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April 21, 2003

Comment on AOR 2003-12

Lawrence Norton, Esquire
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Comment on AOR 2003-12

Dear Mr. Norton:

I am writing on behalf of Common Cause and Democracy 21 to comment on AOR 2003-12, an advisory opinion request on behalf of Rep. Jeff Flake (R-AZ) and the "Stop Taxpayer Money for Politicians Committee."

The Committee is an entity ostensibly formed to promote a state ballot initiative on the November, 2004 ballot, seeking to repeal the Arizona public financing system for state elections. The AOR seeks guidance on the application of the Bipartisan Campaign Reform Act (BCRA) to activities of Rep. Flake in conjunction with the Committee, and to certain activities of the Committee with regard to ads that refer to clearly identified candidates for federal office.

The form of this AOR does not, like a proper advisory opinion request, pose a specific set of facts and seek guidance on whether the proposed activity is permissible. Instead, it recounts a number of variables about the possible forms of organization the Committee might have, and the numerous hypothetical levels of possible entanglement between the Committee and Rep. Flake, and then invites the Commission to design a program for the Committee that comports with the law. The Commission's regulations make clear that "Requests presenting a general question of interpretation, or posing a hypothetical situation...do not qualify as advisory opinion requests." 11 C.F.R. 112.1(b).

The Commission should reject this advisory opinion request because of its improper form, and refuse to respond to the requester's invitation that the Commission juggle the multiple variables posed by the request and respond to every hypothetical combination of them.

In the event the Commission nevertheless decides to respond to the AOR in this form, we provide the following comments, starting with an introductory point.

Neither BCRA, nor FECA more generally, regulates the activities of ballot initiative and referenda campaigns in and of themselves. Similarly, neither BCRA nor FECA constrains the money that can be spent in a campaign for or against ballot initiative measures.

So too, neither BCRA nor FECA inhibit the right of any person, including a Federal candidate or officeholder, from speaking out in support of or in opposition to a ballot initiative measure.

BCRA and FECA do become applicable, however, where the activities of a ballot initiative committee cross the line to affect Federal elections, Federal officeholders or Federal candidates. Where a ballot initiative committee, for instance, becomes an alter ego of a Federal candidate or his campaign committee, or engages in activities that by their nature affect Federal elections, or sponsors TV ads that promote or attack Federal candidates in the guise of discussing a ballot initiative, or coordinates political activities with a Federal candidate, the principles and provisions of BCRA and FECA are properly triggered. That is the larger context presented by this advisory opinion request.

1. Application of 2 U.S.C. 441i(e)(1). Rep. Flake is a Federal officeholder and a candidate for re-election in the 2004 election. Section 441i(e)(1) of BCRA provides that a Federal officeholder or candidate shall not "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity," or "in connection with" an election for non-Federal office, unless the funds comply with Federal law contribution limits and source prohibitions.

This restriction applies not just to any Federal officeholder or candidate, but also to "an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office..." *Id.* Thus, for purposes of the restrictions in section 441i(e)(1), the Committee stands in the shoes of Rep. Flake if it is "established, financed, maintained or controlled" by Rep. Flake.

i.

The facts set forth in the advisory opinion request make clear that Rep. Flake "established" the Committee within the meaning of Section 441i(e). According to the requester's letter of March 24, 2003, Rep. Flake "is among the individuals who formed the Committee, he acted as its chairman and he signed the filing with the Arizona Secretary of

State's Office that formed the Committee." Letter at 1. The requester's letter of April 7, 2003 confirms that Rep. Flake "was the Committee's original Chairman." Letter at 2.

These admissions make plain that Rep. Flake "established" the Committee for purposes of Section 44 1i(e). The standard set forth in the Commission's regulation defining this BCRA term is "whether the sponsor, directly or through an agent, had an active or significant role in the formation of the entity..." 11 C.F.R. 300.2(c)(2)(ix). By being "among the individuals" who "formed" the Committee, by acting as its original chairman, and by signing the Committee's organizational papers, Rep. Flake plainly meets the standard of having played "an active and significant" role in the formation of the Committee.

Accordingly, the Committee is an entity that was "established" by a Federal candidate or officeholder.

ii.

The Committee's request attempts to avoid this conclusion by stating that Rep. Flake has taken steps to disassociate himself from the establishment of the Committee. This, however, is not a "curable" action, on the facts presented here. And indeed, the steps taken by Rep. Flake were apparently done only in response to inquiries from the Commission's Office of General Counsel in the course of this AOR matter, precisely in order to avoid the legal implications of this finding.

According to the requester, the Committee was established by Rep. Flake on January 17, 2003. The original AO request was filed on March 3, 2003. On March 14, 2003, the Office of General Counsel wrote to the requester and asked him to "explain in detail what role, if any, Rep. Flake has played in the formation of the Committee."

Rep. Flake then "resigned from the Committee on March 21, 2003," just one week after the Commission's inquiry to the requester. *See* Requester Letter of April 7, 2003 at 2. Then, in a letter sent three days later by the requester on March 24, 2003, the Committee states that Rep. Flake "is no longer Chairman of the Committee." Letter of March 24, 2003 at 1. (Requester notes, however, that Rep. Flake "would like to resume his role as Chairman if permitted to do so by the Commission." *Id.* at 1). In the wake of this precipitous resignation while the AOR is pending, the requester then claims that Rep. Flake was the "original Chairman" but "is no longer affiliated with the Committee." Letter of April 7, 2003 at 2.

This timeline indicates that, having "established" the Committee by forming it, chairing it and filing for it, Rep. Flake suddenly resigned from the Committee in an attempt to disaffiliate himself from it in response to the Commission's inquiry into his role in the formation of the Committee.

What was done cannot be un-done in this fashion. Rep. Flake "established" the Committee within the meaning of the BCRA. That fact survives his sudden effort to distance

himself from the Committee. His subsequent resignation as chairman does not vitiate the actions he previously took to establish the Committee, nor does it alter the fact that the Committee was "established" by a Federal officeholder.

Although the Commission's regulations contemplate the possibility of disaffiliation, they provide that the sponsor must "demonstrate that all material connections between the sponsor and the entity have been severed *for two years*." 11 C.F.R. 300.2(c)(4)(ii)(emphasis added). Rep. Flake "severed" his connection to the Committee precisely one month ago. He clearly does not meet the standard for disaffiliation, and therefore his actions in "establishing" the Committee continue to trigger the coverage of section 441i(e)(1) over the activities of the Committee.

iii.

In addition to finding that Rep. Flake "established" the Committee, and that he cannot disentangle himself from that finding, his activities on behalf of the Committee will also trigger the provisions of section 441i(e)(1) if he "finances, maintains or controls" the Committee.

The facts stated in the request make clear that he does. He seeks to be either chairman, Letter of March 21 at 1, or an officer or director of the Committee. Letter of March 3 at 2. He seeks to raise money for the Committee by attending and speaking at its events, or hosting fundraising events for it. *Id.* Indeed, Rep. Flake and "his agents and employees of his authorized campaign committee" seek "to be involved in all aspects of the Committee, including its governance..." Letter of March 21 at 2. Rep. Flake and his agents "would like to be able to direct and participate in the governance of the Committee, as well as formulating its strategy and tactics for the ballot referendum." *Id.* Further the Committee seeks to employ both present and former employees of Rep. Flake's congressional office and campaign committee. *Id.* And the Committee seeks to hire common vendor consultants who are or have been retained by Rep. Flake's authorized committee. *Id.*

These facts – and the degree of entanglement they establish – demonstrate that Rep. Flake proposes to "finance, maintain or control" the Committee. The Commission's regulations at 11 C.F.R. 300.2(c)(2) list multiple factors to implement the "finance, maintain and control" standard, and provide that these factors "must be examined in the context of the overall relationship" between the sponsor, in this case Rep. Flake, and the entity, in this case the Committee, to determine whether the entity is financed, maintained or controlled by the sponsor.

These factors include:

- whether Rep. Flake has "the authority or ability to direct or participate in the governance of the entity...through formal or informal practices or procedures. (subpara. ii).

- whether Rep. Flake has "the authority to hire, appoint, demote or otherwise control the officers or other decision-making employees" of the Committee (subpara. iii).

• whether Rep. Flake has "common or overlapping officers or employees" with the Committee that "indicates a formal or ongoing relationship" (subpara. v).

• whether Rep. Flake has any employees who were employees of the Committee (subpara. vi).

All of these factors are triggered by the facts proposed by the requester. Given this, and given the "overall relationship" proposed here of a tight integration between the Committee, on the one hand, and Rep. Flake and his agents and employees on the other, the Commission should conclude that the Committee is "financed, maintained or controlled" by Rep. Flake as well as "established" by him.

iv.

As an entity "established" by a Federal candidate or officeholder, or as an entity "financed," "maintained" or "controlled" by a Federal candidate or officeholder, the Committee may not "solicit, receive, direct, transfer or spend" non-Federal funds "in connection with an election for Federal office, including funds for any Federal election activity" 2 U.S.C. 441i(e)(1)(A), or "in connection with any election other than an election for Federal office..." 2 U.S.C. 441i(e)(1)(B). As we discuss below, the Committee seeks to spend funds both for "Federal election activity" and "in connection with" an election. In both instances, therefore, it must raise and spend only federally permissible funds.

(a). Federal election activity. The AOR makes clear that the Committee intends to spend funds for "Federal election activity." The March 3 letter specifies that the Committee will engage in "voter identification," "voter registration" and "get-out-the-vote" programs, all of which are "Federal election activities" under BCRA. Letter at 1; *see* 2 U.S.C. 431(20)(i) (voter registration); (ii) (voter identification and get-out-the-vote). The request specifically states the Committee's intent to engage in voter registration and get-out-the-vote activities in connection with the November, 2004 ballot, using non-federal funds. Letter of March 3, 2003 at 5.

Further, the requester states that it will refer to Senator John McCain and potentially to other Federal candidates, including Rep. Flake himself, in broadcast and other public communications. Letter of March 3 at 4-5; Letter of March 21 at 4. Under BCRA, any "public communication" that refers to a clearly identified Federal candidate and that "promotes or supports" or "attacks or opposes" a candidate, is a "Federal election activity." 2 U.S.C. 431(20)(iii). The Committee seeks to use non-federal funds for such public communications.

It cannot do so. As an entity "established" by a Federal officeholder, and "financed, maintained or controlled" by one, the Committee is prohibited by section 441i(e)(1) from raising or spending non-federal funds on "Federal election activities," including many of the activities it describes in the request -- voter registration, voter identification or get-out-the-vote activities, 2 U.S.C. 431(20)(i), (ii), or public communications that refer to a Federal candidate within the scope of section 431(20)(iii).

(b) "In connection with" an election. More broadly, the Committee's proposed activities will be "in connection with" a Federal or non-Federal election, and thus required under section 441i(e)(1) to be funded with federally permissible funds.

The Committee has been organized as a Section 527 entity under the Internal Revenue Code, Letter of March 24 at 1, but the request states that the Committee will reorganize under Section 501(c)(4) of the Code should that make a difference to the application of the BCRA. *Id.*

Under these facts, the IRS status of the Committee does not alter the application of BCRA.

(1) *As a Section 527 entity.* Section 527 status under the Internal Revenue Code is available only to a "political organization." 26 U.S.C. 527(a). A "political organization" is an entity "operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. 527(e)(1). An "exempt function" means the function "of influencing or attempting to influence the selection, nomination, election or appointment of any individual to any Federal, State or local public office..." 26 U.S.C. 527(e)(2).[1]

By definition, then, a section 527 political organization is "in connection with" an election, either Federal or non-Federal. As such, any section 527 organization that is "established, financed, maintained or controlled" by a Federal candidate or officeholder may not, under section 441i(e)(1), raise or spend non-Federal funds, whether for Federal or non-Federal purposes.[2]

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[1] If one looks only at the Committee's assertion that it intends primarily to influence a ballot initiative measure, then under applicable IRS interpretation, it does not qualify for section 527 status. *See Private Letter Ruling 199925051,* 1999 WL 424878 (March 29, 1999) ("Generally, expenditures made in connection with ballot measures, referenda, or initiatives are not section 527 exempt function expenditures.") Indeed, the IRS allowed a ballot committee to qualify for section 527 status only where its advocacy activities for ballot initiative measures "were part of a deliberate and integrated political campaign strategy to influence the election for state and local officials by making active use of ballot measures, referenda and initiative campaigns." *Id.*

That appears to be the case here as well. It means that the Committee could qualify under this theory as a section 527 entity, but it would also clearly establish that its purpose was to influence candidate elections, and therefore that, under BCRA, it would be required to raise and spend only federally permissible funds because of its connections to Rep. Flake.

[2] Given this, the Committee has apparently already violated the law if it has raised any non-Federal funds. As we discussed above, the requester states that Rep. Flake was "among the individuals who formed the Committee," which was organized as a section 527 entity. Letter of March 24 at 1. To the degree that the Committee has raised or spent any non-Federal funds to date, it thereby has apparently violated section 441i(e)(1). The Committee states that it has returned "all funds raised while Rep. Flake was affiliated with the Committee," Letter of April 7 at 1, but this, of course, does not vitiate any violation that occurred by the Committee's raising of non-Federal funds in the first place.

(2) *As a section 501(c)(4) entity.* Alternatively, the Committee indicates that it may alter its tax status to section 501(c)(4) of the Code. This would not change the conclusion.

Commission precedent establishes that, because of the close entanglement between the Committee and Rep. Flake, all of its activities should be considered "in connection with" an election. In A.O. 1989-32 (July 2, 1990), the Commission advised a section 501(c)(4) entity organized to qualify and pass a ballot initiative measure – much as the Committee here ostensibly seeks to do – that it was subject to the provisions of FECA banning contributions by foreign nationals because its activities were "in connection with" an election. The Commission reached this conclusion on the basis of the involvement of a state officeholder with the ballot initiative committee, circumstances that apply here as well with the involvement of Rep. Flake with the Committee.

In the 1989 advisory opinion, the state officeholder had "significant influence" on the ballot committee's actions. He was "involved in communications" from the committee, and acted as a public spokesperson for it. There was a "substantial overlap" between the committee staff and the officeholder's campaign staff.

Although the Commission recognized that contributions to a ballot initiative committee were not *per se* within the scope of FECA, including its ban on contributions by foreign nationals, it held that the activities of the committee in this instance "entail the sponsorship and participation of a candidate seeking election to public office concurrently with the ballot referendum effort." The Commission noted that even though the committee would neither solicit funds for the candidate nor expressly advocate his election, the candidate had organized the committee "with the knowledge that his name will be inextricably linked with the committee before the same electorate voting on his reelection and at the same time as the campaign and voting for such reelection take place." Based on this, the Commission concluded that the activities of the committee were campaign-related.

Given the circumstances here, the same analysis pertains. Rep. Flake has closely associated himself with the Committee and, as we discussed above, seeks "to be involved in all aspects of the Committee, including its governance..." Letter of March 21 at 2. His name has been and will continue to be closely associated with the Committee as a public matter, and he intends to serve as a spokesman for it. Although not disclosed in the request, published reports state that Rep. Flake is considering a Senate candidacy, *see e.g.*, J. Kamman, Arizona Republic, February 21, 2003, and the Committee's statewide activities correspond to the electorate relevant to Rep. Flake's potential candidacy.

Just as the Commission concluded in A.O. 1989-32 that the entanglement of a candidate with a ballot initiative committee made the committee's activities "in connection with" an

election, so too here the facts presented by Rep. Flake, as a Federal candidate, about his involvement with the Committee make its activities "in connection with" an election as well.[3]

Thus, because the Committee is subject to section 441i(e)(1) of BCRA as an entity "established, financed, maintained or controlled" by a Federal officeholder and candidate, and because the Committee's activities are "Federal election activities," and more broadly, are "in connection with" an election, the Committee may "solicit, receive, direct, transfer or spend" only Federally permissible funds.

2. Application of 2 U.S.C. 441i(e)(4). Even if the Commission were to find that section 441i(e)(1) does not apply here, section 441i(e)(4) would nonetheless place limits on the ability of Rep. Flake, or any other Federal candidate or officeholder, to solicit funds for the Committee.[4]

Section 441i(e)(4) provides that a Federal officeholder or candidate can solicit funds for a section 501(c)(4) entity for any clause (i) and (ii) "Federal election activity" only if the solicitation is made to an individual and in an amount not to exceed $20,000 in a calendar year. The same restriction is true for a solicitation on behalf of an entity whose "principal purpose" is to conduct any clause (i) or (ii) Federal election activity.

The Commission's regulations provide that a Federal candidate or officeholder may make a general solicitation of funds, without regard to source or limit, on behalf of a section 501(c)(4) organization *only if the organization does not engage* in activities "in connection with" an election or have a principal purpose to conduct election activities, including Federal election activities such as voter registration or get-out-the-vote efforts. 11 C.F.R. 300.52(a)(1).

Because the Committee intends to engage in "Federal election activity," any solicitation of funds by Rep. Flake expressly for such activities must meet the source and amount limitations of section 441i(e)(4). In addition, if a "principal purpose" of the Committee is to engage in such activities, then all solicitations on its behalf by Rep. Flake, regardless of whether they are expressly for "Federal election activities," must conform to those limits.

3. Application of Title II of BCRA. The request states that the Committee intends to sponsor broadcast ads that may refer to Senator John McCain, who is a candidate for reelection in November, 2004, or to Rep. Flake, who is a candidate for re-election (and a potential Senate candidate) for the same ballot. Letter of March 3 at 4; Letter of March 24 at 4.

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[3] This analysis is true whether the Committee is organized as a section 501(c)(4) entity or as a section 527 entity.

[4] This assumes the Committee is organized as a section 501(c)(4) entity. Any solicitation of non-federal funds by a Federal officeholder or candidate for a section 527 entity is prohibited by section 441i(e)(1).

To the extent that these broadcast ads are aired within Arizona 30 days before a primary election or 60 days before the general election, and thus fall within the definition of "electioneering communication," 2 U.S.C. 434(f)(3), the Committee cannot pay for such ads if it is an incorporated entity.[5] 2 U.S.C. 441b(c)(1). Thus, if the Committee is a corporation, it cannot sponsor a television or radio ad that refers to Senator McCain, Rep. Flake or any other Federal candidate, if the ad is run 30 days before a primary or 60 days before the November, 2004 general election, and is "targeted" to Arizona voters statewide (in the case of an ad referring to Senator McCain) or to Rep. Flake's congressional district (in the case of an ad referring to Rep. Flake, assuming he does not become a candidate for the Senate).

4. Application of the coordination rules. The requester sets forth facts that indicate Rep. Flake intends to play an integral role in the activities of the Committee, including selecting and working with the Committee's media firm, and designing and scripting its public communications. Letter of March 24 at 3.

If certain public communications made by the Committee are "coordinated" with Rep. Flake due to his involvement with the Committee, the communication will constitute a "contribution" to Rep. Flake. 11 C.F.R. 109.21(a), (b).[6] This contribution will be illegal, either as an impermissible corporate contribution to Rep. Flake's campaign (assuming the Committee is a corporation), or as an in-kind contribution in excess of the applicable contribution limits (assuming the Committee is not a corporation and the contribution is greater than $2,000 per election).

Thus, Rep. Flake's involvement with the Committee at a time that he is also a Federal candidate must avoid triggering the coordination rules.

A communication by the Committee will be considered "coordinated" with Rep. Flake if it meets both a "content" and "conduct" test set forth in the Commission's rules. 11 C.F.R. 109.21(a).

i. *Content.* The request indicates that the Committee intends to make public communications that either constitute an "electioneering communication" or that refer to a clearly identified candidate within the period 120 days prior to either a primary or general election and that are "directed" to the electorate of the candidate. Any such communication would meet the "content" prong of the coordination rule. 11 C.F.R. 109.21(c)(1), (4).

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[5] This assumes that the Committee would not qualify as an MCFL corporation under 11 C.F.R. 114.10(c), including the restriction that it cannot directly or indirectly accept donations from business corporations or labor organizations. 11 C.F.R. 114.10(c)(4)(ii).

[6] So too, an expenditure by the Committee other than for a public communication will be an illegal contribution to Rep. Flake if it is "coordinated" by being made "in cooperation, consultation or concert with, or at the request or suggestion of" Rep. Flake or his agent. 11 C.F.R. 109.20(a).

Thus, if any of these kinds of communications by the Committee also meet the "conduct" standards of the Commission's rules, they will be illegal in-kind contributions to Rep. Flake.

ii. *Conduct.* Although it is impossible to conclude from the facts presented, it is likely, in light of those facts, that ads run by the Committee will be "created, produced, or distributed at the request or suggestion" of Rep. Flake or his agents, 11 C.F.R. 109.21(d)(1), given Rep. Flake's intimate involvement in the creation of the Committee, and the integral role he seeks to play on a continuing basis in its operations. *See, e.g.* Letter of March 24 at 3 ("If permitted, the Committee wishes Rep. Flake and his agents to bring their expertise to bear on all the Committee's public communications... The Committee would also like Rep. Flake to play a role in selecting the media firm used to create the Committee's public communications and to receive his and his agents ideas for specific scripts and copy.")

For the same reason, the communications will meet the "conduct" standard if, with regard to a given ad, Rep. Flake or his agents is "materially involved" in decisions regarding the ad, including its content, intended audience, timing or other similar details. *Id.* at (d)(2). The same is true if the Committee creates, produces or distributes an ad after "substantial discussion" about the communication with Rep. Flake or his agent. *Id.* at (d)(3). Given the circumstances presented by the requester, all of these standards appear to be met and the Commission's coordination rules will accordingly be applicable.

Conclusion

The Commission should not respond to the AOR because of its improper form.

If the Commission does respond, given the facts presented in this AOR and based on the analysis discussed above, the Commission should advise the requester that the Committee is "established, financed, maintained or controlled" by Rep. Flake, and therefore can raise and spend only federally permissible funds for Federal election activities or activities "in connection with" an election. Because of Rep. Flake's entanglement with the Committee, the Commission should also advise the Committee that all of its activities will be "in connection with" an election and therefore must be funded with federally permissible funds.

Further, any ad that meets the definition of an "electioneering communication" must comply with the provisions of Title II of BCRA, and cannot be paid for by the Committee if it is organized as a corporation itself.

Finally, the facts presented by the AOR show that Rep. Flake will likely be "coordinating" with the Committee, including on the preparation and dissemination of public communications that refer to him or to Senator McCain, within a period 120 days before an election. Any coordination on such an ad would result in a "contribution" from the Committee to Rep. Flake that must comply with the source prohibitions and contribution limits of Federal law.

We appreciate the opportunity to provide these comments.

Sincerely,

/s/ Donald J. Simon

Donald J. Simon

DJS:skk