COMMENT ON AOR 2011-12

BRENNAN CENTER FOR JUSTICE

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June 3, 2011

Christopher Hughey, Esq.
Acting General Counsel
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: AOR 2011-12 Majority PAC and House Majority PAC

Dear Mr. Hughey:

We write on behalf of the Brennan Center for Justice at NYU School of Law ("Brennan Center") with regard to Advisory Opinion Request 2011-12 (Majority PAC and House Majority PAC) (the "Request").

The first question in the Request asks whether:

> 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?

The Brennan Center urges the Commission to advise that the answer to this question is "no." This proposal runs afoul of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which prohibits federal officeholders and candidates, and officers of national party committees, from soliciting contributions that are not subject to the amount and source limitations of federal law. *See* 2 U.S.C. § 441i. BCRA unambiguously prohibits party committees from soliciting funds "that are not subject to [BCRA's] limitations, prohibitions, and reporting requirements," and likewise prohibits federal officeholders and candidates from soliciting or directing funds unless they "are subject to the limitations, prohibitions and reporting requirements" of the law. *Id.* §§ 441i(a)(1), (e)(1)(A).

Because the unlimited contributions described in the Request are not "subject to the limitations" of federal law, solicitation of such funds by covered officials is prohibited by 2 U.S.C. § 441i. The Supreme Court upheld the constitutionality of these solicitation restrictions in *McConnell v. FEC*, 540 U.S. 93, 142-84 (2003).

The Commission is bound to follow federal statute and Supreme Court precedent and must therefore advise that the proposed solicitation is prohibited by federal law.

Congress enacted the solicitation ban to prevent parties, officeholders and candidates from encouraging maxed-out donors to buy additional influence and access through additional contributions to organizations that could accept unlimited funds. The Supreme Court upheld these rules as "valid anticircumvention measures" and an important bulwark against corruption and the appearance of corruption. *See McConnell*, 540 U.S. at 182. As the Court explained:

> Large soft-money[1] donations at a candidate's or office-holder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself. Without some restriction on solicitations, federal candidates and officeholders could easily avoid FECA's contribution limits by soliciting funds from large donors and restricted sources to like-minded organizations engaging in federal election activities.

Id. at 182-83.

The solicitation proposed in the Request would create exactly the same concerns about corruption cited by the Court in *McConnell.* It would encourage federal candidates and other covered officials to circumvent their own federal contribution limits by soliciting unlimited funds for the PACs—and it would encourage the same influence peddling that BCRA aimed to prevent.

Moreover, the Supreme Court has done nothing to disturb the federal ban on the solicitation of unlimited funds by covered officials—in *Citizens United* or elsewhere. To the contrary, in *Citizens United* the Court reaffirmed *McConnell*'s extensive record of evidence regarding the corrupting influence of such solicitations. *Citizens United v. FEC*, 130 S. Ct. 876, 910-11 (2010). The Court has since declined an opportunity to revisit the issue, instead affirming a lower court decision that relied upon *McConnell* to reject an as-applied challenge to BCRA's soft-money ban. *See RNC v. FEC*, 698 F. Supp. 2d 150, 158 (D.D.C. 2010), *aff'd* 130 S. Ct. 3544 (2010).

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[1] *McConnell* refers to money that is not subject to federal limitations, prohibitions and reporting requirements colloquially as "soft money," and other comments filed with the Commission have gone to great lengths to define what "soft money" allegedly is (or is not). *See Republican Super PAC Comment on Advisory Opinion Request 2011-12*, May 27, 2011, http://saos.nictusa.com/aodocs/1175674.pdf ("RSPAC Comment"). But debates over the definition of "soft money" are irrelevant to the ultimate question here: whether the ban found at 2 U.S.C. § 441i prohibiting solicitation of *unlimited* funds (even when those funds are otherwise subject to federal regulation) remains in effect. As explained in this letter, it plainly does.

Although the Request can be resolved based on the relevant statutory language, it is worth noting that the proposed scheme contradicts the reasoning of *Citizens United*. Independent expenditure PACs are exempt from federal contribution limits because of the judicial determination that independent expenditures pose no risk of corruption. *See Citizens United*, 130 S. Ct. at 908 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)) ("'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.'"). The proposed solicitations hardly eliminate the risk of *quid pro quo* arrangements between donors and candidates, as required by the reasoning of *Citizens United*.

For these reasons, the Commission should reject the arguments contained in the comments, dated May 27, 2011, submitted by Republican Super PAC ("RSPAC"). RSPAC claims that covered officials may solicit funds for an independent expenditure PAC because "IE-PAC funds are subject to the FECA's limits, prohibitions, and reporting that are applicable to them and thus remain fully FECA-compliant." *See* RSPAC Comment at 8. This is nothing more than a rhetorical sleight of hand. Independent expenditure PAC funds are *not* subject to FECA's contribution limits—and the question of whether an IE-PAC is compliant with the provisions of federal law that are "applicable to them" has no bearing on whether a covered official may solicit unlimited contributions for that PAC.

In short, the proposed solicitations would invent and exploit a putative loophole in the federal campaign finance laws that would swallow entirely the ban on solicitation of unlimited money by covered officials. The Supreme Court has upheld this ban, and the contribution limits it is designed to protect, as advancing constitutionally vital anti-corruption interests. Accordingly, the FEC should erase any possible doubts about the legality of the proposed solicitation scheme and advise that any party committee member or federal officeholder or candidate who participates in soliciting or directing unlimited funds to a Super PAC does so in clear violation of federal law.

Respectfully submitted,

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