Comments on AOR 2011-12

Robert Knop/FEC/US
05/31/2011 08:23 AM

To "Shawn Woodhead Werth" <swoodhead@fec.gov>
cc
bcc
Subject Fw: Comments on Advisory Opinion Request 2011-12

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From: "Kaylan Phillips" [kphillips@bopplaw.com]
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To: Robert Knop
Cc: <JBoppjr@aol.com>; "'Richard E Coleson'" <rcoleson@bopplaw.com>
Subject: Comments on Advisory Opinion Request 2011-12

Mr. Knop,

Thank you for returning my call earlier today.

As you instructed, I faxed the following attached documents to Ms. Werth and Mr. Hughey this afternoon.

Please confirm receipt of this email.

Thank you.

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May 27, 2011

By Facsimile and Electronic Mail
Shawn Woodhead Werth,
Secretary and Clerk of the Commission
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2011-12 (Majority PAC & House Majority PAC)

Dear Ms. Werth,

On behalf of our client Republican Super PAC ("RSPAC"), we submit the following comments on advisory opinion request 2011-12.

Sincerely,

BOPP, COLESON & BOSTROM

James Bopp, Jr.
Richard E. Coleson

cc: Christopher Hughey,
Acting General Counsel

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May 27, 2011

Christopher Hughey, Acting General Counsel
Office of General Counsel
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999 E Street, NW
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2011-12 (Majority PAC & House Majority PAC)

Dear Mr. Hughey,

On behalf of our client Republican Super PAC ("RSPAC"), we comment on advisory opinion request 2011-12 (the "AOR") by Majority PAC and House Majority PAC (collectively, the "PACs").

The AOR's Significance

The PACs state their understanding of how RSPAC intends to operate, assert a desire to do likewise, and seek confirmation that they may. That these Democratic PACs seek to operate in this fashion is in itself significant. It means that they see no inherent corruption, appearance of corruption, circumvention, or other public-policy evil in a PAC operating in this fashion. Rather, they embrace the concept and seek guidance on the possible technical problem, the soft-money ban, that might stand in the way of doing what they otherwise want to do. If the technical legal problems are resolved, as they are below, the PACs will embrace the permission to do what they want to do. Thus, this is not a Republican or Democratic issue.

In contrast, the so-called campaign-finance "reformers" have called such a federal independent-expenditure-only political committee ("IE-PAC") a "shadow group" and "obviously corrupting," despite the IE-PAC's status as a regulated federal political committee in compliance with applicable Federal Election Campaign Act ("FECA") restrictions and disclaimer and

reporting requirements.[1] This now stands as the reformers' attack on both Republicans and Democrats.

Campaign Legal Center and Democracy 21 recently sent a letter to members of Congress claiming that if they solicit for either RSPAC or the PACs doing so would violate the ban on soliciting funds that are not FECA-compliant, but they helpfully acknowledge that "the coordination provision is not the provision that is applicable here."[2] The reformers therein made the erroneous representations that "officeholders and candidates . . . will be able to earmark" (only donors can earmark, if they choose) and that officeholders "could solicit . . . with the understanding that the PAC will spend the money on 'independent' expenditures to benefit that particular officeholder . . ." (the "independence" of independent expenditures ("IEs") means there is no constitutionally cognizable understanding and breaks any quid-pro-quo-corruption link). If possible, these reformers would prevent the PACs and RSPAC from exercising their First Amendment liberties of expression and association.

The recent losses the reformers have suffered in the courts and before the Commission counsel against heeding their ongoing assault on these rights. *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010); FEC AO 2010-09 (Club for Growth); FEC AO 2010-11 (Commonsense Ten). The cited authorities establish, as did *Buckley v. Valeo*, 424 U.S. 1, 47 (1976), that the independence of an independent expenditure breaks any link that would permit constitutionally cognizable quid-pro-quo corruption. As *Buckley* put it:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.

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[1] *See* Campaign Legal Center Press Release, "Legality of Proposed Soft Money Activities by RNC Shadow Group Challenged by Campaign Legal Center and Democracy 21" (May 17, 2011), available at http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1337:may-17-2011-legality-of-proposed-soft-money-activities-by-rnc-shadow-group-challenged-by-campaign-legal-center-and-democracy-21&catid=63:legal-center-press-releases&Itemid=61.

[2] *See*, Campaign Legal Center Press Release, "Campaign Legal Center and Democracy 21 Inform Members of Congress it is Illegal for Them to Solicit Unlimited Contributions for a Super PAC," available at http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1346:may-25-2011-campaign-legal-center-and-democracy-21-inform-members-of-congress-it-is-illegal-for-them-to-solicit-unlimited-contributions-for-a-super-pac&catid=63:legal-conter-press-releases&Itemid=61.

Id. That settled constitutional analysis, reiterated in *Citizens United*, 130 S. Ct. at 909 ("independent expenditures . . . do not give rise to corruption or the appearance of corruption"), is the controlling analysis here, along with a proper understanding of the statutory scheme. The statutory scheme only regulates the coordination of expenditures and communication, *see infra*, and so long as there is no coordination as to these (which the reformers concede there is not, *see supra*), there is no cognizable corruption or circumvention.

It is also significant that the PACs raise a second question seeking "confirm[ation]" concerning the ability of "covered officials" to "participate in fundraisers for [IE-PACs] at which unlimited individual, corporate, and union contributions are raised, provided that they do not solicit such [unlimited] contributions by complying with 11 C.F.R. § 300.64." AOR at 1. Though there is no reason to consider this rule because contributions to IE-PACs are federal funds, *see infra*, by assuming that IE-PACs must be treated like any other political committee or political party committee with respect to how the law should treat them, the PACs support an affirmative answer to their first question.

The AOR's Questions

The PACs pose two questions, first stated thus:

> 1. Despite the Supreme Court's decision in *McConnell v. FEC* upholding the soft money solicitation ban, may Federal officeholders and candidates, and officers of national party committees (hereinafter, "covered officials") solicit unlimited individual, corporate, and union contributions on behalf of the PACs without violating 2 U.S.C. 441i?
>
> 2. If the answer to the first question is "no," please confirm that covered officials do not violate 2 U.S.C. § 441i if they participate in fundraisers for the PACs at which unlimited individual, corporate, and union contributions are raised, provided that they do not solicit such contributions by complying with 11 C.F.R. § 300.64.

AOR at 1. Then they state them thus:

> 1. May covered officials solicit unlimited individual, corporate, and union contributions on behalf of the PACs without violating 2 U.S.C. § 441i?
>
> 2. If the answer to Question 1 is "no," may covered officials participate in fundraisers for the PACs at which unlimited individual, corporate, and union contributions are raised provided that they do not solicit such contributions by complying fully with 11 C.F.R. § 300.64?

AOR at 3-4.

Initial Response

Regarding AOR Question 1, "Analytical Question 1," *infra*, restates AOR Question 1 in an analytically more useful form, which is then analyzed below.

Regarding AOR Question 2, because IE-PAC funds are federal funds, *see infra*, there is no reason to reach AOR Question 2. "[T]he rule [does not] cover fundraising events at which only Federal funds are solicited . . . ." Explanation and Justification, Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events, 75 Fed. Reg. 24375, 24378 (May 5, 2010). But if IE-PAC funds were nonfederal funds, this regulation would clearly permit federal candidates and officeholders[3] to attend and participate in IE-PAC fundraisers as described in the regulation. The regulation does not address political parties and their officials speaking at such fundraisers, but they may already solicit funds for IE-PACs in their "individual capacity" if IE-PAC funds were deemed nonfederal funds, *see McConnell v. FEC*, 540 U.S. 93, 139, 157, 160-61, 178 (2003), and the logic of allowing candidates and officeholders to speak as the rule permits extends to also allowing political party officials to do so.[4]

Analytical Question 1

AOR Question 1 is here restated in an analytically more useful form:

1. Given that political party officials may solicit[5] contributions to federal PACs, 2 U.S.C. § 441i(d), and covered officials[6] may solicit FECA-compliant contributions, 2 U.S.C. § 441i,

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[3] The regulation addresses only candidates and officeholders, not all "covered officials" as identified in the AOR. *See* 11 C.F.R. § 300.64 ("This section covers participation by Federal candidates and officeholders . . . .").

[4] While now superseded, the Commission's 2005 E&J on the rule noted that even having federal candidates and officeholders *solicit* funds at what were, after all, *fundraising* events posed little risk of corruption. *See* Candidate Solicitation at State, District, and Local Party Fundraising Events, 70 Fed. Reg. 37649, 37651 (June 30, 2005).

[5] The question and analysis are framed in terms of "solicit," i.e., "to ask, request, or recommend, explicitly or implicitly, that another person make a contribution . . . ." 11 C.F.R. § 300.2(m). For analytical purposes, "direct" could be substituted (where factually applicable), i.e., "to guide, directly or indirectly, a person who has expressed an intent to make a contribution . . . ." 11 C.F.R. § 300(n). There are constitutional vagueness and overbreadth problems with "implicitly" and "indirectly" in these definitions, along the lines of the problem identified with certain language in *Buckley*, 424 U.S. at 42-44, but these problems are not further addressed other than to note that *McConnell* said covered officials could "endorse" PACs. 540 U.S. at 139.

[6] "Covered officials" herein means national political party officials in their *official* capacities and federal candidates, because the former may solicit nonfederal funds in their *individual* capacities. *See supra*. "Covered officials" also excludes state candidates and officeholders, who

must funds that IE-PACs may use ("IE-PAC federal funds"[7]) be considered federal funds for purposes of section 441i because

(a) IE-PAC federal funds are contributions lawfully given to a federal PAC,

(b) IE-PACs and IE-PAC federal funds are FECA-compliant, remaining statutorily subject to all PAC restrictions that may be constitutionally applied to them,

(c) covered officials may solicit FECA-compliant contributions for other entities based on the limits of the *entity* for which they solicit the funds, not their *own* limits, and

(d) there are no constitutionally cognizable justifications for not considering IE-PAC federal funds as federal funds for purposes of section 441i?

Analytical Question 1 Analyzed

Initially, RSPAC notes that the PACs recite AO 2010-11 (Commonsense Ten), which established that IE-PAC federal funds properly include corporate and union contributions. The PACs do not mention AO 2010-09 (Club for Growth), which recognized that the independence of IEs breaks the link of possible quid-pro-quo corruption and circumvention,[8] and established that (1) IE-PAC federal funds include amount-unlimited contributions, *id.* at 4; (2) the Club for Growth President, who served as treasurer of CFG's federal PAC, could also serve as its IE-PAC treasurer, based on the representation of non-coordination (especially so where recommended firewalls were implemented), *id.*; and (3) the IE-PAC "may solicit and accept funds earmarked for specific independent expenditures," *id.* at 5.

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are limited regarding *spending* nonfederal funds in certain situations, but not in *soliciting* them. *See* 2 U.S.C. § 441i(f).

[7] "IE-PAC federal funds" are FECA-compliant funds for IE-PACs. Contributions to the IE-PAC are unlimited in amount and may be from corporations and unions. IE-PAC federal funds remain source-restricted by all constitutionally permissible FECA provisions applicable to PACs, e.g., contributions may not be from foreign nationals or federal contractors, and they remain subject to all disclaimer and reporting requirements.

[8] As the Commission put it, *id.* at 5:

> [T]he Club has represented that the Committee will not, itself, make any contributions or transfer any funds to any political committee if the amount of a contribution to the recipient committee is governed by the Act, nor will the Committee make any coordinated communications or coordinate any expenditures with any candidate, authorized committee, political party committee, or agent of such persons Thus, because there is no possibility of circumvention of any contribution limit, section 110.1(h) and its rationale do not apply to the Committee's solicitations or any contributions it receives that are earmarked for specific independent expenditures.

The reported RSPAC activity that the PACs wish to emulate simply puts these pieces together, based on the premises that IE-PAC federal funds must be considered federal funds for purposes of section 441i, both by statutory interpretation and because of the lack of any corruption or circumvention rationale for deeming them otherwise. Thus, covered officials may ask persons to contribute to an IE-PAC, the contributors of IE-PAC federal funds may themselves choose to earmark contributions for specific independent expenditures, and the IE-PAC may use earmarked contributions for IEs as earmarked.

The PACs, in analyzing what they seek to do, only offer one paragraph on AOR Question 1. There they acknowledge that "covered officials may clearly solicit federally permissible funds on behalf of the PACs," AOR at 3, but indicate their concern that IE-PAC federal funds may not be "federally permissible funds" under 2 U.S.C. § 441i. In addressing their concern, the PACs cite two decisions that upheld the "soft money" ban and two cases that "did not even challenge" the soft-money solicitation ban. AOR at 3-4. Unfortunately, the PACs' analysis is inadequate to explain why they may not do what they seek to do. Their minimal analysis fails to address the analytical issues here. Neither AO 2009-09, AO 2009-11, nor the judicial decisions to which the PACs refer, ever said that IE-PAC federal funds are soft money or otherwise "federally [im]permissible funds." No analysis of which we are aware has ever called IE-PAC federal funds soft money, and the PACs don't do so in their AOR. So to the extent that section 441i was designed to get rid of the "[s]oft money of political parties" (as its title indicates), we do not deal here with what is commonly understood as soft money. Regarding soliciting funds for PACs, the "soft money" statute expressly permits political party officials to solicit contributions for "political committees," *see* 2 U.S.C. § 441i(d)(2), and no one disputes that IE-PACs are political committees.

Thus, the PACs' minimal analysis does not provide an adequate foundation for justifying that the PACs may not do what the PACs seek to do. It ignores the deeper analytical questions in RSPAC's Analytical Question 1 to which we turn.

> **1. Given that political party officials may solicit contributions to federal PACs, 2 U.S.C. § 441i(d), and covered officials may solicit FECA-compliant contributions, 2 U.S.C. § 441i, must funds that IE-PACs may use ("IE-PAC federal funds") be considered federal funds for purposes of section 441i . . . .**

This core question asks whether the funds that IE-PACs may use and that covered officials would solicit for them must be considered FECA-compliant federal funds for purposes of section 441i in light of four analytical points that are considered next.

> **(a) IE-PAC federal funds are contributions lawfully given to a federal PAC . . . .**

The core question begins with the premises that political party officials may "solicit . . . funds for . . . a political committee," 2 U.S.C. § 441i(d), and covered officials may solicit FECA-compliant contributions, 2 U.S.C. § 441i. IE-PACs are federal PACs, IE-PAC federal funds are

fully FECA-compliant, and IE-PAC federal funds are contributions lawfully given to a federal PAC. For these reasons alone, IE-PAC federal funds should be deemed federal funds for purposes of section 441i.

In section 441i, which was Congress's plan (as its title indicates) to eliminate the "[s]oft money of *political parties*" (emphasis added), Congress thought it permissible for political party officials to solicit PAC funds.[9] This is because Congress understood that PACs were not themselves political parties and did not view PACs as any part of the perceived soft-money problem. PACs have not, and do not (even if they are IE-PACs), deal in soft money. Donations to them are by definition FECA "contributions,"[10] i.e., federal funds. As such, they are properly classed as federal funds that covered officials may solicit.

(b) IE-PACs and IE-PAC federal funds are FECA-compliant, remaining statutorily subject to all PAC restrictions that may be constitutionally applied to them . . . .

It has been argued by the "reformers" that, since section 441i(a)(1) describes soft money as funds "not subject to the limitations, prohibitions, and reporting requirements of this Act," contributions to IE-PACs are soft money. This is so, as the argument goes, because while IE-PACs comply with reporting requirements and are subject to all source restrictions except for contributions from corporations and unions, they are not subject to contribution-amount restrictions. But such a wooden analysis overlooks the goals of Congress, the considerations of the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003), and the fact that the specific statutory terms were a simple way of describing soft money that has been overtaken as to IE-PACs by court rulings and Commission advisory opinions on the constitutionality of applying FECA to IE-PACs.

McConnell described its concerns, and those of Congress, in ridding political parties of soft money. The Court noted fundamentally that contributions, are defined as gifts for the purpose of influencing federal elections. 540 U.S. at 123 (citing 2 U.S.C. § 431(8)(A)(i)). "Donations made solely for the purpose of influencing state or local elections are therefore unaffected by FECA's requirements and prohibitions." *Id.* As the court noted, allocation rules allowed large quantities

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[9] As the Supreme Court noted in *McConnell*, "Even [2 U.S.C. § 441(d)], which on its face enacts a blanket ban on party solicitations of funds to certain tax-exempt organizations, nevertheless allows parties to solicit funds to the organizations' federal PACs." 540 U.S. at 139. Moreover, as *McConnell* noted, there are "no limits on other means of endorsing tax-exempt organizations or any restrictions on solicitations by party officers acting in their individual capacities." *Id.* Consequently, there is no question that political party officials may *endorse* IE-PACs in their official capacities, and may solicit for them in their individual capacities.

[10] The Commission treats donations to IE-PACs as "contributions" that do not "circumvent[] . . . contribution limits" under 11 C.F.R. § 110.1(h). AO 2010-09 at 5. *See also id.* at 3 ("Committee may solicit and accept *contributions* from the general public" (emphasis added)).

of soft money to be used by national political parties, including for get-out-the-vote drives, generic party advertising, issue ads, and administrative expenses. *Id.* at 123-24. The Court said that parties had "a special relationship and unity of interest" with candidates, *id.* at 145, and based on that, "parties promised and provided special access to candidates and senior Government officials in exchange for large soft-money contributions." *Id.* at 130.[11]

Of course, none of that would happen in the present situation involving FECA-compliant funds being solicited for a federal political committee. No political party would get any nonfederal funds. None has a political party's special relationship with candidates. None would provide special access to candidates and officeholders. None would be making issue ads or doing other activity with nonfederal funds. All of that is gone. PACs are not political parties. They lack the connection with candidates and officeholders that political parties have. They cannot provide access. All of a PAC's activities are fully regulated and disclosed. And IE-PACs do fully disclosed IEs, not "so-called issue ads," *id.* at 126.[12]

These were concerns that Congress and the Supreme Court had in mind when Congress banned nonfederal funds for political parties and the Supreme Court upheld the ban. Because IE-PACs were nonexistent then, Congress did not address them. It chose to define nonfederal funds by reference to whether they were subject to the FECA's limits, prohibitions, and reporting. But that was done as a way of describing money that was not FECA-compliant, i.e., soft money, not to resolve whether there were legitimate soft-money concerns in the IE-PAC context. As already noted, IE-PAC funds are subject to the FECA's limits, prohibitions, and reporting that are applicable to them and thus remain fully FECA-compliant. Such funds are not soft money. So the issue ought to be framed at the level at which the public, congressional, and litigation debates occurred, i.e., at the level of FECA compliance. The debate over soft money primarily had to do with the fact that it was federally unregulated. IE-PAC federal funds are fully federally regulated.

Moreover, unlike soft money, IE-PAC federal funds are FECA compliant to the full extent that the FECA restrictions may be applied under the First Amendment and corresponding FEC Advisory Opinions. Contributions and expenditures are fully disclosed on regular PAC reports. IEs carry disclaimers. IE-PAC funds are subject to all the source restrictions applicable to PACs, but as applied to them the statutory prohibitions that govern them have been held unconstitutional as to contributions from corporations and unions. And even the amount restrictions on contributions *statutorily* apply to IE-PACs, because they are governed by PAC

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[11] The Court's concerns were all framed in terms of soft-money contributions *to national party's*, not to any other entity such as a PAC. *See, e.g., id.* at 144-45 (in this key analytical portion of the opinion, the *to*-a-political-party formulation occurs six times).

[12] *McConnell*'s concerns about soft money being used for issue ads, 540 U.S. at 131, is completely gone because (1) all funds involved with parties, candidates, officeholders, PACs, and IE-PACs are now fully federally regulated and (2) the electioneering-communications restrictions have brought issue ads under federal regulation.

laws like all other PACs, except that these are unconstitutional as applied to IE-PACs. The reason there are unconstitutional applications also bears on whether IE-PAC federal funds are rightly deemed federal funds, to which topic we shall return. For now, it is sufficient to note that because IE-PAC federal funds are fully FECA-compliant, do not involve these articulated concerns of Congress and the Court, and are compliant with all PAC requirements that may constitutionally be applied to them, they are indisputably federal funds.

> **(c) covered officials may solicit FECA-compliant contributions for other entities based on the limits of the *entity* for which they solicit the funds, not their *own* limits . . . .**

It may be argued that though IE-PAC federal funds are in fact federal funds for IE-PACs, they are not so for covered officials that might wish to solicit for them. Under this view, covered officials would be barred from soliciting for IE-PACs because the funds would be soft money for the covered officials and so solicitation would be barred under 2 U.S.C. § 441i. But this analysis fails when one considers that the law looks to the recipient to determine whether the solicited funds are FECA-compliant, not to the solicitor. Suppose covered candidate Alpha wants to solicit funds for the Democratic National Committee. Alpha's own limit for contributions to her campaign committee is $2,500. If the scope of permissible solicitations is determined by what is legal for her, then she could only solicit $2,500 for the DNC. But that is not correct. The law looks to what is legal for the recipient and allows Alpha to solicit $30,800 for DNC. This happens regularly where a prominent federal candidate signs a fundraising letter for a national political party committee, soliciting funds at the committee's level, not the solicitor's, and soliciting funds that are then used for IEs supporting the candidate. The same rule applies here, so that what is legal for the IE-PAC controls what may be solicited.

> **(d) there are no constitutionally cognizable justifications for not considering IE-PAC federal funds as federal funds for purposes of section 441i[.]**

As mentioned above, key concerns of Congress and the Supreme Court are simply absent from IE-PACs. IE-PACs lack political parties' "special relationship" with candidates and officeholders, cannot provide the access that political parties could provide, are not political parties, do not deal with federally unregulated funds, and do make fully-federally-regulated IEs instead of "so-called issue ads." But what about *McConnell*'s concern that where

> corporate, union, and wealthy individual donors have been free to contribute substantial sums of soft money to the national parties, which the parties can spend for the specific purpose of influencing a particular candidate's federal election[,] [i]t is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude[?]

540 U.S. at 145. That concern is inapplicable in the present situation for three reasons.

First, that concern was expressed where (a) soft money was given (b) to political parties. *Id.* The present situation involves (a) no soft money and (b) no money given to political parties.

Second, even were the situations comparable, the gratitude-access-influence theory of corruption was rejected in *Citizens United* and can no longer be relied upon:

> When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption. . . . The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt:
>
> > "Favoritism and influence are not ... avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness."
>
> Reliance on a "generic favoritism or influence theory ... is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle."
>
> The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse "'to take part in democratic governance'" because of additional political speech made by a corporation or any other speaker.

909-10 (citations omitted). "Ingratiation and access . . . are not corruption." *Id.* at 910.

Third, regarding the surviving quid-pro-quo corruption interest, the *Citizens United* Court held that (a) "[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate," *id.* at 910, and (b) "independent expenditures . . . do not give rise to corruption or the appearance of corruption, *id.* at 909. The Court distinguished *McConnell* in a manner directly applicable here: "The BCRA record establishes that certain donations to political parties, called 'soft money,' were made to gain access to elected officials. This case, however, is about independent expenditures, not soft money." *Id.* at 910-11.

The present analysis likewise is about independent expenditures by a federal PAC using FECA-compliant contributions, not soft money donations to political parties. So long as there is no coordination by the IE-PAC with candidates or political parties concerning expenditures or communications—which, as noted above, the "reformers" concede is not a problem here—there is no cognizable quid-pro-quo corruption involved with the making of independent expenditures.

As *Buckley* held, "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." 424 U.S. at 47. That settled constitutional analysis was reiterated in *Citizens United*. 130 S. Ct. at 909 ("independent expenditures . . . do not give rise to corruption or the appearance of corruption").

The restrictions on soft money solicitations at 2 U.S.C. § 441i must be justified by some underlying anti-corruption interest. But the independence of the IEs breaks the link of possible quid-pro-quo corruption and circumvention. *See, e.g.*, AO 2010-09 at 5.

Thus, as a matter of law (since *Buckley*, 424 U.S. at 47), the *independence* of an IE means that *no* IE creates a cognizable quid-pro-quo benefit for a candidate, even if the candidate is named, even if the FECA-compliant funds for the IE originated from a candidate asking a person to contribute the funds to the person who makes the IE, even if the candidate asks that FECA-compliant funds be given to an IE-PAC, even if the solicited contributor chooses to earmark the contributions for specific IEs mentioning that candidate. So long as the candidate and the IE-PAC do not coordinate the actual expenditure for the communication, there is no cognizable anti-corruption interest.

Consequently, there being no corruption inherent in an IE, no corruption interest justifies banning solicitation of FECA-compliant funds to the entity making the IE. So it would be unconstitutional to ban covered officials from soliciting contributions of IE-PAC federal funds to IE-PACs for making IEs. The Commission should not construe 2 U.S.C. § 441i in an unconstitutional manner by deciding that IE-PAC federal funds are not federal funds for purposes of section 441i. Thus, IE-PAC funds are federal funds for IE-PACs and for the purposes of 2 U.S.C. § 441i. And the Commission should issue an advisory opinion telling the PACs that they may do what they say they want to do.

Sincerely,

BOPP, COLESON & BOSTROM

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