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December 29, 2003

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

**Re: Advisory Opinion Request 2003-38**

Dear Mr. Norton:

I am writing on behalf of the Campaign Legal Center to provide comments on Advisory Opinion Request 2003-38, submitted on behalf of Engel for Congress.

The request seeks permission for U.S. Representative Eliot Engel (D-N.Y.) to participate in the formation and operation of a redistricting committee to pay for legal fees incurred in connection with redistricting litigation (concerning the New York congressional map). It argues that Congressman Engel should be able to raise and spend funds "on an unrestricted basis" for redistricting activities.

We disagree with the notion that federal campaign finance law – as properly applied – permits Members of Congress to raise and spend funds on an unrestricted basis for redistricting expenses. Instead, we believe that the law requires them to raise and spend only "hard money" for such expenses.

As enacted by the Bipartisan Campaign Reform Act of 2002 ("the Reform Act"), 2 U.S.C. § 441i(e)(1)(A) prohibits federal officeholders and candidates from soliciting, receiving, directing, transferring or spending funds "in connection with an election for Federal office" unless the funds are subject to the source prohibitions, amount limitations and reporting requirements of federal campaign finance law.

The same restriction applies to fundraising and spending by entities which are "directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office": they may not solicit, receive, direct, transfer or spend funds "in connection with an election for Federal office" unless the funds are subject to the prohibitions, limitations and reporting requirements of the Act. *See* 2 U.S.C. § 441i(e)(1)(A).

The activity contemplated by Congressman Engel and the redistricting committee clearly involve types of conduct covered by 2 U.S.C. § 441i(e)(1)(A) – soliciting, receiving and

spending funds. Moreover, Congressman Engel would "participate in the formation and operation" of the redistricting committee. Thus, the committee would be "directly or indirectly established, financed, maintained or controlled" by a federal officeholder under 2 U.S.C. § 441i(e)(1).

The remaining question is whether the fundraising and spending proposed here would be "in connection with an election for Federal office." We believe that this would clearly be the case.

Redistricting is the process of redrawing the boundaries of the geographic units which individually serve as the jurisdictions for electing each Member of the U.S. House of Representatives. The connection between the outcome of redistricting and the elections of House Members is direct, substantial and widely recognized. Among other things, a redrawn district map can convert a perennially "safe" House seat into a competitive race, pit two incumbents against one another (and thus guarantee the unseating of one incumbent) or shore up the re-election prospects of a House Member who had previously won by but the slimmest of margins.

Indeed, in current times, it may be fair to characterize redistricting *as* the election (with voting, unfortunately, increasingly consigned to the role of ratifying seemingly pre-destined results). As stated by Columbia Law School Professor Samuel Issacharoff, "Voters no longer choose members of the House; the people who draw the lines do." *See* Jeffrey Toobin, "The Great Election Grab," *The New Yorker*, Dec. 8, 2003, p. 65. Drawn using highly sophisticated computer tools, today's congressional district maps have overwhelmingly provided safe House seats for one political party or the other. Competitive elections have been reduced to the rarity. *See id.*, pp. 64-65, 75-76 and 78.

Political professionals understand very well the significance of redistricting for elections. Describing pending Supreme Court litigation over redistricting tactics, one well-known Democratic lawyer in election-law cases said, "At stake in this case is control of Congress – nothing more, nothing less." *Id.*, p. 65. Along these lines, with the swing of a few seats able to shift control of the U.S. House of Representatives from one party to the other, party leaders determined to retain or achieve majority status have intervened in redistricting fights. *See id.*, pp. 63-65. Moreover, given the centrality of redistricting to prospects for election or re-election to the House, it is no surprise that the issue of permissible fundraising for redistricting activities (including litigation) has been the subject of multiple Advisory Opinion requests from House Members. *See* Advisory Opinions 1990-23, 1982-37 and 1981-35; *see also* Advisory Opinion Request 2003-38.

The request nonetheless denies that the raising and spending of funds by federal officeholders for redistricting expenses is "in connection with an election for Federal office," pointing to pre-Reform Act Commission Advisory Opinions which considered whether such expenses were regulated by federal campaign finance law. It proceeds to indicate that, in enacting the Reform Act, Congress "showed no clear intent to disturb" the practices licensed by its previous Advisory Opinions concerning redistricting. The request concludes by citing Advisory Opinion 2003-15 for the proposition that the

Commission should continue to adhere to its pre-Reform Act Advisory Opinions concerning redistricting.

The pre-Reform Act Advisory Opinions concerning redistricting which were cited in the request did in fact permit federal officeholders to raise and spend unlimited funds for redistricting expenses. In so doing, Advisory Opinion 1981-35 rejected the notion that donations of corporate treasury funds to a redistricting committee set up by several Members of Congress violated the prohibition of 2 U.S.C. § 441b on contributions and expenditures of such funds in connection with any election to federal office.

However, the Commission should not feel bound by these pre-Reform Act Advisory Opinions concerning redistricting expenses. Nothing does or should tether the Commission to prior analyses that would contravene the plain language and broad purposes of the Reform Act.

As indicated above, a straightforward and common-sense analysis yields the conclusion that federal officeholder fundraising and spending for redistricting expenses (including those relating to litigation) are "in connection with an election for Federal office." Moreover, the converse result – allowing federal officeholders to raise and spend unlimited funds for such purposes, including funds from corporations, unions and foreign nationals – would conflict with the broad purposes of Reform Act.

Indeed, the Reform Act's legislative history reveals that a principal congressional concern motivating the effort to enact this legislation was that, despite the presence of constitutionally valid funding source prohibitions and contribution limits in federal campaign finance law, the previous campaign finance system had not as a practical matter worked to insulate federal elections from soft money (*i.e.*, funds outside of the prohibitions and limitations of the Act).[1]

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[1] *See, e.g.*, 148 Cong. Rec. H373 (daily ed. Feb. 13, 2002) (statement of Rep. Blumenauer) ("Mr. Chairman, part of the legacy of President Teddy Roosevelt was an effort to get rid of corporate contributions to Federal elections, and they have been illegal for almost a century. But what we have seen over time, the evolution of a system that has permitted corporate contributions to move into the political process, be the process of soft money, something that is corrupting on those who have to contribute it, who have to receive it. It is not good for the American public."); 148 Cong. Rec. H353 (daily ed. Feb. 13, 2002) (statement of Rep. Shays) ("Soft money has reintroduced into the Federal campaign finance system the very kinds of contributions that the federal laws intended to exclude - namely donations from corporations, unions, as well as large individual contributions. Soft money is not just a loophole, it is the loophole that ate the law. Let's send a clear message today that our democracy - and our integrity -- is not for sale."); 147 Cong. Rec. S2435 (daily ed. Mar. 19, 2001) (statement of Sen. McCain) ("We have restrictions now that have been upheld by the courts; they have simply been circumvented by the rather recent exploitation of the so-called soft money loophole. Teddy Roosevelt signed a law banning corporate contributions. Harry Truman signed a law banning contributions from labor unions. In 1974, we enacted a law to limit contributions from individuals and political action committees directly to the candidates . . . Those laws were rendered ineffectual not unlawful by the ingenuity of politicians determined to get around them who used an allowance in law that placed no restrictions on what once was intended essentially to be a building fund for the State parties.").

Congress's emphasis on election spending *realities* (whatever the prevailing regulatory characterizations) and concern about the role that had been assumed by soft money should broadly inform the Commission's interpretation and implementation of the Reform Act. They at least counsel the Commission to forsake resort to past regulatory holdings that do not square with the application of the plain language of the Reform Act and would license the raising and spending of funds not subject to federal source prohibitions, amount limitations and reporting requirements in ways that are *clearly* in connection with federal elections.

As noted above, the request cites Advisory Opinion 2003-15 for the proposition that the Commission should be bound by its past Advisory Opinions concerning whether redistricting-related fundraising and spending by federal officeholders were "in connection with" federal elections. In Advisory Opinion 2003-15, the Commission approved a House Member's proposal to establish a legal expense fund which would raise and spend funds outside the limits of federal campaign finance law, reasoning that (in its view) this activity had not previously been considered "in connection with an election for Federal office."

However, Advisory Opinion 2003-15 presented a much lesser degree of potential conflict with the broad purposes of the Reform Act than does the request at hand. Although the legal expense fund approved in Advisory Opinion 2003-15 would not be subject to federal campaign finance law's contribution amount limitations and source prohibitions, House ethics rules in their own right cap contributions to legal expense funds at $5,000 per year per donor and prohibit contributions from agents of foreign principals. Representatives Nancy L. Johnson and Jim McDermott, *Memorandum to all Members, Officers and Employees; Legal Expense Fund Regulations*, Jun. 10, 1996. In this instance, apart from the operation of federal campaign finance law, there would be no separate source of authority limiting the sizes and sources of contributions to the redistricting committee set up by a federal officeholder. Officeholder fundraising for redistricting expenses could indeed entail large donations from particular sources and large aggregations of funds, especially as redistricting may be on the verge of becoming a more than "once a decade" phenomenon. *See* J. Toobin, "The Great Election Grab," pp. 63-64.

Moreover, after the Commission issued Advisory Opinion 2003-15, the U.S. Supreme Court issued its opinion in *McConnell v. FEC*, 540 U.S. ___ (2003). The Court's opinion characterized Commission allocation rules permitting political parties to use soft money to pay for activities which plainly influenced federal elections as contrary to the Federal Election Campaign Act of 1971, as amended. *See id.*, slip. op. at 12, 32, 32 n. 44 and 58. While, as noted, these statements specifically addressed political party allocation rules, the criticism of the Commission's track record in deciphering when spending is tied to federal elections should weigh upon the agency now to approach such analysis in all contexts in a manner which accords with campaign finance realities and is sensitive to the Act's core purposes.

Thus, the Commission should conclude that the proposal for a federal officeholder to participate in the formation and operation of a redistricting committee to pay for legal fees incurred in connection with redistricting litigation, and to raise and spend unlimited funds for such purposes, falls squarely within the coverage of 2 U.S.C. § 441i(e)(1)(A). As a consequence, the federal officeholder would be limited to receiving, soliciting and spending funds subject to the prohibitions, limitations and reporting requirements of the Act (*i.e.*, "hard money") for such purposes, and the redistricting committee he would establish and control could receive and spend only hard money.

The Commission has recently adopted regulations which, unwisely, foreclose any possibility that an organization established and controlled by a federal officeholder (but not constituting an "authorized committee") could be treated as affiliated with (and thus subject to common contribution limits with) the officeholder's authorized campaign committee. *See* 11 C.F.R. § 100.5(g)(5). However, in adopting these regulations, the Commission further indicated that, "To the extent Leadership PACs are used to pay for costs that could and should otherwise be paid for by an candidate's authorized committee, such payments are in-kind contributions, subject to the Act's contribution limits and reporting requirements." *See* 68 Fed. Reg. 67,017 (Dec. 1, 2003). In addition to limiting the contemplated redistricting committee to raising and spending hard money, the Commission should also apply such "in-kind contribution" analysis to this request. Certainly, the presence of a strong nexus between the activities of Congressman Engel's proposed redistricting committee and the ultimate boundaries of his electorate would support a finding that the redistricting committee's spending was an "in-kind" contribution to the Congressman's authorized committee, subject to the Act's contribution limits and reporting requirements.

Thank you for your attention to these comments.

Sincerely,

*/s/ Glen Shor*

Glen Shor
FEC Program Director