BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 4643
Friends of Eric Serna for Congress and	)	
John Pound, as Treasurer	)	

BRIEF OF FRIENDS OF ERIC SERNA FOR CONGRESS AND JOHN B. POUND, AS TREASURER

I. There is no probable cause to believe that the Serna Campaign violated the act.

2 U.S.C. § 441a(f) reads as follows:

Prohibited contributions and expenditures. No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this section. (emphasis added)

2 U.S.C. § 441a(f) is violated only if the party at fault knowingly did so. An act can only be knowingly done if a person commits the infraction. The only person mentioned in this regard in counsel's brief who was affiliated with the Serna campaign is the campaign's former manager, Thomas Carroll.

The substantive assertion is that the Serna campaign (and, presumably, the Democratic Party of New Mexico) violated the act. The human conduit, as far as the Serna campaign is concerned, is Mr. Carroll. The question, therefore, is this: did Mr. Carroll knowingly violate 2 U.S.C. § 441a(f)? If he did not, then the campaign, which can only act through its agents and representatives, did not either.

By trade, Mr. Carroll is in the insurance business. He is also, unquestionably, experienced in the political realm. He is not a lawyer.

In determining whether Mr. Carroll knowingly violated § 441a(f), it is necessary to examine the relevant facts from his point of view, i.e. the point of view of an experienced campaign manager. General Counsel's argument is that Carroll should have analyzed things in 1997 in this matter:

a. There was a special election in New Mexico, of short duration. That election was for a seat in the Congress of the United States. The Democratic candidate in the special election was Eric Serna. Carroll was the manager of the Serna campaign;

b. Carroll's function, as campaign manager, was to help win the election for Mr. Serna;

c. The Democratic Party of New Mexico's function was to help win the election for Mr. Serna;

d. Because there was only one race in the spring of 1997, anything the Democratic Party did would benefit only the Serna campaign;

e. Under normal circumstances, i.e. when there are several elections in the mill, it would be natural for the manager of the Serna campaign, and his counterparts in other Democratic campaigns, to communicate with representatives of the Democratic Party.

f. Even though the Democratic Party would not be contributing money to the Serna campaign in excess of what is permitted by federal law, Mr. Carroll should avoid communications of any sort with representatives of the party because any such communication would, in effect, constitute a coordination of effort which could only inure to the benefit of the Serna campaign. Accordingly, Mr. Carroll should

have surmised that any such communication would constitute a violation of 2 U.S.C. § 441a(f);

g. If Carroll in fact had any such communications with representatives of the party, he should have realized that he was required to report the monetary value of anything he thought the party did as a result of such communications to the Serna campaign treasurer so that the information could be included in the treasurer's reports to the Federal Election Commission;

h. By communicating with representatives of his party, failing to translate the value of those communications into dollars and failing to report this information to the treasurer of the Serna campaign, Carroll knowingly violated § 441a(f).

This, we believe, is the theory being advanced by General Counsel. It is not reflective of the thought process one would expect of someone in Mr. Carroll's position in the spring of 1997. The Serna campaign is not aware of any materials which were provided to it by the FEC prior to or during the special election of 1997 identifying this issue.[1] Legal research done today does not disclose the existence of caselaw which would have alerted Mr. Carroll to the issue even if he had thought to ask about it. From Carroll's point of view, General Counsel's thesis would be counterintuitive. A campaign manager's job is to try to win his election. A political party has the same function. A competent campaign manager's instincts tell him or her to do precisely what General Counsel now says Mr. Carroll should have avoided.

Some things, including legal duties, are instinctive. One's instinct says that it is violative

[1]We are not saying that no such materials were provided. If they were, no one in the Serna campaign was aware of them or is presently aware of them.

of the law to steal money. Other things are not instinctively wrongful. The only reason, for example, why it is wrong to accept a political contribution from a corporation is because a statute makes it wrong. If Mr. Carroll had accepted a contribution in excess of $1,000 from a corporation, his background in politics would have told him, through the pre-existing educational process, that he was violating the statute. Cobbling together the argument advanced by General Counsel in this situation, however, is a different thing altogether. The complaint which was filed in this matter is an invitation to the Federal Election Commission to enter previously uncharted waters and to create a new rule of conduct, applicable only in unusual circumstances. If it results in the creation of new rules or guidelines for special elections, persons in Mr. Carroll's position in future campaigns will be charged with knowledge of those rules and guidelines. Thomas Carroll cannot have knowingly violated an administrative rule which did not exist.

II. There is no probable cause to believe that the Serna Campaign's treasurer, John Pound, violated the act.

In the case of the treasurer of the Serna campaign, John Pound, there is no evidence of a violation of the law. In his brief, General Counsel makes no attempt to implicate Mr. Pound. Pound's name is mentioned only twice in the brief. At page 4, as a prelude, counsel says "...this office is prepared to recommend that the Commission find probable cause to believe that the friends of Eric Senna for Congress Committee and John Pound, as Treasurer, violated 2 U.S.C. §441a(f)." What follows are seven pages of legal and factual analysis. The names of those involved in the alleged transgression are mentioned. Pound's is not. Pound's name only comes up again in the final sentence of the brief, under the heading "General Counsel's Recommendations." In that sentence, counsel concludes by recommending that the Commission "find probable cause to believe that the friends of Eric Serna for Congress and John B. Pound, as

Treasurer, violated 2 U.S.C. § 441a(f)."

We are assuming that Mr. Pound's name is included in General Counsel's Recommendation in his official capacity, i.e., as a human figurehead for the Serna campaign. As worded, however, counsel's brief can be read to suggest that Mr. Pound should ultimately be found to have violated 441a(f) in his individual capacity. Regardless of what is intended, a finding of probable cause that "John Pound, as treasurer," violated the law would be understood by the public to mean that Mr. Pound intentionally failed to report contributions he knew should have been reported. Not only is this untrue, but General Counsel makes no such allegation.

General Counsel argues in his brief that Mr. Serna's campaign manager, Thomas Carroll, shared thoughts and ideas about the campaign, and generally coordinated those thoughts and ideas with two representatives of the New Mexico Democratic Party, Randy Dukes and Earl Potter. The theme of Counsel's brief is that the three men were sophisticated and experienced in the political world and should have known enough to build a wall of sorts between Carroll on the one hand and Potter and Dukes on the other. Specifically, as already seen, General Counsel argues that because this was a special election all three individuals should have reasoned that any activity on the part of the party would benefit only the Serna campaign and might therefore be viewed as contributions to the campaign. As we have also pointed out, there was no caselaw, and none is cited by General Counsel in his brief, which would have alerted Carroll, Dukes or Potter that communications amongst them were violative of 2 U.S.C. § 441a(f). The idea that the Democratic Party should not communicate with a Democratic candidate's campaign manager would not have occurred to Carroll, Potter or Dukes. If General Counsel had recommended a finding of probable cause that any of these three persons violated the statute, they could not

knowingly have done so. Perhaps this is why no such recommendation is made.

General Counsel makes an even stranger recommendation. Concluding that Carroll, Dukes and Potter coordinated their efforts in an impermissible way, Counsel appears to recommend that another person, Mr. Pound, be held accountable, simply because Pound served as the campaign's treasurer. Pound did not participate in any of the conversations upon which General Counsel's recommendation is based. Pound knew nothing of the expenditures made by the Democratic Party, i.e. the expenditures listed in the table at pages 1-3 of General Counsel's brief. He was not privy to the decisions to make the expenditures or the reporting of these expenditures to the FEC by the Democratic Party.

If General Counsel is actually suggesting that Pound should ultimately be found to have violated the Federal Election Campaign Act, he is arguing for administrative creation of *respondeat superior* liability for campaign treasurers. Nothing in the Federal Election Campaign Act suggests or authorizes such a thing. A treasurers' liability must be based on a knowing and willful violation of the law. *See, e.g. FEC v. Committee of One Hundred Democrats,* 844 F.Supp. 1, D.C.D.C. (1993).

A person who volunteers to serve as treasurer for a congressional campaign does not agree to serve as personal guarantor of the conduct of others. If the law imposed such a burden on campaign treasurers, it would be the rare candidate who would be able to find a person willing to assume the responsibility.

CONCLUSION

General Counsel's Recommendation is inherently unfair. The only representative of the Serna campaign who had the information necessary to tack together the elements of General Counsel's thesis was Mr. Carroll. The thesis is too ephemeral, however, for any reasonable person to conclude that Mr. Carroll should have divined it. Even if Carroll had been an expert in federal election law (and he was not) there was no caselaw or, to our knowledge, administrative ruling which would have alerted him to the possibility that simply by sharing thoughts with representatives of his own party he was violating the Federal Election Campaign Act. Carroll cannot have had acted knowingly. Accordingly, the Serna campaign cannot have absorbed any guilty knowledge through Mr. Carroll.

The campaign treasurer, Mr. Pound, was not aware of communications between Carroll and representatives of the party. Carroll cannot be expected to have put together the pieces of the puzzle. Pound did not know there was a puzzle to begin with.

The Commission may or may not choose to adopt specific rules dealing with special elections. If it does, the rules shall apply prospectively. It is fundamentally unfair to suggest that any such rule should be applied retroactively, especially when punitive measures are discussed.

Respectfully submitted

Kimball R. Udall
Attorney for John B. Pound
P.O. Box 1984
Santa Fe, New Mexico 87504-1984
(505) 982-4676

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Brief of Friends of Eric Serna for Congress and John B. Pound, as Treasurer were mailed by first-class mail, postage prepaid to Mary W. Dove, Secretary of the Federal Election Commission, 999 E. Street, N.W., Room 905, Washington, DC 20463 (ten copies); and Larry H. Norton and Margaret J. Toalson, Office of General Counsel, 999 E. Street, N.W., Washington, DC 20463 (three copies) on the 14th day of February, 2002.

Kimball R. Udall