August 13, 2003

Mary Dove
Secretary
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Dear Ms. Dove:

I am writing on behalf of the Campaign Legal Center to provide comment on Draft Advisory Opinion 2003-15, which the Commission has scheduled for consideration on August 14, 2003.

The draft is a response to a request by U.S. Representative Denise Majette (D-GA) and the Committee to Re-Elect Congresswoman Denise Majette (the Representative's principal campaign committee) for guidance as to whether she may establish a legal expense trust fund that receives and spends donations not subject to the source prohibitions, amount limitations, and reporting requirements of the Federal Election Campaign Act of 1971 (FECA), as amended, to defray certain litigation-related costs.

The Bipartisan Campaign Reform Act of 2002 amended FECA to provide, at 2 U.S.C. § 441i(e)(1)(A), that a Federal officeholder or candidate, or any entity such individuals directly or indirectly establish, finance, maintain or control, may 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 this Act" (emphasis added).

Draft Advisory Opinion 2003-15 correctly notes that Representative Majette seeks to establish a legal expense trust fund to defray costs relating to litigation in which "the complaint . . . seek[s] a special primary and special general election for the seat now held by [the Congresswoman]." Draft Advisory Opinion 2003-15 at 1. Despite acknowledging this direct connection between the litigation and an election for Federal office, the draft nonetheless concludes that this litigation is not in fact "in connection with" a Federal election for purposes of 2 U.S.C. § 441i(e)(1)(A) – and thus, the contemplated legal expense trust fund may operate outside that provision's funding source and amount restrictions and reporting requirements. Draft Advisory Opinion 2003-15 at 6.

Notably, in reaching this conclusion, Draft Advisory Opinion 2003-15 does not deny the litigation's direct implications for a Federal election. Rather, it argues that "this lawsuit

is no more 'in connection with a Federal election'" (Draft Advisory Opinion 2003-15 at 5) than that considered in a specified past Advisory Opinion permitting a Federal candidate to establish a legal expense trust fund outside of FECA limits and that the enactment of 2 U.S.C. § 441i(e)(1)(A) does not mandate a departure from this line of analysis.

We disagree with the arguments offered by the draft for forsaking a common-sense application of the relevant language of BCRA to the facts at hand – which would readily yield the conclusion that the contemplated legal expense trust fund would operate "in connection with an election for Federal office" under 2 U.S.C. § 441i(e)(1)(A). Instead of pursuing the approach proposed in Draft Advisory Opinion 2003-15, we believe that the Commission should determine that this legal expense trust fund *is* subject to 2 U.S.C. § 441i(e)(1)(A).

1. Legislative History

The draft's professed fidelity to certain prior Advisory Opinions appears to rest considerably on the absence of specific mention of legal expense trust funds in the legislative history of BCRA. Draft Advisory Opinion 2003-15 at 5.

However, to any extent those prior Advisory Opinions could reasonably be considered support for the proposition that the raising and spending of funds through the legal expense trust fund contemplated by Rep. Majette would not be "in connection with an election for Federal office," the enactment of BCRA in fact counsels their rejection in favor of a more realistic analysis.

While apparently containing no specific references to Federal candidate or officeholder legal expense funds, BCRA's legislative history reveals that a principal congressional concern motivating the effort to enact this legislation was that, despite the presence of constitutionally valid funding source prohibitions and contribution limits in FECA, the campaign finance legal regime had not as a practical matter worked to insulate Federal elections from soft money (*i.e.*, funds outside of the prohibitions and limitations in FECA).[1]

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[1] *See, e.g.*, 148 Cong. Rec. H373 (daily ed. Feb. 13, 2002) (statement of Rep. Blumenauer) ("Mr. Chairman, part of the legacy of President Teddy Roosevelt was an effort to get rid of corporate contributions to Federal elections, and they have been illegal for almost a century. But what we have seen over time, the evolution of a system that has permitted corporate contributions to move into the political process, be the process of soft money, something that is corrupting on those who have to contribute it, who have to receive it. It is not good for the American public."); 148 Cong. Rec. H353 (daily ed. Feb. 13, 2002) (statement of Rep. Shays) ("Soft money has reintroduced into the Federal campaign finance system the very kinds of contributions that the federal laws intended to exclude – namely donations from corporations, unions, as well as large individual contributions. Soft money is not just a loophole, it is the loophole that ate the law. Let's send a clear message today that our democracy – and our integrity – is not for sale."); 147 Cong. Rec. S2435 (statement of Sen. McCain) ("We have restrictions now that have been upheld by the courts; they have simply been circumvented by the rather recent exploitation of the so-called soft money loophole. Teddy Roosevelt signed a law banning corporate contributions. Harry Truman signed a law banning contributions from labor unions. In 1974, we enacted a law to limit contributions from individuals and political action committees directly to candidates. . . Those laws were rendered ineffectual

Congress's emphasis on election spending *realities* (whatever the prevailing regulatory characterizations) and concern about the role that had been assumed by soft money should broadly inform the Commission's interpretation and implementation of BCRA. They at least counsel the Commission, in construing BCRA, to forsake resort to past regulatory holdings that, under a gloss now assigned them by the agency, do not square with the application of the plain language of BCRA and would license the raising and spending of funds not subject to Federal source prohibitions, amount limitations, and reporting requirements in ways that are clearly in connection with Federal elections.[2]

2. Prior Advisory Opinions

Draft Advisory Opinion 2003-15 concludes that the Commission should treat this case in accordance with certain prior Advisory Opinions permitting Federal candidates or officeholders to establish legal expense trust funds not subject to the source prohibitions, amount limitations, and reporting requirements of Federal campaign finance law. Specifically, it indicates that the litigation involving Rep. Majette "is no more 'in connection with a Federal election'" than that involved in prior Advisory Opinion 1996-39. Draft Advisory Opinion 2003-15 at 5.

Even if the Advisory Opinions cited in the draft and in Rep. Majette's attorney's April 14, 2003 correspondence are to be scrutinized to divine their significance for this case, we do not believe that they are precedent for the conclusion that the contemplated legal expense trust fund is not subject to 2 U.S.C. § 441i(e)(1)(A).

In ruling on the cited requests for Advisory Opinions from Federal officeholders and candidates for permission to establish legal expense trust funds not subject to Federal campaign finance law's source prohibitions, amount limitations, and reporting

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not unlawful by the ingenuity of politicians determined to get around them who used an allowance in law that placed no restrictions on what once was intended essentially to be a building fund for the State parties.").

[2] Likewise, the rules adopted by the House for the 108th Congress do not support the idea that soft money can be used in connection with Federal elections through legal expense funds. The House rule cited in the Draft Advisory Opinion 2003-15 indicates that the $50 restriction on gifts to House Members and employees does not apply to contributions to legal expense funds established in accordance with the restrictions and disclosure requirements of the House Committee on Standards of Official Conduct (though, per a separate House rule, acceptance of contributions to legal expense funds from registered lobbyists or agents of foreign principals is prohibited). H. Res. 5, 108th Cong. (2003). Its adoption is accordingly better understood as reaffirmation of a general principle that the legal expense fund rules of the Committee on Standards of Official Conduct are controlling in this area (as opposed to the general $50 cap on gifts in House rules) – and not a statement with respect to the full particulars of such rules in all their potential applications.

In any event, the adoption of House rules cannot outweigh the more relevant legislative history with respect to the question at hand – *i.e.*, statements on the House and Senate floor *during the consideration of BCRA* indicating congressional concern about the fact that soft money had come to be used in connection with Federal elections. And of course, those rules cannot override the plain language of BCRA.

requirements, the Commission's analyses appear to have been focused on the purpose for undertaking the legal expenses. If the litigation expenses in a given case were considered "for the purpose of influencing any election for Federal office," then the Commission *did* in fact indicate that Federal campaign finance limits applied. If they were not considered to be for that purpose, then Federal campaign finance limits were deemed inapplicable.

While one could reasonably take issue with the Commission's application of the "for the purpose of influencing" test in these Advisory Opinions, the more critical point is that the agency was then applying a different, narrower standard than it must apply under new 2 U.S.C. § 441i(e)(1)(A). Indeed, this provision recently added by BCRA uses an "in connection with an election for Federal office" test.[3]

Draft Advisory Opinion 2003-15 points to Advisory Opinion 1996-39 as of "particular relevance" (Draft Advisory Opinion 2003-15 at 4) to its ultimate determination that Rep. Majette may establish the contemplated legal expense fund without any coverage by 2 U.S.C. § 441i(e)(1)(A). Advisory Opinion 1996-39 concerned a Federal candidate's desire to set up a legal expense fund (that accepted corporate treasury funds and other funds outside Federal limits) to defray expenses relating to litigation over whether her nominating petitions were sufficient to qualify for the Republican primary ballot. The basis for the Commission's determination that the contemplated legal expense fund was permissible was its prior holding in Advisory Opinion 1982-35.[4]

In turn, Advisory Opinion 1982-35 permitted a Federal candidate to establish a legal expense fund outside the purview of FECA to challenge a party rule which limited access to the primary election ballot.[5] Here, as opposed to relying solely on prior holdings, the Commission elaborated on the underlying rationale for its determination. It concluded

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[3] Notably, 2 U.S.C. § 441i(e)(1)(A) does not use the terms "contribution" or "expenditure," which are separately defined in FECA to encompass receipts or spending "for the purpose of influencing any election for Federal office." *See* 2 U.S.C. §§ 431(8)(A)(i), (9)(A)(i).

[4] *See* Advisory Opinion 1996-39 ("Past opinions have considered specific situations where individuals faced with preliminary legal actions contesting their access to the ballot needed to secure funds to pay for the costs associated with these disputes. Your situation is not unlike that of the requester in Advisory Opinion 1982-35 . . . Given these opinions, the Commission concludes that funds received and spent to pay for the expenses of the litigation described in your request would not be treated as contributions or expenditures for purposes of the Act, provided they are raised and spent by an entity other than a political committee. As a result, corporate funds may be accepted by another entity for this purpose.").

[5] This discussion of Advisory Opinion 1982-35 refers to what appears on the Commission's website as Advisory Opinions *1982-35A* and *1982-35B* (so far as this commenter can see, they are identical). The document that appears as "Advisory Opinion Number 1982-35" on the Commission's website is a "Concurring Opinion of Commissioner Thomas E. Harris to Advisory Opinion 1982-35". We are proceeding under the impression that Advisory Opinions 1982-35A and 1982-35B are in fact the "Advisory Opinion 1982-35" with which Commissioner Harris concurs (in his document nonetheless posted as "Advisory Opinion Number 1982-35"). Along these lines, Advisory Opinion 1996-39, in its footnote 3, notes how "[t]he Commission in *Advisory Opinion 1982-35* was careful to distinguish Advisory Opinion 1980-57, a prior opinion dealing with ballot access." (emphasis added). It is only the documents labeled as Advisory Opinions 1982-35A and 1982-35B on the Commission's website which endeavor to "distinguish Advisory Opinion 1980-57."

that the legal expense fund was permissible because it had not been set up for the purpose of influencing a Federal election.[6] Indeed, the Commission distinguished prior Advisory Opinion 1980-57, in which it had held that funds raised by a Federal candidate to finance a lawsuit to remove a potential opponent from the ballot *were* subject to FECA. It noted that, in Advisory Opinion 1980-57, "[t]he Commission concluded that the legal action engaged in by the requestor was *for the purpose of influencing* a Federal election since the object of the requestor's lawsuit was to eliminate the electorate's opportunity to cast a vote for his opponent." (emphasis added).[7] The Commission then contrasted the case at

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[6] *See* Advisory Opinion 1982-35 ("The Commission is of the opinion that funds raised by the candidate for the described legal fund established to defray litigation costs to contest the application of a particular party rule to the selection of candidates to participate in a primary election would not be considered 'contributions' as defined by the Act at 2 U.S.C. 431(8)(A) and thus, funds raised for this purpose would not be subject to the Act's contribution limitations at 2 U.S.C. 441a(a). The term 'contribution [sic] includes, in part, 'any gift, subscription, loan, advance, or deposit 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(8)(A); 11 CFR 100.7(a) . . . The situation presented in this request is distinguishable from that addressed in Advisory Opinion 1980-57. Here, the candidate is not *attempting to influence* a Federal election by preventing the electorate from voting for a particular opponent.") (emphasis added). Moreover, in Advisory Opinion 1983-37 – also cited in Advisory Opinion 1996-39 -- the Commission permitted the state party in the same case to establish a legal expense fund outside the purview of FECA. The Commission approved the request because of the similarity to the situation in Advisory Opinion 1982-35. *See* Advisory Opinion 1983-37 ("The Commission agrees that the situation described in your request is similar to the situation presented in Advisory Opinion 1982-35. Thus, the Commission concludes that to the extent monies in the fund will be used only for the purposes described, and will be maintained separately from funds used for Federal elections, the Party's legal expense fund would not be subject to the Act's limitations, prohibitions, and reporting requirements."). Advisory Opinion 1983-37 also cited the result in Advisory Opinion 1983-30, which, in turn, set forth a "purpose of influencing" standard and likewise stemmed from Advisory Opinion 1982-35. *See* Advisory Opinion 1983-30 ("Under the Act, a 'contribution' is defined as a gift . . . for the purpose of influencing any election for Federal office. 2 U.S.C. § 431(8). Similarly, the term 'expenditure' is defined in an identical fashion as relating to payments made for the purpose of influencing a person's nomination or election to Federal office. 2 U.S.C. § 431(9). The Commission concludes that to the extent the proposed fund is used exclusively for the purposes of defraying legal costs and expenses resulting from the litigation described in your request, donations to and disbursements from the fund would not constitute contributions or expenditures under the Act. Accordingly, neither the source nor the amount of donations to the fund would be limited under the Act or Commission regulations . . . The situation described in your request is indistinguishable in all material aspects from the situation presented in [Advisory Opinion 1982-35] . . . Thus, the Commission reaches the same result in this opinion.").

[7] *See also* Advisory Opinion 1980-57 ("Here by contrast, the funds would be solicited by the Committee on behalf of a Congressional candidate who has initiated litigation against a potential general election opponent *in circumstances which indicate that the action may have been undertaken for the purpose of influencing an election.* A candidate's attempt to force an election opponent off the ballot so that the electorate does not have an opportunity to vote for that opponent is as much an effort to influence an election as is a campaign advertisements derogating that opponent. Moreover, since the litigation expenses incurred by you are not for the purpose of ensuring compliance with the Act, they are not exempt from the definition of contribution or expenditure under 2 U.S.C. § 431(8)(ix) or § 431(9)(vii). Thus, funds received by you from the Committee which have been obtained by the Committee in the circumstances set forth in your request would constitute contributions from the Committee. They would be reportable as such by your principal campaign committee under 2 U.S.C. § 434 and would otherwise be subject to the limitations and prohibitions of the Act. 2 U.S.C. §§ 441a, 441b, 441c, 441e, etc.") (emphasis added).

The language of other Advisory Opinions cited in Draft Advisory Opinion 2003-15 and the April 14, 2003 correspondence from Rep. Majette's attorney likewise supports the conclusion that a "purpose of influencing a Federal election" test was at the core of the Commission's prior Advisory Opinion legal expense fund analysis. In Advisory Opinion 1983-21, the Commission concluded that a Federal officeholder could set up a legal expense trust fund outside of FECA to defray expenses arising from an investigation conducted by the House Committee on Standards of Official Conduct, stating: "Under the Act, a 'contribution' is defined as a gift . . . made by any person for the purpose of influencing any election for Federal office. 2 U.S.C. § 431(8). Similarly, the term 'expenditure' is defined in an identical fashion as relating to payments made for the purpose of influencing a person's nomination or election to Federal office. 2 U.S.C. § 431(9). The Commission concludes that to the extent the proposed trust fund is used exclusively for the purpose of paying the costs of your legal defense arising from Congressional or other proceedings not involving compliance or audit matters under the Act, donations to and disbursements from the Trust would not constitute contributions or expenditures under the Act. See Advisory Opinions 1981-13 and 1979-37 . . . Accordingly, neither the source nor the amount of donations to the Trust would be limited under the Act or Commission regulations."

In Advisory Opinion 1982-37, the Commission concluded that a Federal candidate may raise funds outside of FECA to defray legal expenses relating to reapportionment matters, indicating: "Under the Act, the term 'contribution' includes 'any gift . . . made by any person for the purpose of influencing any election to Federal office . . .' 2 U.S.C. § 431(8). The influencing of Federal elections by persons and organizations is regulated by the Act and the Commission's regulations. The influencing of the reapportionment decisions of a state legislature, although a political process, is not considered election-influencing activity subject to the requirements of the Act . . . Similarly, the financing of litigation which relates to reapportionment decisions made by the state legislature is not viewed as election-influencing under the Act and Commission regulations . . . See Advisory Opinion 1982-14 and 1981-35, *and compare Advisory Opinion 1980-57*. Accordingly, based upon your representations that these donations will be used solely to finance reapportionment-related activity, the Commission concludes that donations made for this purpose do not constitute contributions and expenditures under the Act." (emphasis added). In Advisory Opinion 1980-4, the Commission permitted a presidential campaign committee to accept legal services from compensated law firm personnel to defend against a lawsuit without a "contribution" under FECA resulting, noting: "The Act, as amended by the Federal Election Campaign Act Amendments of 1979, provides that contribution includes any gift or advance of money or anything of value made by any person for the purpose of influencing any election for Federal office . . . The Commission does not believe there in any basin [sic] under the Act for treating donated legal services to defend against a civil action as services rendered for the purpose of influencing the election of any person to Federal office."

In Advisory Opinion 1979-37, the Commission permitted a Federal candidate to establish a legal expense trust fund to receive, among other things, corporate and labor donations to defray the costs of defending against criminal charges and charges by the House Ethics Committee. In Advisory Opinion 1981-13, the Commission permitted a Federal candidate to raise funds outside the Act (including corporate funds) for a legal expense fund to defray legal costs arising out of a lawsuit alleging that he slandered a former campaign aide of an opposing candidate. In both Advisory Opinions, the Commission noted that the fundraising activities were "exclusively connected with, and strictly for the purpose of" paying legal defense costs. The use of "exclusively connected with" language is isolated here – it does not appear in the Commission's subsequent Advisory Opinions cited by Draft Advisory Opinion 2003-15 or the correspondence from Rep. Majette's attorney. As indicated above, Advisory Opinion 1982-35 – which served as the basis for many of these subsequent Advisory Opinions – carefully distinguished between legal actions and expenses that were undertaken "for the purpose of influencing a Federal election" (such as those involved in Advisory Opinion 1980-57) and those where the candidate was "not attempting to influence a Federal election." Indeed, it is notable that in Advisory Opinion 1983-21 (cited in Draft Advisory Opinion 2003-15), Advisory Opinions 1979-37 and 1981-13 were mentioned following "purpose" analysis that omitted any "exclusively connected with" language. *See* Advisory Opinion 1983-21 ("Under the Act, a 'contribution' is defined . . . as a gift made by any person for the purpose of influencing any election for Federal office . . . the term 'expenditure' is defined in an identical fashion . . . The Commission concludes that to the extent the proposed trust fund is used exclusively for the purpose of

hand, indicating, "[h]ere, the candidate is not *attempting to influence a Federal election* by preventing the electorate from voting for a particular opponent." (emphasis added). Accordingly, it appears that the precedent which determined the result in Advisory Opinion 1996-39 turned on application of a "for the purpose of influencing a Federal election" test – and not the "in connection with a election for Federal office" standard found in new 2 U.S.C. § 441i(e)(1)(A).

Along these lines, even though Advisory Opinion 1996-39 mentions 2 U.S.C. §441b, the language in the opinion affirming that corporate funds could be accepted by the legal expense fund indicates that this determination was derivative of Advisory Opinions 1982-35 and 1983-37 – which, as discussed, turned upon application of a "purpose of influencing a Federal election" test rather than the "in connection with a [Federal] election" standard of 2 U.S.C. § 441b.[8] As such, permission granted in that prior Advisory Opinion for the use of corporate or labor treasury funds for litigation expenses is not precedent for the analysis that must be undertaken in this instance.

The Commission should thus apply the "in connection with an election for Federal office" language of 2 U.S.C. § 441i(e)(1)(A) according to its plain meaning, unencumbered by the outcomes of the cited past Advisory Opinions. As indicated above, this would result in the conclusion that Rep. Majette's contemplated legal expense fund falls subject to the source prohibitions, amount limitations, and reporting requirements of

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paying the costs of your legal defense arising from Congressional or other proceedings not involving compliance or audit matters under the Act, donations to and disbursements from the Trust would not constitute contributions or expenditures under the Act. See Advisory Opinions 1981-13 and 1979-37, copies enclosed.").

In Draft Advisory Opinion 2003-15, the Commission also cites, in footnote text, personal use regulations at 11 C.F.R. § 113.1(g)(6)(i) referencing legal expense trust funds. The regulation indicates that third-party payments to a legal expense trust fund established in accordance with the rules of the U.S. Senate or the U.S. House of Representatives would not by virtue of that paragraph be considered within the scope of a "contribution under subpart B of part 100 to the candidate." The reference to a "contribution under subpart B of part 100" again invokes a definition turning upon gifts or payments "for the purpose of influencing any election for Federal office." *See* 11 C.F.R. § 100.52(a). More generally, to the extent this regulation indicates that all legal expense funds operated in accordance with the rules of the U.S. Senate and U.S. House may operate entirely outside of FECA, it cannot be squared with and must yield to 2 U.S.C. § 441i(e)(1)(A). Notably, House rules permit Members of Congress to establish legal expense funds where legal expenses "arise in connection with: the individual's candidacy for or election to federal office." *See* Nancy L. Johnson, Chairman and Jim McDermott, Ranking Democratic Member, Committee on Standards of Official Conduct, Memorandum to All Members, Officers and Employees (Jun. 10, 1996), *available at* http://www.house.gov/ethics/Appendices_Gifts_and_Travel.htm. Fundraising and spending for legal expenses that "arise in connection with: the individual's candidacy for or election to federal office" are clearly covered by new 2 U.S.C. § 441i(e)(1)(A) ("A candidate, individual holding Federal office . . . 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 the Act.").

[8] *See* Advisory Opinion 1996-39 ("Given [Advisory Opinions 1982-35 and 1983-37], the Commission concludes that funds received and spent to pay for the expenses of the litigation described in your request would not be treated as contributions or expenditures for purposes of the Act, provided they are raised and spent by an entity other than a political committee. *As a result*, corporate funds may be accepted by another entity for this purpose.") (emphasis added).

Federal campaign finance law. But even were the Commission to assume – incorrectly, in our opinion – that the cited past Advisory Opinions permitting Federal candidates and officeholders to establish legal expense funds not subject to these Federal campaign finance limits stemmed from application of an "in connection with an election for Federal office" test, 2 U.S.C. § 441i(e)(1)(A) should still apply here. In none of those cases did the legal expenses arise from a lawsuit that seeks relief in the very form of cancellation of an established Federal election result and the holding of new Federal elections, as they do in this instance. The "connection" to a Federal election presented by the facts in Advisory Opinion request 2003-15 is extraordinarily direct. As indicated in April 25, 2003 correspondence from Rep. Majette's attorney, ". . . the plaintiffs continue to demand a special primary and a general election for the seat currently held by Representative Majette. Accordingly, although technically no longer a defendant, Representative Majette would be the most seriously affected if the Court were to grant plaintiff's request." Thus, under this framework, the contemplated legal expense trust fund should still fall subject to 2 U.S.C. § 441i(e)(1)(A).

In light of the above analysis, we respectfully request that the Commission revise Draft Advisory Opinion 2003-15 and determine that the legal expense fund that Rep. Majette seeks to establish is subject to 2 U.S.C. § 441i(e)(1)(A). Thank you in advance for your consideration of these comments.

Sincerely,

Glen Shor
FEC Program Director