



**Minutes for Meeting of
Friday, April 20, 2012**

Item 1: Call to Order

Commission Chair Fuller called the meeting to order at 11:30 a.m.

Item 2: Roll Call

Present – Commission Chair Fuller, Commissioners Lee Biddle, Faye Detsky-Weil, John O’Neill, and Bud Wetzler (Commission Vice Chair William Howatt arrived at 11:35 p.m.)

Excused – Commissioner Cochran

Staff – Executive Director Stacey Fulhorst, General Counsel Christina Cameron, Program Manager Steve Ross, and Senior Investigator Lauri Davis

Item 3: Approval of Commission Minutes

Approval of Ethics Commission Minutes of April 20, 2012

Motion: Approve with minor changes
Moved/Seconded: O’Neill/Biddle
Vote: Carried Unanimously
Excused: Cochran

Item 4: Non-Agenda Public Comment

None

Item 5: Discussion and Possible Action Concerning Proposed Limit for Contributions from Political Parties to City Candidates and Attribution Rules

Director Fulhorst explained that the Commission Chair scheduled this special meeting to continue the discussion of issues not resolved at the April 12 meeting concerning political party contribution limits. She advised the Commission that there have been two developments since the last meeting. First, she explained that in discussions with April Boling she learned that it is not feasible for a political party to demonstrate that it used only funds from individuals in amounts of \$500 or less to make contributions to a City candidate. She reminded the Commission that Barrett Tetlow from the local Republican Party explained at the last meeting that federal campaign laws require the parties to segregate their funds into federal/hard money accounts and state/soft money accounts, and that they are required to use hard money to pay for a certain percentage of overhead and administrative expenses. She recently learned, however, that federal law also requires political parties to pay for all their administrative and overhead costs from their federal accounts, and seek reimbursement of the appropriate percentage of these costs from their state accounts. For this reason, conforming money in the federal account is frequently drawn down in excess of the amount required to pay those administrative costs. To comply with federal law, the parties have to transfer substantial funds between their state and federal accounts on a regular basis. As a result, there is no way for the Commission or the public to determine whether a political party had sufficient conforming funds on hand to make a particular contribution to a City candidate.

The second development since the last meeting is addressed in the letter from Charles Bell, attorney for the California Republican Party. Mr. Bell asserts that state law prohibits the City from imposing additional filing requirements on state general purpose recipient committees. In other words, he maintains that the City may not require the California Republican Party to file attribution disclosure reports. Although Mr. Bell represents the state party, Ms. Fulhorst advised the Commission that she has conferred with Ms. Cameron and confirmed that the laws cited in Mr. Bell's letter apply to local political parties as well. As a result, there is essentially a conflict between state law and the order issued by the District Court.

In order to address this conflict, Director Fulhorst explained that the Commission could go back to court (likely both state and federal courts) or could consider an alternative. The first alternative is a proposal mentioned by Commissioner Biddle at a previous meeting that would require City candidates to obtain the attribution information from the political party and file a disclosure report with the City Clerk. She noted that a drawback with this option is the candidate would clearly be relying on information from the political party, and the Commission would have no way to hold the political party responsible. She added that another drawback for this option is the

potential for a political party to assert that requiring a candidate to file the party's attribution information is essentially an indirect filing obligation for the party.

A different option involves accepting Mr. Bell's legal arguments at face value for purposes of conducting the balancing test required by the court. In other words, the Commission could recognize that the absence of any attribution reporting requirements would increase the potential for circumvention of the City's individual contribution limit. The Commission could take this factor into consideration when setting a particular party limit.

Finally, Director Fulhorst noted that the letter from Mr. Bell also addresses the aggregation of contribution limits from various levels of the same political party. He points out that all of the county parties in the state are considered separate entities under state law; therefore, he contends that each county party should be permitted to make a separate contribution to a City candidate within prescribed limits. Ms. Fulhorst advised the Commission that, according to research conducted by Ms. Cameron, federal law currently imposes a \$5,000 limit on contributions from a national political party and another \$5,000 aggregate limit on contributions from all other levels of the same political party combined. Additionally, she reported that the City's outside counsel in the *Thalheimer* litigation recommended an aggregate limit for different levels of the same political party as opposed to an outright ban from sources outside the county. She said that the outside counsel also expressed his view that the District Court would uphold an aggregation law.

In response to a question from Commissioner O'Neill on the apparent conflict between the *Thalheimer* ruling and state law, Director Fulhorst explained that the court upheld the application of the City's attribution rules to contributions from political parties, but did not address the issue of whether the attribution reporting requirements could be preempted under state law.

General Counsel Cameron provided an overview of the memorandum she prepared for the meeting, and discussed the importance of arriving at a limit that balances the associational rights of political parties with the need to prevent circumvention of individual contribution limits. She pointed out that a limit can be too low, as was the case when the *Thalheimer* court stated that it was clear that the City had not conducted the balancing test when arriving at the previous \$1,000 limit. On the other hand, a limit should not be so high as to create the potential for circumvention of the individual limit. She mentioned a recent Montana court case, and observed that although it is not binding on the City, the court upheld a range of political party limits that represented amounts equal to 5 times the individual limit to 36 times the individual limit (depending upon the office sought). She also discussed the fact that in the *Shrink* case, the facts involved a multiplier of 10 times the individual limit for political parties, and the court did not indicate that this limit was problematic. Finally, she noted that federal campaign laws currently limit individual

contributions to \$1,000 and political party contributions to \$5,000. In summary, she advised that different benchmarks as well as public policy considerations may be considered, and that conducting a proper inquiry is more important than the number ultimately chosen.

In response to a question from Commissioner Howatt regarding the appropriateness of a \$5,000, \$10,000, or \$20,000 limit, or no limit at all, Ms. Fulhorst responded that there is no magic number, but that the Commission may consider a number of factors, including the limits that were evaluated in the *Buckley*, *Shrink*, and Montana cases, as well as the data provided by Professor Thad Kousser.

Commissioner Howatt discussed the potential for disenfranchising different individuals and groups other than political parties by permitting political parties to make direct contributions to City candidates. He expressed his view that political parties can be a composite of separate groups that exert pressure on candidates and officials, and that the City should not give large political parties an outsized role in campaigns. Ms. Fulhorst reiterated the direction from the court that the City consider the rights of individuals to associate with a political party and balance these rights with the City's interest in preventing opportunities for circumvention. General Counsel Cameron added that the courts recognize that there is a special place for political parties in election campaigns.

UCSD Professor Thad Kousser noted that at its prior meeting the Ethics Commission decided that some limit for political parties was more appropriate than no limit, and that his comments would be focused on factors that could help the Commission arrive at a limit. He suggested that the Commission consider various benchmarks, including the limits in place in the top 15 U.S. cities. He noted that other cities are a better basis for comparison than congressional races; cities have a much more limited donor pool because their elected officials will only have the power to influence municipal decisions whereas congressional candidates have the potential to influence national affairs.

He explained that the Commission could consider the average limit for the cities that had limits, and could also consider a limit based on a per-resident or per-voter comparison. Based on his calculations, each option leads to limits between \$9,000 and \$13,000 for citywide races. He added that the \$13,000 limit is based on the per-voter comparison, and that San Diego has a higher voter turnout than some of the other cities because its elections coincide with national elections.

Professor Kousser observed that with respect to different limits for district and citywide elections, about half the cities in the chart have them and half do not. He pointed out that running for citywide office is significantly more expensive than running for district office. He noted that the top two district candidates in

past election cycles spent on average \$200,000 per election cycle, the top two city attorney candidates averaged \$560,000, and the top two mayoral candidates averaged \$1.3 million (not including Steve Francis as a self-funded candidate).

He suggested that a higher limit for citywide races would recognize the parties' associational rights as more people typically want to associate with their parties in a mayoral election than in a district election. As for increasing the likelihood of circumvention with a larger limit, he pointed out that because of the higher costs of a citywide election – in essence, a bigger “pie” – a larger limit for citywide elections versus district elections wouldn't actually increase the respective slice of each pie. In other words, the amount of the political party contribution as a percentage of overall candidate spending would be essentially the same.

Professor Kousser discussed the different ratios that could be used, stating that the cities in the chart used 2-to-1 to 4-to-1 ratios. He pointed out that having different limits (district versus citywide) for party contributions does not mean there should also be different limits for individual contributions as there are different dynamics involved. With individual limits, there are a larger number of individuals interested in a citywide campaign, thus allowing citywide candidates to raise significantly more money from more people. Party contributions, on the other hand, do not involve more potential donors in a citywide race than a district race; as a result, it is appropriate to treat these limits differently.

Professor Kousser recommended a party limit of \$12,000 per citywide election, which he noted would be the largest limit of all the cities on the chart other than Jacksonville. This amount would represent 24 times the limit in place for individuals. He recommended the Commission consider a 4-to-1 ratio for district elections, such that the limit for contributions from political parties to district candidates would be \$3,000 per election. He expressed his view that these limits are large enough to recognize the parties' associational rights but not so large that they create the potential for circumvention. In addition, he noted that the suggested limits would represent 6 and 24 times the amount of the individual limit, which fits well within the 5 to 36 multipliers recently upheld in the Montana case.

In response to an inquiry from Commissioner O'Neill, staff advised that some (but not all) of the limits on the chart referenced by Professor Kousser are indexed for inflation. Director Fulhorst noted that the City's laws already include an indexing mechanism.

In response to a question from Commissioner Howatt regarding registered voters, Professor Kousser noted that there are currently 252,000 registered Democrats, 176,000 registered Republicans, and that the majority of the remainder are “declined to state,” which is a growing trend throughout the

state and the country. Commissioner Howatt asked about an individual's right to disassociate from a political party, and Professor Kousser explained that the courts have recognized the right to associate with (not disassociate from) political parties. Finally, with respect to satisfying the *Randall* requirements, Professor Kousser noted that a limit for political party contributions would serve as an anti-circumvention tool, preventing parties from being used as pass-throughs for money laundering, thereby making the City's individual limit irrelevant.

Barrett Tetlow with the Republican Party of San Diego County reiterated his previous recommendation that there be no limits for contributions from political parties, and stated that the Republican Party will "probably be going back to court" if the limit adopted by the City is too low. He suggested that the Commission consider three relevant factors in arriving at a recommended limit: (1) has the City considered the balancing test (he stated that he believes the Commission has done an excellent job); (2) has the limit selected been upheld by a court; and (3) what limits are in places in other jurisdictions (he added that more than just the 15 jurisdictions in the chart should be considered).

Mr. Tetlow addressed the suggestions contained in his April 19, 2012, memorandum to the Ethics Commission and pointed out that a limit between \$62,000 and \$68,000 would be appropriate for San Diego based on a comparison between the size of a congressional/senate district and the City's population. He also suggested that because the City's population and number of eligible voters are comparable to Rhode Island's, the City could adopt the same limit as Rhode Island's: \$88,000. If the limit were based on the number of members of the San Diego County Party Central Committee (58), it would be set at \$29,000 (individual limit of \$500 multiplied by 58). Alternatively, if the limit were based on the number of voters registered with each political party, \$1 for each registered voter would result in a limit of \$178,000 for the Republican Party and \$256,000 for the Democratic Party. Finally, he suggested the Commission consider the \$500 individual limit multiplied by 6,000 people.

April Boling commented on the proposed attribution rules, recommending that there be no limit on how far back a party may go to identify an individual for attribution purposes. Alternatively, if the Commission decides to recommend a time limit, she expressed her support for Option C in the staff's Municipal Code draft, which limits the look-back period to January 1 of the second most recent odd-numbered year.

Simon Mayeski with Common Cause expressed his support for the numbers recommended by Professor Kousser and noted that they are based on facts. He also expressed his view that, because San Diego is a California city, the Commission should consider other California cities for comparison purposes.

William Moore with the San Diego Democratic Party recapped his discussion from the previous meeting and stated that the contribution limit should be high enough for a political party to signal support in the early stages of a campaign, or between \$5,000 and \$10,000. He said that if campaigns cost on average \$142,000 in Council District 6, a \$5,000 limit, or 3.5% of the average cost, would be a significant amount. He noted that the parties tend to use member communications to persuade voters later in the election cycle. He also noted that the City's elections are non-partisan, and that individuals should have the most influence in the process.

Ms. Fulhorst explained that federal law imposes a \$5,000 limit on direct party contributions to candidates and a limit of approximately \$36,000 for coordinated expenditures. In contrast, local law imposes no limits on coordinated expenditures if they are in the form of member communications. Commissioner Biddle added that under local law, following the rulings in *Citizen United* and *Thalheimer*, there are no limits on the funds a committee can receive for the purpose of making independent expenditures to support candidates.

In response to a question from Commissioner Detsky-Weil regarding a political party's ability to track individual contributions, Ms. Fulhorst explained that parties do track the receipt of all contributions including those under \$100, but cannot track a particular dollar all the way through to a contribution to a candidate.

In response to a question from Commissioner Howatt, Ms. Cameron confirmed that the citations in Mr. Bell's letter are accurate and that state law is potentially in conflict with the District Court's ruling in *Thalheimer*. She explained that Judge Gonzalez upheld the City's attribution rules, but did not address whether the disclosure requirement would be precluded by state law.

Ms. Fulhorst pointed out that this is a factor the Commission may want to take into account; there is a basis for a political party to sue the City if it imposes rules requiring the filing of attribution disclosure reports. Without a disclosure requirement, she observed that the attribution rules would essentially be unenforceable.

Commissioner Howatt expressed his view that limiting the size of political contributions would serve to limit corruption if attribution reporting requirements are eliminated.

In response to a question from Commissioner Biddle, Ms. Fulhorst clarified that the elimination of attribution reporting requirements would not also mean the elimination of the law that requires political parties to use only donations from individuals in amounts of \$500 or less to fund contributions to City candidates. She confirmed that the Commission could investigate a potential violation of the attribution rules if there were sufficient facts to suggest a

violation might have taken place. Commissioner Biddle commented that a lower contribution limit will be particularly important if there are no attribution reporting requirements.

Motion: Recommend no attribution reporting requirements for contributions from political parties to City candidates
Moved/Seconded: O'Neill/Howatt
Vote: Carried unanimously
Excused: Cochran

On the issue of an aggregate limit, Commissioner Biddle suggested that a single limit be applied to all levels of a particular party. Commissioner Wetzler suggested one limit for a local county party with a separate limit for the other levels of the same party combined. Commissioner O'Neill pointed out that if there is a single limit for all levels of a party, a local party could be short-changed if a party outside San Diego makes a contribution. Commissioner Howatt expressed his support for a single aggregate limit, adding that it would not limit the ability of parties to participate in other ways, such as member communications and get-out-the-vote efforts.

Motion: Recommend a single aggregate limit for contributions from all levels of the same political party to a City candidate
Moved/Seconded: O'Neill/Howatt
Vote: Carried 5-1 (Wetzler voted nay)
Excused: Cochran

Commissioner Biddle commented that, without attribution reporting requirements, he has concerns about setting a limit that is too high. Although he previously suggested that \$5,000 was an appropriate limit for district elections, he said he was now supporting the suggestion made by Professor Kousser that the per election limit for district candidates be set at \$3,000 in light of the Commission's decision to not require attribution disclosure reports.

Commissioner O'Neill stated that he would prefer to discuss the limit for district candidates in conjunction with a limit for citywide candidates. He opined that a 2-to-1 ratio is too low, and that a ratio of 4-to-1 or 6-to-1 would be better. He recommend a \$3,000 limit on contributions from political parties to City candidates in district elections, and a \$12,000 limit in citywide elections.

Commissioner Wetzler observed that the limits suggested by Commissioner O'Neill are comparable to those recommended by the local Democratic Party.

Commissioner Howatt stated that he was not opposed to the suggested limits, but commented that San Diego's history of corruption does not stem from political party contributions. Ms. Fulhorst concurred with Commissioner

Howatt's observation, and noted that Judge Gonzalez stated in her order that political parties do not create the same appearance of corruption as special interests. Instead, the anti-circumvention concerns involve the potential for special interests to create an appearance of corruption by moving large contributions through political parties to City candidates.

Motion: Recommend a \$3,000 per election limit on contributions from political parties to City candidates in district elections, and a \$12,000 limit in citywide elections
Moved/Seconded: O'Neill/Biddle
Vote: Carried 5-1 (Fuller voted nay)
Excused: Cochran

Adjournment

The meeting adjourned at approximately 1:40 p.m.

Clyde Fuller, Commission Chair
Ethics Commission

Stacey Fulhorst, Executive Director
Ethics Commission

THIS INFORMATION WILL BE MADE AVAILABLE IN ALTERNATIVE FORMATS UPON REQUEST.