



FEDERAL ELECTION COMMISSION

Washington, DC 20463

APR 3 0 2002

By Certified Mail

Mr. Lance H. Olson, Esquire
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555 Capitol Mall, Suite 1425
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RE: MUR 4788
California Democratic Party
Democratic State Central Committee of California
Federal, and Katherine Moret, as treasurer
Democratic State Central Committee of California
Non-Federal, and Katherine Moret, as treasurer

Dear Mr. Olson:

Based on a complaint filed with the Federal Election Commission on August 12, 1998, and information supplied by your above-referenced clients, the Commission, on June 22, 1999, found that there was reason to believe that the California Democratic Party violated 2 U.S.C. §§ 441b, 441a(a)(2)(A), 441d(a), 441a(d), and 11 C.F.R. § 102.5 (a)(1)(i); the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. §§ 441b, 441a(a)(2)(A), 441d(a), 441a(d), 434(b), and 11 C.F.R. § 102.5 (a)(1)(i); and, the Democratic State Central Committee of California—Non-Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5 (a)(1)(i). The Commission instituted an investigation of this matter. On February 12, 2002, the Commission decided to 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).

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that your clients violated 2 U.S.C. §§ 441b, 441d(a), 434(b), and 11 C.F.R. § 102.5 (a)(1)(i).

MUR 4788
Lance H. Olson, Esq.
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The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Margaret Toalson, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Lawrence H. Norton
General Counsel

Enclosure
Brief

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)
4)
5 California Democratic Party)
6 Democratic State Central Committee of California—Federal) MUR 4788
7 and Katherine Moret, as treasurer)
8 Democratic State Central Committee of California—Non-Federal)
9 and Katherine Moret, as treasurer)

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11 **GENERAL COUNSEL'S BRIEF**

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13 **I. STATEMENT OF THE CASE**

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15 This matter was generated by a complaint filed by the California Republican Party (CRP),
16 on August 12, 1998, by and through its Chairman Michael Schroeder, alleging that "the
17 Democratic State Central Committee of California (a.k.a. the California Democratic Party
18 (CDP))"¹ used monies from its non-federal account to finance communications that expressly
19 advocated the election of Lois Capps in the March 10, 1998, special election in the 22nd
20 Congressional District of California.

21 On June 22, 1999, the Federal Election Commission (the "Commission") found reason to
22 believe that the California Democratic Party and the Democratic State Central Committee of
23 California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. §§ 441b, 441d(a), and
24 11 C.F.R. § 102.5(a)(1)(i); the Democratic State Central Committee of California—Federal and
25 Katherine Moret, as treasurer, violated 2 U.S.C. § 434(b); and the Democratic State Central

¹ The Democratic Central Committee of California—Federal ("Federal Committee" or "Federal Account") with Katherine Moret, as treasurer, is a political committee registered with the Commission and is a federal account of the California Democratic Party. The Democratic State Central Committee of California—State ("Non-Federal Committee" or "Non-Federal Account") is listed on disclosure reports (Schedule H3, Transfers from non-federal accounts) as a non-federal account and is a non-federal account of the California Democratic Party. The Non-Federal Committee is registered with the Secretary of State of California with Katherine Moret, as treasurer. In this report, "the CDP" refers collectively to the California Democratic Party, its Federal and Non-Federal Committees/Accounts, and Katherine Moret as treasurer.

Committee of California—Non-Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a)(1)(i).

The information developed in discovery shows that the CDP financed mail pieces and radio advertisements containing express advocacy of a clearly identified candidate. The CDP, however, misreported payments related to these advertisements as allocated generic voter expenses instead of independent expenditures, used \$77,281.67 in impermissible funds from a non-federal account to pay for part of the expenses, and failed to include proper disclaimers in the advertisements.

Accordingly, this Office is prepared to recommend that the Commission find probable cause to believe that the California Democratic Party and the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. §§ 441b, 441d(a), and 11 C.F.R. § 102.5(a)(1)(i); the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 434(b); and the Democratic State Central Committee of California—Non-Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a)(1)(i).

II. APPLICABLE LAW

Under the Federal Election Campaign Act of 1971, as amended (“the Act”) and Commission regulations, disbursements by committees that constitute expenditures² for the purpose of influencing a Federal election must be made only with funds that are subject to the limitations and prohibitions of the Act. 2 U.S.C. § 431(9)(A); 11 C.F.R. §§ 109.1(a), 110.4(a)(1), 114.2(b), and 115.2(a)

² The Act defines “expenditure” as “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.” 2 U.S.C. § 431(9)(A)(i); 11 C.F.R. § 100.8(a)(1)

Political committees, such as state party committees, that finance activities with regard to both federal and non-federal elections must establish a separate federal account for all disbursements, contributions, expenditures and transfers by the committee in connection with any federal election, unless it receives only contributions subject to the prohibitions and limitations of the Act. 11 C.F.R. § 102.5(a)(1)(i) and (ii). Except as provided for in 11 C.F.R. § 106.5(g), no transfers may be made to such federal account from any other account(s) maintained by such committee for the purpose of financing activity in connection with non-federal elections, and only funds subject to the prohibitions and limitations of the Act shall be deposited in such separate federal account. *Id.*

Corporations and labor organizations may not make contributions “in connection with” a federal election. 2 U.S.C. § 441b(a). In 1998, the State of California allowed corporations and labor organizations to contribute to a political party. Thus, an influx of funds to a federal account from a non-federal account would violate 2 U.S.C. § 441b(a).

Commission regulations set forth specific procedures for party committees in making disbursements in connection with both federal and non-federal elections. 11 C.F.R. § 106.5(a). If a party committee has established separate federal and non-federal accounts, *see* 11 C.F.R. § 102.5, it may allocate these disbursements between these accounts according to various formulas set forth in the regulations. The categories of activity to which allocation applies include, *inter alia*, administrative expenses and expenses for generic voter drive activities. “Administrative expenses” are defined as “including rent, utilities, office supplies, and salaries, except for such expenses directly attributable to a clearly identified candidate.” 11 C.F.R. § 106.5(a)(2)(i). “Generic voter drives” are described as “including voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the

1 general public to register, vote or support candidates of a particular party or associated with a
2 particular issue, without mentioning a specific candidate.” 11 C.F.R. § 106.5(a)(2)(iv).

3 The Act defines “clearly identified” as meaning “(A) the name of the candidate involved
4 appears; (B) a photograph or drawing of the candidate appears; or (C) the identity of the
5 candidate is apparent by unambiguous reference.” 2 U.S.C. § 431(18). Commission regulations
6 further define “clearly identified” as

7 The candidate’s name, nickname, photograph, or drawing appears or the identity of the
8 candidate is otherwise apparent through an unambiguous reference such as “the
9 President,” “your Congressman,” or “the incumbent,” or through an unambiguous
10 reference to his or her status as a candidate such as “the Democratic presidential
11 nominee” or “the Republican candidate for the Senate in the State of Georgia.”

12
13 11 C.F.R. § 100.17.

14
15 Accordingly, candidate-specific activity, such as that pertaining to a clearly identified or
16 specific candidate, does not constitute generic voter activity and is not allocable under Section
17 106.5.³ Such candidate-specific disbursements, if made in support of a federal candidate,
18 constitute “contributions” to or “expenditures” on behalf of that candidate and would be subject
19 to the limitations and prohibitions under the Act, including the requirement that these
20 disbursements be made with funds obtained exclusively from the Party’s federal account.

21 Communications that call for the election or defeat of a clearly identified candidate
22 constitute express advocacy. Commission regulations define “express advocacy” to include such

³ Even apart from candidate specific activity, generic voter drive expenses that pertain to wholly federal or wholly non-federal elections are not allocable. See FEC, Explanation & Justification, Methods of Allocation Between Federal and Non-Federal Accounts, Payments, Reporting, 55 Fed. Reg. 26058, 26063 (June 26, 1990) (“Please note that all administrative expenses must be allocated between federal and non-federal accounts, if incurred by a committee that makes disbursements in connection with both federal and non-federal elections, and that chooses to pay any portion of such disbursements from its non-federal account. Such committees must also allocate all costs of generic voter drive activity, except for get-out-the-vote drives conducted on behalf of a wholly federal or wholly non-federal special election”).

phrases as “vote for the President,” “Smith for Congress,” “support the Democratic nominee,” or “cast your ballot for the Republican challenger for U.S. Senate in Georgia,” or other words which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate. 11 C.F.R. § 100.22(a).

Disbursements for communications that expressly advocate the election or defeat of a clearly identified candidate and that are not made in coordination with the candidate are “independent expenditures.” 2 U.S.C. § 431(17); 11 C.F.R. §§ 109.1(a) and 100.16; *see* 2 U.S.C. § 441a(a)(7)(B)(i). Independent expenditures are not limited by the Act, but must come entirely from funds subject to the limitations and prohibitions of the Act.

A party committee that makes independent expenditures has specific reporting requirements. 2 U.S.C. § 434(b)(4)(H)(iii) and 6(B)(iii); 11 C.F.R. § 104.3(b)(1)(vii). The party committee must report the name and address of the candidate to whom the expenditure pertains, including the date, amount, and purpose of the independent expenditure. 11 C.F.R. § 104.3(b)(3)(vii)(A). The party committee must further indicate whether the expenditure is in support of, or in opposition to, a candidate, and certify, under penalty of perjury, that the expenditure was not made in coordination with the candidate. 11 C.F.R. § 104.3(b)(3)(vii)(B).

The Act provides that whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, such communication shall contain a disclaimer in accordance with 2 U.S.C. § 441d(a). *See also* 11 C.F.R. § 110.11(a)(1). For such a communication, the disclaimer must explicitly state both who paid for it and whether or not any candidate or campaign committee authorized it.

Id

1 **III. THE FACTS**

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3 Following the October 28, 1997, death of Representative Walter Capps, who represented
4 the 22nd Congressional District of California, a special election to fill the vacancy in the House
5 seat for the rest of Mr. Capps' term was held on January 13, 1998, and on March 10, 1998. The
6 special runoff election on March 10, 1998, involved only the race to fill the U.S. House vacancy,
7 and there was only one candidate nominated by the Democratic Party, Lois Capps.⁴

8 The CDP financed direct mail pieces and radio advertisements referencing the March 10,
9 1998, special runoff election. Each of the five mail pieces has a different theme ("Healthcare",
10 "Education A", "Education B", "Respect", and "Capps tradition"). Two of the mail pieces
11 include Spanish phrases. All the mail pieces contain multiple references to Walter Capps and the
12 statements "Continue the Walter Capps Tradition," "Vote Democratic" and "Special election,
13 Tuesday, March 10th." One of the mail pieces also includes photographs of and a quote from the
14 late Walter Capps. The radio advertisements—one in Spanish and the other in Spanish and
15 English—contain the same exhortations and multiple references to Walter Capps as in the mail
16 pieces but also include statements telling "voters of the 22nd congressional district" that "on
17 March 10th there will be a special election to fill the seat of recently deceased democrat, Walter
18 Capps." The radio advertisements ran from February 28, 1998, through the day of the election on
19 March 10, 1998. The mail pieces and radio advertisements state that they were "Paid for by the
20 California Democratic Party" but do not state whether they were authorized or not authorized by
21 any candidate or candidate committee

⁴ An open primary for the special election was held on January 13, 1998. Because no candidate received more than 50% of the vote, the top vote getter in each party participated in the runoff election. Lois Capps, Walter Capps' widow, won the special election (runoff) garnering 53.46% of the vote. Representative Capps later ran unopposed in the June 2, 1998, Democratic Primary for the 22nd Congressional District and was reelected in the 1998 General Election.

Information obtained in discovery and from disclosure reports shows that the CDP spent a total of \$99,079.06 for the mail pieces and radio advertisements, of which \$86,250 was disbursed to vendor Crounse & Malchow for the mail pieces and \$12,829.06 was disbursed to vendor Armando Gutierrez & Associates for the radio advertisements. The CDP treated the expenses for these communications as generic party disbursements under 11 C.F.R. § 106.5(a)(2)(iv) and allocated the costs for these communications between its federal and non-federal accounts. As reflected below, \$77,281.67 (77% of the funds used for the communications) came from the non-federal account. The CDP's use of funds from the non-federal account for federal activity is a violation of 11 C.F.R. § 102.5(a)(1)(i) which requires that payments for federal activity be made only from a committee's federal account.

1998 April Quarterly Report for Democratic State Central Comm. CA (Federal)

Name	Reported Purpose of Disbursement	Date	Total Amount	Federal Share	Non-Federal Share
Crounse & Malchow	Generic Voter Contact/Media Printing	2/27/98	86,250.00	18,975.00	67,275.00
Armando Gutierrez & Associates	Generic voter contact	2/25/98	9,800.00	2,156.00	7,644.00
Armando Gutierrez & Associates	Production costs for voter contact	3/13/98	3,029.06	666.39	2,362.67
Totals			99,079.06	21,797.39	77,281.67

IV. ANALYSIS

Disbursements for communications that urge the public to vote for a clearly identified candidate cannot comprise generic voter drive costs and are therefore not included within the Commission's allocation regulations 11 C F R. § 106.5. Although the CDP's mail pieces and radio advertisements did not include the name or photo of the candidate "Lois Capps," her identity was apparent through unambiguous reference. The language in the CDP's

1 advertisements urged the public to “Continue the Walter Capps Tradition,” and to “Vote
2 Democratic” in the “Special election, Tuesday, March 10th.” This message on its face is
3 exclusively directed at one specific election—the special election on March 10th.⁵ Because there
4 was only one office at stake in the March 10th special election and only one Democrat on the
5 ballot, the message can mean no other candidate but the Democratic nominee in the March 10th
6 special election for the House seat for the 22nd District of California. In finding reason to believe
7 that the CDP had violated provisions of the Act and Regulations, the Commission concluded that
8 where only one office is at stake in a special election and where only one member of that party is
9 on the ballot, the communication to vote for that specific party on that election day can refer to
10 no other candidate, i.e., a clearly identified candidate. *See* MUR 4788, Factual and Legal
11 Analysis, pp. 10-11. The Commission further stated that the disbursements urging the public to
12 vote for such clearly identified candidate “were not generic voter drive costs ” *Id.* at 11.

13 Communications that call for the election or defeat of a clearly identified candidate
14 constitute express advocacy. 11 C.F.R. § 100.22(a). The exhortation to “Continue the Walter
15 Capps Tradition,” coupled with a call to “Vote Democratic” in the “Special election, Tuesday,
16 March 10th” are words that urge the election of the clearly identified candidate, Lois Capps, and
17 therefore constitute express advocacy.

18 Disbursements for communications that are not coordinated with the candidate and that
19 expressly advocate the election or defeat of a clearly identified candidate are “independent
20 expenditures.” 2 U.S.C. § 431(17). All disbursements for independent expenditures must be
21 funded entirely from funds subject to the limitations and prohibitions of the Act 2 U.S.C. §

⁵ The message also mentions by name Walter Capps, the previous officeholder deceased incumbent of the Congressional District, and spouse of the Democratic nominee, Lois Capps. One of the advertisements also includes photographs of Mr. Capps.

431(9)(A); 11 C.F.R. §§ 109.1(a), 110.4(a)(1), 114.2(b), and 115.2(a). Of the \$99,797.39 the CDP spent on these advertisements, \$21,797.39 was reported as the federal share and \$77,281.67 as the non-federal share. Because California permits contributions from corporations and labor unions, the CDP's use of impermissible funds from a non-federal account to finance federal activity violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a).⁶ In addition, by misreporting the payments for the advertisements as allocated expenditures rather than as independent expenditures, the CDP violated 2 U.S.C. § 434(b). Finally, the CDP violated 2 U.S.C. § 441d(a) by failing to include in these express advocacy communications complete disclaimers stating whether they were authorized or not authorized by any candidate or candidate's committee.

Based on the foregoing, this Office is prepared to recommend that the Commission find probable cause to believe that the California Democratic Party and the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. §§ 441b, 441d(a), and 11 C.F.R. § 102.5(a)(1)(i); the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 434(b); and the Democratic State Central Committee of California—Non-Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a)(1)(i).

V. GENERAL COUNSEL'S RECOMMENDATIONS

1. Find probable cause to believe that the California Democratic Party and the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. §§ 441b, 441d(a), and 11 C.F.R. § 102.5(a)(1)(i)

2 Find probable cause to believe that the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 434(b).

⁶ Disclosure reports for 1997-1998 of the CDP's non-federal account also reflect contributions from corporations and labor unions

3. Find probable cause to believe that the Democratic State Central Committee of California—Non-Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a)(1)(i).

4/30/02
Date

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