FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
CHIEF COMMUNICATIONS OFFICER
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY

DATE: March 18, 2009

SUBJECT: COMMENT ON AO 2009-04 (DRAFTS A, B, and C)
Al Franken for U.S. Senate and the
Democratic Senatorial Campaign Committee

Transmitted herewith is a timely submitted comment from Paul S. Ryan on behalf of the Campaign Legal Center and Democracy 21 regarding the above-captioned matter.

Proposed Advisory Opinion 2009-04 is on the agenda for Thursday, March 19, 2009.

Attachment

March 18, 2009

By Electronic Mail

Thomasenia Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Alternative Draft Advisory Opinions 2009-04 (Franken / DSCC)

Dear Ms. Duncan:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to three alternative drafts of Advisory Opinion 2009-04 (Agenda Doc. No. 09-13) ("Drafts A, B and C"), being considered by the Commission in response to a request filed jointly by Al Franken for U.S. Senate (the "Franken Committee") and the Democratic Senatorial Campaign Committee ("DSCC"), seeking:

1. "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[;]" and

2. "confirmation that the [Franken] Committee may raise federal funds under an additional, separate limit for the post-recount contest litigation now underway in Minnesota."

AOR 2009-04 at 1.

We submit these comments principally to object in the strongest possible terms to AO Draft C, and to comments submitted jointly by the three Republican national committees[1] that raise an issue not presented by the requestors here: whether soft money (*i.e.*, non-federal funds) can be raised and spent by candidates and party committees to pay for recount and election contest expenses.

Notwithstanding its disclaimer to the contrary, the reasoning of Draft C would permit candidates and party committees not only to raise million dollar contributions from individuals, but also from corporations, labor unions and foreign nationals, all to pay for recount and election

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[1] *See* The National Republican Senatorial Committee, the Republican National Committee, and the National Republican Congressional Committee, Comments on AOR 2009-04 at 2 (Feb. 26, 2009) ("The Committees continue to believe that AO 2006-24 was wrongly decided in broadening the Commission's jurisdiction over recount funds") (hereafter "Republican Committee Comments").

contest expenses.[2] Supporting this Draft would not only fly in the face of the soft money restrictions of BCRA, but would also overrule more than 30 years of the Commission's own precedents on the treatment of recount expenses. It would be reckless for the Commission to adopt Draft C, or to use the advisory opinion process this way.

Background

There is a long history to the recount issue which sets the context for this AOR. On three prior occasions, all following the enactment of BCRA, party committees submitted advisory opinion requests seeking permission to raise and spend soft money for recount purposes in federal elections.[3] On the first two occasions, the Commission's general counsel recommended that the Commission adopt an opinion that BCRA now requires the committees (and their federal candidates and officeholders) to raise and spend only hard money (*i.e.*, federally permissible funds) for recount purposes.[4] But following the release of these recommendations, and on the eve of the Commission's votes, the advisory opinion requests were withdrawn by the party committees at the last minute, thereby preempting the Commission's vote.[5]

On the third occasion, the Commission (without a recommendation from the general counsel) approved AO 2006-24, making clear that "because election recount activities are in connection with a Federal election, any recount fund established by either a Federal candidate or the State Party must comply with the amount limitations, source prohibitions, and reporting requirements of the Act." AO 2006-24 (DSCC, NRSC and Republican State Comm. of Pennsylvania) at 2. The advisory opinion permitted a candidate and a state party to each establish separate hard money recount funds.

Given the Commission's clear statement of law in AO 2006-24 – that federal election recount activities are "in connection with" a federal election and therefore that only hard money

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[2] Draft C claims that "the Act's source prohibitions and reporting requirements nonetheless apply pursuant to 11 C.F.R. § 100.91." Draft C at 17. But as we explain below, the legal rationale and statutory basis underlying the regulation would be destroyed by Draft C's conclusion that recount expenses are not "in connection with" an election. Section 100.91 of the Commission's regulations applies the source prohibitions established by 2 U.S.C. §§ 441b and 441e to recount funds. These statutes, in turn, apply only to funds raised and spent "in connection with" an election. If the Commission were to adopt the conclusion in Draft C that recount funds are not "in connection with" an election, there would no longer be any legal basis on which to apply the source prohibitions of sections 441b and 441e to recount funds through 11 C.F.R. § 100.91.

[3] *See* AOR 2006-24 (DSCC, NRSC and Republican State Comm. of Pennsylvania) (Aug. 7, 2006); AOR 2004-38 (NRSC) (Oct. 13, 2004); AOR 2002-13 (DSCC, DCCC, NRSC, NRCC) (Oct. 30, 2002).

[4] *See* Draft AO 2004-38; Agenda Doc. 04-99 (Draft A) (Oct. 26, 2004) available at http://www.fec.gov/agenda/2004/mtgdoc04-99.pdf; Draft AO 2002-13; Agenda Doc. 02-79 (Draft A) (Nov. 12, 2002) available at http://www.fec.gov/agenda/agendas2002/mtgdoc02-79.pdf.

[5] *See* In the Matter of AO 2004-38 available at http://ao.nictusa.com/ao/no/040038.html; In the Matter of AOR 2002-13 (Nov. 14, 2002) available at http://ao.nictusa.com/ao/no/020013.html.

may be used to pay for such activities – the requestors here, the Franken Committee and the DSCC, accordingly state that they intend to raise and spend only hard money in connection with recount and election contest expenses. AOR at 2, 3. The Franken Committee seeks to establish both a recount fund and an election contest fund, while the DSCC seeks to establish a separate hard money recount fund.

Drafts A and B reiterate and apply the Commission's "opinions and rationales set forth in Advisory Opinion 2006-24" and correctly conclude that, as a threshold matter, the activities proposed by the Franken Committee and the DSCC must be paid for with hard money. *See* Draft A at 6; *see also* Draft B at 5.

Draft C, however, remarkably concludes that recounts and election contests are not "in connection with" an election and that the "Franken Committee's existing recount fund and proposed election contest fund are not subject to the Act's limits." Draft C at 17. This is a position supported by comments filed by the Republican national committees, which argue that "AO 2006-24 was wrongly decided in broadening the Commission's jurisdiction over recount funds [*i.e.*, requiring the use of hard money]."[6]

For the reasons stated by the Commission in AO 2006-24, and for the reasons given by the general counsel in recommending draft advisory opinions in 2004 and 2002, the Commission should reject Draft C and the suggestion of the Republican committees, and instead should reiterate here that federal recount and election contests are indeed "in connection with" a federal election and that, consequently, all recount and election contest activities must be paid for with hard money.

With respect to the two questions posed by this AOR, the Commission should adopt Draft A, confirming that under existing Commission regulations the DSCC may establish a separate hard money fund to pay recount, election contest and other post-election litigation costs, but denying the Franken Committee's request for permission to establish an election contest fund subject to a limit that is separate from and in addition to its existing recount fund.

We reluctantly endorse Draft A here because it is the best option, given the Commission's existing recount regulations and the Commission's position in AO 2006-24. *See* 11 C.F.R. §§ 100.91 and 100.151. As we have previously noted,[7] we believe these regulations erroneously take the position that recount activities are not "for the purpose of influencing" a federal election, even though they are "in connection with" an election. This interpretation defies common sense, and although it is not appropriate to do so in the context of the pending AOR, the Commission should at an appropriate point reconsider its recount regulations. Properly construed, and even apart from changes made by BCRA, the law requires funds raised and spent for recount activities to be both "contributions" and "expenditures," which in turn

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[6] *See* Republican Committee Comments at 2 (Feb. 26, 2009) ("The Committees continue to believe that AO 2006-24 was wrongly decided in broadening the Commission's jurisdiction over recount funds").

[7] *See* Comments of Democracy 21 and the Campaign Legal Center on AOR 2006-24 (April 24, 2006) at 7-8.

would lead to a different result on the issue of whether candidates and party committees are permitted to establish separate recount funds subject to separate contribution limits.

1. **Recount funds are raised and spent "in connection with" an election and the conclusion in Draft C to the contrary should be rejected.**

The Commission's longstanding position has been that recount funds are "in connection with" a federal election, although not "for the purpose of influencing" a federal election. Given this dichotomy, the Commission, prior to BCRA, took the view that a federal candidate could raise donations from individuals for recount expenses without those funds being subject to the contribution limits in 2 U.S.C. § 441a, a provision which is based on the "for the purpose of influencing" standard. The Commission has, however, treated funds raised for recount purposes as subject to 2 U.S.C. § 441b, which prohibits corporate or union contributions, and to 2 U.S.C. § 441e, which prohibits contributions from foreign nationals, both of which are based on the "in connection with" standard. The Commission explained this interpretation of the law in AO 2006-24:

> Commission regulations promulgated before the enactment of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA"), make exceptions from the cited definitions [of "contribution" and "expenditure"] for gifts, loans, or payments made with respect to a recount of the results of a Federal election. 11 CFR 100.91 and 100.151. Nonetheless, in recognition of the Act's prohibitions on corporations, labor organizations, national banks, and foreign nationals making contributions or donations "in connection with" Federal elections, *see* 2 U.S.C. 441b(a) and 441e(a)(1)(A), these recount regulations expressly bar the receipt or use of funds prohibited by 11 CFR 110.20 (foreign nationals) and Part 114 (corporations, labor organizations, and national banks). 11 CFR 100.91 and 100.151.

AO 2006-24 at 5 (footnote omitted) (emphasis added).

Because the corporate ban in section 441b (and in part 114 of the regulations), and the ban on foreign national contributions in section 441e (and in section 110.20 of the regulations), both apply to activities "in connection with" a federal election, the recount regulations are necessarily based on a legal conclusion that recounts are "in connection with" a federal election.

The Commission went on in AO 2006-24 to summarize two pre-BCRA advisory opinions in which the Commission applied these statutes and regulations, *see* AO 2006-24 at 5 (citing AOs 1978-92 and 1998-26), and then proceeded to explain how BCRA necessarily changed the analysis:

> BCRA took effect after these advisory opinions were issued. Under BCRA, Federal candidates and officeholders 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 the Act ("Federal funds"). *See* 2 U.S.C. 441i(e)(1)(A); *see also* 11 CFR 300.2(g). These

> restrictions apply to Federal officeholders and candidates, their agents, and entities directly and indirectly established, financed, maintained, or controlled by, or acting on behalf of, any such candidates or officeholders. *Id.*; *see also* 11 CFR 300.60 and 300.61. Congress's choice of the "in connection with" standard in 2 U.S.C. 441i(e)(1)(A) requires the Commission to conclude that section 441i(e)(1)(A) applies to funds raised or spent on recounts of Federal elections. This conclusion flows from the plain language of BCRA, as well as the Commission's recount regulations dating to 1977 that are premised on the conclusion that recounts are "in connection with" Federal elections. *See* 2 U.S.C. 441b(a), 441e(a)(1)(A); 11 CFR 100.91 and 100.151.

AO 2006-24 at 5-6 (emphasis added). This conclusion led the Commission to opine that "[t]o the extent that Advisory Opinions 1978-92 and 1998-26 differ from this result, they are superseded." *Id.* at 6.

In short, BCRA changed federal law with respect to recount funds. In using the phrase "in connection with" in BCRA's soft money ban, Congress must be presumed to have intended to encompass recount funds within the soft money ban – because the Commission has long viewed recount funds as being "in connection with" federal elections. As is noted in Draft C: "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." Draft C at 10 (citing *Lorillard v. Pons*, 434 U.S. 575 (1978)). The Commission for decades had interpreted recount funds to be "in connection with" elections and, when Congress enacted BCRA in 2002, it not only amended and re-enacted section 441b with its "in connection with" language intact, but it also used precisely the same phrase in the new soft money ban in section 441i(e). Under BCRA, therefore, candidates must pay for recount activities using hard money.

As mentioned above, the Commission has previously considered the application of BCRA to recount funds. In an advisory opinion proceeding immediately following the enactment of BCRA, the general counsel recommended adoption[8] of an opinion explaining the impact of BCRA as follows:

> Congress's choice of the "in connection with" standard in 2 U.S.C. 441i(e) prohibits a Federal candidate's solicitation, receipt, direction, transfer or disbursement of funds not subject to the limits, prohibitions and reporting requirements of the Act, even for recounts. To conclude otherwise, the Commission would have to determine that expenses for recounts are not "in connection with" the Federal election whose results are subject to recount. The Commission's determination that recount expenses are "in connection with" the relevant Federal election is dictated by the logic and the plain language of BCRA, particularly in light of the Commission's regulation dating back to 1977 that is premised on the conclusion that recounts and election contests are in connection with Federal elections.

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[8] *See* Agenda Doc. 02-79 (Nov. 12, 2002), Cover memorandum at 1 ("This office would recommend Draft A . . . ."); available at http://www.fec.gov/agenda/agendas2002/mtgdoc02-79.pdf.

Agenda Doc. 02-79 (Draft A) at 15-16 (emphasis added).[9] The same position was ultimately adopted by the Commission in AO 2006-24.

Despite this clarity in the law, Draft C proceeds nonsensically to conclude that recount funds are not "solicited, received or spent in connection with an election, and are therefore not subject to 2 U.S.C. § 441i(e)(1)." Draft C at 12.

The dots in Draft C simply do not connect. Regulations 100.91 and 100.151 explicitly reflect – through incorporation of the "prohibitions of 11 CFR 110.20 and part 114" – that recount activities are "in connection with" elections. How Draft C can note the continuing validity and enforceability of these regulations and then immediately proceed to conclude, contrary to what the regulations mean, that recount activities are not "in connection with" an election" is incomprehensible.

But the patent nonsense of Draft C does not end there. Draft C goes on to argue that:

> AO 2006-24 could not have concluded correctly that donations to a Federal candidate's fund to conduct a recount of general election results do not aggregate with contributions from the same sources to that candidates general election fund, since those funds would all be considered to be given "in connection with" the same general election and subject to the same aggregate limit under the Act.

Draft C at 13.

To the contrary, there is a simple explanation for the conclusion in AO 2006-24 that donations to a recount fund are not aggregated, for the purpose of contribution limits, with "contributions" made to the candidate's general election fund. As explained above, under the Commission's longstanding recount regulations and interpretation of the law, donations to a recount fund are not "contributions." *See* 11 C.F.R. § 100.91. Therefore, the Commission has reasoned that they are not aggregated with "contributions" made to a candidate's campaign committee. But recount funds are now nonetheless subject to separate contribution limits – not by direct application of 2 U.S.C. § 441a as "contributions," but, instead, by the application of BCRA's soft money ban at 2 U.S.C. 441i(e)(1), which incorporates by reference the amount limits and source prohibitions for all funds raised by candidates "in connection with" an election.

Draft C cites the Supreme Court's decision in *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), 479 U.S. 238 (1986), as support for the contention that the phrase "in connection with" an election does not encompass recount activities. This is more nonsense.

In *MCFL*, the Court's construed the term "expenditure" in 2 U.S.C. 441b, as applied to a non-profit corporation, and held, based on its earlier discussion in *Buckley v. Valeo*, 424 U.S. 1

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[9] The Draft further noted that to the extent the existing regulations are inconsistent with this conclusion, "the Commission intends to reevaluate the continuing viability of these rules in a subsequent rulemaking." Agenda Doc. 02-79 (Draft A) at 16.

(1976), that the term would be limited to express advocacy. But *Buckley* made clear that the express advocacy test does not apply to "political committees," defined as "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate," *Buckley*, 424 U.S. at 79, such as the Franken Committee and political party committees like the DSCC.

Thus, the *MCFL* Court's narrowing construction of section 441b has no relevance to the Franken Committee or the DSCC, because money spent by candidates and party committees is, "by definition, campaign related." *Buckley*, 424 U.S. at 79.

The analysis set forth in Draft C, concluding that federal candidates may raise recount and election contest funds without limit because recounts "are not 'in connection with' an election," is plainly wrong and should be rejected here. *See* Draft C at 12-17. This analysis is contrary to every bit of Commission precedent dating back to the 1970's, all of which has treated recount funds as "in connection with" elections.

And, as noted above, if Draft C is right, then there is no statutory basis for applying sections 441b or 441e to recount funds either, as Commission regulations have long done. Thus, the analysis in Draft C rejects the approach of the Commission's longstanding regulations. Further, the only logical conclusion of the Draft C analysis is that federal candidates, including publicly financed presidential candidates, could solicit and receive *unlimited corporate and union treasury funds, as well as unlimited donations from foreign nationals*, for recount purposes. This would be an absurd result that is flagrantly contrary not only to BCRA but to FECA as well. Draft C can make a claim that the source prohibitions continue to apply to recount funds, but the claim is not credible since there would be no plausible statutory basis for applying the source prohibitions, and the Commission would not be able to sustain that position.

2. BCRA prohibits the DSCC from raising or spending soft money for any purpose.

BCRA not only prohibits federal candidates from raising or spending soft money in connection with elections but also, even more broadly, prohibits a national committee of a political party, such as the DSCC, from soliciting, receiving or spending "any funds[] that are not subject to the limitations, prohibitions, and reporting requirements" of FECA. *See* 2 U.S.C. § 441i(a)(1) (emphasis added). The Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003), upheld the national party soft money ban, reasoning that "large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used" and concluding that "Congress had sufficient grounds to regulate the appearance of undue influence associated with this practice. The Government's strong interests in preventing corruption, and in particular the appearance of corruption, are thus sufficient to justify subjecting all donations to national parties to the source, amount, and disclosure limitations of FECA." *Id.* at 156 (emphasis added).

Neither the AOR nor any of the three alternative draft opinions suggest that BCRA's clear statutory prohibition can be read in such a way as to allow the DSCC to raise and spend soft money for recount activities. On the contrary, the DSCC proposes only to raise and spend

hard money, and the three draft opinions would permit the DSCC only to raise and spend hard money for recount and election contest activities.

Comments filed by the three Republican national committees, however, imply that parties should be permitted to raise and spend soft money for recount activities. These party committees wrongly claim that "[b]efore AO 2006-24, recount funds had been considered outside the scope of the Commission's regulatory authority" and go on to argue that "AO 2006-24 was wrongly decided in broadening the Commission's jurisdiction over recount funds." Republican Committee Comments at 2.

The Commission should reject the thinly-veiled request by the Republican committees that it overturn AO 2006-24 and allow party committees to raise and spend soft money for recounts and election contests. Such an opinion would directly and impermissibly contravene the plain language and intent of BCRA.

3. **The Franken Committee may not raise federal funds under an additional, separate limit for the post-recount contest litigation now underway in Minnesota.**

The Franken Committee "seeks confirmation that it may establish a new fund specific to the ongoing election contest in Minnesota" that 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." AOR 2009-04 at 3. The Franken Committee further proposes that "donations to the Committee's election contest fund will not be aggregated with contributions from those persons . . . for the Committee's recount fund." *Id.*

As correctly explained in Draft A:

> [T]he Commission's regulations, since 1977, have only provided a single exception to the definitions of "contribution" and "expenditure" for all recount activity, and it is clear that in promulgating the rule that contains the exception, the Commission intended a single exemption to apply to all aspects of recount activity, whether such activity is "with respect to the recount of the results of a Federal election, or an election contest concerning a Federal election."

Draft A at 8 (citing 11 C.F.R. § 100.4(b)(15) (1977) and 11 C.F.R. § 100.91 (2009)).

Draft A makes clear that, "[i]n referring to a recount and an election contest in the same provision in this way, the regulations indicate that these two elements of the post-election process are two possible steps in determining the outcome of an uncertain election[,]" and that the "use of both terms in the regulations was intended to encompass a wide variety of possible post-election procedures that might be employed to determine the outcome of an election, depending on various states' laws, not to imply a distinction between them." Draft A at 9.

In AO 2006-24, the party committees sought, and the Commission granted, permission to raise money into a recount fund to pay:

> "expenses resulting from a recount, election contest, counting of provisional and absentee ballots and ballots cast in polling places," as well as "post-election litigation and administrative-proceeding expenses concerning the casting and counting of ballots during the Federal election, fees for the payment of staff assisting the recount or election contest efforts, and administrative and overhead expenses in connection with recounts and election contests" ("recount activities").

AO 2006-24 at 2-3; *see also* Draft A at 9 (citing AO 2006-24) (emphasis added). AO 2006-24 permitted the establishment of a single hard money fund to pay all of these expenses.

Draft A correctly observes that "When all of such post-election expenses are 'in connection with' the same election, as they are in the Minnesota recount and election contest at issue here, there is nothing in the Act of Commission regulations to justify separate donation limits for different steps in the post-election process." Draft A at 9-10.

As noted in Draft A, "If the Commission were to allow federal candidates and officeholders to solicit funds subject to separate donation limits for each of these matters, the Commission would effectively nullify the anti-corruptive goal behind the limitation placed on Federal candidates and officeholders by BCRA." Draft A at 10.

Indeed, were the Commission to approve the Franken Committee's request, it would open the door to a slippery slope of proliferating hard money funds established by a candidate involved in a post-election contest. On the logic of the Franken Committee, a candidate could set up a recount fund, an election contest fund for state court trial work, a litigation fund for appellate work, a fund for federal court election contests, etc. – each of which could accept a donation under a separate contribution limit, thus quickly allowing a single individual to donate very large sums of money in aggregate, and thereby nullifying as a practical matter the restrictions of section 441i(e), which the Commission applied to recount funds in AO 2006-24. Although this is more than what the Franken Committee here requests, there is no principled basis to grant its request for separate recount and election contest funds, without laying the groundwork for the establishment of multiple funds, each with a separate limit.

For these reasons, we urge the Commission to advise the Franken Committee that it may not raise federal funds under an additional, separate limit for the post-recount election contest litigation now underway in Minnesota – and to reject the conclusion in Draft B that the Franken Committee may set up a second fund, as well as the conclusion in Draft C that funds raised by the Franken Committee for recount and election contest expenses are not subject to contribution limits.

4. Recount funds are "for the purpose of influencing" an election.

This AOR can be decided on the grounds set forth above and, based on the existing recount regulation at 11 C.F.R. § 100.91, the Commission should adopt Draft A. Nonetheless, in a future rulemaking, the Commission should reconsider its existing recount regulations and the precedent developed under them, all of which are based on the erroneous view that funds spent for recounts of federal elections are not "for the purpose of influencing" those elections.

The Commission's 1977 regulations are incorrect. Recount funds are, and always should have been treated as, "for the purpose of influencing" a federal election. By this analysis, funds spent for recount purposes would be "expenditures" and "contributions" under FECA. Even apart from the operation of sections 441i(a) and (e) of BCRA, the DSCC and a Senate candidate should be permitted to raise only federally compliant funds for such purposes. Further, candidates and party committees should not be permitted to establish separate recount funds into which hard money can be raised under separate contribution limits.

The Commission's position to the contrary simply makes no sense. Indeed, it is difficult to conceive of funds that are more directly "for the purpose of influencing" an election than those funds spent to determine the actual winner of the election. Unlike the redistricting process – which is related to, but not a part of, an election – a recount is an integral part of the election process itself. If a candidate hires an attorney to provide legal oversight to the process of casting and counting ballots in the candidate's election on Election Day, that surely would be considered an "expenditure" by the candidate, to be funded only with hard money by the campaign committee. Similarly, spending by a candidate on a recount effort to determine who actually won the election should be treated as an "expenditure" by the candidate as well.[10]

It is of course correct that a recount is not, in itself, an "election" as defined in 2 U.S.C. § 431(1). But neither is a television advertisement an "election," or a campaign rally, or a get-out-the-vote drive. Each of these activities is part of the candidate's efforts to influence the outcome of the "election." Precisely the same is true of a recount. The activities paid for by a candidate or party with regard to a recount are "for the purpose of influencing" the outcome of an "election," in this case, a general election as defined in section 431(1)(A).

Because funds spent on recount activities are "for the purpose of influencing" an "election," they are by definition "expenditures," and the funds raised by the federal campaign committees or party committees for such purposes are "contributions." As such, they are subject to the contribution limits and source prohibitions of the Act.

As flawed as the existing regulatory framework is with regard to recount financing, the Commission in this proceeding should do it no further harm. The Commission should not allow a candidate to proliferate recount funds. The Commission should not allow unlimited contributions by individuals to be raised by federal candidates and party committees for recount purposes. The Commission should certainly not open the door to donations by corporations or foreign nationals, contrary to 30 years of precedent, by fatally undermining the legal rationale that supports 11 C.F.R. §§ 100.91 and 100.151. Given the existing regulations and the precedent established by AO 2006-24, we urge the Commission to adopt Draft A, and then in a separate proceeding to reconsider the flawed premise that recounts funds are not "for the purpose of influencing" federal elections.

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[10] The recount process is typically characterized by candidates, their representatives, and party operatives each attempting to ensure a complete count of all "valid" votes, to ensure that "invalid" votes are not counted, and to ensure that the final tally of votes is free from error. Candidates and parties undertake recount activities for the specific purpose of ensuring that the candidate's lead will be protected, or their opponent's lead will be eroded, during the recount process.

We appreciate the opportunity to comment on this matter.

Sincerely,

/s/ Fred Wertheimer

Fred Wertheimer
Democracy 21

/s/ J. Gerald Hebert

J. Gerald Hebert
Paul S. Ryan
Campaign Legal Center

Donald J. Simon
Sonosky, Chambers, Sachse
Endreson & Perry LLP
1425 K Street NW – Suite 600
Washington, DC 20005

Counsel to Democracy 21

Paul S. Ryan
The Campaign Legal Center
1640 Rhode Island Avenue NW – Suite 650
Washington, DC 20036

Counsel to the Campaign Legal Center

Copy to: Each Commissioner
Commission Secretary