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July 27, 2005

Comments on AOR 2005-10

By Electronic Mail

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Advisory Opinion Request 2005-10

Dear Mr. Norton:

These comments are filed on behalf of the Campaign Legal Center in regard to AOR 2005-10, an advisory opinion request submitted by U.S. Representatives Howard L. Berman (D-CA) and John T. Doolittle (R-CA), seeking the Commission's opinion as to whether the Congressmen may "freely raise funds for committees that are formed solely to support or oppose initiatives on the November 8, 2005 California statewide special election ballot; and that are neither established, financed, maintained or controlled by persons covered by" the Bipartisan Campaign Reform Act of 2002 (BCRA) soft money fundraising prohibition.

The Federal Election Campaign Act (FECA), as amended by BCRA, along with existing Commission regulations, require the Commission to decide that Congressmen Berman and Doolittle may not "freely raise funds" in connection with California's November election. *See* 2 U.S.C. § 441i(e)(1). *See also* 11 C.F.R. §§ 300.60 and 300.62.

Despite the requestors' best efforts to complicate the matter, the appropriate legal analysis in this instance is simple. The Commission need only answer two straightforward questions:

- **Are the requestors covered by the soft money prohibition of section 441i(e)(1)—*i.e.*, are the requestors federal candidates, federal officeholders, or agents of federal candidates or officeholders?**

- If so, is the proposed activity covered by the soft money prohibition of section 441i(e)(1)—*i.e.*, does the activity constitute soliciting or directing funds in connection with an "election"?

As federal officeholders, Congressmen Berman and Doolittle are clearly covered by the soft money prohibition of section 441i(e)(1). Further, the activity proposed by Congressmen Berman and Doolittle—soliciting and directing funds in connection with a ballot initiative campaign—clearly are in connection with an "election" and thus constitutes activity covered by the soft money prohibition of section 441i(e)(1). Because both questions above are answered in the affirmative, federal campaign finance law clearly restricts the Congressmen's proposed activities.

Indeed, the key question presented here has already been resolved by the Commission, in its ruling and analysis in Ad.Op. 2003-12, which directly held that a state ballot initiative was an "election" within the meaning of 2 U.S.C. 441i(e)(1). The requestors' attempt to distinguish this advisory opinion is plainly incorrect. Thus, unless the Commission is prepared to overrule Ad.Op. 2003-12 – a step for which there is no justification – the Commission should conclude that the solicitation restriction of section 441i(e)(1) applies to the activities proposed here.

We respectfully urge the Commission to advise Congressmen Berman and Doolittle that their solicitation and direction of funds in connection with California's November statewide election must comport with FECA amount limitations and source prohibitions, as required by section 441i(e)(1)(B).

1. **BCRA's legislative history, purpose and text make clear that federal officeholders are prohibited from soliciting soft money in connection with <u>any</u> election.**

FECA, as amended by BCRA, clearly states that federal candidates, officeholders and their agents shall not "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office . . . unless the funds are subject to the limitations, prohibitions and reporting requirements" of FECA. 2 U.S.C. § 441i(e)(1)(A). Federal law further provides that federal candidates, officeholders, and their agents shall not "solicit, receive, direct, transfer, or spend funds in connection with <u>any</u> election other than an election for Federal office . . . unless the funds are not in excess of the amounts permitted" by FECA, and "are not from sources prohibited [by FECA] from making contributions in connection with an election for Federal office." 2 U.S.C. § 441i(e)(1)(B).

In other words, when a federal officeholder raises funds in connection with a federal election, such fundraising activity must not only comport with FECA amount limitations and source prohibitions, but must also be reported to the Commission. By comparison, when a federal candidate or officeholder raises funds "in connection with <u>any</u> election other than" a Federal election, such fundraising activity must comport with FECA amount limitations and source prohibitions, but may not require reporting to the Commission.

BCRA's legislative history makes clear that this prohibition on federal candidate and officeholder solicitation and receipt of soft money is the very foundation of BCRA. One of

BCRA's principal sponsors explained: "It is a key purpose of [BCRA] to stop the use of soft money as a means of buying influence and access with Federal officeholders and candidates." 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). Even opponents of BCRA understood the intent and effect of BCRA's soft money ban. Senator Hatch (R-UT) explained to his colleagues on the Senate floor: "The primary provision of McCain-Feingold essentially bans soft money by making it unlawful for national political parties and federal candidates to solicit or receive any funds not subject to the hard money limitations of the Federal Election Campaign Act." 147 Cong. Rec. S3240 (daily ed. April 2, 2001) (statement of Sen. Hatch).

Congress recognized that the improper influence resulting from soft money contributions depends not on an officeholder's actual receipt of soft money contributions, but on an officeholder's successful solicitation of soft money contributions—regardless of whether or not the officeholder controls the recipient organization. One BCRA sponsor proudly proclaimed: "[W]e will be taking the solicitation of big money by people in power . . . out of American politics and with it will go the appearances of favoritism and corruption." 148 Cong. Rec. S2116 (daily ed. Mar. 20, 2002) (statement of Sen. Levin)(emphasis added). Senator McCain (R-AZ) likewise emphasized the importance of BCRA's ban on the solicitation of soft money. Senator McCain explained:

> These [BCRA] provisions break no new conceptual grounds in either public policy or constitutional law. . . . Indeed, statutes like these have been on the books for over 100 years for the same reason that we're prohibiting certain solicitations—to deter the opportunity for corruption to grow and flourish, to maintain the integrity of our political system, and to prevent any appearance that our Federal laws, policies, or activities can be inappropriately compromised or sold.

148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

Furthermore, Congress understood that BCRA's prohibition on the solicitation of soft money was vital to preventing circumvention of the prohibition on candidate and party receipt of soft money. Senator Snowe (R-ME) explicitly noted the importance of the solicitation ban to preventing circumvention of BCRA's ban on officeholder and party receipt of soft money:

> Now, some of our opponents have said that we are simply opening the floodgates in allowing soft money to now be channeled through these independent groups for electioneering purposes. To that, I would say that this bill would prohibit members from directing money to these groups to affect elections, so that would cut out an entire avenue of solicitation for funds, not to mention any real or perceived "quid pro quo."

148 Cong. Rec. S2136 (daily ed. Mar. 20, 2002) (statement of Sen. Snowe).

BCRA's legislative history, purpose and text confirm that section 441i(e)(1) was intended to eliminate the threat of real and apparent corruption resulting from federal officeholder

solicitation of soft money for themselves or for other political committees—in connection with any election. Nowhere does BCRA's legislative history, purpose, or text provide or suggest that the application of section 441i(e)(1) depends on an officeholder's control of the recipient committee or on the type of the election (*i.e.*, federal or non-federal) for which the funds are solicited.[1]

2. The Supreme Court in *McConnell* upheld BCRA's prohibition on federal officeholder solicitation of soft money for committees over which the officeholder has no control, and regardless of the ends to which the funds are ultimately put.

The Supreme Court in *McConnell v. FEC* upheld against constitutional challenge the section 441i(e)(1) federal officeholder soft money ban. 540 U.S. 93, 181-84 (2003). The Court began its analysis of the soft money prohibition, as applied to federal candidates and officeholders, by examining the BCRA prohibition on direct receipt of soft money by such candidates and officeholders. The Court noted:

> No party seriously questions the constitutionality of [the federal law] general ban on donations of soft money made directly to federal candidates and officeholders, their agents, or entities established or controlled by them. Even on the narrowest reading of *Buckley*, a regulation restricting donations to a federal candidate, regardless of the ends to which those funds are ultimately put, qualifies as a contribution limit subject to less rigorous scrutiny. Such donations have only marginal speech and associational value, but at the same time pose a substantial threat of corruption. By severing the most direct link between the soft-money donor and the federal candidate, [the federal law] ban on donations of soft money is closely drawn to prevent the corruption or the appearance of corruption of federal candidates and officeholders.

McConnell, 540 U.S. at 182 (emphasis added).

The Court then went on to examine the constitutionality of the BCRA ban on soft money solicitation by federal officeholders such as Congressmen Berman and Doolittle. The Court upheld the solicitation ban, reasoning:

> [the] restrictions on solicitations are justified as valid anticircumvention measures. Large soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself.

McConnell, 540 U.S. at 182 (emphasis added).

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[1] As stated above, although the type of election (*i.e.*, federal or non-federal) does not affect the application of section 441i(e)(1), the type of election does affect the scope of regulation under section 441i(e)(1) (*i.e.*, whether the fundraising activity must comport with FECA amount limitations, source prohibitions, and reporting requirements or only with FECA amount limitations and source prohibitions. *See* 2 U.S.C. §§ 441i(e)(1)(A) and (B)).

The *McConnell* Court upheld the BCRA ban on federal officeholder solicitation of unrestricted contributions for committees over which the candidate has no control and regardless of the ends to which those funds are ultimately put—as a closely drawn, constitutionally permissible means of preventing corruption and circumvention of existing contribution limits.

Neither candidate control of the recipient committee, nor the recipient committee's use of the funds, are relevant factors in the application of section 441i(e)(1). The argument by Congressmen Berman and Doolittle that such factors are relevant is without merit.

3. Commission regulations reinforce the BCRA provision prohibiting federal officeholders from soliciting soft money in connection with any election

Commission regulations interpreting section 441i(e)(1) state that "[i]ndividuals holding Federal office" "may solicit, receive, direct, transfer, spend, or disburse funds in connection with any non-Federal election, only in amounts and from sources that are consistent with State law, and that do not exceed [FECA's] contribution limits or come from prohibited sources under [FECA]." 11 C.F.R. §§ 300.60 and 300.62.

The Commission's regulations could not be more clear. The soft money solicitation prohibition of FECA section 441i(e)(1)(B) applies to the fundraising activities of any federal officeholder in connection with any non-federal election. Neither the text of the regulations, nor the Commission's Explanation and Justification for the regulations, suggest that the regulatory phrase "any non-Federal election" does not include California's November statewide election. Similarly, neither the text of the regulations, nor the Commission's Explanation and Justification for the regulations, suggest that candidate control of the recipient committee is relevant to the application of section 441i(e)(1). *See* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, Final Rules and Explanation and Justification, 67 Fed. Reg. 49064, 49107 (July 29, 2002).

Commission regulations 300.60 and 300.62 explicitly prohibit Congressmen Berman and Doolittle from "freely raising funds" in connection with California's November election.

4. The Commission's Advisory Opinion 2003-12 held that ballot initiative campaigns are "elections" within the meaning of section 441i(e)(1), whether or not the ballot committee is controlled by a federal candidate or officeholder.

The only significant question presented by the current AOR is whether a ballot initiative campaign constitutes an "election" within the meaning of section 441(e)(1)(B). The Commission has already decided that it does. In Advisory Opinion 2003-12, the Commission was asked by an Arizona political committee, Stop Taxpayer Money for Politicians Committee (STMP), along with U.S. Representative Jeff Flake (R-AZ), who had established STMP, for guidance on the application of FECA and FEC regulations "to a ballot measure campaign that STMP and Representative Flake plan[ned] to undertake for the November 2, 2004, election in Arizona." *See* AO 2003-12 at 1.

A threshold question addressed by the Commission in AO 2003-12 was whether STMP's activities in the ballot initiative campaign were "in connection with any election other than an election for federal office." The Commission analyzed this question at length:

> As used in subparagraph (B) of section 441i(e)(1), the term, "in connection with any election other than an election for Federal office" is, on its face, clearly intended to apply to a different category of elections than those covered by subparagraph (A), which refers to "an election for Federal office." This phrasing, "in connection with any election other than an election for Federal office" also differs significantly from the wording of other provisions of the Act that reach beyond Federal elections. Particularly relevant is the prohibition on contributions or expenditures by national banks and corporations organized by authority of Congress, which applies "in connection with any election to political office." 2 U.S.C. 441b(a). Where Congress uses different terms, it must be presumed that it means different things. Congress expressly chose to limit the reach of section 441a(b) to those non-Federal election for a "political office," while intending a broader sweep for section 441i(e)(1)(B), which applies to "any election" (with only the exclusion of elections to Federal office). ***Therefore, the Commission concludes that the scope of section 441i(e)(1)(B) is not limited to elections for a political office, and that the activities of STMP as described in your request...are in connection with an election other than an election for Federal office. 2 U.S.C. 441i(e)(1)(B).***
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> AO 2003-12 at 5-6 (emphasis added) (footnotes omitted).

It is certainly true that AO 2003-12 involved additional issues because STMP was a state committee "established, financed, maintained and controlled" by a federal officeholder, and therefore subject to additional BCRA restrictions. But the Commission's threshold analysis in AO 2003-12 of whether section 441i(e)(1)(B) applies to ballot initiative campaigns was not dependent on the fact that the ballot committee at issue there was controlled by a federal candidate. Indeed, the Commission expressly decided that *even if* the committee was *not* controlled by a federal candidate or officeholder, section 441i(e)(1)(B) *would still apply to its activities*.

The Commission decided this key point in the context of distinguishing between the pre-ballot qualification activities of an initiative committee, and the post-qualification activities. If a ballot committee is controlled by a federal candidate, the Commission said, then *all* of its activities, both pre-qualification and post-qualification, are subject to section 441i(e)(1)(B) restrictions:

> The Commission finds that all activities of a ballot measure committee "established, financed, maintained or controlled" by a Federal candidate, as is the case here...are "in connection with any election other than an election for Federal office." This includes activity in the signature gathering and ballot qualification

> stage, as well as activity to win passage of the measure after it qualifies for the ballot.
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> *Id.* at 6.

But where the ballot committee is independent of a federal candidate or officeholder, only its post-qualification activities are subject to section 441i(e)(1)(B):

> On the other hand, the Commission concludes that the activities of a ballot measure committee ***that is not "established, financed, maintained or controlled" by a Federal candidate or officeholder, or agent of either***, are not "in connection with any election other than an election for Federal office" prior to the committee qualifying an initiative or ballot measure for the ballot, ***but are "in connection with any election other than an election for Federal office" after the committee qualifies an initiative or ballot measure for the ballot." 2 U.S.C. 441i(e)(1)(B)***
> ....
>
> ***[O]nce a ballot measure committee qualifies an initiative or referendum for the ballot, its subsequent activities will be deemed to be "in connection with any election other than an election for Federal office" under 2 U.S.C. 441i(e)(1).***
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> *Id.* at 6-7 (emphasis added).

This is a clear statement that *even a ballot committee organized independently of a federal candidate or officeholder* is operating within the restrictions of section 441i(e)(1) in its post-qualification activities. Thus, it necessarily follows that a federal candidate or officeholder cannot solicit or direct funds for such a committee because of the restrictions imposed on federal candidates and officeholders by section 441i(e)(1)(B).

Faced with such direct and controlling precedent, the requesters here predictably seek to dismiss this portion of AO 2003-12 as mere "dicta." AOR at 4. But this is simply wrong.

It is of course true that many of the questions answered by the Commission in AO 2003-12 addressed restrictions on STMP as an entity that was "established, financed, maintained or controlled" by a federal officeholder. But the meaning of the term "election" in section 441i(e)(1)(B) was the very first question decided by the Commission in AO 2003-12, and the foundation on which the rest of the analysis depended. The Commission concluded that post-qualification ballot campaign activities are in connection with an "election" whether or not the activities are undertaken by a committee controlled by a federal candidate.

This ruling is not "dicta" for an additional reason as well. Having determined that a referenda election is an "election" within the meaning of section 441i(e)(1), the Commission in AO 2003-12 automatically presumed—without explicit analysis—that section 441i(e)(1) applied to the fundraising activities of Congressman Flake. If that were not true – if Congressman Flake was not restricted in his ability to raise soft money for a state ballot initiative committee – it would not have mattered whether STMP was "established, financed, maintained or controlled"

by Congressman Flake. But because section 441i(e)(1) *did* apply to Congressman Flake, it therefore applied as well (by statute) to any committee "established" by him. Thus, STMP was covered by section 441i(e)(1) only because Congressman Flake was covered. But the threshold proposition decided by the Commission – that a ballot initiative is an "election" within the meaning of section 441i(e)(1) – was necessary for its holding that STMP was covered by the statute because it was "established" by Congressman Flake, and he himself was covered, and therefore it cannot be dismissed here as "dicta."

Also incorrect is the requester's argument that the Commission's discussion of AO's 1984-62 and 1982-10 – both of which held that referenda were not "elections" within the meaning of section 441a(b) – is applicable only in the context of a committee "established by" a federal candidate. AOR at 6. That discussion in AO 2003-12 is a matter of pure statutory exegesis, and is based on the fact that the language in section 441i(e)(1), referring to an "election, is obviously broader than the language in section 441a(b), referring to an "election to any political office...." Solely because of this difference in statutory language did the Commission distinguish the narrower holding of those prior advisory opinions in construing the meaning of section 441i(e)(1). Nothing in that portion of the analysis depended on the fact that STMP was a referenda committee controlled by a federal candidate.

So too, the requesters misrepresent the import of comments filed in AO 2003-12. They quote, for instance, from comments submitted by the Center for Responsive Politics, which stated that FECA and BCRA "generally" do not impact the activities of independent ballot referenda committees. Of course that is true – such committees are generally free to operate outside federal law. But that is an entirely different point than whether *federal* law restricts the activities of *federal* candidates and officeholders in raising or spending money for such committees. As the Commission correctly concluded in AO 2003-12, BCRA does restrict the activities of federal officeholders. The CRP comments further pointed out, in the sentence prior to the two sentences quoted by requesters, that federal candidates and officeholders are free to express support or opposition to state ballot measures. But again, that is an entirely different proposition than whether federal candidates and officeholders are permitted to raise and spend nonfederal funds for such committees.

Because they fail to establish that the controlling language from AO 2003-12 is merely "dicta," requesters attempt to construe the language as applying only to "committees whose activities implicate the purposes of FECA" such as "where a committee's spending would affect a candidate's own election." AOR at 5.

This effort to radically shrink the scope of section 441i(e)(1) also fails. It cannot be disputed that federal candidates and officeholders are restricted by section 441i(e)(1)(B) from raising soft money in connection with *any* non-federal election, not only those that "would affect [the] candidate's own election." If the requester's theory were correct, for instance, it would mean that all federal officeholders would be free to solicit unlimited soft money for gubernatorial candidates running in elections in 2005 – when none of those federal officeholders are on the ballot. This is plainly wrong.

Conclusion

According to the facts presented in AOR 2005-10, Congressmen Berman and Doolittle wish to solicit and direct soft money contributions in connection with a California state election—activity which is clearly prohibited by section 441i(e)(1).

In an effort to obtain a favorable advisory opinion from the Commission, the Congressmen incorrectly frame the operative legal question regarding the applicability of section 441i(e)(1) to their proposed activities. Rather than simply asking whether federal officeholders like themselves may solicit soft money in connection with state elections, the Congressmen instead shift the focus of their query to the fundraising activities of hypothetical California ballot measure committees "neither established, financed, maintained or controlled by persons covered by" section 441i(e)(1). *See* AOR 2005-10 at 1. This shift in focus conveniently enables the Congressmen to argue that no government interest is served by restricting the fundraising activities of these hypothetical independent ballot measure committees in California.

To be clear, the fundraising activities of state ballot measure committees are not at issue in this AOR. At issue are the fundraising activities of federal officeholders.

Congress and the Supreme Court have recognized that soft money contributions made as the result of federal officeholder solicitation threaten real and apparent corruption of such officeholders. BCRA's legislative history, purpose and text, as well as this Commission's regulations, make clear that federal officeholders are prohibited from soliciting soft money contributions in connection with any election.

For the above stated reasons, we urge the Commission to formally advise Congressmen Berman and Doolittle that they are prohibited by 2 U.S.C. § 441i(e)(1) from soliciting or directing funds in excess of FECA amount limitations or from sources prohibited by FECA in connection with California's November election.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ J. Gerald Hebert

J. Gerald Hebert
Campaign Legal Center