



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Via Facsimile and First Class Mail

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JUN - 9 2011

Cleta Mitchell, Esq.
Foley & Lardner LLP
3000 K Street, NW
Suite 600
Washington, D.C. 20007

RE: MUR 6407
Senate Conservatives Fund and
Barry Wynn, in his official capacity
as treasurer

Dear Ms. Mitchell:

By letter dated November 1, 2010, the Federal Election Commission notified your clients, Senate Conservatives Fund and its treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On June 7, 2011, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe Senate Conservatives Fund and Barry Wynn, in his official capacity as treasurer, violated 2 U.S.C. § 441a(a)(2). Accordingly, the Commission closed its file in this matter.

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) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

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Cleta Mitchell, Esq.
MUR 6407
Page 2 of 2

If you have any questions, please contact Thomas J. Andersen, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter G. Blumberg", with a stylized flourish at the end.

Peter G. Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Senate Conservatives Fund and Barry Wynn, MUR 6407
in his official capacity as treasurer
Senator James DeMint

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by Pat Waak, alleging violations of the Federal Election Campaign Act of 1971, as amended ("the Act"), by Senate Conservatives Fund and Barry Wynn, in his official capacity as treasurer, and Senator James DeMint.

II. FACTUAL AND LEGAL ANALYSIS

This matter involves alleged coordination between, on the one hand, the Senate Conservatives Fund ("Fund") and Senator James DeMint, and on the other, Buck for Colorado ("Buck Committee") and Kenneth R. Buck, a candidate for U.S. Senator from Colorado in 2010. The complaint alleges that the Fund, a leadership PAC of DeMint's, made large disbursements reported as independent expenditures in support of Buck around the same time that DeMint had endorsed Buck and was campaigning with him. The complaint also notes that the Fund sent fundraising letters to solicit contributions for Buck and transferred hundreds of thousands of dollars to Buck in earmarked contributions. The complaint alleges that, under these circumstances, the reported expenditures appear to have been coordinated. In response, the Respondents argue that there was no coordination because there are no facts that satisfy the conduct standard of the Commission's regulations. Upon review of the complaint, responses, and other available information, there appears to be no basis for concluding that the Buck

1 Committee coordinated with the Fund regarding the disbursements reported by the Fund as
2 independent expenditures.

3 **A. Factual Background**

4 The Fund registered with the Commission as a non-connected PAC in April 2008, listing
5 DeMint as a "Leadership PAC Sponsor."¹ The Fund's website states that it is "chaired by U.S. Sen.
6 Jim DeMint (R-South Carolina)" and "dedicated to electing strong conservatives to the United States
7 Senate." <http://senateconservatives.com/site/about>. Between June 5, 2010, and October 27, 2010,
8 the Fund reported approximately \$440,000 in independent expenditures in support of Buck, with
9 about 60% of that amount consisting of media advertising/placement and the remainder consisting
10 mainly of email list rental/usage.² Based on the Fund's independent expenditure reporting and a
11 search of publicly available sources, it appears that the Fund's advertisements pertaining to the 2010
12 Colorado Senate race consisted of (1) a 60-second radio ad in mid-July 2010, (2) a 30-second
13 television ad broadcast in early October 2010, and (3) two disbursements for "web ads" in August
14 and October 2010. The radio ad promoted Buck's positions on illegal immigration, taxes, and
15 federal spending, concluding with the following statements: "If those are your values, vote for Ken
16 Buck in the Republican Senate Primary. For more information, go to senateconservatives.com."
17 <http://senateconservatives.com/site/post/283/scf-launches-radio-ad-in-colorado>. The television ad
18 criticized the votes of Buck's opponent, Senator Michael Bennett, on government spending and
19 health care bills, concluding with the following statement: "Michael Bennett. He's already been in

¹ The Statement of Organization lists MINT PAC, another federally registered leadership PAC sponsored by DeMint, as an affiliated committee. MINT PAC's filings with the Commission do not show any contributions, expenditures, or other disbursements in connection with Buck's campaign.

² The Fund reported independent expenditures in 2010 in support of several other Senate candidates, including over \$100,000 on each of six candidates. The Fund also disclosed \$10,000 in direct contributions to the Buck Committee in 2010, exhausting its limit for the primary and general elections. 2 U.S.C. § 441a(a)(2)(A).

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1 Washington too long.” [http://senateconservatives.com/site/post/342/scf-launches-ad-targeting-](http://senateconservatives.com/site/post/342/scf-launches-ad-targeting-bennet-in-colorado)
2 bennet-in-colorado.

3 The complaint bases its coordination allegations on these facts: (1) DeMint endorsed Buck
4 in April 2010; (2) since endorsing Buck, DeMint has actively campaigned with him, including a
5 July 8, 2010, visit to Denver, Colorado, to “talk to Buck and then join him at a campaign event to
6 speak on his behalf;” (3) the July 8 event occurred during the Fund’s “spending spree” on behalf of
7 Buck that included a \$29,500 “independent” expenditure on June 29, 2010, for a “Buck Email List”
8 and a \$37,750 “independent” expenditure on July 16, 2010, for Buck radio spots;³ (4) a few weeks
9 later, the Fund paid for a \$55,150 “media buy to support Buck” (reported as an independent
10 expenditure for “Radio Placement”); (5) the Fund sent out emails soliciting funds for Buck’s
11 campaign “[r]ight before and right after DeMint and Buck campaigned together;” and (6) the Fund
12 transferred \$235,769 in earmarked contributions to the Buck campaign by the end of August 2010.
13 Complaint at 2-4.

14 The complaint cites several publicly available sources to support its allegations, focusing on
15 a statement reportedly made by DeMint regarding the Fund’s independent expenditures: “He [Buck]
16 can’t know what I’m doing [and] I don’t know what they’re [the Buck campaign] doing except what
17 I find out on their website.” Manu Raju, *DeMint PAC fills primary coffers*, POLITICO, Aug. 10,
18 2010 (“POLITICO article”). The complaint alleges that, in fact, DeMint knew what Buck was doing
19 “because he was there in Denver doing it with him.” Complaint at 4. The article states that Buck
20 and DeMint “said they have had no conversations about DeMint’s financial investment in the race,
21 denying there was any discussion about the [radio] ad buy.” POLITICO article. DeMint also
22 reportedly stated that “he’s doing everything lawfully and that he’s got ‘legal people all over this’”

³ It is not clear how the complainant arrived at the \$37,750 figure; the Fund disclosed a \$30,065 expenditure on July 16, 2010, for “Buck-Radio Placement,” but reported no other related disbursements on or around that date.

1 to ensure that the Fund operates in compliance with federal law, and a spokesman for Buck
2 reportedly stated that the radio ad “is something we learned about when it was aired.” *Id.*

3 Another article cited in the complaint contains several quotes from DeMint and Buck from
4 their speeches at the July 8, 2010, campaign event, none of which reference any independent
5 expenditures or communications planned by the Fund. Joseph Boven, “DeMint joins Buck in
6 bucking Republican establishment candidates,” COLORADO INDEPENDENT, July 9, 2010.⁴
7 Regarding DeMint’s fundraising emails (copies of which are included in a blog cited in the
8 complaint), two of them focus solely on Buck’s campaign and solicit contributions to Buck through
9 the Fund’s website, and one mentions several Senate candidates being supported by the Fund
10 “[t]hrough direct contributions, independent expenditure campaigns, and campaign donation
11 bundling efforts.” <http://www.desertconservative.com>. The emails do not describe the Fund’s
12 independent expenditure plans or contain any facts suggesting any contacts between DeMint and the
13 Fund, on the one hand, and Buck and the Buck Committee, on the other.

14 In response to the complaint, the Fund contends that “an appearance or even more than
15 one appearance” by Senator DeMint at a Buck campaign event “does not come close” to
16 satisfying the conduct prong of the Commission’s regulations. Fund Response at 1. The Fund
17 states that its communications (1) were not made at the “request or suggestion” of the Buck
18 campaign; (2) were not created, produced, or distributed at the Fund’s suggestion with the
19 “assent” of Buck or his campaign; (3) were not made with the “material involvement” of Buck or
20 his campaign and that all material information was based upon and obtained from publicly
21 available sources; and (4) were not based upon “substantial discussions” with Buck or his

⁴ Video recordings of both speeches are available on YouTube. See
<http://www.youtube.com/watch?v=da77fNEs2Ho> (DeMint speech);
<http://www.youtube.com/watch?v=tBjlbElciFM&feature=related> (Buck speech).

1 campaign *Id.* at 1-2. Also, there were no common vendors or independent contractors between
2 the Fund and the Buck campaign, and the Fund did not republish, distribute, or disseminate
3 materials from the Buck campaign. *Id.* at 2.

4 Buck and the Buck Committee similarly deny that they coordinated the expenditures at
5 issue with the Fund. The response includes affidavits from Buck and the Buck Committee's
6 treasurer Ken Salazar, who has served as treasurer since April 2009. Both individuals state that
7 they "did not cooperate with, consult with, act in concert with, request, or suggest that" DeMint
8 or the Fund make any public communications supporting Buck's candidacy, and that no person
9 acting on behalf of Buck or the Buck Committee "cooperated with, consulted with, acted in
10 concert with, requested, or suggested that" DeMint or the Fund make any public communications
11 supporting Buck's candidacy. Attachments to Buck Committee Response.

12 The Buck Committee asserts that the complaint's interpretation of the law "would require
13 the Commission to exceed its statutory authority by treating any payment as [a coordinated]
14 expenditure merely because the person making the expenditure has a close relationship with the
15 candidate." Buck Committee Response at 2. The response concludes that it is improper for the
16 Commission to open an investigation "when the only facts contained in the complaint are
17 evidence of lawful and constitutionally protected behavior." *Id.* at 3.

18 B. Legal Analysis

19 The central issue in this matter is whether advertisements paid for by the Fund in support of
20 candidate Kenneth Buck were, in fact, independent expenditures, as reported, or whether they were
21 coordinated with the Buck Committee. The complaint alleges that because DeMint and Buck were
22 actively campaigning together in Colorado during Buck's candidacy, and in light of other campaign
23 assistance provided by DeMint and the Fund (e.g., fundraising emails from DeMint; forwarding of

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1 earmarked contributions), the disbursements in support of Buck reported by the Fund as independent
2 expenditures must have been coordinated.

3 The Act provides that no multicandidate committee shall make contributions to any
4 candidate and his or her authorized political committee with respect to any election for Federal
5 office, which, in the aggregate, exceed \$5,000. 2 U.S.C. § 441a(a)(2)(A). The Act provides that
6 an expenditure made by any person “in cooperation, consultation, or concert, with, or at the
7 request or suggestion of,” a candidate or his authorized committee or agent is a contribution to
8 the candidate. See 2 U.S.C. § 441a(a)(7)(B)(i); 11 C.F.R. § 109.20(a).

9 A communication is coordinated with a candidate, an authorized committee, a political
10 party committee, or an agent of any of the foregoing when the communication is (1) paid for, in
11 whole or part by a person other than that candidate, authorized committee, or political party
12 committee; (2) satisfies at least one of the content standards⁵ described in 11 C.F.R. § 109.21(c);
13 and (3) satisfies at least one of the conduct standards described in 11 C.F.R. § 109.21(d).
14 11 C.F.R. § 109.21(a)(1) – (3). In contrast, an independent expenditure is an expenditure by a
15 person for a communication expressly advocating the election or defeat of a clearly identified
16 candidate that is not made in cooperation, consultation, or concert with, or at the request or
17 suggestion of a candidate, a candidate’s authorized committee, or their agents, or a political party
18 committee or its agents. 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.

19 In this matter, the first prong of the coordinated communication test is satisfied because the
20 Fund is a third-party payor. The second prong of the test, the content standard, appears to be

⁵ The Commission recently revised the content standard in 11 C.F.R. § 109.21(c) in response to the D.C. Circuit’s decision in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008). The Commission added a new standard to the content prong of the coordinated communications rule. 11 C.F.R. § 109.21(c)(5) covers communications that are the functional equivalent of express advocacy. See *Explanation and Justification for Coordinated Communications*, 75 Fed. Reg. 55947 (September 15, 2010). The effective date of the new content standard is December 1, 2010, after the events at issue in this matter. The new standard would not change the analysis in this Report.

1 satisfied in two ways: (1) the text of the radio ad contains “magic words” express advocacy (“Vote
2 for Ken Buck”), *see* 11 C.F.R. §§ 100.22(a) and 109.21(c)(3), and (2) the ad clearly identified Buck
3 and appears to have been broadcast in Colorado starting in mid-July 2010, well within 90 days of the
4 August 10, 2010, primary election. *See* 11 C.F.R. § 109.21(c)(4)(i). Thus, whether or not the
5 Fund’s communications were independent expenditures or coordinated communications hinges on
6 an analysis of the conduct prong of the test.

7 The conduct prong may be satisfied when, *inter alia*, (1) a communication is created,
8 produced, or distributed at the request or suggestion of the candidate or his or her authorized
9 committee, or at the suggestion of the person paying for the communication, and the candidate or his
10 or her committee assents to that suggestion; (2) the candidate or his or her authorized committee is
11 materially involved in certain decisions regarding the communication; or (3) the communication is
12 created, produced, or distributed after one or more substantial discussions about the communication
13 between the candidate and his or her authorized committee and the payor or his or her agents.
14 11 C.F.R. § 109.21(d)(1)–(3).

15 Based on a review of the available information, including the complaint and publicly
16 available sources, it appears that DeMint appeared with Buck only once during the period at issue, at
17 a July 8, 2010, campaign event in Denver. DeMint and Buck both gave speeches at the event that
18 were recorded and made publicly available; however, there is no indication that the two men or their
19 staffs discussed public communications planned by the Fund at that time or any other time.
20 Specifically, there is no allegation or information linking DeMint’s appearance with Buck to the
21 Fund’s public communications, such as statements by Buck that requested or suggested that the
22 Fund run advertisements on his behalf, or information indicating that Buck assented to the Fund’s
23 suggestion that it create, produce, or distribute ads in support of his campaign. In fact, the only

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1 reference to the Fund's expenditures in support of Buck appeared to be in a fundraising email in
2 which DeMint discussed the Fund's independent expenditure campaigns in support of several
3 candidates for U.S. Senate. However, there is no information in the email, or any other available
4 document or source, suggesting that DeMint or the Fund coordinated the expenditures at issue with
5 Buck or his campaign. Moreover, the responses, which include affidavits by Buck and his campaign
6 treasurer, deny that any of the conduct prongs were satisfied or that the Buck Committee cooperated
7 with, consulted with, acted in concert with, or requested or suggested that DeMint or the Fund make
8 any public communications supporting Buck's candidacy.

9 Given the Respondents' denials, the speculative nature of the complaint, and the absence
10 of any other information suggesting coordination, the conduct prong of the coordinated
11 communications regulations has not been met, thus, there appears to be no resulting violation of
12 the Act. Therefore, there is no reason to believe that the Senate Conservatives Fund and Barry
13 Wynn, in his official capacity as treasurer, violated 2 U.S.C. § 441a(a)(2), or that Senator James
14 DeMint violated the Act.

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