

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Republican National Committee, et al.) MUR 4250

GENERAL COUNSEL'S REPORT

I. BACKGROUND

On June 24, 1997, the Commission found reason to believe the Republican National Committee and Alec Poitevint, as treasurer ("RNC"), violated 2 U.S.C. § 441e by accepting the proceeds of a loan secured with foreign national funds. See Memorandum in MUR 4250 dated May 8, 1997. On July 15, 1997 the Commission directed compulsory discovery to several individuals and entities, including the RNC and the National Policy Forum ("NPF"), a 501C(3) organization closely related to the RNC. Subsequent to the Commission's above actions, the Department of Justice began a preliminary inquiry in to possible criminal violations arising out of substantially the same transactions at issue in this matter. After an initial extension of time in which to respond to the Commission's discovery requests -- and in lieu of any factual responses - - the RNC files the instant motion to stay the Commission's administrative proceedings in this matter pending resolution of the nascent criminal inquiry by the Department of Justice.¹ Alternatively, the RNC moves for a stay of this matter until the Department of Justice "determines the direction of the criminal inquiry." See Attachment at 1 and 4.

¹ The motion presumably is filed on behalf of both the RNC and the NPF. During a meeting preceding the RNC's filing, counsel for the RNC represented that both the RNC and the NPF were withholding production pending the Commission's consideration of the motion.

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II. ANALYSIS

The RNC fails to cite any legal authority or factual basis that are supportive of its motion for a stay. In its motion, the RNC cites three federal court cases, only two of which are controlling in the District of Columbia Circuit, for the general proposition that Federal courts have discretion in staying administrative and civil matters pending the outcome of parallel criminal matters where, based on the fact of the individual cases, the interest of justice requires such action. *See* Attachment. Based on this general premise, and without specific argument, the RNC concludes that failure to stay this matter “raises serious constitutional concerns,” imposes an unreasonable burden on respondent and may be “potentially prejudicial” to a possible criminal action. *See Id* at 3 and 7. Last, again without elaboration, the RNC not only concludes that a stay would not adversely affect the Commission’s investigation, but that a stay in fact may “actually enhance” the investigation. *See Id*.

This Office does not disagree with the RNC’s general proposition that courts retain discretion in granting stays under the appropriate circumstances. However, a close examination of these cases clarifies that a stay in this matter -- where respondent fails to demonstrate that it will be adversely affected by its continuation -- is not warranted. In United States v. Kordej, 397 U.S. 1 (1970) -- the Supreme Court overruled the lower court’s decision to overturn a criminal conviction because such conviction was partially based on evidence gathered in a parallel civil proceeding brought by the FDA. Addressing the issue of parallel actions, the Supreme Court noted that a stay of the civil proceeding need be balanced against the public interest in preserving the unhampered function of an agency’s regulatory duties. Only where the government intention in bringing the civil action may be improper, or where there is a demonstrable prejudicial affect

on respondent, should a stay be granted. *See id.* at 769. The Supreme Court found that absent these factors “[i]t would stultify enforcement of a federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial”. *Id.*

Similarly, in an *en banc* decision in SEC v. Dresser Indus., 628 F.2d 1368 (D.C. Cir. 1980), the District of Columbia Court of Appeals upheld the district court’s refusal to grant a stay of a civil proceeding brought by the SEC pending the outcome of a criminal investigation into substantially the same activity. In balancing the various interest, the court reasoned that “ in the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence” *Id.* at 1374. Building on Kordel, and noting that “[t]he Constitution, therefore, does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings,” the court elaborated that:

Other than where there is specific evidence of agency bad faith or malicious governmental tactics, the strongest case for deferring civil proceedings until after completion of the criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter. The noncriminal proceeding, if not deferred, might undermine the party’s Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Civil Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case. If delay of the noncriminal proceeding would not seriously injure the public interest, a court may be justified in deferring it.

Id. at 1375-76.

Based on this criteria, the court found that because “no indictment has been returned; no Fifth Amendment privilege threatened; Rule 16(b) has not come into effect; and the SEC

subpoena does not require Dresser to reveal the basis for its defense,” a stay in the matter was not appropriate. *Id.*

Like Kordel and Dresser, the RNC has made no showing of the special circumstances required for a stay of the proceedings.² The RNC has not been indicted; the RNC preserves its right to invoke the protection of the Fifth Amendment; Rule 16(b) is not in effect; and the Commission’s subpoena does not require disclosure of respondent’s defense.

Accordingly, the RNC has provided no basis for staying this matter. In fact, the RNC has not even represented that it is a target of the investigation, acknowledging that the Department of Justice has not yet determined “the direction of the criminal inquiry.” Similarly, the Department of Justice has not independently requested that this Office stay its enforcement proceeding. Because the criminal inquiry is in an early stage, and despite respondent’s contentions to the contrary, a stay would adversely impact the Commission’s investigation. There has been no indication of the duration or direction of the criminal matter. While the initial round of discovery has produced some evidence of a violation by respondent, it is not presently clear what additional documentation or testimony may be necessary to conclusively establish a violation. An indefinite stay would prejudice the Commission’s ability to gather the necessary evidence, allowing for the fading of memories and the loss of other evidence over time. Similarly, a delay would necessarily prevent a potential speedy resolution of the matter and could raise statute of limitations concerns.

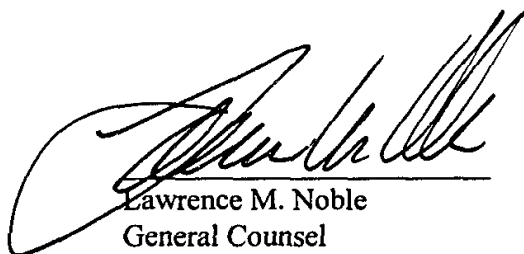
² The third case cited by respondent is a Third Circuit appellate decision where the court upheld a stay of a civil private right of action pending resolution of a parallel criminal “anti-trust suit covering alleged illegal activity in a three state area, going back many years.” Texaco Inc. v. Borda, 383 F.2d 607, 608-609 (3rd Cir. 1967). Based on the unusual scope of the matter, the court concluded that to defend two matters at the same time would unduly burden defendant. The RNC makes no similar showing concerning the scope of MUR 4250.

Because the RNC has provided no basis for staying the matter under the applicable test developed by the courts, and because a stay could prejudice the Commission's ability to successfully resolve this matter, this Office recommends that the Commission deny both of respondent's alternative motions.

III. RECOMMENDATION

Deny the motion by the Republican National Committee and Alec Poitevint, as treasurer, for a stay of the administrative proceedings in MUR 4250.

9/26/97
Date


Lawrence M. Noble
General Counsel

Attachment:

RNC Motion for a Stay of Administrative Proceedings