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2011 JUN 29 P 12:31

To:	Office of the Commission Secretary Office of General Counsel	**From:**	Steve Hoersting
Fax:	(202) 208-3333 (202) 219-3923	**Pages:**	5 (incl. cover)
Phone:	(202) 694-1000	**Date:**	June 29, 2011
Re:	Comments on AO 2011-12, Draft B	**cc:**	

☐ **Urgent** x **For Review** **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

• **Comments:**

Dear Commission Secretary and General Counsel:

Attached are comments on AO 2011-12 Draft B.

Thank you.

Steve Hoersting

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June 29, 2011

Office of General Counsel
Attention: Ms. Rosemary C. Smith
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

VIA TELEFAX and ELECTRONIC MAIL

Re: Comments on AO 2011-12 (Majority PAC and House Majority PAC) – Draft B

Dear Ms. Smith:

I am co-founder of the Center for Competitive Politics and legal architect in the case *SpeechNow.org v. FEC*. I nonetheless submit these comments in my personal capacity in the interest of time.

SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010) (en banc), was an as-applied challenge to the existing statutory framework. It was successful because it respected the constitutional bedrock that groups speaking independently of candidates cannot corrupt them, and where the possibility of corruption is cured speech prevails, not controls.

After a lot of hard work, by a lot of skilled people, including a band of conscientious commissioners and assistants at the FEC, the *SpeechNow.org* and *Citizens United* opinions—like the *North Carolina Right to Life* and *EMILY's List* opinions before them—have lead to what are now known as "SuperPACs."[1]

This Commission is now being asked whether candidates and officeholders may solicit unlimited and unrestricted funds to "SuperPACs."

[1] Had I and my colleagues at the Institute for Justice and CCP been even more successful these organizations might be called "SuperGroups," with reporting obligations under 2 U.S.C. §434(c) (independent expenditures) and §434(f) (electioneering communications), but not under §434(a) (political committees).

Let me begin commenting on the question by stating my belief that had the *SpeechNow.org* litigation contemplated an organization established, financed, maintained or controlled by a federal candidate or officeholder, its result would have been opposite. Those unsure on this point should observe the *EMILY's List* opinion, which went to great lengths to describe the analytical difference between party committees controlled by or comprised of officeholders and non-profit non-connected committees, which are not. Those still unsure should re-read *EMILY's List* while considering the phenomenon known as the "leadership PAC." A leadership PAC is a non-connected committee established, financed, maintained and controlled by a federal officeholder. Simply re-read *EMILY's List*, and every place you see the term "political party" or "party committee" substitute the words "leadership PAC." The substitution will fit remarkably well and you will understand that the constitutional analysis for entities controlled by candidates is fundamentally different than that of independent entities—irrespective of the candidate the entity (in this case the SuperPAC) ultimately chooses to target with political advertising.

But the advisory opinion request does not contemplate SuperPACs controlled by candidates or officeholders, only officeholders raising unlimited contributions for SuperPACs. This difference, however, does not dispose of the matter. Corporate contributions to candidates are still prohibited, and candidates and officeholders are still prohibited from soliciting corporate or excessive contributions under the officeholder soft-money ban at 441i(e). Again, *SpeechNow.org* was an as-applied challenge to the existing statutory framework. SpeechNow did not challenge the federal-officeholder soft-money ban at 2 U.S.C. §441i(e). SpeechNow's as-applied challenge was completely silent as to section 441i(e). The D.C. Circuit was completely silent on section 441i(e). Section 441i(e) was alive and well at the time SpeechNow filed suit, just as it is alive and well today.

Moreover, had SpeechNow offered to the court a candidate as SpeechNow's solicitor, the circuit court would certainly have held that the corrupting nexus to that candidate would prevent SpeechNow from receiving an unlimited and unrestricted contribution through that candidate.

In short, the argument that *SpeechNow.org* + *Citizens United* opinions mean that officeholders who solicit *unlimited* and *unrestricted* contributions to SuperPACs are soliciting contributions "subject to the limitations [and] prohibitions ... of this Act" is wrong.[2] The officeholders' involvement prevents the organization from receiving an unrestricted contribution—under the logic of *SpeechNow.org*, the discussion in *EMILY's List* and the direct prohibition against unrestricted officeholder solicitations in § 441i(e).

[2] I take no joy in appearing to support unwarranted speech restrictions, or in articulating a position opposite the undisputed leader in the effort to free political speech from government control.

The most this Commission can hold, without upsetting current law, is that federal candidates and officeholders may solicit contributions of $5000 or less from individuals on behalf of SuperPACs.

That leaves open the question of whether candidates and officeholders may simply attend SuperPAC fundraising events. There is no prohibition on candidates or officeholders attending a fundraiser, even an event where soft money is solicited; the right of association is stronger than that. But any SuperPAC that invites candidates to its fundraiser better realize that, should those candidates/attendees be the beneficiary of the SuperPACs' advertising, it will accelerate an opponent's charge of coordination (though that fact alone will not decide the matter). If the coordination charge proves successful it will strip the SuperPAC of its "Super" status and plunge its executives and the candidates they thought they were helping into criminality. *See SpeechNow.org, supra;* see also 2 U.S.C. § 437g(d)(1).

It is worth recounting how we got here. After the Supreme Court handed down its landmark opinion in *Citizens United v. FEC,* old hands, like Bob Lenhard and Ben Ginsberg, warned that the only way political party committees and the officeholders tied to them would achieve parity with independent groups would be for Congress to repeal the soft money ban. That advice was clear; that was fifteen months ago. Congress didn't listen. Rather, it concentrated its efforts in crafting a DISCLOSE Act that would do indirectly what the Court held cannot be done directly: keep independent and corporate speakers on the sidelines.

That effort failed. Now the same counsel intimately involved in the DISCLOSE Act effort (blessed, one suspects, by the same principals) are back, begging the FEC to protect them from the consequences of their actions. This is not the time for this Commission to double back on its commitment to the law.

In this, the most tumultuous era in campaign finance law, this Commission has, since its principled ruling in *The November Fund,* parroted or presaged the campaign finance opinions of the federal circuit courts and Supreme Court of the United States. It has gained the grudging respect of veteran reporters like Dan Eggen, Ken Doyle and Ken Vogel who, despite repeated cries from the "reformers" that the Commission gets it "wrong" have come to find that the Commission gets it right again, again, and again.

All of that would be squandered with an incorrect handling of this vote. Federal judges, who have stood with the Commission and face foundation-funded criticism of their own, will hear of the decision and be crestfallen. They know their hard-won opinions were based upon the principle that officeholders are to be kept from the inner workings of unrestricted independent organizations until Congress repeals the soft money ban. They think the Commission knows it, too.

If this Commission elides the soft-money ban after the Court has told others no, the baseless charge that it is "feckless," "rogue," "captured" or "dead" will suddenly stick. The Democratic congressional caucus, like a Br'er Rabbit suddenly freed of the

restraints it put in motion, will laugh in the Commission's face while *The Muckraker* sweeps its legs. FEC defenders, who have defended the Commission's defense of the law, will be robbed of their arguments and an odd-numbered agency with a "strong" chairman will loom on the horizon—an agency that would inaugurate, not bring to a close, *true* problems in American politics.

There are few things worse for a country of laws than government restrictions on core political speech, but worse things do exist. Among them are administrative agencies that ignore enactments of Congress the Courts have led stand.

This request makes plain that Democratic officeholders want to have their soft-money ban (to appease a progressive caucus) and have the FEC eat away at it, too. The Commission should not smash itself on the rocks of public opinion to provide this extra-legal outcome.

If Senate Majority Leader Harry Reid wants, rightly, to undo the soft-money ban, he has at his disposal the only legitimate means of doing so: He can pass a law in Congress. There is, after all, no reason to believe that the Senate's Minority Leader, lead challenger to the soft-money ban in *McConnell v. FEC*, will mount much of a filibuster.

Respectfully submitted,

/s/ S.M. Hoersting

Stephen M. Hoersting