



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel *SCJ*

DATE: February 29, 2000

SUBJECT: MUR 4761, 4763, 4764-General Counsel's Report

The attached is submitted as an Agenda document for the Commission Meeting of _____

Open Session _____

Closed Session _____

CIRCULATIONS

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72 Hour TALLY VOTE ☒

Open/Closed Letters ☐

24 Hour TALLY VOTE ☐

MUR ☐

DSP ☐

24 Hour NO OBJECTION ☐

STATUS SHEETS ☐

INFORMATION ☐

Enforcement ☐

Litigation ☐

PFESP ☐

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FEB 29 2000

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FEDERAL ELECTION
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BEFORE THE FEDERAL ELECTION COMMISSION

2000 FEB 29 P 1: 22

In the Matter of)

MURs 4761, 4763, 4764

Texas Democratic Party, *et al.*)

Association of Trial Lawyers of America)

Political Action Committee and)

Dan Cohen, as treasurer)

SENSITIVE

GENERAL COUNSEL'S REPORT

I. ACTIONS RECOMMENDED

In MUR 4763, accept the attached signed conciliation agreement and close the file; in MUR 4761, take no further action against the respondents and close the file;

in MUR 4764, enter into preprobable cause conciliation with the respondents and approve a proposed conciliation agreement.

II. BACKGROUND

In MUR 4763, the Commission found reason to believe that the Texas Democratic Party ("State Committee") and seven Democratic county committees in Texas violated 2 U.S.C. § 441a(f) by accepting excessive contributions totaling \$109,666 from various political committees in 1996. These findings were premised on the fact that the respondent party committees appeared to be affiliated and, hence, subject to a common contribution limit of \$5,000 per calendar year.

More than half (\$60,000) of the excessive contributions to the party committees were made by two contributors, the Association of Trial Lawyers of America Political Action Committee ("ATLA-PAC") and the American Federation of State, County & Municipal Employees-PEOPLE ("AFSCME-PEOPLE"). In MUR 4761, the Commission found reason to believe that ATLA-PAC violated 2 U.S.C. § 441a(a)(2)(C) by making excessive contributions totaling \$35,000 to affiliated Texas Democratic committees in 1996.

In MUR 4764, the Commission found reason to believe that one of the party committee respondents in MUR 4763, the Harris County Democratic Party ("Harris Committee"), also violated 2 U.S.C. § 441a(f) and 11 C.F.R. § 102.5(a)(1)(i) by improperly transferring a total of

\$49,451 from its non-federal account to its federal account for 100% non-federal activity during 1996.

In light of the overlapping issues and respondents, this Office investigated these matters together, initially focusing on the party committee respondents in MUR 4763. In order to further investigate the affiliation issue, the Commission approved subpoenas to produce documents and orders to submit written answers for each of the eight party committee respondents.

On December 1, 1998, following the respondents' request in MUR 4763 to enter into preprobable cause conciliation, but prior to the receipt of any discovery responses, the Commission approved a joint conciliation agreement

When negotiations proved unfruitful, the respondents agreed to respond to the outstanding discovery requests, as reported to the Commission in the General Counsel's Report dated February 25, 1999.

After reviewing the initial discovery responses, this Office expressed its concerns to counsel for the Texas Democratic committee respondents as to inadequacies in those responses.² Following numerous phone conversations, meetings and letters requesting clarification of certain responses as well as additional information, this Office believes that the respondents have substantially complied with the Commission's subpoenas/orders and that the investigation of this matter is complete. As discussed below, the evidence gathered at this juncture sufficiently establishes that the party committee respondents are affiliated.

² Respondents' initial responses are available for review in the Office of the General Counsel.

Counsel have requested this Office to present the attached signed conciliation agreement for the Commission's consideration.

III. DISCUSSION

A. MUR 4763: State and County Party Committees

1. Summary of Investigation

The conclusion that the party committee respondents are affiliated is primarily based on the large intra-party transfers disclosed in the committees' reports. The consequences of such transfers is governed by 11 C.F.R. § 110.3(b)(3), which implements the provisions against the proliferation of political committees set forth in 2 U.S.C. § 441a(a)(5):

All contributions made by the political committees established, financed, maintained, or controlled by a State party committee and by subordinate State party committees shall be presumed to be made by one political committee. This presumption of affiliation shall not apply if –

- (i) The political committee of the party unit in question has not received funds from any other political committee established, financed, maintained, or controlled by any party unit; and
- (ii) The political committee of the party unit in question does not make its contributions in cooperation, consultation or concert with, or at the request or suggestion of any other party unit or political committee established, financed, maintained, or controlled by another party unit.

11 C.F.R. § 110.3(b)(3).³

³ While the regulation speaks of the presumption of one political committee in terms of *making* contributions rather than *receiving* them, the legislative history of 2 U.S.C. § 441a appears to treat affiliated committees other than national/state combinations as single committees for both purposes. Consequently, the affiliated committees would be governed by section 441a(a)(1) or (2) as to the amounts they may collectively give and, by extension, section 441a(f) as to the amounts they may jointly receive. See H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 6 (1976); S. Rep. No. 94-677, 94th Cong., 2d Sess. 9-10 (1976); H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 55, 58 (1976). In addition, the Commission has historically interpreted the limitations of the Act to cover contributions received by affiliated committees. See General Counsel's Report in this matter dated November 25, 1998.

The regulation requires that both (i) and (ii) be satisfied to avoid the presumption of affiliation. Here, neither is satisfied. First, there is abundant evidence of intra-party transfers. A more accurate picture of these transfers was gleaned through discovery, and is summarized in Attachment 2. Between 1993 and 1996, the State Committee transferred at least \$338,530.71 in federal funds to the respondent county committees, and the county committees transferred at least \$113,475.90 in such funds to the State Committee.⁴ In considering the affiliated status of political committees, 2 U.S.C. § 441a(a)(5)(A) effectively exempts such transfers that are raised through joint fundraising efforts. The disclosure reports do not indicate that any of the transferred funds qualify for this exemption, and the responses appear to confirm that the transfers did not consist of joint fundraising proceeds.⁵ See Attachment 3 at 11, 19 (responses to Question 5). Accordingly, the large transfers of funds among the state and county party

⁴ These amounts were listed in the First General Counsel's Report as \$365,543 and \$108,563, respectively, and were based on this Office's examination of the respondent committees' disclosure reports. These figures were adjusted after reviewing further documentation and explanations provided by the respondents during the course of discovery.

⁵ Aside from transfers resulting from the distribution of joint fundraising proceeds, the Act and regulations do not consider the purposes of intra-party transfers in relation to the issue of affiliation. *See* 2 U.S.C. § 441a(a)(5)(A) and 11 C.F.R. § 110.3(b)(3). However, in order to present a more complete picture of the circumstances surrounding the transfers, this Office has attempted to ascertain the purposes of various transfers beyond the sparse information contained in the respondents' disclosure reports. The majority of the transfers from the State Committee to the county committees appear to have been for GOTV activities conducted by the county committees. For example, the responses indicate that a \$30,500 transfer from the State Committee to the Galveston County Democratic Party on December 2, 1996 was for "efforts to get-out-the-vote in the December 10, 1996 Run-Off Election." Attachment 3 at 22 (Response to Question 6). Other transfers include such items as a "birthday distribution," which the State Committee explained as "relat[ing] to an agreement between the DNC and the local county party committees regarding a satellite broadcast event held in conjunction with the President's birthday. It is the understanding of the [State Committee] that funds raised in connection with this event were raised for the DNC. The DNC then distributed some portion of these funds to the local county committees via the [State Committee]. The [State Committee] was not a participant in this fundraising effort." Attachment 3 at 12 (Response to Question 9b).

committees prevent them from avoiding the presumption of affiliation. 11 C.F.R.

§ 110.3(b)(3)(i).

The evidence also indicates that the party committees cannot meet the second condition for avoiding the presumption, as it appears that the county committees are bound to act in concert with the State Committee. The Rules of the Texas Democratic Party (Jan. 1996 and Jan. 1998 editions) ("Rules") set forth the extent to which the State Committee limits the autonomy of the county committees. Article I of the Rules states that "[e]very person who accepts a Party office at any level . . . must agree to support all of the Party's nominees or shall be removed" (emphasis added). Attachment 4 at 1.⁶ Article III, which pertains to committees and officers at both the state and county level, states at section A.12 that "[a] Party Officer shall be removed from office if during the current term of office such Officer publicly supports or endorses an opposing Party or nominee of an opposing Party, a person seeking the nomination of an opposing Party, or a non-Democratic candidate seeking an office in an election in which candidates may file by Party affiliation and a Democrat is seeking the office in question." Attachment 4 at 4. Section A.13 defines the terms "publicly supports" and "endorses" as, *inter alia*, "giving financial support, including contributing money or its equivalent, such as equipment loans, services, or supplies" (emphasis added). *Id.* The procedures governing the enforcement of the above rules is covered in section A.14, which invests the chairman of the State Committee with ultimate authority to remove officers at the county level. *Id.* at 4-5.

The specific sections of the Rules cited above are directly relevant to the second condition of the presumption: that each of the respondent committees not make contributions in

⁶ Complete copies of the 1996 and 1998 editions of the Rules are contained in the MUR 4763 Bulk File in the Office of the General Counsel, Bates # FEC4763-TDP-0010 through 0087.

cooperation, consultation or concert with, or at the request or suggestion of another party unit or its political committees. 11 C.F.R. § 110.3(b)(3)(ii). The Rules constrain independent action on the part of the county committees and ensure that the State Committee exercises substantial control over them. Most significantly, the Rules appear to limit a county committee's ability to contribute to candidates not supported by the State Committee, acting as a continuous prior restraint imposed on each county committee. That a committee may choose not to make contributions to an opposition candidate is of little consequence, as the Rules serve as a compelling deterrent at the outset. Accordingly, the county committees may be said to make their contributions in cooperation or concert with the State Committee.

In response to inquiries as to the scope of the above-cited sections of the Rules, the respondents have claimed that the State Party "is not in a position to characterize or to interpret state law." See Attachment 3 at 12, 19-20. While the Texas Election Code provides detailed procedures governing the conduct of elections and the composition of party executive committees, *see, e.g.* Tex. Elec. Code Ann. § 171.022 (West 1999), this Office's examination of Texas law reveals no provisions addressing the control of the state party over persons holding party offices. In fact, Texas case law has affirmed that courts have no power to interfere in the judgments of constituted authorities of established political parties in matters involving party government and discipline, including the removal of party officers. *See, e.g., Carter v. Tomlinson* (Sup. 1950) 149 Tex. 7, 14; 227 S.W.2d 795, 798.

Finally, in Statements of Organizations filed with the Commission prior to the activity at issue, six of the seven county committees have listed the State Committee as an affiliated committee (the Harris Committee left the applicable section blank). None of these committees has ever filed any subsequent amendments claiming disaffiliation with the State Committee. In

sum, all the available evidence demonstrates that the committees are affiliated. As affiliated committees, the respondents were limited to jointly receiving a maximum of \$5,000 in 1996 from any one person or multicandidate political committee.

2. Counterproposed Agreement

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Accordingly, this Office recommends that the Commission accept the attached agreement and close the file in MUR 4763.

B. MUR 4761: ATLA-PAC

Between September 30 and October 1, 1996, ATLA-PAC made a contribution of \$5,000 to the State Committee and also contributed \$5,000 to each of seven Democratic county party respondents. Because the State Committee and the county party committees are affiliated, ATLA-PAC exceeded its \$5,000 contribution limit and made excessive contributions totaling \$35,000. ATLA-PAC's response states that "[p]rior to making these contributions, it was represented to ATLA-PAC that the Texas local party committees were not 'affiliated' with the Texas state party under federal election law." Attachment 6 at 2. This is consistent with the State Committee's Statement of Organization filed with the Commission, which lists no affiliated committees, and in fact includes an attachment claiming that the county committees "are neither established, controlled or financed" by the State Committee.

After receiving a second notice from RAD advising it to request refunds of the excessive contributions from the affiliated committees, ATLA-PAC provided the Commission with copies of letters assertedly sent to the county committees requesting refunds of the contributions. The dates on these letters indicate that they were sent approximately one month after ATLA-PAC was first notified by RAD of the apparent violation. ATLA-PAC then received responses from four of these committees, each stating that ATLA-PAC's request for a refund had been received but that that no refund was required, as the committees claimed that they were not affiliated. To date, the State Committee and the county party recipients have not refunded any of the excessive contributions.

ATLA-PAC's response claims that the actions of ATLA-PAC demonstrate "good faith" and "best efforts" to comply with the remedial actions requested by the Commission. By refusing to refund the contributions, "the local party committees left ATLA-PAC exposed to legal liability for excessive contributions with no possibility of remedying such alleged violation." Attachment 6 at 5. This Office's investigation has uncovered no evidence that would contradict ATLA-PAC's characterization of the events or its belief that the party committees were not affiliated when it made the contributions.

In light of ATLA-PAC's belief that the party committees were independent when it made contributions to them (supported by information to that same effect in the State Committee's Statement of Organization), as well as its requests for refunds of the excessive contributions as advised by RAD, this Office recommends that the Commission take no further action against the Association of Trial Lawyers of America Political Action Committee and Dan Cohen, as treasurer, send an admonishment letter and close the file in MUR 4761.

D. MUR 4764: Harris Committee

As noted previously, in MUR 4764 the Commission found reason to believe that the Harris Committee violated 2 U.S.C. § 441a(f) and 11 C.F.R. § 102.5(a)(1)(i) in connection with improper transfers totaling \$49,451 from the Harris Committee's non-federal account to its federal account for 100% non-federal activity during 1996. While the activity in MUR 4764 does not overlap with the issues in the matters discussed above, it is being handled along with the others because the Harris Committee is also a respondent in MUR 4763, which was simultaneously referred to this Office by RAD. Although the violations in MUR 4764 are

relatively straightforward, this Office postponed recommending conciliation in MUR 4764 so as not to impede or interfere with the investigation of MUR 4763, and in view of our efforts to conciliate that matter. Consistent with the discussion and recommendations concerning MUR 4763, there would appear to be no bar to proceeding with conciliation in MUR 4764 at this time.¹⁷

Attached for the Commission's approval is a proposed conciliation agreement which contains admissions of the violations and provides for a civil penalty.

¹⁷ In their responses to the Commission's other reason to believe findings in these matters, counsel for the party committee respondents did not address the allocation-related reason to believe findings against the Harris Committee.

IV. RECOMMENDATIONS¹⁸

1. In MUR 4763, accept the attached counterproposed conciliation agreement and close the file with regard to all of the respondents:

Texas Democratic Party
 and Jane Hedgepeth, as treasurer
 Bexar County Democratic Party
 and Eddie Rodriguez, as treasurer
 Dallas County Democratic Party
 and David A. Parnell, as treasurer
 Galveston County Democratic Party
 and Mary Ellen Brennan, as treasurer
 Harris County Democratic Party
 and Sue Schechter, as treasurer
 Jefferson County Democratic Party
 and Gilbert T. Adams Jr., as treasurer
 Travis County Democratic Party
 and Mina Clark, as treasurer
 21st Century Political Action Committee
 and Art Brender, as treasurer

2. In MUR 4761, take no further action against the Association of Trial Lawyers of America Political Action Committee and Dan Cohen, as treasurer, close the file and send an admonishment letter.
- 3.

¹⁸ Two of the committees have new treasurers: Eddie Rodriguez replaced John J. Murnin as treasurer of the Bexar County Democratic Party on February 2, 1999, and Sue Schechter replaced Charlie Gerhardt as treasurer of the Harris County Democratic Party on July 1, 1999. Pursuant to Commission practice, the new treasurers are named in these recommendations.


4.

5. In MUR 4764, enter into conciliation with the Harris County Democratic Party and Sue Schechter, as treasurer, prior to a finding of probable cause to believe, and approve the attached proposed conciliation agreement.
6. Approve the appropriate letters.

Lawrence M. Noble
General Counsel

2/28/00
Date

BY:


Lois G. Lerner
Associate General Counsel



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARY W. DOVE/VENESHE FEREBEE-VINES
COMMISSION SECRETARY

DATE: MARCH 6, 2000

SUBJECT: MURs 4761, 4763 & 4764 - General Counsel Report
dated February 28, 2000.

VW

The above-captioned document was circulated to the Commission
on Tuesday, February 29, 2000.

Objection(s) have been received from the Commissioner(s) as
indicated by the name(s) checked below:

Commissioner Elliott	—
Commissioner Mason	—
Commissioner McDonald	—
Commissioner Sandstrom	<u>XXX</u>
Commissioner Thomas	<u>XXX</u>
Commissioner Wold	<u>XXX</u>

This matter will be placed on the meeting agenda for Tuesday,

March 14, 2000. Please notify us who will represent your Division before the
Commission on this matter.