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February 17, 2009

BY HAND

AOR 2009-04

Thomasenia Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

**Re: Al Franken for U.S. Senate and Democratic Senatorial Campaign Committee
Advisory Opinion Request**

Dear Ms. Duncan:

Pursuant to 2 U.S.C. § 437f (2009), we seek an advisory opinion on behalf of Al Franken for U.S. Senate (the "Committee") and the Democratic Senatorial Campaign Committee ("DSCC"). Specifically, the requestors seek confirmation that the DSCC, like state parties and federal candidates, may establish a recount fund that will be used to pay recount, election contest and other post-election litigation costs resulting from Federal elections. They also seek confirmation that the Committee may raise federal funds under an additional, separate limit for the post-recount contest litigation now underway in Minnesota.

The DSCC is a national committee of a political party for purposes of 2 U.S.C. § 441i(a)(1). Throughout its history, the DSCC has been actively engaged in recounts and election contests in Senate races. See FEC Adv. Op. 2006-24. The most recent example is in Minnesota, where, more than three months after Election Day, the 2008 Senatorial election is still unresolved.

A statewide manual recount in Minnesota has been conducted and concluded, giving a 225-vote lead to Democratic candidate Al Franken. But in January, Republican candidate

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Norm Coleman filed a lawsuit to contest the recount, and the two candidates remain locked in a protracted legal battle. Both candidates and their state parties have established recount funds and have raised large sums of money. But if the candidates are only able to raise under a single limit for the entire post-election process, and if only the state parties are allowed to establish separate recount funds, then it will become progressively harder to defend the candidates' and parties' interests in that process, which has become virtually unprecedented in its length, complexity and expense.

The general election period spanned less than two months, from September 7 to November 4; the canvass, recount and contest have already consumed more than three months, with no end in sight. National Republican Senatorial Committee chair John Cornyn "said Coleman has raised \$5 million since election day – and that even that isn't enough." See Manu Raju, "GOP Dead Set Against 59th Senator", *Politico*, Feb. 15, 2009, available at http://www.politico.com/news/stories/0209/18832_Page2.html.

First, the DSCC seeks confirmation that it, like state parties and federal candidates, may rely on Advisory Opinion 2006-24, establish a recount fund, and use that fund to pay expenses related to the statewide recount and ongoing election contest in Minnesota. Consistent with Advisory Opinion 2006-24, any funds solicited, received, directed, transferred, or spent by the DSCC's recount fund will be subject to the amount limitations, source prohibitions and reporting requirements of the Federal Election Campaign Act of 1971 (the "Act"). See FEC Adv. Op. 2006-24. Accordingly, the DSCC's proposed recount fund will only accept federal funds. It will not accept contributions from corporations, labor organizations, national banks, or foreign nationals. And the fund will not be permitted to receive donations that in the aggregate exceed \$30,400 per person or \$15,000 per multi-candidate political committee. See 2 U.S.C. § 441a(1)(B) and (2)(B).

Because the Commission's definitions of "contribution" and "expenditure" make exceptions for gifts, loans, or payments made with respect to a recount of the results of a Federal election, see 11 C.F.R. §§ 100.91, 100.151, donations to the DSCC's recount fund will not be aggregated with contributions from those persons to the DSCC for the same calendar year. Nor will the aggregate biennial contribution limits of 2 U.S.C. § 441a(a)(3) apply to an individual's donations to the DSCC's recount fund. See FEC Adv. Op. 2006-24. Thus, for example, an individual who has already contributed \$30,400 to the DSCC in 2009 will be permitted to donate an additional \$30,400 to the DSCC's recount fund, even if such individual had already contributed the maximum amount permitted under the aggregate biennial contribution limits.

Neither the Act nor Advisory Opinion 2006-24 presents any basis to treat the DSCC differently than a state party or candidate for purposes of recount financing. All operate under a common restriction: when raising funds in connection with federal elections, they may solicit and accept only funds that are “subject to the limitations, prohibitions, and reporting requirements of [the] ... Act.” 2 U.S.C. § 441i(a)(1) (national parties). *Accord id.* § 441i(e)(1)(A) (candidates). *Cf.* 11 C.F.R. § 102.5(a)(1)(i) (2008) (requiring state parties to make disbursements in connection with federal elections from a federal account). If a state party may raise federal funds under a separate calendar year limit for recount and contest purposes, then this option should be no less available to a national party committee, which operates under the same basic restriction. Moreover, the funds raised by the DSCC exclusively for recount purposes are not “contributions” any more than those raised by state parties or candidates are. There is no reasoned basis to permit state parties and candidates to finance recount and contest activities under separate limits, while denying national parties this same option.

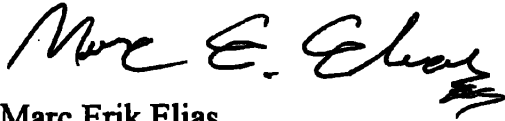
Second, Al Franken for U.S. Senate seeks confirmation that it may establish a new fund specific to the ongoing election contest in Minnesota. This fund would be separate from the Committee’s existing recount fund, and would be used only for the purpose of paying for expenses related to the election contest and resulting litigation. Consistent with 2 U.S.C. § 441i(e) and Advisory Opinion 2006-24, the election contest fund will not receive donations that in the aggregate exceed \$2,400 per person or \$5,000 per multi-candidate political committee. As with donations to the DSCC’s proposed recount fund, donations to the Committee’s election contest fund will not be aggregated with contributions from those persons either for the general election or for the Committee’s recount fund. Donations from individuals to the Committee’s election contest fund will not be subject to the aggregate biennial contribution limits.

Because the parties’ inquiry relates specifically to the ongoing election contest and post-election litigation in Minnesota, we ask that the Commission issue to the parties a written advisory opinion within 10 days after receiving this request. The timeliness of Commission response will affect the ability of all concerned, in both political parties, to advocate their interests in these unprecedented proceedings.

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We thank the Commission for its most urgent attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Marc E. Elias", with a stylized flourish at the end.

Marc Erik Elias

cc: Chairman Walther
Vice Chairman Petersen
Commissioner Bauerly
Commissioner Hunter
Commissioner McGahn
Commissioner Weintraub



Marc Elias
<meli@perkinscoie.com>
02/20/2009 03:04 PM

To <JWaldstreicher@fec.gov>
cc <rknop@fec.gov>, <mjohnson@fec.gov>
bcc

Subject Re: Franken/DSCC AO request

Thank you for your email.

Following the November 2008 election, the State of Minnesota conducted a statewide recount for the U.S. Senate race. The recount ended with the certification of results by the State Canvassing Board on January 5, 2009. Pursuant to state law, on January 6, 2009, former Senator Coleman and his campaign manager, Cullen Sheehan filed a civil lawsuit challenging the certified results. This lawsuit — called an election contest under Minnesota law — is the next step in the process, but is a separate legal proceeding from the recount. It is currently in trial in Ramsey County District Court. Our request proposes that the contest fund would be used to pay only for expenses incurred in connection with the civil lawsuit — legal fees, staff aiding in the litigation, etc. It would not be used to pay for any expenses incurred prior to January 6, 2009 (the date of the contest lawsuit). To date, the recount fund has paid both for recount expenses and for the contest expenses. We believe that a new fund (with a new limit) should be permitted to pay for expenses related to the contest.

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Marc E. Elias
Perkins Coie LLP
607 14th St, NW
Washington, DC 20005

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From: <JWaldstreicher@fec.gov>
Date: Fri, 20 Feb 2009 13:51:27 -0500
To: Marc Elias <MElias@perkinscoie.com>
Cc: <rknop@fec.gov>, <mjohnson@fec.gov>
Subject: Franken/DSCC AO request

Dear Marc:

We are reviewing the AO request you recently submitted on behalf of Al Franken for U.S. Senate and the Democratic Senatorial Campaign Committee. We would like to clarify one part of the second question, regarding Al Franken for U.S. Senate's proposed election contest fund. Could you please clarify how this new fund would be distinct from the committee's existing recount fund? Specifically, what types or categories of expenses are expected to be paid out of each of the funds, and how does the committee intend to handle expenses that may straddle both the recount and the election contest? Also, does the current litigation relate to the recount or the election contest, or both? Once we have clarified these issues we can begin to draft a response to your request. Thanks for your cooperation.

Yours,
Joanna Waldstreicher
Office of General Counsel, Policy Division
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