FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CONCURRENCE IN ADVISORY OPINION 1999-11

VICE CHAIRMAN WOLD and COMMISSIONERS ELLIOTT and MASON

We write to explain our purposes in substantially re-writing the General Counsel's draft of Advisory Opinion (AO) 1999-11, in which we followed an approach similar to that which we employed in redrafting AO 1999-2. Our purposes were two-fold: (1) to focus the legal analysis in the opinion on the facts of the request, and not to engage in a discussion of the Federal Election Campaign Act ("FECA" or "the Act"), 2 U.S.C. § 431 *et seq.*, beyond that necessary for a conclusion in this instance; and (2) to abandon the use of the phrase "campaign related" as a test or description of activity we find is "for the purpose of influencing" or "in connection with" a federal election.

In rewriting AOs 1999-2 and 1999-11, a majority of the Federal Election Commission ("the Commission") employed a different methodology than the Commission used previously.[1] In AO 1999-2, we identified the specific factor which we believed was dispositive in determining that the proposed event was "in connection with a federal election."[2] We specifically excised the Office of General Counsel's (OGC) proposed language discussing factors (solicitation and express advocacy) not present in that request which might be relevant in applying the law to different situations.[3] In AO 1999-11, we again excised from the OGC's draft a passage generally describing conclusions of previous advisory opinions as establishing solicitation and express advocacy as non-exclusive tests for "campaign-relatedness."[4] Instead we concluded on the facts presented that the proposed activity was not "for the purpose of influencing" a federal election.[5]

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[1] *See Concurring Opinion of Chairman Scott E. Thomas and Commissioner Danny L. McDonald on Advisory Opinion 1999-2* (criticizing Commission's change in approach in Advisory Opinion 1999-2); *see Concurring Opinion of Chairman Scott E. Thomas and Commissioner Danny L. McDonald on Advisory Opinion 1999-11* (criticizing Commission's change in approach in Advisory Opinion 1999-11).

[2] *See Advisory Opinion 1999-2* at 4 ("The status of speakers as [federal] candidates appears to be the determining factor in extending the invitation to participate in the (candidate) forums"; as a result, the activity in question fell within the scope of 2 U.S.C. § 441b(a).).

[3] *See Agenda Document Number 99-27* at 6 (original OGC "blue" draft of AO 1999-2 discussing lack of express advocacy and solicitation of contributions in the facts presented to the Commission).

[4] *See Agenda Document Number 99-61* at 4 (original OGC "blue" draft of AO 1999-11 discussing prior advisory opinions from which the Commission concluded that the existence of express advocacy or solicitation of contributions would render an activity "campaign related").

[5] *See Advisory Opinion 1999-11* at 3-4 (fact that state officeholder would continue to appear at constituent forum in her capacity as a state official rendered activity outside the scope of 2 U.S.C. §§ 431(8) & (9)).

We believe the approach we adopted in AO 1999-11 is mandated by explicit statutory limitations inherent to the advisory opinion process. General statements of tests and standards (other than those included in the FECA and our regulations) are inappropriate to the advisory opinion process because (1) this process is limited to specific events or transactions and (2) the Commission may enunciate rules of law which bind the regulated community only through regulations, not through advisory opinions. [6]

THE ADVISORY OPINION PROCESS

The FECA requires the Commission to issue advisory opinions.[7] But the FECA circumscribes this authority in several significant ways.

First, and as all Commissioners now seem to acknowledge,[8] advisory opinions are clearly not rules or regulations. Advisory opinions may address only "the *application* of [the FECA] . . . or a rule or regulation prescribed by the Commission."[9] Further, 2 U.S.C. § 437f(b) specifies that "[a]ny rule of law which is not stated in this Act . . . may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d)." Subsection 437f(b) is an extraordinary restatement of a restriction which is clear from the plain reading of subsections 437f(a) and 438(d): the Commission may not establish a rule of general applicability through the advisory opinion process, even through an infinite number of advisory opinions.

Second, 2 U.S.C. § 437f(a) limits advisory opinions to "a specific transaction or activity." This provision prohibits advisory opinions from addressing generic types of activities. Thus, advisory opinions are not the appropriate forum for general restatements of the law, regulations, and previous advisory opinions beyond that which is necessary to address a particular request. And while a variety of factors might cause the Commission

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[6] See our Statement of Reasons on the 1996 Presidential audits (at 2-4) in which Commissioner Sandstrom joined for a similar discussion of the limitations of the advisory opinion process.

[7] *See* 2 U.S.C. § 437f(a) (requiring Commission to respond to advisory opinion requests).

[8] *See Statement of Reasons of Chairman Scott E. Thomas and Commissioner Danny L. McDonald on the Audits of 1996 Clinton/Gore and Dole/Kemp Campaigns* at 4 (emphasis added) ("Dealing with the last red herring first, to our knowledge no commissioner has been confused about the legal effect of advisory opinions. While advisory opinions clearly have binding consequences, the statute is clear that *general rules of law* have to emanate *from the statute or from regulations* of the Commission."). *But see Concurring Opinion of Chairman Scott E. Thomas and Commissioner Danny L. McDonald on Advisory Opinion 1999-2* at 1 (quoting AO 1996-11) (emphasis added in concurring statement) (stating that in AO 1996-11, "the Commission ha[d] developed the following test: . . .'the absence of solicitations for contributions or express advocacy regarding candidates will not preclude a determination that an activity is '*campaign-related.*'"); *see also Concurring Opinion of Chairman Scott E. Thomas and Commissioner Danny L. McDonald on Advisory Opinion 1999-11* at 1 (emphasis added) ("Certain of our colleagues seem to dislike *the 'campaign-related' test that has emerged over the years* as a way of determining whether activity is regulable under the [FECA] . . . . *This test was articulated fairly recently in [AO] 1996-11. . . .*"); *id.* at 2 (emphasis added) ("Moreover, by leaving in [AO] 1999-11 several citations to *other advisory opinions that use the 'campaign-related' test* (e.g. [AO] 1994-15), our colleagues seem to have approved *that standard* anyway."); *id.* at 2 n. 1 (emphasis added) ("This doesn't suggest a compelling need to alter the General Counsel's draft that used *the often approved 'campaign-related' test.*").

[9] 2 U.S.C. § 437f(a) (emphasis added).

to conclude that a particular event or activity is "for the purpose of influencing an election," an advisory opinion addressing a *particular* event is not the place to attempt to address *the entire range of factors* which *might* be relevant in assessing *different* events.

Nor are such exhaustive restatements necessarily helpful to the regulated community. Declaring, for example, that "there may be [unspecified] other factors which lead to a conclusion that an event is 'campaign-related'"[10] hardly provides useful guidance. Moreover, general discussions of the law, unrelated to the facts of a request, may actually confuse the regulated community as to what aspects of the law are relevant to an opinion. In addition, then, to adhering to our statute, a more limited mode of analysis provides better guidance to the regulated community by identifying the specific factors that are relevant in specific situations.

Third, consistent with the general principle that advisory opinions may not lay down rules of general applicability, reliance on opinions is limited to "any person involved in the specific transaction or activity" and "to any person involved in any specific transaction or activity which is *indistinguishable in all its material aspects*"[11] from the activity which is the subject of the advisory opinion. While this provision specifically governs the regulated community's use of advisory opinions, a corollary to it likewise prohibits the Commission from applying advisory opinions to materially distinguishable activities. For instance, not only would it be unhelpful, but it would seem impermissible, for the Commission to apply an advisory opinion predicated on express advocacy or solicitation of contributions to a situation in which those factors are absent.

These inherent limitations on the advisory opinion process have specific implications for how the Commission should address advisory opinion requests. For us to vote for future advisory opinions, they should apply relevant provisions of our statute first, and then of our regulations, to the facts of a request. And the Commission's conclusion should be based on applying the statute and our regulations, not on applying other advisory opinions.

We do not object to the Commission referring, where appropriate, to earlier advisory opinions that shed further light on the conclusion, either because they are consistent with the conclusion in similar circumstances, or because they illustrate the limits of the conclusion by contrasting conclusions with differing facts.[12] The conclusion

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[10] *Concurring Opinion of Chairman Scott E. Thomas and Commissioner Danny L. McDonald on Advisory Opinion 99-2* at 2.

[11] 2 U.S.C. § 437f(c) (emphasis added).

[12] For instance, advisory opinions may be usefully cited to address a specific point: in the case of AO 1999-2, that invitations to candidates as candidates will cause the Commission to determine that an event is "in connection with an election"; and, in the case of both AO 1999-2 and 1999-11, that the capacity in which a candidate is participating in an event is one relevant factor in determining whether the event is "in connection with" or "for the purpose of influencing" an election. However, the Commission should be careful in characterizing the holdings of previous advisory opinions, since confusion has arisen in the past from such secondary characterizations more than from the initial opinions themselves. See, for instance, the discussion in our Statement of Reasons on the 1996 Presidential audits (at p. 1, n. 2) of the staff's mischaracterization in AO 1985-14 of the holding in AO 1984-15 as an "electioneering message."

in the advisory opinion, however, should proceed from the statute and the regulations, because they establish the rules of law, and not from previous advisory opinions, because they do not. The order of reference to statute, regulations, and advisory opinions may be a fine point, but it is important in keeping the distinction clear between rules that have the force of law and *prior applications* of those rules (i.e., advisory opinions), which only shed light on the instant analysis or conclusion.

We feel the Commission will be on far sounder ground in defending its advisory opinions, and even in narrowly using those opinions as references for regulations and enforcement matters, if it makes clear in the advisory opinions themselves that it is merely applying clearly identified, specific provisions of our statute or regulations.

USE OF "CAMPAIGN-RELATED" RATHER THAN "IN CONNECTION WITH" OR "FOR THE PURPOSE OF INFLUENCING" AN ELECTION

Another critical change we made from the OGC's drafts in AOs 1999-11 and 1999-2 was to abandon the use of the phrase "campaign related" and substitute for it the statutory phrases "in connection with" or "for the purpose of influencing" a federal election.[13] We did so because we see three problems with employing "campaign-related" as a key phrase to either categorize or regulate political activity.

First, the phrase does not appear to be used in the FECA or in Title 25 or 26. Since it also does not appear to be used in any relevant fashion in Commission regulations,[14] its use as a substantive test would violate the FECA.[15]

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[13] *Ante* at 1 & at n. 1-5.

[14] Commission regulations on allocation of travel expenses do distinguish between "campaign and non-campaign related travel" (at 11 C.F.R. § 106.3 for congressional candidates and at 11 C.F.R. §§ 9004.7 and 9034.7 for presidential and vice-presidential candidates). Section 106.3 does not include a definition of "campaign related." Identical subsections (b)(2) of 9004.7 and 9034.7 supply a partial definition, but then make it clear that that definition is not exhaustive:

> "If any campaign activity, other than incidental contacts, is conducted at a stop, that stop shall be considered campaign-related. Campaign activity includes soliciting, making, or accepting contributions, and expressly advocating the election or defeat of the candidate. Other factors, including the setting, time and statements or expressions of the purpose of an event, and the substance of the remarks or speech made, will also be considered in determining whether a stop is campaign-related."

That definition applies outside of the context of the travel regulations only by analogy, and is of limited usefulness in any event because it is not a complete definition. It is instructive, however, to note that even in these regulations the phrase "campaign-related" (1) needs specific examples to define it, and (2) is defined in terms of another phrase, "campaign activity," which at least has the advantage of being a more informative and helpful description of the type of activity to which it is meant to refer. (It is unclear whether "campaign related" in these regulations is broader in the types of activity that it might include than "campaign activity." That uncertainty itself demonstrates a problem with relying on the use of that term in these regulations as a basis for using it in advisory opinions.) Furthermore, because the OGC's drafts of AOs 1999-2 and 1999-11 did not refer to or cite these regulations, they do not appear to incorporate even this limited guidance in defining the phrase.

[15] *See ante* at 2 (discussing 2 U.S.C. § 437f(b)).

Second, far from being "simply a shorthand reference to the statutory tests,"[16] the Commission has, in fact, often used "campaign related" as a test or standard and has even extended it to activities other than those that were specifically addressed in AO 1990-5, the opinion which spawned it.[17] Given its past use as a test, we feel it would be best to eliminate the possible *suggestion* that the phrase "campaign related" would be so used in the future.

Third, the phrase is so vague as to be virtually devoid of meaning. "It is not clear to us how we will decide what issues a candidate discusses [or activities in which he engages] are ["related" to] his campaign . . . ."[18] "Campaign-related" is subject to myriad interpretations, about which reasonable minds can differ.

It is also not helpful as a shorthand expression of activity the Commission has found to be "in connection with" or "for the purpose of influencing" an election because it is by no means clear that the phrase would have only that limited role; as noted, the Commission has employed it as a test. And even if the phrase were understood to have that limited role, the factors the Commission has found to be "in connection with" or "for the purpose of influencing" an election are too varied to be usefully described by a

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[16] *Concurring Opinion of Chairman Scott E. Thomas and Commissioner Danny L. McDonald on Advisory Opinion 1999-11* at 2.

[17] *See, e.g., ante* at n. 8 (*Concurring Opinions on AOs 1999-2 and 1999-11* discussing the Commission's past uses of this phrase as a test); *see also First General Counsel's Report* in MUR 4687 (Voinovich) (Nov. 16, 1998) at 8 (citing AO 1994-15) ("[T]he relevant issue is whether the two Issue 2 ads are otherwise 'campaign-related' communications."); *id.* at 10 ("Given [the various factors in this case], it does not appear that either [of the advertisements] were 'otherwise campaign-related.'"); *General Counsel's Report* in MUR 4305 (Forbes) (Jan. 16, 1998) at 3 (emphasis added) ("*The standard primarily relied upon by this Office* was set forth by the Commission in [AO] 1990-5 . . . . [where] the Commission held that any edition would be deemed 'campaign-related' and thus 'for the purpose of influencing' if [various factors were present]."); *id.* at 5 n. 6 (". . . all the subjects discussed in [Mr. Forbes'] columns and mentioned in the GC brief are analyzed in the same manner with respect to the AO 1990-5 ["campaign-related"] standard."); *id.* at 7 (emphasis in original) ("Respondents cramped reading of the standard enunciated by the Commission in AO 1990-5 would suggest that 'campaign-related' material comprises only those issues discussed repeatedly by the candidate and personally identified with him or her . . . [But] the Commission actually imposed a broader restriction on the requester in AO 1990-5. Not only were issues raised by the candidate during the campaign deemed to be 'campaign-related,' but the standard also encompassed the candidate's 'views on public policy issues' and 'those of the candidate's opponent,' *without* directly referencing the campaign. Accordingly, the subjects cited in the GC Brief that were also commented upon by Mr. Forbes in his column easily satisfy the Commission's [campaign-related] standard as stated in AO 1990-5."); *id.* at n. 8 ("The issues focused upon in the GC Brief . . . are all arguably 'public policy issues' under the AO 1990-5 standard. Accordingly, commentary on these issues in Forbes, Inc. publications would appear to sufficiently meet this standard . . . . The 'campaign-related' criteria in AO 1990-5 are fully set forth as follows . . . ."); *id.* at 8 ("In any case, the columns containing campaign issue discussions by the candidate that appear in *The Hills-Bedmister Press* fall squarely within the AO 1990-5 standard . . . since reference to the candidate is not a necessary element of that standard."); *id.* at n. 9 ("While the 'campaign-related' test in AO 1990-5 does contain an identification prong as one of its three criteria, . . . the test is disjunctive. . . . As described above in the text, the part of the test involving references to campaign issues is clearly satisfied."); *id.* at 9 ("Respondents complain about the 'vagueness and arbitrary application' of the 'campaign-related' standard . . . but they are free to request advisory opinions . . . .").

[18] *Statement of Reasons of Commissioners Lee Ann Elliott and David M. Mason* in MUR 4687 (Voinovich) at 3.

shorthand expression. Since the phrase "campaign-related" is no more informative than "in connection with" or "for the purpose of influencing" an election, there is no useful purpose to be served by employing it. To avoid confusing or misleading the regulated community, we believe the Commission should discontinue using it.[19]

STATUS OF PRIOR ADVISORY OPINIONS

Lastly, we make it clear that we would not overturn the *result* in any advisory opinion where the Commission employed the "campaign-related" test to conclude that activity was "in connection with" or "for the purpose of influencing" an election. In this statement, we are simply establishing a different approach that we want Commission staff to use in drafting future advisory opinions, and are simply advising the staff that for us to approve an opinion, it should abandon the further use of a test (or term of reference) that we do not find useful, in favor of the statutory language.

There is no need to "overturn" any prior advisory opinions in order for the Commission to disregard any statement or test in those opinions which goes beyond the specific facts the request presents. Because, as noted,[20] advisory opinions are limited to the facts of each request, the broad statements and tests the Commission has employed in some previous advisory opinions are equivalent to *dicta* in judicial opinions.[21] As also noted,[22] such general statements cannot be held as binding in any instance in which a single material aspect changes.

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[19] By considering the negative impact upon the regulated community of the use of the "campaign-related" test/phrase, we do no violence to *Marbury v. Madison*, 5 U.S. 137 (1803). *See Statement of Reasons of Chairman Scott E. Thomas and Commissioner Danny L. McDonald on the Audits of 1996 Clinton/Gore and Dole/Kemp Campaigns* at 7 n.27 (arguing *Marbury* prohibits Commission from considering constitutional requirements). *Marbury* held that the federal judiciary is the final arbiter of the Constitution. *Id.* at 177-178. It did not (nor, given when it was decided, could it) hold that independent federal agencies are barred from taking into account the commands of the Constitution, particularly when they are adopting and applying *their own standards*. Federal courts have, in fact, rejected just such an assertion, noting that all agencies *must* take constitutional considerations into account in discharging their obligations. *See Continental Airlines, Inc. v. Department of Transportation*, 843 F.2d 1444, 1455-56 (D.C. Cir. 1988) ("[I]n carrying on its interpretive function, an agency must be mindful of the higher demands of the Constitution."). Indeed, the Commission must be particularly mindful of doing so because it--more than any other federal agency--regulates an area at the core of the Constitution's premier amendment. *See Bush-Quale '92 Primary Committee, Inc. v. Federal Election Commission*, 104 F.3d 448, 452 (D.C. Cir. 1997) ("Although this case concerns political speech and, in that sense, implicates the First Amendment, the very nature of the FEC dictates that all Commission determinations will touch upon political speech.").

[20] *Ante* at 2 (discussing 2 U.S.C. § 437f(a)).

[21] *See Karl Rove & Company v. Richard Thornburgh*, 39 F.3d 1273, 1280 n. 19 (5th Cir. 1994) (discussing Commission Advisory Opinion 1989-2) (emphasis added) ("*Although admittedly this statement is dicta*, we nonetheless believe it provides an important insight into how the agency charged with enforcing the FECA views the extent of that Act's preemptive effect on candidate's liability for campaign debts.").

[22] *Ante* at 3 (discussing 2 U.S.C. § 437f(c)).

Without exhaustively reviewing each advisory opinion in which the "campaign-related" test/phrase was used,[23] we can state that each of us would agree with the conclusions in many of those opinions. For this reason as well, there would be nothing to "overturn." The specific results of prior advisory opinions stand in situations involving indistinguishable facts unless and until reversed. To the extent those opinions bless specific activities, they may thus still be relied upon. But to the extent that broad dicta from those opinions might appear to enunciate tests or standards which apply to circumstances other than those specified in the relevant requests, those parts of the opinions were never binding in the first place. We consider such tests and standards void.

CONCLUSION

We are not certain that, as a practical matter, our approach significantly departs from the Commission's past practice. As noted above regarding prior advisory opinions generally, and in the specific examples of AOs 1999-11 and 1999-2, the outcomes may not change at all. To the extent that advisory opinions are cited in enforcement matters or relied upon by courts this more limited approach should generally be beneficial by tying conclusions in advisory opinions to specific provisions of our statutes or regulations. In any case, we feel bound to observe the statutory strictures inherent in the advisory opinion process and to adhere to the statutory requirements in adopting generally applicable rules of law (i.e. regulations). This is not merely a preferable mode of analysis; it is the legally required method of employing the powers Congress has entrusted to us.[24]

A parade of horribles may be presented about what might follow from the more faithful adherence to the statute which we have adopted. We can conjure no procession more horrifying, however, than a government agency trampling the First Amendment rights of its citizens by attempting to apply vague and ill-publicized restrictions on the exercise of self-government.

Darryl R. Wold 8/16/99
Darryl R. Wold Date
Vice Chairman

Lee Ann Elliott 8/16/99
Lee Ann Elliott Date
Commissioner

David M. Mason 8/16/99
David M. Mason Date
Commissioner

[23] *See Concurring Opinion of Chairman Scott E. Thomas and Commissioner Danny L. McDonald on AO 1999-11* at 2 ("[B]y leaving in [AO] 1999-11 several citations to other advisory opinions that use the "campaign-related" test (e.g. [AO] 1994-15), our colleagues seem to have approved that standard anyway.").

[24] Again, see our Statement of Reasons on the 1996 Presidential audits (at 2-4) for a similar discussion of the limitations of the advisory opinion process.