FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY MWD

DATE: October 2, 2006

SUBJECT: COMMENTS ON DRAFT AO 2006-24

Transmitted herewith are timely submitted comments by Messrs. Fred Wertheimer, J. Gerald Hebert, Paul S. Ryan, and Donald J. Simon on behalf of the Campaign Legal Center and Democracy 21 regarding the above-captioned matter.

Proposed Advisory Opinion 2006-24 is on the agenda for Wednesday, October 2, 2006.

Attachment

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2006 OCT -2 P 1:05

By Electronic Mail

October 3, 2006

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

Re: Comments on Draft Ad. Op. 2006-24

Dear Mr. Norton:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to alternative draft Advisory Opinions 2006-24, published by the Commission's Office of General Counsel September 29, 2006. These alternative draft opinions respond to an advisory opinion request (AOR 2006-24) filed jointly by the National Republican Senatorial Committee (NRSC), the Democratic Senatorial Campaign Committee (DSCC) and the Republican Federal Committee of Pennsylvania, a state party, seeking permission for those party committees or their federal candidates to raise non-federal funds for use in recounts or election contests following the 2006 mid-term elections.

On August 24, 2006, the Campaign Legal Center and Democracy 21 filed comments responding to AOR 2006-24, reminding the Commission that *twice before*, party committees have submitted materially similar advisory opinion requests; *twice before*, the general counsel recommended that the Commission adopt an opinion that BCRA now requires the committees (and their federal candidates and officeholders) to raise and spend only hard money for recount purposes; and *twice before,* these advisory opinion requests were withdrawn by the party committees at the last minute — after the release of the general counsel's recommendation, and on the eve of the Commission's consideration of the matter — thereby preempting the Commission's vote.

The Commission has now been asked the same question for a third time since the enactment of BCRA. Nothing has changed. For the reasons detailed in our August 24 comments (attached for your convenience), there is no reason for the Commission to depart from the general counsel's previous analysis and recommendations, should it actually get to vote on the matter this time. And though the general counsel has not publicly recommended adoption of either of the alternative draft Advisory Opinions 2006-24, "Draft A" is virtually identical analytically to the draft opinions recommended by the general counsel in 2002 and 2004.

Just as we agreed with the analysis and conclusions set forth in the general counsel's preferred "Draft A" documents in both 2002 and 2004 — making clear that recount activities are "in connection with a Federal election" and thus must be funded entirely with federal funds —

we likewise agree with "Draft A" of alternative draft Advisory Opinions 2006-24, which employs the same analysis and reaches the same conclusions.

As "Draft A" notes, the Commission's longstanding regulations regarding recount funds, 11 C.F.R. §§ 100.91, 100.151, prohibit the use of funds from foreign nationals (by incorporating 11 C.F.R. § 110.20) as well as from corporations and labor unions (by incorporating Part 114). Both sets of regulatory restrictions are based on statutory prohibitions that apply to funds spent "in connection with" federal elections. 2 U.S.C. § 441e (foreign national ban); 2 U.S.C. § 441b (corporate and union ban). The Commission's recount regulations thus are necessarily dependent on a threshold premise that recounts are "in connection with" federal elections. *See* Draft A at 8.

Prior to BCRA, the provisions of section 441a (relating to contribution limits) did not apply to spending "in connection with" federal elections. But section 441i(e) of BCRA changed that — and now subjects *all* spending by federal candidates "in connection with" federal elections to "the limitations, prohibitions and reporting requirements of the Act." This includes the contribution limits of section 441a, as well as the prohibitions of sections 441b and 441e. The Commission must give effect to the change of law made by BCRA. The Commission cannot ignore the plain application of section 441i(e). Nor can the Commission conclude that recount funds are not "in connection with" federal elections (and therefore that section 441i(e) is inapplicable to recount funds), for that conclusion would simultaneously and necessarily undermine the statutory basis for the Commission's longstanding position that recount funds are subject to the bans on foreign national donations, and corporate or union funding. And to reach that conclusion would completely stand the soft money ban of BCRA on its head.

Accordingly, we urge the Commission to review our August 24 comments and, for the reasons detailed therein, to approve "Draft A" of the alternative draft Advisory Opinions 2006-24.

We appreciate the opportunity to comment on this matter.

Sincerely,

/s/ Fred Wertheimer

Fred Wertheimer
Democracy 21

/s/ J. Gerald Hebert

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Copy to: Each Commissioner
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