

Congress of the United States
Washington, DC 20515

October 22, 2004

VIA FAX

Lawrence M. Norton
 General Counsel
 Federal Election Commission
 999 E Street NW
 Washington, DC 20463

*Comments on
 AORs 2004-38 and 39*

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 FEDERAL ELECTION
 COMMISSION
 OFFICE OF GENERAL
 COUNSEL

Re: Advisory Opinion Requests 2004-38 and 2004-39

Dear Mr. Norton:

As the primary sponsors of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), we submit this comment on Advisory Opinion Requests 2004-38 and 2004-39. Because the two AORs raise similar and overlapping issues we have prepared a single comment and respectfully request that you include it in the record and consider it for each AOR.

In AOR 2004-38, the Nethercutt for Senate committee and candidate George Nethercutt (together, the "Nethercutt campaign") asks a series of questions concerning the candidate's ability to raise unlimited soft money from individuals for a recount fund under the campaign's control or for recount funds established and controlled by other entities. In AOR 2004-39, the Washington State Republican Party ("WSRP") indicates that it "intends to establish a fund to finance recount activities in connection with one or more federal elections." WSRP asks a series of questions concerning whether it can raise money from individuals and federal political committees in unlimited amounts and whether federal officeholders can appear at fundraisers for that purpose.

We strongly believe that the Commission's response to these requests must make clear that BCRA's ban on soft money applies to recounts. Neither federal candidates nor state parties should be able to raise or spend soft money on these activities.

In past elections, funds could not be raised for recount expenses from foreign nationals or from corporations or labor unions. The limits applicable to individual contributions, however, did not apply to recounts. See 11 C.F.R. § 100.91. This distinction apparently arose from the difference in statutory language between 2 U.S.C. § 431(8) and (9) (contributions and expenditures are made "for the purpose of influencing" federal

elections) and 2 U.S.C. § 441b (corporate and unions may not contribute “in connection with” a federal election).

Thus, the Commission appears to have determined in the past that recount expenses are “in connection with”, but not “for the purpose of influencing,” a federal election. After watching the recount proceedings in Florida during the 2000 presidential election, can anyone really believe that the legal effort undertaken by the two campaigns was not “for the purpose of influencing” the election? It is hard to imagine a more absurd legal fiction. Perpetuating it will only bring disdain and discredit upon the Commission.

Even if the statutory distinction is valid, the Nethercutt campaign’s request for permission to raise and spend soft money on recounts must be denied. BCRA specifically provides that Federal candidates and officeholders may not solicit, receive, or spend funds “in connection with” a Federal election that are not subject to the limitations of the Federal Election Campaign Act (“FECA”). 2 U.S.C. § 441i(e). The intent of that provision was to completely remove federal candidates and officeholders from the solicitation, receipt, and spending of “soft money.” To permit candidates or officeholders to raise money from individuals in unlimited amounts for recount expenses would directly contravene both the letter and intent of the statute. BCRA requires that any fund from which recount expenses will be paid must also comply with the individual contribution limits in 2 U.S.C. § 441a.

The Nethercutt campaign suggests that the clause “in connection with an election for Federal office” in 2 U.S.C. § 441i(e) does not apply to recounts because recounts are not included in the definition of “election” in FECA. It also suggests that recounts are akin to redistricting and legal defense funds, which the Commission has held are not subject to FECA. These arguments are wrong. A recount is obviously not a separate election: it is a legal proceeding to determine the outcome of an election. To argue that a recount is not connected to the election it is deciding makes no sense whatsoever. It is connected to an election in the most basic way possible – it will decide the result. There can never be a recount without an election. Redistricting litigation or other legal proceedings for which a candidate or officeholder might use a legal defense fund do not have a similar direct connection to a specific election.

The Nethercutt campaign also asks in a supplemental letter dated October 15 if it can mention the word “recount” in general solicitations for 501(c) organizations that conduct “recount activities.” We have a hard time understanding what “recount activities” an incorporated 501(c) organization could legally conduct. Such activities are clearly “in connection with” a federal election and therefore would be prohibited by 2 U.S.C. § 441b. In any event, a general solicitation for such a group by a federal candidate or officeholder must comply with 2 U.S.C. § 441i(e)(4)(A). Mentioning recounts in a solicitation would violate that provision’s requirement that the solicitation “not specify where the funds will or should be spent.” Furthermore, 2 U.S.C. § 441i(e)(4) does not permit federal candidates or officeholders to solicit soft money for 527 organizations.

With respect to state parties such as WSRP, the Commission should take this opportunity to rectify its mistaken decision that recounts are "in connection with" but not "for the purpose of influencing" a federal election. WSRP states unequivocally that its recount fund will only be used for federal elections. There can be no question that these expenses, like the costs of express advocacy independent expenditures, contributions to federal candidates, and coordinated expenditures under 2 U.S.C. § 441a(d) must be paid for with hard money.

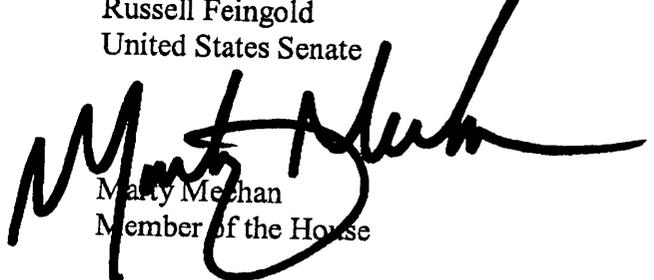
The prospect of a recount in one or more states in the upcoming election is very real. Based on the experience in Florida in 2000, such an event would undoubtedly be a wrenching one for the country. The Commission should not compound the problem by allowing soft money back into our election process to pay for recounts. The suggestion that soft money can be used by parties or candidates to fund recount expenses must be answered firmly in the negative.

Sincerely,


John McCain
United States Senate


Russell Feingold
United States Senate


Christopher Shays
Member of the House


Marty Mehan
Member of the House

