

JAN 22 2002

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 4788
California Democratic Party *et. al.*)

GENERAL COUNSEL'S REPORT #3

I. ACTIONS RECOMMENDED: Close the investigation; take no further action and close the file as to the Friends of Lois Capps and David Powdrell, as treasurer ("Capps Committee"); take no further action as to the California Democratic Party and the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, regarding the findings based on coordination.

II. BACKGROUND

This is a complaint-generated matter involving allegations that the California Democratic Party ("CDP") used prohibited expenditures to pay for express advocacy advertisements that the CDP ran in the 1998 special election for the 22nd Congressional District of California and that the CDP coordinated these advertisements with the campaign of Lois Capps. The Commission made findings that were based on coordination and prohibited expenditures and initiated an investigation into whether advertisements produced by the CDP for the 1998 special election had been coordinated with the Capps campaign.¹ See First General Counsel's Report ("FGCR"), dated May 6, 1999.

General Counsel's Report #2 ("GCR#2"), dated April 17, 2000, provides a summary of the Capps Committee's and the CDP's responses to the first round of subpoenas. As discussed in GCR#2, both the CDP and the Capps Committee denied communicating with each other

¹ Two months after the Commission made reason to believe findings in this matter, the Commission separately authorized an audit of the Democratic State Central Committee of California—Federal pursuant to 2 U.S.C. § 438(b). The Commission approved the Final Audit Report on February 26, 2001.

1 regarding the CDP's advertisements, but their responses did not address communications with
2 third parties regarding these advertisements. Moreover, the CDP refused to fully answer
3 interrogatories pertaining to its communications with third parties about these advertisements.
4 See GCR#2, pages 13-14. Because of the possibility that coordination between the CDP and the
5 Capps Committee could have occurred through a third party intermediary, this Office
6 recommended that the Commission issue a subpoena to the Democratic Congressional Campaign
7 Committee ("DCCC") rather than initiating a subpoena enforcement action against the CDP. *Id.*
8 The DCCC was viewed as the third party most likely to have been involved in communications
9 with both the Capps Committee and the CDP because the DCCC had reported coordinated party
10 expenditures in support of Capps. *Id.* The Commission, however, decided not to issue the
11 subpoena to the DCCC. Instead, the Commission, on May 23, 2000, authorized the Office of
12 General Counsel to file civil suit to enforce the subpoena against the CDP. See Memorandum to
13 the Commission dated June 1, 2000. Subsequently, the Commission approved additional
14 discovery to develop information about third party contacts. See GCR #2, pages 12-14. On June
15 2, 2000, the Commission approved the issuance of a second subpoena to the Capps Committee
16 and subpoenas to the two vendors that provided the services at issue in this matter--Armando
17 Gutierrez & Associates, Inc., and Crounse & Malchow.

18 Following is a summary of
19 information obtained from additional discovery as to the CDP, Capps Committee, and the
20 two vendors. This report also includes recommendations for no further action regarding the
21 coordination allegations.

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The CDP was notified of the Commission's intent to file suit for failure to comply with

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the subpoena. Following the notice, the CDP submitted a supplemental response to the subpoena

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on June 19, 2000, which raised privileges and objections and was not fully responsive. *See*

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Memorandum to the Commission dated June 28, 2000, at Attachment 1.

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CDP, on October

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27, 2000, submitted some of the documents it had listed on its privilege log

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2 CDP produced additional documents and supplemental responses to interrogatories on April
3 19, May 4, and June 14, 2001. Attachments 2-4.

4 **IV. SUMMARY OF RESPONSES & INFORMATIONAL INTERVIEWS**

5 **A. The California Democratic Party**

6 In responses the CDP
7 addressed communications between the CDP and the DCCC and produced additional documents,
8 primarily facsimile transmissions of draft radio transcripts and mail pieces that were sent from
9 Peter Cari, then-DCCC Strategic Planning Director, to Lance Olson, CDP counsel and/or to
10 Kathy Bowler, the CDP's Executive Director. The CDP acknowledges having had written and
11 oral communications with the DCCC regarding the Capps special election, and the mail pieces
12 and radio spots the CDP produced for that election. Specifically, the CDP acknowledges, "Ms.
13 Bowler communicated with Peter Cari and Matthew Angle of the DCCC about the text of the
14 mail pieces and radio spots, financing, legal compliance and indemnification." Attachment 4, at
15 4. The CDP also acknowledges that Olson spoke with Robert Bauer, DCCC counsel, "regarding
16 the development and legality of the mail pieces and radio spots." *Id.* The CDP also
17 acknowledges that Bowler "recalls discussing mechanics such as when the advertisements would
18 be completed and text changes, but does not recall further specifics" and "recalls general

1 discussion on changing wording in the advertisements, as well as the use of federal and non-
2 federal funds to pay for the advertisements, but does not recall further specifics." *Id.* at 4 and 8.

3 **B. Armando Gutierrez & Associates**

4 Information obtained from informal interviews with Armando Gutierrez & Associates,
5 the vendor that produced and placed the radio spots, reflects that the officials at the DCCC (in
6 particular, Peter Cari) were the primary contacts with the vendor regarding the radio buys.⁵
7 Specifically, the information obtained shows that it was the DCCC rather than the CDP that
8 initially contacted and primarily interacted with Armando Gutierrez & Associates regarding the
9 development and production of radio buys and that Peter Cari reviewed and authorized the script.

10 According to Armando Gutierrez, his first contact with the DCCC was early to mid-
11 February 1998 when he received a call from the DCCC.⁶ Gutierrez states that he was told that
12 a special election was taking place, and that he was asked whether he was "willing to work on the
13 Capps campaign" to do "issue advocacy ads for Lois Capps." He said that Peter Cari asked him
14 for a proposal to "check out the Hispanic media in that congressional district and put together a
15 proposed radio buy," that he sent the proposal to Cari and/or to Paul Frick at the DCCC for input,
16 that the DCCC reviewed the proposal and authorized him to proceed with creating the radio
17 scripts. Gutierrez said that he created several scripts and passed them back to the DCCC for

⁵ These interviews are contained in Reports of Investigation ("ROIs") and are located in the Central Enforcement Docket ("CED").

Documents produced by Gutierrez, also located in CED, include the proposal from Gutierrez for radio buys for the period February 28, 1998-March 10, 1998, transcripts of two bilingual Spanish/English radio buys entitled "Anti-Latino" and "Don't Let the Politicians Cut Education From Our Children," listing DCCC/California Democratic Party as the client; invoices from Spectacular Broadcasting to Burnett Media, Gutierrez's media buyer, for the radio spots running from March 1, 1998, through March 10, 1998, two self-mailers listed as "GOTV" entitled "Education" and "Respect"; and a memorandum (Attachment 5), dated March 19, 1998, from Gutierrez to Cari, regarding "Information on Lois Capps' Buy "

⁶ Armando Gutierrez said that the call came from either Peter Cari, Paul Frick, media director at the DCCC, or Moses Mercado, a staffer in Representative Richard Gephardt's office.

1 legal review. Gutierrez says that he remembers Cari telling him that Lois Capps' name could not
2 be mentioned but that Walter Capps' name could. Gutierrez also says that he remembers that
3 conversation with Cari as conveying something to the effect "we push this to the limit of the law,
4 if the law doesn't specifically prevent you, you do it."

5 In informal interviews with this Office, Laura Barbarena, Gutierrez's Creative Director in
6 1997-1998, states that she had no conversations with the Capps campaign. Barbarena, however,
7 makes references to the Capps campaign when discussing the work for the special election. For
8 example, she says Kathy Bowler "was in charge of the payment process for the Capps
9 Campaign." Bowler, however, was with the CDP not the Capps campaign. Similarly, Barbarena
10 states that she may have faxed Cari "a script to run by legal in the Capps campaign." Barberana
11 also produced several documents—traffic instructions for the radio buy, drafts of scripts of the
12 radio spots, copies of checks, and notes.⁷ One of the radio transcript is entitled "Lois Capps Spot
13 II." See Attachment 6, at 3. Other radio transcripts suggest that the DCCC and the CDP were
14 concerned about the use of the word "Capps" in the text. *Id.* at 1-2.

15 Gutierrez's and Barbarena's frequent references to the Capps campaign when discussing
16 the special election suggest that they and others essentially considered the advertisement
17 campaign not as generic GOTV activity, but as support of Capps

18 **C. Crounse & Malchow**

19 Crounse & Malchow provided the direct mail services at issue in this matter.⁸ Informal
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⁷ Documents produced by Barbarena are located in CED

⁸ Documents produced by Crounse & Malchow consist of four pieces of campaign literature two Spanish-
language pieces with English translation entitled "Don't Let Politicians Cut Our Children's Education" and
"Respect," and two pieces entitled "Continue the Walter Capps Tradition" and "Who Should Decide What Care You
Need " Documents are located in CED.

1 interviews were conducted with Hal Malchow, the firm's creative director, and with Ooman
2 "Anil" Mammen, the firm's account executive. Malchow claims little recollection of the
3 services. He says that the DCCC made the initial contact regarding these services but that he
4 doesn't remember who from the DCCC called.⁹ Malchow avers that he had no contact with the
5 Capps campaign. Mammen was a vice president of the firm during 1997-1998¹⁰ and had the
6 most contacts with Kathy Bowler and with Peter Cari regarding the services. According to
7 Mammen, Peter Cari was his main contact at the DCCC. He said that Cari placed the order for
8 the mail pieces and that he had conversations with Cari regarding the schedule, payment and
9 contents for the pieces. Mammen also said that he remembers conversations with Kathy Bowler
10 of the CDP, though not the specifics. He said that both Cari and Bowler gave instructions and/or
11 provided input regarding the contents of the mailings. Finally, Mammen contends that 1) "there
12 clearly was no money, direction, or instruction from the [Capps] campaign;" 2) "Bob Bauer and
13 Judy Corley made it clear to never discuss anything with the [Capps] campaign," and 3) "our
14 interpretation of the FEC regulations was that there should be no direct contact with the [Capps]
15 campaign."

16 **D. The Capps Committee**

17 The second subpoena to the Capps Committee sought information regarding any
18 communications the Capps Committee may have had with third parties regarding the
19 mailings/advertisements the CDP produced for the 1998 special election. The Capps

⁹ Hal Malchow told Commission investigators that he called Bob Bauer, the DCCC's attorney, about this matter and that Bauer informed him that he was already aware of the matter

¹⁰ Anil Mammen also worked as Director for Direct Mail at the DCCC in 1991-1993.

1 Committee's second subpoena response was received on July 25, 2000. Attachment 7.¹¹ As in
2 its first subpoena responses, the Capps Committee denies having "any written and/or oral
3 communications, conferences, meetings or discussions with anyone regarding the CDP
4 mailings/advertisements." *Id.* at 3.

5 The Capps Committee submitted a supplemental response to the second subpoena on
6 June 18, 2001. Attachment 9. In the response, Cathy Duvall, campaign manager for the Capps
7 Committee during the 1998 special election, unequivocally states that the "Capps Committee did
8 not coordinate in any way with the California Democratic Party, or any other entity regarding the
9 Party's GOTV mailings, or its radio advertisements," and that the "Capps Committee was not
10 involved in the preparation, distribution, planning, placement, volume, or targeting of these
11 advertisements." *Id.* at 1. Duvall also avers that the "Capps Committee made clear from the
12 outset of the campaign that it did not want any third party groups, including the Democratic Party
13 to conduct election-related activity in connection with the special election." *Id.* at 2. Regarding
14 discussions with the DCCC, Duvall avers that she "voiced [her] . . . objection to the Party's
15 efforts to Paul Frick of the Democratic Congressional Campaign Committee," and that she "told
16 Mr. Frick that the Capps campaign did not want any Party support or activity in connection with
17 the election and that the Party's efforts were counterproductive to the Capps Committee's
18 efforts." *Id.*

¹¹ The Capps Committee's subpoena response includes a cassette tape and copies of advertisements produced by the Capps campaign. These documents are not attached and are located in CED

V. DISCUSSION

Information obtained in the investigation shows that the DCCC and the CDP closely collaborated on the production of the mail pieces and radio spots at issue. It also appears that the DCCC was far more involved than the CDP in the production of these advertisements. The fact that the DCCC made coordinated expenditures in support of the Capps campaign and its central role in the production of the advertisements at issue raised questions as to whether coordination occurred through the DCCC. At the same time, both the Capps Committee and the CDP deny having had any discussions with each other regarding these advertisements, and the Capps Committee adamantly denies having had any involvement in or discussions with the DCCC or with any other entity about these advertisements except to register displeasure with Mr. Frick at the DCCC about the Party's activity in support of the Capps campaign. Although we could attempt to gauge the credibility of the Capps Committee's representations with additional subpoenas and depositions of the DCCC and the Capps Committee, it does not appear a good use of Commission resources to pursue the coordination issue given the parties' denials and the lack of any affirmative evidence of communications about the advertisements that demonstrate coordination. Accordingly, this Office recommends that the Commission take no further action and close the file as to the Friends of Lois Capps and David Powdrell, as treasurer, and take no further action as to the California Democratic Party and the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, regarding the findings based on coordination.

Although this Office does not recommend pursuing the violations based on coordination, we do recommend pursuing the CDP for violations based on the making of prohibited expenditures/use of non-federal funds, and failure to include disclaimers

1 As discussed in the FGCR, pages 17-18, because the CDP's advertisements contained
2 express advocacy of a clearly identified candidate, they were not generic activity and were
3 therefore required to be funded entirely from funds subject to the limitations and prohibitions of
4 the Act. CDP disclosure reports reflect that the CDP paid a total of \$99,079.06, to the vendors
5 that provided services in connection with these advertisements. Of this amount, \$22,797.39 was
6 reported as the federal share and \$77,281.67 as the non-federal share. The State of California in
7 1998 allowed corporations and labor organizations to contribute to a political party. A review of
8 disclosure reports filed by the CDP's non-federal account during the period at issue reflects
9 contributions that would be impermissible under the Act, i.e., contributions from corporations
10 and labor unions, and contributions in excess of federal limits. It is clear that the CDP used such
11 funds to pay for the express advocacy advertisements for the 1998 special election in violation of
12 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a)(1)(i), that it failed to properly report these expenditures
13 in violation of 2 U.S.C. § 434(b), and that it failed to include proper disclaimer in these
14 advertisements in violation of 2 U.S.C. § 441d(a).

15 Given the CDP's posture on the express advocacy issue,¹³ this Office does not believe it
16 would be fruitful to offer to engage in preprobable cause conciliation with regard to these
17 violations. Accordingly, this Office intends to move to the briefing stage regarding these
18 violations.

19 **VI. RECOMMENDATIONS**

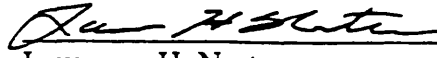
20 1. Take no further action and close the file as to the Friends of Lois Capps and David
21 Powdrell, as treasurer.
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¹³ In its responses to the reason to believe findings and to the subpoena, the CDP has consistently argued that its advertisements are not independent expenditures because they do not contain express advocacy of a clearly identified candidate. See FGCR, pages 11-14, and GCR#2, page 8

2. Take no further action as to the California Democratic Party and the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, regarding 2 U.S.C. §§ 441a(a)(2)(A) and 441a(d).

3. Approve the appropriate letters.

1/17/02
Date


Lawrence H. Norton
General Counsel

Attachments:

1. CDP subpoena response, dated October 23, 2000.
2. CDP supplemental subpoena response, dated April 18, 2001.
3. CDP supplemental subpoena response, dated May 3, 2001
4. CDP supplemental subpoena response, dated June 14, 2001
5. Memorandum dated March 19, 1998, "Information on Lois Capps' Buy."
6. Transcripts, radio advertisements.
7. Capps Committee Supplemental Response to Subpoena, dated July 24, 2000.
8. Correspondence, OGC & Capps Committee.
9. Capps Committee Supplemental Response to Subpoena, dated June 18, 2001.

Staff assigned: Dominique Dillenseger