PERKINS COIE

A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
607 FOURTEENTH STREET, N.W · WASHINGTON, D.C. 20005-2011
TELEPHONE: 202 628-6600 · FACSIMILE: 202 434-1690

JUDITH L. CORLEY
(202) 434-1622

August 11, 1997

F. Andrew Turley
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 4643 - Democratic Party of New Mexico

Dear Mr. Turley:

This is in response to the complaint filed against the Democratic Party of New Mexico ("Respondent" or "the Party") by the Republican Party of New Mexico ("Complainant") alleging violations of the federal campaign laws. The complaint is without merit and should be dismissed.

Complainant alleges that Respondent violated the federal campaign laws by spending nonfederal funds in connection with a federal election. The discussion below will demonstrate that the Party lawfully undertook party building activities in full compliance with Commission regulations governing the use of federal and nonfederal funds.

The Facts

The State of New Mexico held a special election on May 4, 1997 to fill the Congressional seat vacated when former Congressman Bill Richardson resigned to become Ambassador to the United Nations. The Democratic Party of New Mexico fielded a candidate in that election and supported that candidate with direct contributions and coordinated party expenditures under Section 441a(d).

The Party also undertook a generic voter identification and get-out-the-vote effort. This included such traditional party activities as enhancing the Party's voter file with information on Democratic voters, conducting an absentee ballot/ 'early

vote' program, communicating with traditional Democratic Party constituencies (such as Hispanics and Native Americans) about the Party's position on issues, and conducting a GOTV effort. All of these activities were undertaken as generic activity, without any reference to the Democratic Party's candidate for election.

The immediate catalyst for these activities may have been the May 4 special election, and yet, the purpose of the activities -- and the benefits derived from them -- reached far beyond the special election. The Party was able, through its efforts at issue here, to dramatically expand its ability to identify and get out Democratic voters in elections in the future. This was accomplished through an increase in the voter file used for Party activities, clear identification of solid and leaning Democratic voters, establishment of systems for contacting voters, education of the public on positions of the Party, development of lists of volunteers for future Party efforts, training of Party staff and volunteer on methods and techniques to get out the vote, development of materials for reaching voters (scripts and brochures that are universal in nature). See e.g., Affidavit of C. Sloan Cunningham.[1]

The FEC's Regulations

The Commission's own regulations recognize that the generic party building activities undertaken by Respondent are a legitimate and lawful function of party committees. The regulations define the category of activity as "generic voter drives" to include:

> voter registration, voter identification, and get-out-the-vote drives, or any other activities that urge the public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate.

11 C.F.R. § 106.5(a)(2)(iv) (emphasis added). See also, 11 C.F.R. § 106.1(c)(2). The activities undertaken by the Party fall within this category of spending. None of the materials distributed referred to any candidate by name. Rather, the materials addressed the reader or listener in generic party terms, such as "Vote Democratic,"

---

[1] A faxed copy of the affidavit is submitted with the response today. The original will be provided when it is received.

"Support the Democratic Party, "It is always important to vote, and vote Democratic." At no time was "a specific candidate" named or "mentioned" in these materials.

Party committees undertaking activities that benefit both federal and nonfederal elections may allocate their expenses between their federal and nonfederal account. 11 C.F.R. §§ 106.1(d), 106.5(a)(2)(iv). The Commission regulations provide a specific formula for state party committees which choose to allocate these generic expenditures. 11 C.F.R. § 106.5(d). The regulations do not bar the application of the allocation regulations to a special election,[2] and there is no requirement to apply the regulations any differently in this or any other special election. In fact, such an application would make it impossible for party committees to perform their legitimate functions in the election process.

A party's responsibilities to its members and to the voters are no different in a special election than in a regular general election. It must contact and educate the same number of voters about the same election processes and procedures in both circumstances. It must ensure that the interests of the party are promoted and protected regardless of whether there is one candidate or 20 candidates on the ballot. As noted above, a party's activities in one election build successively with each election cycle and benefit future party building activities.

The Commission's own regulations acknowledge this effect. The Explanation and Justification to the allocation regulations addresses the situation when there are no federal elections in a particular election year: In this case, the allocation formula for generic voter drives is based on the ballot in the next general election. "Such allocation is necessary to account for the portion of a committee's off-year administrative functions and generic activities that impact on future federal elections." 55 Fed. Reg. 26064 (June 26, 1990) (emphasis added). The Complaint cannot be reconciled with the Commission regulations, because it would compel the one outcome -- all-federal financing -- that the Commission rejected in the formulation of its allocation rules. As noted previously, the Commission based this position on the impact of activities in that year on future years when federal elections would be held. The Complainant's position is completely inconsistent with that rationale: it would have the Commission find that a party's preparations for a special federal election

[2] See Explanation and Justification, 55 Fed. Reg. 26064 (June 26, 1990)

would have no effect on nonfederal elections in the future. This makes no sense. If the general proposition adopted by the Commission is true -- that any party-building activity in any year affects both the immediate election and the party's prospects in future elections -- then it must be true all around, requiring some allocation to account for the impact on future federal and nonfederal elections.

In this regard, it is significant that of all the choices faced by the Commission in its regulations, the one urged by the Complaint was flatly rejected. Nowhere does the Commission provide for no allocation. In all cases, the Commission, recognizing the broad federal and nonfederal impact of party-building activities, makes room for some allocation. The course chosen by the Commission, which clearly considered and rejected the alternative, was to determine an appropriate allocation for the various circumstances the party might face.

In a manner inconsistent with the Commission's regulations, Complainant's argument that the Party must spend only federal money in connection with a special election would require the conclusion that the funds spent are exclusively for the purpose of influencing a single federal election. As such, all the expenditures would have to be treated as contributions to or coordinated party expenditures on behalf of the federal candidate seeking election. Under the FECA and Commission regulations such contributions and expenditures by a party committee are subject to strict limitations: contributions of $5,000 per calendar year to a candidates; expenditures of $63,620[3] on behalf of the general election nominee. Under Complainant's interpretation, the Party would have been able to spend only $68,620.00 on the special election. Any other spending would have violated the contribution or spending limits set out in the Act. This result cannot be sustained without making it impossible the Party to perform the very functions it is established to perform in any election.

Constitutional Issues Raised by the Party's Role in Elections

In addition to the Commission's own regulations permitting this type of party building activity, there are strong Constitutional grounds which support the Party's expenditures at issue here.

---

[3] This is assuming that the national party committee delegated its spending limit to the Party.

Party committees undertake a wide range of activities to fulfill their responsibilities. Clearly one type of activity involves unambiguous support for clearly identified candidates. The courts have recognized that this type of activity may be limited and "is not the sort of political advocacy that this Court in *Buckley* found was entitled to full First Amendment protection." *California Medical Ass'n v. FEC*, 453 U.S. 182, 196 (1981). As noted above, the Party made contributions to and expenditures on behalf of its candidate in the special election that fell into these categories. Those activities were undertaken in full compliance with the limits and restrictions of the Act. See, 2 U.S.C. §§ 441a(a) and 441a(d).

But party committees also are responsible for formulating and promoting the party's ideas, programs and themes, and for persuading the public to support the party as a whole, without reference to support for a particular candidate. Such efforts include communications to promote the party's position on public policy issues. Other important party activities include the types of activities at issue in this complaint, including efforts to promote the party through voter registration, programs to identify party supporters, phoning, leafleting and other activities aimed at turning out voters on election day.

These communications and activities are entitled to the same high degree of Constitutional protection that the Supreme Court afforded expenditures in *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (limits on expenditures "represent substantial . . . restraints on the quantity and diversity of political speech.") The Court provided a narrow construction of the limits on expenditures through the application of the "express advocacy" standard, which was intended to distinguish between those activities of a party committee that are designed to benefit a clearly identified candidates versus those activities that more broadly promote the party.

These activities also implicate directly a party's associational rights. "[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty assured by . . . freedom of speech." *NAACP v. Alabama ex re. Patterson*, 357 U.S. 449, 460 (1958). This protection of the right of association under the First Amendment has been extended to "partisan political organizations." *Tashijian v. Republican Party*, 479 U.S. 208, 214(1986).

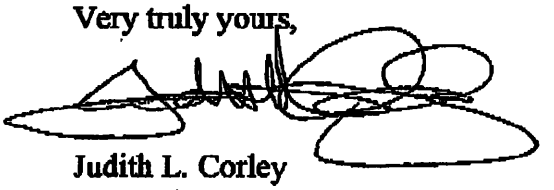
Any attempt to restrict the Party's ability to conduct generic voter drive activities implicates directly these Constitutional protections. Where the activities of

a party clearly, as here, fall into the generic categories of party building activities, the use of federal and nonfederal funds to promote the party is lawful and protected.

Conclusion

As the above discussion shows, the Party's expenditures at issue in the complaint were for necessary, constitutionally protected party-building activities. They were conducted in accordance with the Commission's regulations. The complaint should be dismissed and the Commission should take no further action.

Very truly yours,



Judith L. Corley
Counsel to Respondents

Enclosure

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 4663

AFFIDAVIT OF C. Sloan Cunningham

I, C. Sloan Cunningham, hereby state as follows:

1. I have personal knowledge of the facts set forth herein and if called to testify in this matter, I would testify as set forth herein.

2. I was the County field director of the Democratic Party Committee of New Mexico ("the Party") during the 1997 special election to fill the vacancy in the 3rd Congressional District of New Mexico.

3. I worked with the Party on its party building and get-out-the-vote activities in connection with this election.

4. The purpose of the Party's activities was to build a stronger, more effective party organization and to assist and motivate voters in the special election and in future elections.

5. To this end, the Party made expenditures to enhance its voter file, to identify Democratic voters, to establish systems for contacting voters through mail and phone programs,

to educate the public on issue of concern to the Party, to develop lists of volunteers and other party activists, to train Party staff and volunteers on methods and techniques to get out the vote, to develop materials for reaching voters (including scripts and brochures).

6. These activities all significantly expanded the ability of the Party to conduct registration and GOTV programs in the future. The experience and materials developed through these efforts will be used by the Party in all elections in the future, including the 1998 general election.

7. All of these activities were undertaken as generic party building activities of the Party. None of the materials produced by the Party for these efforts identified the Democratic candidate in the special election.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 8th day of August, 1997.

C. Lowe Cunningham