

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
California Democratic Party) MUR 4788
Democratic State Central Committee-Federal)
and Katherine Moret, as treasurer)
Democratic State Central Committee-Non-Federal)
and Katherine Moret, as treasurer)

**RESPONDENTS' LEGAL ARGUMENT RE GENERAL COUNSEL'S
REQUEST FOR FINDING OF PROBABLE CAUSE**

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
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I. INTRODUCTION

The California Democratic Party, the California State Central Committee (Federal and Non-federal) and Katherine Moret, treasurer (referred to collectively as "CDP") file this legal brief in response to the Office of General Counsel's brief. CDP received notification on May 7, 2002 that the General Counsel is recommending to the Federal Election Commission that it find probable cause to believe respondents violated the Federal Election Campaign Act ("FECA or "the Act") when they allocated the expense of several communications urging voters to "Vote Democratic" in a special election held in March, 1998 between their federal and non-federal accounts. Specifically, the General Counsel argues that the allocation rules for "generic party activity" are inapplicable to special elections.

Respondents urge the Commission not to find probable cause for two reasons.

First, the General Counsel's position clashes with settled case law on express advocacy, as well as applicable statutes and regulations. The General Counsel argues that the disputed communications necessarily refer to a "clearly identified candidate" -- Lois Capps -- because she was the sole Democratic candidate in the March 10, 1998 special election. Ms. Capps was not clearly identified -- her name, photograph, and likeness were absent from the communications. The General Counsel's position is that the communications were express advocacy simply because one could discover from external information that she was the lone Democratic candidate. Court decisions have overwhelmingly rejected this view of express advocacy, stating that the concept cannot vary depending upon the audience's understanding or other external conditions. Express advocacy is a question of law resolved purely by looking at the content of the communication. In this case, the communication urged voters to vote Democratic -- a classic generic voter activity.

Second, the General Counsel assumes that political committees cannot allocate generic voter drive expenditures between federal and non-federal accounts during special elections where only one office is at stake. But the applicable regulations do not differentiate between special elections and general elections, nor do they except special elections. *See* 11 C.F.R. § 106.5. Political parties are allowed to allocate generic party expenditures according to a prescribed ratio. This ratio derives from the categories of federal offices on the general election ballot. It applies throughout a two-year election cycle. The regulation does not provide for differentiation among elections during the

course of an election cycle. The General Counsel's position would read new language into Section 106.5 that does not exist.

II. FACTUAL ISSUES

CDP has acknowledged during the Commission's investigation that it paid for several direct mail pieces and radio spots in spring 1998 urging Californians to "Vote Democratic" and referring to the special election scheduled for March 10, 1998 in the 22d Congressional District. None of those pieces mentioned Democratic candidate Lois Capps or expressly advocated Lois Capps' election. The number, content, and cost of these communications is not in dispute.¹ This matter centers solely on whether the costs of the mailers and radio communications were properly allocated between CDP's federal and non-federal accounts as generic party activities.

III. WHETHER A COMMUNICATION IS EXPRESS ADVOCACY DEPENDS ON THE WORDS OF THE COMMUNICATION, NOT A CONTEXTUAL APPROACH DEPENDING ON THE AUDIENCE'S KNOWLEDGE.

CDP acknowledges that if it had paid for candidate-specific advertisements, the costs of such advertisements would have to be paid completely with funds from its federal account. However, the disputed communications did not refer to a specific candidate. They simply urged members of the public to vote Democratic in the March 10, 1998 special election. The General Counsel argues that any voter drive activity in a special

¹Initially the Office of General Counsel asserted that these communications were coordinated expenditures. Both CDP and the Lois Capps campaign denied any coordination. The General Counsel has apparently dropped claims related to coordination from the request for a probable cause finding.

election is necessarily a candidate-specific expenditure because the “identity of the candidate is apparent by unambiguous reference.” This is not the law as it is currently understood by the courts or reflected in the Commission’s regulations.

A. Case Law on Express Advocacy

Case law dealing with express advocacy has rejected a context-driven or audience-driven approach. The *Buckley* court noted that express advocacy cannot turn on the perceptions of the audience, because to do so would “put the speaker wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.” *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (quoting *Thomas v. Collins* 323 U.S. 516, 535).

Subsequent judicial decisions have similarly rejected a context-driven approach. Recently, the Fourth Circuit, in finding 11 C.F.R. § 100.22(b) unconstitutional, noted that “the regulation thus shifts the focus of the express advocacy determination away from the words themselves to the overall impressions of the hypothetical, reasonable listener or viewer.” *Virginia Society for Human Life, Inc. v. Federal Election Commission*, 263 F.3d 370, 391 (4th Cir. 2001).

As a District Court recently stated in *Federal Election Commission v. The Christian Coalition*, 52 F.Supp.2d 45, 62 (D. D.C. 1999):

[T]he “express advocacy” standard is...a pure question of law....While in other contexts application of such a legal standard would likely be considered a mixed question of law and fact, the First Amendment requires that the issue of whether a reasonable person would understand a

communication to expressly advocate a candidate's election or defeat must be decided solely as a matter of law.... The only factual determinations are identification of the speaker and the communication's contents. Once those have been made, a communication can be held to contain express advocacy only if no reasonable person could understand the speech in question—and in particular the verbs in question—to, in effect, contain an explicit directive to take electoral action in support of the election or defeat of a clearly identified candidate.

(emphasis added); *see also Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) (if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy); *Federal Election Commission v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997) (same).

B. Lois Capps Was Not Clearly Identified in the Advertisements

Here, the express advocacy question does not focus on whether the words prompt persons to vote. Instead it turns on whether the communications point to a “clearly identified candidate.” A communication clearly identifies a candidate if the name, photograph or drawing of the candidate appears, or “the identity of the candidate is apparent by unambiguous reference.” 2 U.S.C. § 431(18).

As the *Buckley* Court held, this unambiguous reference must be:

“The candidate’s name, photograph or drawing, or ... use of the candidate’s initials, ... the candidate’s nickname ... , his office (e.g., the President or the Governor of Iowa), or his status as a candidate (e.g., the Democratic Presidential nominee, ...).”

Buckley v. Valeo, 424 U.S. 1, 43 fn. 51 (1976). The Commission’s regulations echo this list. *See* 11 C.F.R. § 100.17.

The communications at issue contain no such unambiguous references to Lois

Capps. They merely urge the reader to vote Democratic at the special election. Although one could determine from extrinsic information that one Democrat appeared on the ballot, nothing in the communications suggest this. The average reader may conclude that there were multiple races or multiple Democratic candidates. *See, e.g., Advisory Opinion 1991-25* (special election combined with a general election). In fact, the January 13 special election in this same race had included multiple Democrats. This ambiguity ends the inquiry; express advocacy cannot depend on the reader's perception.

No legal authority suggests that a candidate may become clearly identified without *any* reference to him or her, merely because the candidate appears in a special election. The General Counsel's position is that in the context of a special election, *all* generic voter activity relates to a "clearly identified candidate." This reading relies on a subjective understanding of a specific special election and is inconsistent with the case law interpreting express advocacy.²

²We are aware that the Commission has interpreted Section 106.5 to be inapplicable. *See Adv. Opin. 1998-9*. However, this advisory opinion was not published until May 1998, months after CDP paid for the disputed communications. In its advisory opinion, the Commission acknowledged that a communication which asks the public to vote Republican on a specific election date or "on election day" is "usually a message that falls definitely within the category of generic voter drive cost." But the opinion went on to state that section 106.5 would not apply to a special election containing only one Republican candidate.

To the extent Advisory Opinion 1998-9 stated that committees cannot allocate generic expenditures related to special elections dealing with one office, it announced a new rule of law. This is not the province of advisory opinions. (*See* 2 U.S.C. § 437f(b) (rule of law may only be stated by regulation); *see also United States Defense Cmte. v. Federal Election Commission*, 861 F.2d 765, 771 (2nd Cir. 1988) (advisory opinions not binding on third parties). The Commission may certainly amend section 106.5, but it has not done so.

IV. CDP FOLLOWED COMMISSION REGULATIONS RELATED TO GENERIC VOTER DRIVES

CDP treated the expenses for these communications exactly as provided in the Commission regulations. Under the circumstances, the allegation that CDP violated the law by failing to anticipate the General Counsel's reading of those regulations would be patently unfair.

A. Ballot Composition Method

CDP fully complied with the ballot composition method spelled out in Commission regulations. The costs for these mailings were allocated between CDP's federal and non-federal accounts. Section 106.5(a)(2) provides:

(2) **Costs to be allocated.** Committees that make disbursements in connection with federal and non-federal elections shall allocate expenses according to this section for the following categories of activity:

...

(iv) Generic voter drives including voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the public to register, vote, or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate.

(Emphasis added).³

State and local political party committees use the ballot composition method, which is simply an average ratio to allocate the costs of certain generic party-building activities. The ratio derives solely from the number of *categories* of federal offices

³CDP submits that the reference in (iv) to a "specific candidate" is even narrower than a "clearly identified candidate." Since the communications here did not meet either standard, there may be no practical difference.

divided by the number of *categories* of federal and non-federal offices during a two year election cycle. 11 C.F.R. § 106.5(d)(2). Political party committees are not instructed to calculate the actual number of offices and candidates. Nor are they allowed to consider the effect of primary elections and special elections.

As a practical matter, the ballot composition method produces an average figure covering a two-year election cycle. It does not exclude from the allocation ratio specific elections or special elections. The General Counsel's reading of Section 106.5 would shift away from an average ratio to a case-by-case system that is not grounded in the regulatory language. It does not make sense to have unwritten exceptions to a general formula. To do so is unfair to the regulated community and goes beyond the regulation's language.

The General Counsel's office cites to the regulatory "Explanation and Justification," stating that wholly federal or non-federal special elections cannot be allocated. *See* General Counsel's brief at p. 4 fn. 3. This excerpt contradicts the language of section 106.5. Background statements in the regulatory record cannot be used to contradict a regulation's plain language.

In summary, while Commission regulations provide a "one size fits all" method for allocating generic voter drive expenses, the General Counsel's position would apply a tailored approach that is not grounded in the regulatory scheme.

B. Anomalous Result of the General Counsel's Position

The General Counsel's position in this matter produces several anomalous results.

Only *special runoff* elections would be ineligible for allocated expenditures under Section 106.5(a). Regularly-scheduled primary and general elections are eligible for allocated expenditures. And so are special primary elections where several partisan candidates appear on the ballot, as was the case with the January 13 special election here. Only during a special *runoff* election would allocated expenditures be forbidden. Section 106.5 does not in any way suggest such different treatment.

Another result would be that all generic voter activity – even voter registration – targeted to a special runoff election could be transformed into candidate-specific expenditures. Consider a poster or billboard stating “Democrats – Register to Vote – Special Election March 10.” Under the General Counsel’s view, this would be a candidate-specific expenditure for the Democratic nominee simply because the message urges Democrats to register and to vote on March 10.

This is a tortured reading of Section 106.5. As the Act and regulations recognize, political parties are constantly building their party organization. A key component includes voter registration, voting for party candidates, and public participation in elections. These activities do not become express advocacy simply because a special election is on the horizon.

V. CONCLUSION

Because the communications at issue here were generic party activities that did not refer to a clearly identified candidate, they were not independent expenditures. Therefore, CDP’s allocation of the expenses for these communications was proper under

Section 106.5. CDP did not violate the Act's source prohibitions and contribution limits, nor did it err in reporting the expenditures.

Respondents respectfully urge the Commission to find there is no probable cause to believe they violated the Federal Election Campaign Act.

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OLSON, HAGEL, WATERS & FISHBURN, LLP
Lance H. Olson
Thomas E. Gauthier

By: Thomas E. Gauthier
THOMAS E. GAUTHIER
Attorneys For Respondents

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