

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
National Policy Forum) MUR 4250

GENERAL COUNSEL'S REPORT

I. BACKGROUND

On May 13, 1997, this Office received a complaint alleging that the Republican National Committee violated the foreign national prohibition by receiving the proceeds of a loan issued to the National Policy Forum ("NPF") secured with foreign national funds.¹ See Memorandum in MUR 4250 dated May 8, 1997. 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 and directed compulsory discovery to several individuals and entities, including the NPF. Subsequent to the Commission's above actions, the Department of Justice began a preliminary inquiry into possible criminal violations arising out of substantially the same transactions at issue in this matter.

On September 24, 1997, the RNC filed a motion for a stay of the proceedings in MUR 4250 pending resolution of the Department of Justice's criminal inquiry. During the Executive Session of September 30, 1997, the Commission considered and denied the RNC's motion.

¹ These allegations were contained in an amendment to an earlier complaint filed on August 23, 1995. The initial complaint principally alleged that the RNC conducted allocable activity outside the party structure -- through the National Policy Forum (a closely associated 501(c)(4) corporation) -- using solely soft-dollars. However, the Commission dismissed these allegations due to a lack of four affirmative votes to find a violation.

05 "04" 395 "1751

During discussion on that matter, the Commission was informed that on the previous day, September 29, 1997, the NPF filed a motion for a stay identical to the RNC's earlier motion.

This report addresses this separate motion.

II. ANALYSIS

The NPF 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. Alternatively, the NPF moves for a stay of this matter until the Department of Justice "determines the direction of the criminal inquiry." *See* Attachment at 2 and 5. The NPF's motion is identical in all significant respects to the RNC's motion considered by the Commission during the Executive Session of September 30, 1997.

Like the RNC, the NPF in its separate motion 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 facts of the individual case, the interest of justice requires such action. *See* Attachment. Based on this general premise, and without specific argument, the NPF concludes that failure to stay this matter "raises serious constitutional concerns," imposes an unreasonable burden on the NPF, may be "potentially prejudicial" to a possible criminal action and would not adversely affect the Commission's investigation. *See id* at 5.

This Office does not disagree with the NPF'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 a witness fails to demonstrate that it will be adversely affected by its continuation -- is not warranted. In United States v. Kordel,

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 performance of an agency's regulatory duties. Only where the government's 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 Criminal 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 NPF has made no showing of the special circumstances required for a stay of the proceedings.² The NPF has not been indicted; the NPF 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 the NPF’s defense.

Accordingly, the NPF has provided no basis for staying this matter. In fact, the NPF 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 investigation.” 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 NPF’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

² The third case cited by the NPF 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 NPF makes no similar showing concerning the scope of MUR 4250.

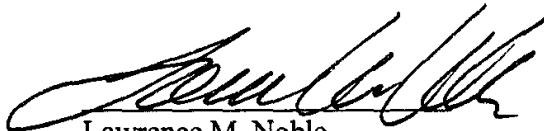
has produced some evidence of a violation by the RNC, it is not presently clear what additional documentation or testimony may be necessary to conclusively establish a violation. An indefinite stay would prejudice the Commission's ability to gather the necessary evidence from the NPF and other sources, 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.

Because the NPF 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 the NPF's alternative motions.

III. RECOMMENDATION

Deny the motion by the National Policy Forum for a stay of the administrative proceedings in MUR 4250.

10/1/97
Date


Lawrence M. Noble
General Counsel

Attachment:

NPF Motion for a Stay of Administrative Proceedings

Staff Assigned: Jose M. Rodriguez

00 04 395 1755