continued enforcement of the remedial provisions of the Agreement is no longer warranted. Rather than reopen the closed MUR and modify the existing Agreement, however, we recommend that the Commission find that the DSCC has fulfilled its obligations under the Agreement and that it is relieved from satisfying the on-going remedial measures of the Agreement.

II. DISCUSSION

A. Background of MUR 3620

On September 24, 1992, the National Republican Senatorial Campaign Committee ("NRSCC") filed a complaint alleging that the DSCC violated the Act and the Commission's regulations by soliciting excessive contributions in the form of earmarked contributions and failing to properly report such earmarked contributions. Specifically, the NRSCC alleged that DSCC's so-called tally program, which allowed an individual donor to "tally" a contribution to the DSCC in the name of a particular senatorial candidate, resulted in illegal, excessive earmarked contributions to such a candidate.

In October 1994, the Commission found reason to believe that the DSCC violated 2 U.S.C. § 441a(a)(8) and 11 C.F.R. § 110.6 by failing to properly forward and report earmarked contributions. The Commission and the DSCC then entered into the 1995 Conciliation Agreement. The Agreement required that the DSCC: (1) pay a $75,000 civil penalty; (2) refund or forward contributions that appear to be earmarked; (3) provide additional education and training to staff regarding earmarking and the tallied contributions; (4) implement procedures regarding the review of fundraising solicitations for the tally program to ensure that such solicitations cannot be read to solicit earmarked contributions; and (5) include in all solicitations pertaining to the tally program the following disclaimer language:

> The DSCC does not accept contributions earmarked for a particular candidate. Contributions tallied for a particular candidate will be spent for DSCC activities and programs as the Committee determines within its sole discretion.

MUR 3620, Agreement at 10, Attach. 2.

After the execution of the Agreement, the NRSCC filed an emergency motion in 1996 alleging that the DSCC violated the Agreement. The Commission conducted an inquiry into that allegation. Although the Commission found that the DSCC itself was in technical compliance with the Agreement, the Commission voted to send the DSCC a cautionary letter stating that the DSCC could have taken additional steps to ensure that participants in the tally program understood that the DSCC did not accept earmarked contributions. *See* Letter from Lawrence Noble, General Counsel, to Robert F. Bauer (Apr. 14, 1997) ("Noble Letter"), Attach. 3.

B. DSCC'S Request to Modify the Agreement

In requesting modification of the Agreement, the DSCC argues generally that the Agreement's remedial measures are unduly burdensome and subject the DSCC to restrictions that do not apply to other national party committees. DSCC Request at 3. The DSCC identifies changes in the factual and legal circumstances that it contends warrant modification of the Agreement. First, the DSCC states that there have been no

substantiated allegations that the DSCC has violated 11 C.F.R. § 110.6,[1] and the case for prolonging a conciliation agreement is therefore weak. DSCC Request at 5.

Second, the DSCC claims that, since the execution of the Agreement in 1995, changes in federal law regarding national party expenditures have rendered obsolete the concern that donors, who have made the maximum contribution amounts, could funnel money to candidates through coordinated party expenditures under 2 U.S.C. § 441a(d). *See* DSCC Request at 5. These changes include: (1) the Supreme Court's decision in *Colorado Republican Federal Campaign Committee v. FEC,* 518 U.S. 604 (1996), which held that the ban on party-financed independent expenditures was unconstitutional; and (2) the Bipartisan Campaign Reform Act's (BCRA) ban on "soft money" raised by national party committees. *See* 2 U.S.C. § 441i. The DSCC argues that these two changes forced the DSCC to raise far more "hard money," and the DSCC now has the ability to fully fund every competitive election, beyond the amounts it may legally spend on coordinated party expenditures. *See* DSCC Request at 6.

Third, the DSCC argues that, because Congress made no changes to the law governing earmarks when enacting BCRA, Congress determined that the existing rules were sufficient to deter illegal earmarking. Accordingly, the DSCC contends that the remedial measures in the Agreement are unwarranted, not required by the Act or regulation, and should be modified.

Fourth, the DSCC states that the restrictions in the Agreement raise First Amendment concerns by subjecting the DSCC to more speech restrictions than other national party committees. To support this argument, the DSCC relies upon *Davis v. FEC*, 554 U.S. 724 (2008), where the Supreme Court struck down the Millionaires' Amendment because the law imposed different contribution limits for candidates in the same race. Citing *Democratic National Committee v. Republican National Committee*, 671 F. Supp. 2d 575 (D.N.J. 2009) ("*DNC v. RNC*"), the DSCC contends that the concern for equal treatment is heightened here because the restrictions imposed in the Agreement have no time limit.

C. DSCC Has Fulfilled Its Obligations Under the Agreement

Neither the Act nor Commission regulations provide a procedure to modify an executed conciliation agreement in a closed matter. In prior matters, however, the Commission has used its discretion to modify such agreements.

In MURs 5017 and 5205 (Friends of Ronnie Shows), for example, counsel for the Treasurer named in the conciliation agreement requested that the Commission revise the agreement to show that he was not the Treasurer at the time the violations were committed and that he was named in the agreement only as a successor Treasurer. In

[1] The Commission has never found reason to believe that the DSCC violated the earmarking regulations or the terms of the Agreement since the Agreement was executed in 1995.

August 2002, the Commission voted to reopen the matter to rescind the original agreement and approved a revised conciliation agreement.

In MUR 4834 (Howard Glicken), the Commission entered into a conciliation agreement requiring the respondent to pay a $40,000 civil penalty and closed the matter on December 11, 1998. The respondent subsequently requested that the Commission reduce the civil penalty to $10,000 based on the respondent's inability to pay the remaining civil penalty. While not reopening the matter, the Commission voted to approve the request and reduced the civil penalty on November 30, 2000.

Based on the circumstances presented here -- where the DSCC has demonstrated that it has fulfilled its obligations under the Agreement -- we believe that further enforcement of the Agreement is unwarranted.

First, the record demonstrates that DSCC has implemented changes to its tally program to ensure that it does not violate the earmarking provisions of the Act and Commission regulations. More than 15 years after the Commission and the DSCC entered into the Agreement, the Commission has not found that the DSCC violated these provisions, nor has it found that the DSCC violated the terms of the Agreement itself. Although the Commission advised the Committee in a 1997 letter to take steps to improve its execution of certain remedial provisions, the Commission nevertheless found that the Committee was in compliance with the Agreement. *See* Noble Letter. Moreover, the DSCC has indicated that it has made further changes to its compliance program in response to the 1997 letter. *See* Letter from Marc Elias to Jin Lee (Mar. 30, 2012), Attach. 4.

Second, we believe that the DSCC has shown that subsequent changes in the law make it less likely that the tally program will be used to funnel earmarked contributions. When the Agreement was executed in 1995, political parties were prohibited from making independent expenditures, and could only make coordinated party expenditures to support Democratic Senate candidates. DSCC Request at 5-6. The DSCC therefore relied on the tally program to help raise funds for its coordinated expenditure program. DSCC Request at 6. On the other hand, the DSCC could raise unlimited "soft money" contributions from sources such as corporations and unions to fund "issue advertisements." *Id.* In this climate, the DSCC contends that it struggled to raise "hard money." *Id.* After the Supreme Court lifted the ban on party-financed independent expenditures in *Colorado Republican Federal Campaign Committee v. FEC* and Congress barred national party committees from raising soft money in BCRA in 2002, the DSCC states that it has raised far more "hard money" (more than $113 million during the 2005-2006 election cycle and $125 million during the 2007-2008 election cycle) than it is allowed to spend on coordinated party expenditures under 2 U.S.C. § 441a(d). *Id.* We have no reason to dispute these numbers, as the DSCC's reports filed with the Commission indicate that the DSCC has substantially increased its fundraising of federal dollars. Nor do we have any reason to doubt that the DSCC dramatically changed its fundraising practices based upon the significant changes in the law.

Third, the fact that the Agreement requires the DSCC to refrain from conduct that is no longer unlawful weighs heavily in favor of a Commission determination that the DSCC's on-going obligations under the Agreement should end. *Cf. Milliken v. Bradley*, 433 U.S. 267, 282 (1977) (holding that federal decrees would "exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution"). Accepting earmarked contributions designated for a candidate in and of itself is not illegal conduct under the Act; so long as a conduit or an intermediary properly forwards an earmarked contribution and reports the receipt of such contribution, no violation of the Act will occur. *See* 2 U.S.C. § 441a(a)(8); 11 C.F.R. § 110.6(c). Accordingly, continuing to bar the DSCC from accepting earmarked contributions inequitably restricts the DSCC from activity that is both lawful and that other national party committees may freely undertake.

Although the DSCC has requested modification of the current Conciliation Agreement, we believe that a Commission determination that the DSCC has fulfilled its obligations under the Agreement is more appropriate based on the unique circumstances presented in this matter. Even in the context of a federal court order, the Supreme Court has held that where the objective of an order has been achieved, "continued enforcement of the order is not only unnecessary, but improper." *Horne v. Flores*, 577 U.S. 433, 450 (2009). Applying this principle to the relevant provision of the Agreement here, we conclude that continued enforcement would be unwarranted, provided that the DSCC remains in compliance with the law. The DSCC has demonstrated that it has instituted changes to its compliance program and has been in compliance with the earmarking rules for over 15 years. Thus, we believe that the remedial provisions of paragraph VI.2 of the Agreement are satisfied and that the DSCC should be relieved from any continuing obligation to comply with those provisions.

III. RECOMMENDATIONS

1. Find that the Democratic Senatorial Campaign Committee ("DSCC") has fulfilled its obligations under the Conciliation Agreement and is relieved from satisfying the remedial measures contained in paragraph VI.2.

2. Send the appropriate letter.

Attachments:

(1) Letter from Marc Elias to Thomasenia Duncan (July 7, 2010)
(2) Conciliation Agreement, MUR 3620
(3) Letter from Lawrence Noble to Robert F. Bauer (Apr. 14, 1997)
(4) Letter from Marc Elias to Jin Lee (Mar. 30, 2012)

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July 7, 2010

BY HAND DELIVERY

Please date stamp this copy and give to messenger to return to Perkins Coie

Thomasenia Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: Modifying Conciliation Agreement in MUR 3620

Dear Ms. Duncan:

We are writing to request modifications to the Conciliation Agreement between the Federal Election Commission (the "Commission") and the Democratic Senatorial Campaign Committee ("DSCC"). The Agreement was reached in 1995, pursuant to MUR 3620.

In MUR 3620, the complainants alleged that contributions received by the DSCC as part of its "tally" program were earmarked for particular candidates. The Agreement requires the DSCC to engage in training and compliance programs, and to include a special disclaimer on all solicitations pertaining to the tally program. The Agreement also forces the DSCC to verify that its solicitations "cannot be reasonably read to solicit earmarked contributions." These restrictions go well beyond what the earmarking regulations require.

Now, more than eighteen years after the original complaint was filed, the DSCC is *still* bound by these restrictions. Meanwhile, no other national party committee is subject to any of these rules. This inequity, which will remain *in perpetuity* in the absence of modification, raises serious concerns.

The DSCC believes that modification of the Agreement is warranted. We would appreciate the chance to meet with you to discuss such a modification.

BACKGROUND

In 1992, several complainants alleged that contributions raised via the DSCC tally program were earmarked contributions under 11 C.F.R. § 110.6(b)(1). The DSCC allowed donors to "tally a contribution to the DSCC in the name of a particular candidate, thereby expressing support for that candidate or crediting the candidate with the raising of the contribution."[1] When it decided the amount of "coordinated expenditures" it would make on behalf of a candidate, the DSCC took into consideration (along with many other factors) the amount of contributions that were tallied for each candidate.

During the relevant period, it "was the DSCC's stated policy and practice to inform contributors that the DSCC did not accept earmarked contributions" and, in fact, "the DSCC did not treat such tallied contributions as being earmarked for the designated candidate."[2] The Commission did "not tak[e] the position that all tallied contributions were earmarked" and "acknowledge[d] that the DSCC may not have intended to solicit earmarked contributions."[3] However, because the DSCC's stated policy of *not* treating "tallied contributions" as "earmarked" was "not always conveyed to contributors," the Commission concluded that some percentage of donors made earmarked contributions.[4]

To avoid litigation, the Commission and the DSCC reached a Conciliation Agreement. In addition to assessing a $75,000 fine, the Agreement required the DSCC to take the following "remedial steps":

- Refund any contributions that appear to be earmarked (or treat them as earmarked contributions under § 110.6);
- Provide additional education and training to DSCC staff and other participants in the tally program;
- Include the following language in its solicitations pertaining to the tally program (and instruct tally participants to do the same): "The DSCC does not accept contributions earmarked for a particular candidate. Contributions tallied for a particular candidate will be spent for DSCC activities and programs as the committee determines within its sole

[1] See MUR 3620, Conciliation Agreement § IV(13) (Aug. 21, 1995). The DSCC still utilizes a tally program, which complies fully with the Conciliation Agreement.

[2] See id., §§ IV(16), V(2).

[3] See id., §§ IV(18), (19).

[4] See id., §§ IV(16), (17).

discretion."

- Implement procedures to review DSCC and candidate fundraising solicitations pertaining to the tally program to ensure that the solicitations "cannot be reasonably read to solicit earmarked contributions."

Since 1995, the Commission has *never* found reason to believe that the DSCC violated either the agreement *or* the earmarking regulations.

LEGAL DISCUSSION

The Federal Election Campaign Act (the "Act") and the Commission's regulations define an "earmarked contribution" as a contribution made with a "designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee."[5] A committee that receives such a contribution must forward it to the candidate within 10 days.[6] Such contributions count against the limit of the original donor to the candidate and, under some circumstances, the limit of the forwarding committee as well.[7] Special reporting requirements also exist.[8]

In imposing the "remedial steps" described above, the Conciliation Agreement goes well beyond these regulations. It requires the DSCC to engage in costly training programs to prevent violations. It compels the DSCC to include a disclaimer on *every* solicitation pertaining to the tally program, taking up valuable space on the solicitation. And it prevents the DSCC from sending any solicitation pertaining to the tally program, unless "it cannot reasonably be read to solicit earmarked contributions." These requirements put the DSCC in a materially different position than the other national party committees, which are not subject to *any* of these restrictions. Moreover, unless a modification is approved, the DSCC remains subject to this disadvantage *in perpetuity*, regardless of changed legal and factual circumstances.

A. Changed factual and legal circumstances justify modification of the Conciliation Agreement.

The Act does not set forth the process that the Commission should follow when a party to a

[5] See 11 C.F.R. § 110.6(b)(1).

[6] See id. § 110.6(b)(2)(iii).

[7] See id. § 110.6(d).

[8] See id. § 110.6(c).

conciliation agreement requests modification.[9] However, the fact that the regulations do not authorize a specific procedure is by no means dispositive. For example, several circuits have held that the Equal Employment Opportunity Commission may bring an action in federal court when an employer has violated a conciliation agreement, even though federal law does not expressly provide for it. Likewise, the Commission has significant discretion in how it *enforces* conciliation agreements.[10] For example, if a party to a conciliation agreement asked the Commission whether it would institute a civil action in response to certain conduct, the Commission would be able to provide guidance. Implicit in the power *not* to enforce certain terms of an agreement, of course, is the power to modify the agreement to change or excise those terms.

In searching for sound legal guidelines, the Commission can look to the Federal Rules of Civil Procedure, which establish standards for a district court to follow when a party to a consent decree seeks modification.[11] Like a conciliation agreement, a consent decree has "attributes both of contracts and of judicial decrees."[12] Rule 60(b)(5) provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding ... [when] the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable."[13] The rule "takes the original judgment as a given and asks only whether 'a significant change in either factual conditions or in law' renders continued enforcement of the judgment 'detrimental to the public interest.'"[14] To "determine the merits" of a Rule 60(5)(b) claim, a court "ascertain[s] whether ongoing enforcement of the original order was supported by an ongoing violation of federal law" and then asks "whether changed circumstances warrant[] modification of the original order."[15] Intervening congressional action may be one such "changed circumstance."[16]

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[9] See Morris v. City of Hobart, 39 F.3d 1105, 1112, n. 4 (10th Cir. 1994) (citing cases).

[10] See 2 U.S.C. § 437g(5)(D) (allowing – but not requiring – the Commission to institute a civil action for relief "if it believes that [a party to a conciliation agreement] has violated any provision of such conciliation agreement.").

[11] See Fed. R. Civ. P. 60(b).

[12] See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986).

[13] See Fed. R. Civ. P. 60(b)(5).

[14] See Horne v. Flores, 129 S. Ct. 2579, 2596-97 (2009), quoting Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992).

[15] See id., 129 S. Ct. at 2597.

[16] Id., 129 S. Ct. at 2601 (finding that NCLB "reflects Congress' judgment that the best way to raise the level of education nationwide is by granting state and local officials flexibility to develop and implement educational programs that address local needs, while holding them accountable for the results.").

Because it requires the DSCC to include a disclaimer on certain solicitations and imposes other restrictions on the DSCC's speech, the Agreement imposes a First Amendment burden.[17] Such restrictions are subject to "exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest."[18] Where an agreement or decree impinges upon the constitutional rights of the defendant, there should be a greater willingness to modify that agreement.

1. Since 1995, there have been no substantiated allegations that the DSCC has violated 11 C.F.R. § 110.6.

The Supreme Court has said that consent decrees should be "limited to reasonable and necessary implementations of federal law."[19] This is strikingly similar to the language in the Act, which states that the purpose of a conciliation agreement is to "correct or prevent" the violation of law.[20] Consequently, without any ongoing violation of federal law, the case for prolonging a conciliation agreement is considerably weaker.[21] Since 1995, there have been no substantiated allegations that the DSCC has violated 11 C.F.R. § 110.6.

2. Changes in federal law since 1995 have rendered obsolete the Commission's concern.

At the time of the Agreement, the Commission believed that donors knew that "the DSCC took into account [tallied contributions] in deciding the amount of 441a(d) expenditures to be made on behalf of a particular candidate," but did not know that "the DSCC retained final discretion regarding the use of any tallied contribution."[22] This first concern – that contributors believed it could funnel money to favored candidates through the 441a(d) program – has been rendered obsolete by intervening legal and factual developments.

In 1995, federal law still prohibited the DSCC from making "independent expenditures" on

[17] The fact that the burden is imposed by a conciliation agreement – rather than a statute or regulation – is immaterial. See, e.g. Maryland Troopers Ass'n, Inc. v. Evans, 993 F.2d 1072, 1076 (4th Cir. 1993) (applying "strict scrutiny" standard under equal protection clause to affirmative action plan imposed by consent decree).

[18] See Citizen's United v. FEC, 130 S.Ct. 876, 914 (2010).

[19] See Frew v. Hawkins, 540 U.S. 431, 441 (2004).

[20] See 2 U.S.C. § 437g(a)(4)(A)(i), (ii); 11 C.F.R. § 111.18(a).

[21] See Horne v. Flores, 129 S. Ct. at 2598.

[22] See MUR 3620, Conciliation Agreement § IV(13).

behalf of Democratic Senate candidates.[23] Instead, the DSCC could only make "coordinated expenditures" in an amount equaling the greater of $20,000 or 2 cents times the voting age population of the state (adjusted annually for cost of living).[24] On the other hand, the DSCC had the ability to raise unlimited "soft money" contributions from individuals, corporations, and labor unions, and spend that money on "issue advertisements."[25]

This resulted in a two-tier system, in which the DSCC raised "hard money" to fund its 441a(d) "coordinated" expenditures and raised "soft money" to finance "issue advertisements." In this environment, the DSCC often struggled to raise enough hard money to finance its "coordinated expenditure program and relied heavily on tallied contributions to fill the gap.

In the interim, two key legal developments occurred. First, the Supreme Court struck down the ban on party-financed "independent expenditures."[26] Second, Congress made it illegal for national party committees to raise "soft money."[27] These two developments forced the DSCC to raise substantially more "hard money" than it did during the early 1990s. In 1994, for example, the DSCC raised only $13.8 million; in contrast, in 2006 and 2008, the DSCC raised $70.6 million and $91.4 million respectively. In the last two election cycles – 2005-6 and 2007-8 – the DSCC raised more than $113 million and $125 million, dwarfing the total amount that the DSCC is legally permitted to spend on 441a(d) expenditures. Now that the DSCC can raise enough money to fully fund *every* competitive election, the DSCC's donors understand that the DSCC will be able to support their favored candidates, regardless of the amount of tallied contributions that the candidate has raised.

3. Congress has made significant changes to the rules governing national party committees, but has not changed the law governing earmarks.

Since 1995, Congress has aggressively reformed the Federal Election Campaign Act, barring candidates from raising certain types of contributions for party committees, imposing new disclaimer requirements, and mandating that committees make more transparent their system for "crediting" certain donors.

- In 2002, Congress enacted the Bipartisan Campaign Reform ("BCRA"), the most far-

[23] See Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604, 619-620 (1996), citing 11 C.F.R. § 110.7(b)(4).

[24] See 2 U.S.C. § 441a(d)(3).

[25] See, e.g. McConnell v. FEC, 540 U.S. 93 (2003).

[26] See Colorado Republican Federal Campaign Committee, 518 U.S. at 608.

[27] See 2 U.S.C. § 441i.

reaching reform to the Federal Election Campaign Act since its passage in 1971. The authors of BCRA believed that national party committees and candidates were circumventing the Act's limits by raising soft money on behalf of the political parties.[28] Congress recognized that these solicitations undermined the effectiveness of the contribution limits, by allowing candidates to raise unlimited contributions for political parties, which, in turn, would spent that money on behalf of those candidates. As the Supreme Court noted in McConnell, it was typical for "a federal legislator running for reelection [to] solicit[] soft money from a supporter by advising him that even though he had already 'contributed the legal maximum' to the campaign committee, he could still make an additional contribution to a joint program supporting federal, state, and local candidates of his party."[29] In response to this concern, Congress banned the solicitation of soft money altogether.

- Likewise, in BCRA, Congress required candidates and political parties to include a new "stand-by-your-ad" disclaimer on television and radio advertisements.[30]

- Finally, in 2007, Congress mandated that party committees (along with candidate committees and leadership PACs) report the contributions "forwarded" by lobbyists and registrants, or "credited" to lobbyists and registrants.[31]

Congress could have implemented similar proposals to further protect against earmarking. For example, it could have limited the ability of candidates to raise hard money for national party committees or the ability of national party committees to feature candidates in its solicitations. It could have required a disclaimer on all party solicitations referring to candidates. And it could have forced party committees to publicly disclose any tally system (or other "credit" system) that it employed. Yet, in the midst of this legislative flurry, Congress left unchanged the earmarking rules.

This decision reflects Congress' determination that the existing rules do a sufficient job of deterring illegal earmarking. It is clear that Congress "may modify generally applicable rules and thereby supersede a prior consent decree arising from those underlying rules."[32] The

[28] See McConnell v. FEC, 540 U.S. at 125 ("Candidates often directed potential donors to party committees and tax-exempt organizations that could legally accept soft money.").

[29] See id, 540 U.S. at 125.

[30] See 2 U.S.C. § 441d(d).

[31] See 11 C.F.R. 104.22(a)(6), (b).

[32] See BellSouth Corp. v. FCC, 162 F.3d 678, 692 (D.C. Cir. 1998).

Commission should also consider modifications where, as here, Congress moves aggressively to reform the Act, but chooses not to implement the type of prophylactic measures prescribed by the conciliation agreement at issue.

B. The current arrangement raises constitutional concerns.

The existence of the Agreement means that the DSCC is subject to more speech restrictions than any other national party committee. In recent years, courts have found that the imposition of different speech restrictions on similarly-situated political entities raises constitutional concerns. In striking down the Millionaire's Amendment, for example, the Supreme Court noted that "[w]e have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other, and we agree with Davis that this scheme impermissibly burdens his First Amendment right to spend his own money for campaign speech."[33] Significantly, the Court found that Congress could have raised the contribution limits of *both* candidates in response to the expenditure of personal funds by one candidate. By imposing "discriminatory fundraising limitations" in "the competitive context of electoral politics," however, Congress infringed upon the First Amendment rights on self-financing candidates.[34]

The concerns are heightened here, because the Conciliation Agreement does *not* contain an expiration date. A district court recently agreed to modify a 1982 Consent Decree between the DNC and the RNC, which restricted the RNC's ability to engage in certain "ballot security" activities. The court found "that the failure of the parties to include an expiration date in the Consent Decree *may impose an inequitable burden on the RNC by forcing it to comply with requirements that exceed those which Congress, in its good judgment, has seen fit to impose in the form of federal law.*"[35] The court found it particularly objectionable that only one entity would be "bound by those obligations in perpetuity, regardless of whether it continues to engage in [the illegal practice] or has any incentive to do so. That situation is inherently inequitable."[36] The existence of the Conciliation Agreement presents the same problems, which will persist until modifications are made.

We would like the opportunity to discuss modifications to the Agreement, at your soonest convenience.

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[33] See Davis v. FEC, 128 S.Ct. 2759, 2771 (2008).

[34] See id., 128 S.Ct. at 2771-72.

[35] See DNC v. RNC, 671 F. Supp. 2d 575, 598 (D. N.J. 2009) (emphasis added).

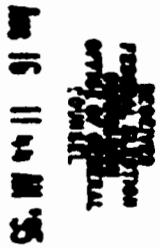
[36] See id., 671 F. Supp. 2d at 621-22.

Very truly yours,

Marc E. Elias
Jonathan S. Berkon
Counsel to the Democratic Senatorial Campaign Committee

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
Democratic Senatorial Campaign Committee and Donald J. Foley, as treasurer	)	
Abrams Committee, f/k/a Abrams '92 and Lawrence B. Buttenwieser, as treasurer	)	MUR 3620
Feinstein for Senate '94 and Michael J. Barrett, as treasurer	)	
Sanford for Senate Committee and Alton G. Buck, as treasurer	)	



CONCILIATION AGREEMENT

This matter was initiated by signed, sworn, and notarized complaints by the National Republican Senatorial Committee and the John Seymour for U.S. Senate Committee. The Federal Election Commission ("Commission") found reason to believe the Democratic Senatorial Campaign Committee and Donald J. Foley, as treasurer, ("DSCC" or "Respondents") violated 2 U.S.C. § 441a(a)(8); 11 C.F.R. § 102.8; 11 C.F.R. § 110.6(b)(2)(iii); and 11 C.F.R. § 110.6(c)(1). The Commission also found reason to believe that the Abrams Committee, f/k/a Abrams '92, and Lawrence B. Buttenwieser, as treasurer; Feinstein for Senate '94, and Michael J. Barrett, as treasurer; and Sanford for Senate Committee, and Alton G. Buck, as treasurer, violated 2 U.S.C. § 441a(f) and 11 C.F.R. § 110.6(c)(2).

NOW, THEREFORE, the Commission and the Respondents, having participated in informal methods of conciliation, prior to a finding of probable cause to believe, do hereby agree as follows:

I. The Commission has jurisdiction over the Respondents and the subject matter of this proceeding, and this agreement has the effect of an agreement entered pursuant to 2 U.S.C. § 437g(a)(4)(A)(i).

II. Respondents have had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondents enter voluntarily into this agreement with the Commission.

IV. The pertinent facts in this matter are as follows:

1. The Democratic Senatorial Campaign Committee is a national committee within the meaning of 2 U.S.C. § 431(14).

2. Donald J. Foley is treasurer of the Democratic Senatorial Campaign Committee.

3. A contribution made by a person, either directly or indirectly, on behalf of a particular candidate, which is in any way earmarked or otherwise directed through an intermediary or conduit, shall be treated as a contribution from such person to such candidate. 2 U.S.C. § 441a(a)(8).

4. Earmarked is defined as a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee. 11 C.F.R. § 110.6(b)(1).

5. A conduit or intermediary means any person (except for a few limited exceptions not applicable to this matter) who receives and forwards an earmarked contribution to a candidate or a candidate's authorized committee. 11 C.F.R. § 110.6(b)(2).

6. 11 C.F.R. § 110.6(b)(2)(iii) provides that any person who receives an earmarked contribution shall, among other requirements, forward such earmarked contribution to the candidate or authorized committee in accordance with 11 C.F.R. § 102.8.

7. Section 102.8 provides, inter alia, that earmarked contributions must be forwarded no later than 10 days after receipt.

8. Pursuant to 2 U.S.C. § 441a(a)(8), the intermediary or conduit of an earmarked contribution must report the source of the contribution and the intended recipient to the Federal Election Commission and to the intended recipient. See also, 11 C.F.R. § 110.6(c)(1).

9. Recipient candidates or candidate committees must report earmarked contributions and each conduit or intermediary, who forwards one or more earmarked contributions which in the aggregate exceed $200 in any calendar year in accordance with 11 C.F.R. § 110.6(c)(2).

10. The national committee of a political party may make expenditures in connection with the general election campaign of a candidate for the office of Senator or of a Representative from a state which is entitled to only one Representative that equals the greater of two cents multiplied by the voting age population of the state, or $20,000. 2 U.S.C. § 441a(d); 11 C.F.R. § 110.7(b).

11. The Federal Election Campaign Act of 1971, as amended, (the "Act") does not prohibit party committees from referring to and promoting party candidates in soliciting funds for the committee and candidates may assist party committees in soliciting funds for the committee.

12. The DSCC has utilized and utilizes a "tally" program as a means of raising funds on behalf of Democratic senate candidates. Tallied funds are used in part to fund coordinated party expenditures pursuant to 2 U.S.C. § 441a(d) as well as other DSCC activities on behalf of its candidates.

13. Under this program a contributor has the option to "tally" a contribution to the DSCC in the name of a particular candidate, thereby expressing support for that candidate or crediting the candidate with the raising of the contribution for the DSCC's "coordinated expenditure" program and other activities.

14. As part of the tally program, the DSCC and the candidate committees produced and distributed fundraising solicitations requesting contributions be sent to the DSCC and indicating that the contributors can tally their contributions to a specific candidate.

15. Some of these solicitations can be fairly read to solicit earmarked contributions and did not contain further clarification and explanation to avoid such a reading; the following examples are illustrative:

a. "For those of you who have already maxed out to my campaign, the DSCC tally is an avenue through which you can offer more support";

b. "[My] race will be close: the tally sheet will be of vital importance";

c. "As an individual, you can contribute up to $1,000 directly to my committee. Contributions in excess of $1,000 must be made payable to the DSCC and marked for my tally";

d. "You can tally your [DSCC] membership to [__'s] campaign. This means that those dollars will go to [__'s] effort";

e. The response card to a request from a candidate's committee to serve on the host committee for a fundraiser on behalf of the candidate, which provided no explanation of the DSCC's tally program, read as follows:

> Please reserve a space in my name on the invitation as a Benefactor -- enclosed is my check for $5,000 (payable to the "Democratic Senatorial Campaign Committee" marked for [__'s] tally) or I pledge to raise $5,000. Patron -- enclosed is my check for $2,500 (payable to the "Democratic Senatorial Campaign Committee" marked for [__'s] tally) or I pledge to raise $2,500. Sponsor -- enclosed is my check for $1,000 (payable to "[__] for Senate") or I pledge to raise $1,000;

f. "I must raise an additional $4 million dollars over the next few weeks. . . . I am counting on you to help me pull it off. If you and [__] have any room to make additional federal contributions, I would be grateful if you could tally money to the DSCC for this effort to defeat [my opponent]";

g. "If you could make a $2,000 contribution to [my committee] and a $10,000 contribution to the DSCC for this effort to defeat [my opponent], it would be one of the building blocks of my campaign";

h. "If you choose to contribute through the DSCC, it is very important that you enclose a letter with your contribution indicating that it is meant for [my tally]. I hope you will consider this as our campaign really needs the support".

16. It was the DSCC's stated policy and practice to inform contributors that the DSCC did not accept earmarked contributions, that the amount of tallied contributions was a significant factor that the DSCC took into account in deciding the amount of 441a(d) expenditures to be made on behalf of a particular candidate, and that the DSCC retained final discretion regarding the use of any tallied contribution. The DSCC acknowledges that this information was not always conveyed to contributors.

17. Some percentage of contributors who responded to these "tally" solicitations earmarked their contributions to the DSCC on behalf of a particular candidate.

18. During the 1992 cycle, the DSCC raised approximately $8,500,000 in tallied funds. During the 1994 cycle, the DSCC raised approximately $11,000,000 in tallied funds. The Commission is not taking the position that all tallied contributions were earmarked, but, without conducting a full investigation, the percentage of contributors who intended that their tallied contributions be earmarked cannot be determined.

19. The Commission acknowledges that the DSCC may not have intended to solicit earmarked contributions.

20. The tallied contributions that were earmarked for a designated candidate were not treated as earmarked by the DSCC, viz. forwarded to the recipient candidate committees within 10 days, reported as earmarked by the conduit and recipient, and applied to each contributor's limit to the candidate committee's campaign.

V. Because the parties desire an expeditious resolution of this matter, the parties enter into this conciliation agreement prior to the Commission completing its investigation. The parties agree that --

1. The DSCC and certain of its candidates prepared and distributed fundraising solicitations for the DSCC's tally program which can be fairly and reasonably read to mean that contributions would be earmarked for a particular candidate within the meaning of 2 U.S.C. § 441a(a)(8). In response to these solicitations, some contributors earmarked their contributions to the DSCC for a particular candidate.

2. Consistent with its stated policy and practice of not accepting earmarked contributions, the DSCC did not treat such tallied contributions as being earmarked for the designated candidate. When a contribution has been earmarked by a contributor for a particular candidate, a political committee receiving the contribution must follow the requirements of the Act, which the DSCC did not do in violation of 2 U.S.C. § 441a(a)(8) and 11 C.F.R. §§ 102.8, 110.6(b)(2)(iii) and

110.6(c)(1). Some of the funds received by the candidate committees as coordinated party expenditures from the DSCC were earmarked contributions which the DSCC, inter alia, failed to report as earmarked contributions and the candidate committees, in turn, did not report as earmarked contributions, in violation of 11 C.F.R. § 110.6(c)(2).

3. The parties agree that the solicitations could have been clarified to avoid soliciting earmarked contributions by additional DSCC efforts to assure that its staff and the candidate committees had a better understanding of the tally program and communicated this understanding more effectively to donors when soliciting for the DSCC's tally program.

VI. 1. DSCC will pay a civil penalty to the Commission in the amount of seventy-five thousand dollars ($75,000), pursuant to 2 U.S.C. § 437g(a)(5)(A); such penalty to be paid as follows:

a. An initial payment of $25,000 due within 30 days after the effective date of this conciliation agreement.

b. Thereafter, two consecutive monthly installment payments of $25,000 each, due 60 and 90 days after the effective date of this conciliation agreement.

c. In the event that any installment payment is not received by the Commission by the fifth day after it becomes due, the Commission may, at its discretion, accelerate the remaining payments and cause the entire amount to become due upon ten days written notice to the DSCC. Failure by the Commission to

accelerate the payments with regard to any overdue installment shall not be construed as a waiver of its right to do so with regard to future overdue installments.

2. The DSCC agrees to implement the following remedial steps.

a. For contributions to the DSCC that appear to be earmarked, the DSCC will refund the contributions or forward the contributions to the designated candidate, in accordance with 2 U.S.C. § 441a(a)(8) and 11 C.F.R. §§ 102.8, 110.6(b)(2)(iii), and 110.6(c)(1).

b. On an on-going basis, the DSCC will provide additional education and training to DSCC staff and participants in the tally program, including the staff of Democratic senate candidates, which will emphasize that: (1) DSCC does not accept contributions earmarked for a particular candidate; (2) tallied contributions will be spent for DSCC activities and programs as the Committee determines within its sole discretion; and (3) contributors must be advised of (1) and (2) above when the DSCC and tally program participants solicit tallied contributions.

c. The DSCC will utilize standard language in its solicitations pertaining to the tally program and, as part of its education and training, will instruct its tally participants to include this language in solicitations distributed by such candidates, their committees and their agents. This language will provide, in substance, that the DSCC does not accept contributions earmarked for a particular candidate and that tallied

contributions will be used as the DSCC determines in its sole discretion. At a minimum, the language will state that:

> The DSCC does not accept contributions earmarked for a particular candidate. Contributions tallied for a particular candidate will be spent for DSCC activities and programs as the Committee determines within its sole discretion.

d. The DSCC will implement reasonable procedures to review DSCC and Democratic Senate candidate fundraising solicitations pertaining to the tally program to ensure that the solicitations cannot be reasonably read to solicit earmarked contributions, in accordance with the requirements of Section VI(2)(b)-(c) of this agreement.

VII. The Commission, on request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

VIII. This agreement shall become effective as of the date that all parties hereto have executed same and the Commission has approved the entire agreement.

IX. Except as provided in Section VI, paragraph (1)(b)-(c), Respondents shall have no more than 30 days from the date this agreement becomes effective to comply with and implement the requirements contained in this agreement and to so notify the Commission.

X. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained in this written agreement shall be enforceable.

FOR THE COMMISSION:

Lawrence M. Noble
General Counsel

8-21-95
Date

FOR THE RESPONDENTS:

Robert F. Bauer
Counsel to Democratic
Senatorial Campaign Committee

8-11-95
Date

FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

April 14, 1997

Robert F. Bauer, Esq.
Perkins Coie
607 Fourteenth Street, N.W
Washington, D.C. 20005-2011

Re: MUR 3620
Democratic Senatorial Campaign
Committee and Paul Johnson, as treasurer

Dear Mr. Bauer:

On March 25, 1997, the Federal Election Commission reviewed the allegations contained in the National Republican Senatorial Committee's ("NRSC") Emergency Motion for Civil Enforcement of the Conciliation Agreement in MUR 3620, the Democratic Senatorial Campaign Committee and Paul Johnson, as treasurer's, ("DSCC") Memorandum in Opposition to the NRSC's Motion, and the DSCC's response to certain interrogatories issued by the Commission. After considering the circumstances, the Commission determined to take no further action in MUR 3620 at this time and closed its inquiry.

Underlying the need for the remedial requirements in the August 1995, conciliation agreement was the belief that participants in the tally program did not understand how the tally program differed from earmarking. While the DSCC has technically complied with the conciliation agreement, it needs to do more to clarify this distinction and carry out the terms of the conciliation agreement.

Accordingly, the Commission advises the DSCC to take steps to ensure that its operation of the tally program is modified to improve its efforts in three areas. First, based on press reports, it appears that some of the 1996 Democratic Senate candidates, as opposed to campaign staff, remain unaware of certain of the remedial provisions of the 1995 conciliation agreement. These candidates are still not describing the tally program accurately, calling into question the effectiveness of some of the DSCC's educational efforts. Second, the DSCC has only "encouraged" Democratic Senate candidates to include disclaimer language in their tally solicitations, and the conciliation agreement required the DSCC to "instruct" participants to include this language. Third, the DSCC should use stronger language with candidates to implement review procedure, because candidates currently are only "encouraged, when possible to have the DSCC review tally fundraising solicitations."

If you have any questions, please contact Stephan Kline, the attorney assigned to this matter, at (202) 219-3690.

Sincerely,

Lawrence M. Noble
General Counsel

Enclosure
General Counsel's Report

Perkins Coie

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March 30, 2012

VIA HAND DELIVERY

Jin Lee, Esq.
Federal Election Commission
Office of the General Counsel
999 E Street
Washington D.C. 20463

Re: MUR 3620

Dear Ms. Lee:

Thank you for your letter, dated March 26, 2012, following up on our previous correspondence.

Your letter references an April 14, 1997 letter from then-General Counsel, Lawrence Noble, to Robert F. Bauer (the "Noble Letter"). At that time the Noble Letter was sent, the Commission had recently determined that the DSCC was in compliance with the conciliation agreement in MUR 3620 and had dismissed several complaints and motions related to that MUR.

Your letter asks "what, if any, steps the DSCC took to improve its compliance" after receiving the Noble Letter. We note, at the outset, that the Noble Letter was sent almost fifteen years ago. The DSCC is not required – either by law or the conciliation agreement – to maintain records indefinitely and it no longer possesses any records related to these frivolous complaints or their resolution.

As we have indicated in previous correspondence, the DSCC has complied fully with the conciliation agreement in MUR 3620. Following the execution of the conciliation agreement, the DSCC instituted a robust compliance program, which the Commission found to be in compliance with the agreement. The DSCC believes that its educational efforts have been successful during the past fifteen years. In 1997, for example, the Noble Letter pointed to public statements from two Senate candidates to suggest that the DSCC should bolster its educational efforts. While the DSCC questions whether such public statements are, in fact, probative of the

success of its compliance program, it notes the absence of any similar public statements in your March 26 letter.

The DSCC has repeatedly emphasized to Senate campaigns the importance of complying with the conciliation agreement. For instance, in a memorandum made available to all Senate candidates and staff each election year, the DSCC instructs Senate campaigns that "all written tally solicitations must include the following language: *The DSCC does not accept contributions earmarked for a particular candidate. Contributions tallied for a particular candidate will be spent for DSCC activities and programs as the Committee determines within its sole discretion.*" The memorandum goes on to instruct that "[t]his language is required on all invitations or other written materials in which tally money is solicited." Likewise, the DSCC's request to have all tally solicitations reviewed no longer includes the "when possible" language to which the Noble Letter objected.

The DSCC has complied fully with the conciliation agreement. The Commission concurred with this finding in 1997 and, since then, there have been no substantiated allegations of noncompliance. However, this is not the issue presented by our request. As we indicated in our previous correspondence, the Commission should grant the DSCC's request to modify the agreement, because circumstances have changed and the DSCC should be permitted to engage the full range of lawful fundraising activities, including earmarking contributions for its candidates consistent with FEC regulations.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

Marc Erik Elias