

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

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2001 APR 13 2 2001

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5078
DATE COMPLAINT FILED: 8/24/00
DATE OF NOTIFICATION: 8/31/00
DATE ACTIVATED: 12/13/00

EXPIRATION OF STATUTE OF
LIMITATIONS: 10/12/04

STAFF MEMBER: Kasandra Robinson

COMPLAINANT: Donald F. McGahn, II, General Counsel
National Republican Congressional Committee

RESPONDENTS: Friends of Joe Baca and
Joe Baca, as treasurer
Joe Baca (as candidate)

RELEVANT STATUTES:
2 U.S.C. § 431(8)(A)(i)
2 U.S.C. § 431(9)(A)
2 U.S.C. § 432(i)
2 U.S.C. § 434(a)(2)(B)(ii)
2 U.S.C. § 434(a)(6)(A)
2 U.S.C. § 434(b)(4)
2 U.S.C. § 434(b)(8)
2 U.S.C. § 441(a)
2 U.S.C. § 441a(f)
2 U.S.C. § 441b(a)
11 C.F.R. § 104.3(a)(3)
11 C.F.R. § 104.3(b)(3)(i)(A)
11 C.F.R. § 104.3(d)
11 C.F.R. § 104.5(f)
11 C.F.R. § 104.7(a)
11 C.F.R. § 104.7(b)
11 C.F.R. § 104.9
11 C.F.R. § 104.11(a)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

21 "04" 405 "3180

I. GENERATION OF MATTER

This matter was initiated by a complaint filed on August 24, 2000 by Donald F. McGahn, II, ("Complainant") General Counsel of the National Republican Congressional Committee. Complainant alleges that during the 1999 special election cycle, Joe Baca ("Candidate")¹, and his authorized Committee, the Friends of Joe Baca and Joe Baca, as treasurer² (the "Committee"), accepted prohibited and excessive contributions, and committed numerous reporting violations. Among other things, the Complainant alleges that the Committee failed to respond to the Reports Analysis Division's ("RAD's") Requests for Additional Information ("RFAs"), indicating knowing and willful violations by the Candidate.

Respondents were notified of the complaint on August 31, 2000. A response was submitted on behalf of all Respondents on October 13, 2000, disputing the allegations contained in the complaint.

II. FACTUAL AND LEGAL ANALYSIS

A. **The Law**

The Federal Election Campaign Act of 1971, as amended (the "Act"), prohibits any person from making contributions "to any candidate and his authorized political committee with respect to any election for Federal Office which, in the aggregate, exceeds \$1,000."

2 U.S.C. § 441a(a). In addition, the Act prohibits any candidate or political committee from knowingly accepting any contribution or making any expenditure in violation of the provisions of this section. 2 U.S.C. § 441a(f). A contribution is any gift, subscription, loan, advance, or

¹ Joe Baca was elected to Congress in November 1999 for the 42nd district of California in a special election to replace the late Congressman George Brown, Jr. Mr. Baca was re-elected in November 2000.

² On September 19, 2000 the Committee filed an amended Statement of Organization naming Joe Baca as treasurer, replacing William P. Smith.

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deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office. 2 U.S.C. § 431(8)(A)(i). An expenditure is any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal Office; and a written contract, promise, or agreement to make an expenditure. 2 U.S.C. § 431(9)(A).

Pursuant to 2 U.S.C. § 441b(a), it is unlawful for corporations to make a contribution or expenditure in connection with any election for Federal office, "or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section."

Commission regulations require political committees to use "best efforts" to obtain the occupation and name of employer for all individuals who contribute more than \$200 in a calendar year. 11 C.F.R. § 104.7(b)(1). A committee may establish "best efforts" by providing the Commission with a description of its procedures for requesting the information.

11 C.F.R. § 104.7(a). In order to establish "best efforts," the committee must demonstrate that it makes at least one request for the information after the contribution is received.

11 C.F.R. § 104.7(b)(2). This one request must be made for any solicited or unsolicited contribution that exceeds the \$200 threshold and lacks the necessary information. *Id.*

Commission regulations also require that "[a]n authorized committee of a candidate for Federal office shall report the total amount of receipts received during the reporting period and, except for itemized and unitemized breakdowns, during the calendar year."

11 C.F.R. § 104.3(a)(3). This includes the total amount of contributions received during the calendar year. *Id.* Moreover, the Act requires treasurers of political committees to file a report

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covering the period beginning July 1 and ending December 31, which shall be filed no later than January 31 of the following calendar year. 2 U.S.C. § 434(a)(2)(B)(ii).

Commission regulations require notification of contributions received within 48 hours of an election. 11 C.F.R. § 104.5(f). If any contribution of \$1,000 or more is received by any authorized committee of a candidate after the 20th day, but more than 48 hours, before 12:01 a.m. of the day of the election, the principal campaign committee of that candidate shall notify the Commission, the Secretary of the Senate and the Secretary of State, as appropriate, within 48 hours of receipt of the contribution. *Id.*

The total amount of all campaign disbursements must be reported in a committee's periodic disclosure filings. 2 U.S.C. § 434(b)(4). Political committees shall report the full name and mailing address of each person to whom an expenditure in an aggregate amount or value in excess of \$200 within the calendar year is made from the reporting committee's federal account(s), together with the date, amount, and purpose of such expenditure. 11 C.F.R. § 104.9. "Purpose" means a brief statement or description as to the reasons for the expenditure.

11 C.F.R. § 104.3(b)(3)(i)(A).

All campaign debts and obligations must be reported in a committee's periodic disclosure filings. 2 U.S.C. § 434(b)(8). For as long as debts remain outstanding, a political committee is required to continuously report their existence until such time as they are extinguished.

11 C.F.R. § 104.11(a). All outstanding obligations are to be reported on FEC Form 3 Schedule D, with specific references to: the amounts owed; the outstanding balance as of the beginning of the reporting period; the amounts incurred during that reporting period; payments made during that period; and the outstanding balance at the close of the reporting period. Committees are also

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required to enclose with this schedule a statement setting out the amount(s) paid and explaining the conditions under which such obligations or debts are extinguished. 11 C.F.R. § 104.3(d).

“Knowing and willful” actions are those that are “taken with full knowledge of all the facts and a recognition that the action is prohibited by law.” 122 Cong. Rec. H3778 (daily ed. May 3, 1976). The knowing and willful standard requires knowledge that one is violating the law. *FEC v. John A. Dramesi for Congress Comm.*, 640 F. Supp. 985 (D.N.J. 1986). A knowing and willful violation may be established by “proof that the defendant acted deliberately and with knowledge that the representation was false.” *U.S. v. Hopkins*, 916 F.2d. 207, 214-15 (5th Cir. 1990). A knowing and willful violation may be inferred “from the defendants’ elaborate scheme for disguising” their actions and their “deliberate convey[ance of] information they knew to be false to the Federal Election Commission.” *Id.* “It has long been recognized that ‘efforts at concealment [may] be reasonably explainable only in terms of motivation to evade’ lawful obligations.” *Id.* at 214, citing *Ingram v. United States*, 360 U.S. 672, 679 (1959).

B. The Complaint

Complainant asserts several violations by the Respondents. According to the complaint, Respondents violated the Act and Commission regulations by: accepting prohibited and excessive contributions; filing a special election pre-election report “that can only be called a disaster”; failing to timely file a Year End Report; failing to file 48-Hour notices; failing to use “best efforts” in obtaining the occupation and name of employers for all individuals contributing more than \$200 in a calendar year; failing to specify the purpose of disbursements; failing to properly report debt; and failing to respond to RFAs, indicating knowing and willful conduct.

21-04-405-3184

1. 12 Day Pre-Runoff Report (9/2/99 - 10/27/99)

According to the complaint, RAD issued the Committee an RFAI regarding this report listing several violations: excessive contributions; corporate/union contributions; failure to exercise best efforts to obtain the occupation and employer of contributors; failure to report contributions, including a \$5,000 contribution from the Committee on Political Education; a possible failure to file 48-hour notices; and discrepancies in the year-to-date totals. The complaint further alleges that the Committee failed to respond to the RFAI.

2. Failure to Timely File a Year End Report (12/7/99 - 12/31/99)

The complaint next alleges that the Committee failed to timely file a Year End Report for 1999. The complaint alleges that when the report was filed, it contained mathematical errors. Specifically, the complaint alleges that the year-to-date contribution amounts (lines (a) through (d) on the detailed summary page) did not add up to the total shown on line 11(e).

3. Failure to Specify the Purpose of Disbursements

The complaint also alleges that Committee reports failed to provide a Schedule B listing the purpose of the campaign's disbursements. The complaint asserts that the Committee's failure to list the purpose of its disbursements calls into question the legality of the Candidate's use of campaign funds.

4. Improper Debt Reporting

The complaint further alleges that the Committee's 12 Day Pre-Primary Report, (1/1/00 - 2/16/00) showed a debt of \$146,316.10. The Committee failed to include a Schedule D to explain this debt. According to the complaint, the amended report disclosed a debt of \$143,065.64, but again, the Committee failed to include a Schedule D to explain the debt. Additionally, the complaint alleges that the April and July Quarterly Reports show no debt at all.

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Complainant alleges that “[s]uch disappearing debt raises serious and troubling questions regarding [the Candidate’s] finances.”

5. Non-Responsiveness to RFAs Indicates Knowing and Willful Conduct

Finally, the complaint alleges that the Committee has ignored the Commission’s RFAs. The complaint asserts that the failures by the Candidate to respond to these RFAs indicates “that he has no explanation for his violations, and they were done intentionally.”

C. The Response

By letter dated October 13, 2000, counsel for the Respondents filed a response to Complainant’s allegations. Noting that the complaint “claims it points out serious issues,” counsel asserts that the “facts largely demonstrate minor reporting inconsistencies.” Counsel contends that in each instance, the Committee provided the required information either with the initial reports, or “provided substantially correct information and fixed any technicalities” in amended reports. In addition, counsel asserts that the Committee has returned three contributions “it mistakenly believed were appropriate.”³ As discussed below, the response addressed the issues raised by each RFAI during the relevant time period.

1. Excessive Contributions

The RFAI dated February 29, 2000, for the Pre-Runoff Report (9/2/99 - 10/27/99), questioned whether contributions accepted from the Keep the Seat Democratic Committee, CA 42nd Dist. of \$6,575 and from the Barona Band of Mission Indians of \$3,000 were excessive. Counsel stated that the Committee had responded by letter and amended the

³Counsel also states that the Committee, in the absence of RFAs, voluntarily amended its April and July Quarterly Reports. However, since the response was sent, RAD has sent RFAs to the Committee concerning its April Quarterly Report and its amended April Quarterly Report. The Committee has responded to the RFAs.

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Pre-Runoff Report and refunded a total of \$4,575 to the Keep the Seat Democratic Committee on January 19 and January 24, 2000, prior to receiving the RFAI. In response to the excessive contribution allegation regarding the Barona Band of Mission Indians, counsel explained that the Barona Indians contributed three separate checks for \$1,000 on September 28, 1999, and appended copies of the checks to the response. Each check was designated for three different elections ('99 primary, '99 general and '00 primary); the Committee also amended the Pre-Runoff Report accordingly.

2. Corporate/Union Contributions

The February 29, 2000 RFAI also questioned whether the Committee had accepted impermissible contributions. According to counsel, with respect to three contributions on the Pre-Runoff Report (9/2/99 - 10/27/99), the Committee refunded contributions it had mistakenly believed were appropriate. In one instance, the contributor (Inland PORAC PAC) was a PAC, but not a qualified Federal PAC, and the Committee refunded its \$500 contribution. In the other two instances, involving two corporate contributions, one for \$500 and one for \$1000, the Committee refunded the contributions October 13, 2000. According to counsel, all of the other questioned contributions, including those contributions questioned by the February 6, 2000 RFAI regarding the Post-Runoff Report (10/28/99 - 12/6/99), were actually from sole proprietorships, and the Committee amended its reports in March 2000 and July 2000, respectively, to reflect this information.

The February 29, 2000 RFAI for the Pre-Runoff Report (9/2/99 - 10/27/99) questioned five contributions. In response, according to counsel, the Committee amended its Pre-Runoff Report to show that three of the contributions had been made by sole proprietorships. Counsel

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states that a fourth contribution is also a sole proprietorship, and that the fifth contribution (a union PAC) was correctly reported in the original report.

3. The Committee's Best Efforts to Locate Occupation and Employer

RFAIs dated February 29, June 6, and June 29, 2000 questioned the Committee's "best efforts" to locate the occupation and employer of all contributors donating \$200 or more in a calendar year. According to counsel, for the Pre-Runoff Report (9/2/99 - 10/27/99), the Committee lacked information as to 43 individual contributors who gave more than \$200. The Committee provided amended reports on December 21, 1999, January 31, and March 16, 2000 setting forth the occupation and employer of 18 of the 43 contributors. Counsel asserts that the Committee was unable to obtain occupation and employer information from the remaining contributors. Counsel asserts that the Committee sent letters to all contributors for whom information was missing, but received few responses.

For the Post-Runoff Report (10/28/99 - 12/6/99), counsel states that the Committee lacked information as to 31 individual contributors who gave more than \$200. The Committee provided amended reports on January 31 and July 11, 2000, setting forth the occupation and employer of ten additional contributors. Counsel again asserts that the Committee sent a letter to contributors for whom information was missing requesting occupation and employer information, but most contributors failed to respond.⁴

⁴ According to counsel for Respondents, "The Committee's standard practices demonstrate that it uses best efforts to compile any missing information. First, each solicitation includes a request for occupation and employer information, as well as a statement that the data is required by federal law. (11 C.F.R. § 104.7(b)). Most importantly, the Committee's treasurer, Bill Smith, and his assistant, Susan Freese, regularly send a letter to all contributors donating over \$200 to ask for his or her occupation and employer. To the best of its knowledge, the Committee has sent a letter to each contributor over \$200 for whom occupation and employer information is missing."

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4. 48-Hour Notices

In his response to the complaint, Respondents' counsel also addressed the February 29, 2000 RFAI questions concerning possible 48-hour notice violations with respect to the Pre-Runoff Report (9/2/99 - 10/27/99). According to counsel, four contributions were disclosed in the report under the name of a sole proprietorship, but the 48-hour notices were correctly filed with the individual's name listed. Thus, the information was reported, albeit in two different formats. As noted previously, the Committee amended its Pre-Runoff Report for three of these contributions to reflect the contributions as coming from individuals. The Committee also received an RFAI dated June 6, 2000, for the Post-Runoff Report (10/28/99 - 12/6/99) questioning possible 48-hour notice violations. Upon review, counsel states, the Committee realized that it inadvertently omitted 48-hour notices for six contributors during the period November 3 - 8, 1999. The Committee mailed these notices to the FEC on July 11, 2000 to correct the record.⁵

5. Year-To-Date Totals

RFAs dated February 29 and June 6, 2000 questioned discrepancies in the year-to-date totals in the Pre-Runoff Report (9/2/99 - 10/27/99) and the amended Post-Runoff Report (10/28/99 - 12/6/99) filed January 31, 2000. According to counsel, the Committee amended these reports on July 11, 2000.

6. Filing of the Year End Report (12/7/99 - 12/31/99)

The complaint alleges that the Committee filed this report late and that it contained mathematical errors. In his response, counsel denies that the report was filed late. A certified mail receipt and acknowledgment of receipt indicates that the Committee timely filed this report

⁵ These contributions totaled \$10,000.

21-04-405-3189

on January 31, 2000. The Committee amended this report on July 11, 2000 to correct the mathematical errors.

7. Disbursements

In response to the allegations that the Committee failed to report the purpose of disbursements, counsel acknowledges that this information was omitted on the first three reports in the year 2000: the Pre-Primary Report (1/1/00 - 2/16/00); the April Quarterly (2/17/00 - 3/31/00); and the July Quarterly (4/1/00 - 6/30/00). An RFAI dated June 6, 2000 first noted this problem. According to counsel, the failure to report the purpose of disbursements was an inadvertent oversight caused by switching software vendors. The Committee provided the omitted information in amended reports filed on August 25 and September 8, 2000.

8. Reporting of Debt

Likewise, counsel for the Committee acknowledged that, due to switching software vendors, the Committee inadvertently omitted Schedule D on the Pre-Primary Report (1/1/00 - 2/16/00) and the April Quarterly Report (2/17/00 - 3/31/00). The Committee amended the Pre-Primary Report on August 25, 2000, and amended the April Quarterly Report on September 6, 2000. The original July Quarterly Report contained a full Schedule D.

9. Response to Requests for Additional Information

Finally, the complaint alleges that the Candidate ignored RFAIs, and that this alleged non-responsiveness indicates knowing and willful misconduct. Counsel for Respondents disagrees. He asserts that the Committee has responded in detail to each issue raised by the FEC within 30 days. All omissions in the reports were inadvertent, not intentional. According to counsel, Respondents "have taken every necessary step to comply with the law and disclose campaign activity."

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D. Analysis

The Committee admits that it accepted an excessive contribution, accepted three prohibited corporate/union contributions, omitted 48-hour notices for six contributions during the period November 3-8, 1999, omitted the description of the purpose of disbursements on three reports, and omitted Schedule Ds on two reports.⁶ The Committee refunded the excessive contribution and the three prohibited corporate/union contributions. It appears that other than these violations, the Committee provided substantially correct information on its initial reports and corrected reporting errors by amending reports.

Complainant alleged that the Candidate ignored RFAIs indicating knowing and willful conduct. After careful review of the Committee's reports and responses to each RFAI addressing the reports in issue, this Office found that the Committee responded to the questions raised by each RFAI, and took corrective action. There is no evidence that the underlying violations were intentional, nor that the Candidate was involved in any knowing or willful conduct to violate the Act.

Based on the above, this Office recommends that the Commission find reason to believe that the Friends of Joe Baca and Joe Baca as treasurer, violated 2 U.S.C. §§ 441a(f), 441b(a), 434(a)(6)(A), (b)(4) and (b)(8). This Office further recommends that the Commission find no reason to believe that the Friends of Joe Baca and Joe Baca as treasurer, violated 2 U.S.C. §§ 432(i) and 434(a)(2)(B)(ii). In addition, this Office recommends that the Commission find no reason to believe that Joe Baca as candidate, violated any provision of the Act.

⁶While the Committee did not provide the dates it sent out "best efforts" letters to contributors donating \$200 or more in a calendar year, after reviewing the Committee's explanation of its standard practices, it appears that the Committee complied with the provisions of the Act.

21-04-105-3191

III. DISCUSSION OF CONCILIATION AND CIVIL PENALTY

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IV. RECOMMENDATIONS

1. Find reason to believe that the Friends of Joe Baca and Joe Baca as treasurer, violated 2 U.S.C. §§ 441a(f), 441b(a), 434(a)(6)(A), (b)(4), and (b)(8).
2. Find no reason to believe that the Friends of Joe Baca and Joe Baca as treasurer, violated 2 U.S.C. §§ 432(i) and 434(a)(2)(B)(ii).
3. Find no reason to believe that Joe Baca as candidate, violated any provision of the Act.
4. Approve the attached Factual and Legal Analysis and conciliation agreement, and the appropriate letters.

Lois G. Lerner
Acting General Counsel

4/12/01
Date

BY: Abigail A. Shaine
Abigail A. Shaine
Acting Associate General Counsel

Attachments:

1. Factual and Legal Analysis
2. Proposed Conciliation Agreement

21-04-405-3193



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel

DATE: April 13, 2001

SUBJECT: MUR 5078-First General Counsel's Report

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

Open Session _____

Closed Session _____

CIRCULATIONS

SENSITIVE ☒
NON-SENSITIVE ☐

72 Hour TALLY VOTE ☒
24 Hour TALLY VOTE ☐
24 Hour NO OBJECTION ☐
INFORMATION ☐
96 Hour TALLY VOTE ☐

DISTRIBUTION

COMPLIANCE ☒
Open/Closed Letters ☐
MUR ☐
DSP ☐
STATUS SHEETS ☐
Enforcement ☐
Litigation ☐
PFESP ☐
RATING SHEETS ☐
AUDIT MATTERS ☐
LITIGATION ☐
ADVISORY OPINIONS ☐
REGULATIONS ☐
OTHER ☐

21.04.405.3194



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Lois Lerner
Acting General Counsel

FROM: Mary W. Dove/Lisa R. Davis
Office of the Commission Secretary

DATE: April 18, 2001

SUBJECT: MUR 5078 - First General Counsel's Report
dated April 12, 2001.

The above-captioned document was circulated to the Commission
on Monday, April 16, 2001.

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

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

This matter will be placed on the meeting agenda for
Tuesday, May 1, 2001.

Please notify us who will represent your Division before the Commission on this
matter.

21.04.405.3195



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: LOIS G. LERNER
ACTING GENERAL COUNSEL

FROM: OFFICE OF THE COMMISSION SECRETARY *WV*

DATE: APRIL 19, 2001

SUBJECT: MUR 5078 - First General Counsel's Report
dated April 12, 2001.

The above-captioned document was circulated to the Commission
on Monday, April 16, 2001.

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

Commissioner Mason	—
Commissioner McDonald	—
Commissioner Sandstrom	—
Commissioner Smith	—
Commissioner Thomas	—
Commissioner Wold	—

XXX FOR THE RECORD

21.04.405.3196