



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAY 8 2010

Brian G. Svoboda, Esq.
Perkins Coie LLP
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2011

RE: MUR 5879
Democratic Congressional Campaign
Committee and Jonathan S. Vogel, in
his official capacity as treasurer

Dear Mr. Svoboda:

On October 23, 2007, you were notified that the Federal Election Commission ("Commission") found reason to believe that your clients violated 2 U.S.C. §§ 434 (b) and 441a(a), and authorized an investigation. On April 13, 2010, the Commission considered the matter, but was equally divided on whether to enter into conciliation with your clients. Accordingly, the Commission closed the file in this matter. One or more Statements of Reasons explaining the Commission's decision will follow.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). A Factual and Legal Analysis approved by the Commission concerning allegations on coordination is enclosed.

If you have any questions, please contact Ana Peña-Wallace, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter G. Blumberg".

Peter G. Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

**RESPONDENTS: Harry Mitchell for Congress and
John Bebbling, in his official capacity as
Treasurer**

MUR: 5879

**Democratic Congressional Campaign
Committee and Jonathan S. Vogel,
in his official capacity as treasurer**

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission ("the Commission") by counsel for J.D. Hayworth for Congress, *see* 2 U.S.C. § 437g(a)(1), alleging that the Democratic Congressional Campaign Committee ("DCCC") and Harry Mitchell for Congress ("Mitchell Committee") coordinated a DCCC television advertisement featuring Harry Mitchell that aired on October 31, 2006. The advertisement used video footage of Mitchell that was also used in a separate Mitchell Committee advertisement that aired twenty-four hours later, on November 1, 2006. Both advertisements addressed an *Arizona Republic* endorsement of Mitchell. The video footage at issue depicted Mitchell interacting with constituents, included shots of Mitchell directly facing the camera, and comprised approximately fifty percent (50%) of the DCCC's television advertisement. The DCCC reported the advertisement in question as an independent expenditure.

In response to the complaint, both the DCCC and the Mitchell Committee denied that there was any coordination. As explained below, the Commission does not have sufficient information to establish that there was any coordination between the committees in connection with the DCCC advertisement. Therefore, the Commission finds no reason to believe that the Mitchell Committee violated 2 U.S.C. §§ 434(b) and 441a(f).

II. FACTUAL SUMMARY

On October 31, 2006, the DCCC aired a 30-second television advertisement that included footage of Arizona Congressional candidate Harry Mitchell. Mitchell appears in half of the DCCC's advertisement, which references an endorsement Mitchell received from *The Arizona Republic*. The next day, on November 1, 2006, the Mitchell Committee aired a television advertisement that included the same footage of Mitchell that the DCCC used in the advertisement that aired 24 hours earlier, and also references the endorsement of Mitchell by *The Arizona Republic*. The overlapping content appears to consist of identical footage of Mitchell, but display slightly different text on the screen.

The complaint alleges that the Mitchell campaign was materially involved in the production of the DCCC advertisement. To support the allegations, the complaint notes that the DCCC and the Mitchell Committee both use the same video footage in two separate television advertisements that aired within 24 hours of each other. Complaint at 2 and Ex. 1. The complaint also asserts that several scenes in the advertisements "were clearly produced in a manner that would necessarily have required Harry Mitchell's material involvement" because he was featured prominently in those scenes. Complaint at 2.

The Commission examined the production of the DCCC advertisement titled "Compare," including how the DCCC obtained the footage of Mitchell used in the advertisement. The "Compare" ad was developed in response to the *Arizona Republic*'s unprecedented endorsement of Mitchell, published on October 27, 2006. There was an urgency to prepare an advertisement to take advantage of the endorsement because it was only a few days before the election. The investigation revealed that the Mitchell Committee provided the DCCC with a copy of the raw video footage used in "Compare" (which was filmed by the Mitchell Committee on September 6

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1 and 8, 2006 at various locations in Arizona for use in its own campaign advertisements) without
2 charge, via the Mitchell Committee's media vendor, Adelstein Liston, on October 27, 2006, the
3 day the *Arizona Republic* endorsement was made public and ten days before the general
4 election.¹ After obtaining the footage, the DCCC then sent the video footage to its media
5 vendor, McMahon Squier and Associates ("McMahon"), who was responsible for producing the
6 advertisement.² The cost of the "Compare" ad was approximately \$427,485.25 (\$5,923.43 for
7 the cost of production and \$421,561.82 for the media buy to air the advertisement).

8 Since 2003, the DCCC has maintained a library containing video footage, images, and
9 other media from which to draw upon for various uses. The DCCC reportedly developed a
10 practice of periodically requesting materials from Democratic members of Congress and
11 Democratic candidates at the start of the election cycle, and of following up with a letter or
12 phone calls if there is no response to the initial request. The DCCC typically ceased updating the
13 media library after the final primary election was held. The DCCC explained that once the
14 decision was made to prepare an advertisement utilizing the endorsement a written request for
15 video footage of Mitchell from its library would have been completed. The DCCC could not

¹ The Mitchell Committee's media vendor sent packages to the DCCC on September 22, 2006 and October 27, 2006. The FedEx package sent to the DCCC on October 27, 2006 was addressed to Kevin Lewis, the Assistant to the DCCC's Chief Operating Officer, who was responsible for collecting candidate footage for the DCCC's media library. In contrast, the FedEx package sent on September 22, 2006 was addressed to Christina Reynolds, the DCCC's Research Director. Per the DCCC's internal firewall procedures, Reynolds would have been prohibited from having contact with the Independent Expenditure unit, so the footage used for the advertisement should not have been sent to her. Further, the label on the beta tapes that the DCCC provided to the Commission containing the Mitchell Committee's raw footage have a date stamp of 10/27/2006. Based on this information, it is reasonable to conclude that the footage was sent on October 27, 2006.

² Three tapes were sent to the DCCC and portions of two of the three were used in "Compare." The first tape was entitled "Firefighters" and was 26 seconds long. Footage from this ad which primarily showed Mitchell from behind and was not used in "Compare." The second tape, entitled "Outdoors" contained 1 minute and 38 seconds of footage of Mitchell talking to people at a park. The third tape, entitled "Porch," was 46 seconds long and featured footage of Mitchell meeting with senior citizens. Portions of "Outdoor" and "Porch" were used in "Compare."

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1 establish whether that procedure was followed in creating the "Compare" advertisement. The
2 Commission obtained a copy of an "Audio Visual Media Library Request Form" requesting
3 Mitchell footage. However, the date stamp at the bottom of the form was 12/18/2006.

4 The DCCC may have issued a general request for video footage from the Mitchell
5 Committee for addition to the DCCC's video library in the ordinary course of business.
6 However, as indicated above, it appears that the video footage used in the advertisements at issue
7 here was not obtained in connection with any such general request. Although the Commission
8 obtained electronic copies of over 200 letters sent to members of Congress requesting video
9 footage and referencing "television advertising" as a possible use for such footage, it located no
10 copies of any written requests sent to the Mitchell Committee.

11 The information obtained during the Commission's investigation has revealed that the
12 video footage of Mitchell used in the "Compare" ad was not obtained from the video library
13 pursuant to the policies implemented for obtaining such footage. Rather, it appears it was
14 requested and obtained on October 28, 2006, the day after the *Arizona Republic* announced its
15 endorsement of Mitchell. The Mitchell Committee placed no restrictions on the use of the
16 footage when it sent copies to the DCCC.

17 **III. ANALYSIS**

18 The Mitchell Committee, which prepared the original video footage of the candidate,
19 does not receive or accept an in-kind contribution, and is not required to report an expenditure,
20 unless the dissemination, distribution, or republication of campaign materials is a coordinated
21 communication. 11 C.F.R. § 109.23(a). The "Compare" ad met the payment and content prongs
22 of the amended coordinated party communications regulations at 11 C.F.R. § 109.37 because the
23 DCCC acknowledged paying for the ad and it was a public communication that referred to a

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1 clearly identified federal candidate and was disseminated 90 days or fewer before the candidate's
2 election.³ The information gathered appears to demonstrate that communications took place
3 between the Mitchell Committee and the DCCC in connection with the footage used for the
4 "Compare" ad, but that such communication falls short of meeting the conduct prong of the
5 coordination regulation.

6 Information pertaining to the manner by which the DCCC obtained the Mitchell
7 campaign footage for use in the creation of the "Compare" ad raises questions about whether the
8 conduct prong of the coordination standard is met through the candidate's material involvement
9 in the advertisement.⁴ See 11 C.F.R. § 109.21(d)(1) and (2). A communication meets the
10 "material involvement" conduct standard if a candidate, authorized committee, or political party
11 committee is materially involved in decisions regarding the (1) the content of a communication,
12 (2) the intended audience for the communication, (3) the means or mode of the communication,
13 (4) the specific media outlet used for the communication, (5) the timing or frequency of the
14 communication, or (6) the size or prominence of a printed communication, or duration of a
15 communication by means of broadcast, cable, or satellite. See 11 C.F.R. § 109.21(d)(2). The
16 "material involvement" standard "focuses . . . on the nature of the information conveyed and its
17 importance, degree of necessity, influence or the effect of involvement by the candidate,

³ The D.C. Circuit's recent decision affirming the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications does not impact the analysis in this matter. See *Shays v. F.E.C.*, 528 F.3d 914, (D.C. Cir. 2008).

⁴ None of the conduct standards are met if a political committee has established and implemented a firewall that meets the requirements of 11 C.F.R. § 109.21(h). However, the safe harbor does not apply if specific information indicates that, despite the firewall, information about the candidate's or political party committee's campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication was used or conveyed to the person paying for the communication. 11 C.F.R. § 109.21(h).

1 authorized committee, political party committee, or their agents in any of the communication
2 decisions.” 68 Fed. Reg. at 433.

3 The information gathered shows that immediately after the October 27, 2006 *Arizona*
4 *Republic* endorsement, the DCCC staff assigned to the Mitchell/Hayworth race concluded that
5 the endorsement was “unprecedented” and they “urgently” sought to capitalize on it with an
6 advertisement. Further, it appears that on the day the endorsement was published, footage date
7 stamped 10/27/2006 was shipped “priority overnight” by Federal Express from the Mitchell
8 Committee’s media vendor to the DCCC. The Mitchell Committee footage delivered on October
9 28, 2006 comprised the only footage of Harry Mitchell used in the DCCC’s “Compare”
10 advertisement broadcast on October 31, 2006.

11 There is no evidence of coordination on the content of the communication itself (other
12 than the acquisition of the footage). The discovery indicates that the three tapes were sent to the
13 DCCC and that portions of two of the three were used in “Compare.” The first tape was entitled
14 “Firefighters” and was 26 seconds long. Footage from this ad which primarily showed Mitchell
15 from behind and was not used in “Compare.” The second tape, entitled “Outdoors” contained 1
16 minute and 38 seconds of footage of Mitchell talking to people at a park. The third tape, entitled
17 “Porch,” was 46 seconds long and featured footage of Mitchell meeting with senior citizens.
18 Portions of “Outdoor” and “Porch” were used in “Compare.” While the volume of footage
19 provided was certainly not extensive, the DCCC still had multiple choices from which to select.
20 Further, although a portion of the footage chosen by the DCCC for inclusion in “Compare” was
21 the same as that contained in one of the Mitchell Committee’s own advertisements, there is no
22 specific information to suggest that the Mitchell Committee was involved in the process by
23 which the DCCC selected that footage for inclusion in “Compare.” Finally, while it appears that

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1 at the very least the DCCC communicated an administrative request to the Mitchell Committee
2 for footage of the candidate, there is no specific information suggesting that any communications
3 relating to the request were substantive in nature or related to any "decision" regarding the
4 advertisement including content, intended audience, means or mode of the communication,
5 specific media outlet used, timing, frequency, or duration. To the contrary, as discussed earlier,
6 representatives from each of the respondent committees have denied that communication took
7 place between the DCCC's IE Unit and the Mitchell campaign.

8 The same facts that raise the issue of whether the material involvement conduct standard
9 is met also gives rise to a discussion of whether the assent or suggestion conduct standard is met.
10 11 C.F.R. § 109.21(d)(1) (stating that the communication is created, produced, or distributed at
11 the request or suggestion of a candidate, authorized committee, or political party committee, or
12 at the suggestion of a person paying for the communication, and the candidate, authorized
13 committee, or political party committee assents to the suggestion). However, as the Commission
14 explained in its Explanation and Justification for the coordination regulations, "[a] request or
15 suggestion encompasses the most direct form of coordination, given that the candidate or
16 political party committee communicates desires to another person who effectuates them."
17 Explanation and Justification, *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421,
18 432 (Jan. 3, 2003). As discussed above in connection with the material involvement standard,
19 there is no specific information that establishes that the communication regarding the
20 advertisement was anything more than a generic request for footage. As a result, the "request or
21 suggestion" conduct standard is not met here.

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- 1 As a result, there does not appear to be information to establish coordination between the
- 2 DCCC and the Mitchell Committee in connection with the advertisement. Accordingly, there is
- 3 no reason to believe that the Mitchell Committee violated 2 U.S.C. §§ 441a(a) or 434(b).

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