



FEDERAL ELECTION COMMISSION
Washington, DC 20463

APR 10 12 52 PM '96

April 10, 1996

MEMORANDUM

TO: The Commission

THROUGH: John C. Sunna
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael Marinelli
Attorney

SUBJECT: Revised Draft of Advisory Opinion 1996-3

Attached is the revised draft of the subject opinion. We request that this draft be placed on the agenda for April 18, 1996.

The changes made to the first draft (Agenda Document #96-22) reflect the further and more complete information regarding the outlays and disbursements of the requester. This information is incorporated into the chart found on page three, the discussion following on page four, and in new footnotes four and five, on pages three and four. There is also further elaboration in footnote three of the types of organizations receiving donations from the requester.

Attachment

AGENDA ITEM
For Meeting of: APR 18 1996

DRAFT

1
2 **ADVISORY OPINION 1996-3**

3
4 **Irwin Gostin**
5 **The Breeden-Schmidt Foundation**
6 **PO Box 711718**
7 **San Diego, California 92171-1718**

8
9 **Dear Mr. Gostin:**

10
11 **This refers to your letters dated April 6, March 1 and January 9, 1996, and December 9,**
12 **1995, which request advice concerning application of the Federal Election Campaign Act of**
13 **1971, as amended ("the Act"), to the possible status of The Breeden-Schmidt Foundation ("the**
14 **Foundation") as a political committee.**

15 **You state that the Foundation was established in order to receive a testamentary**
16 **distribution from Wilmer Breeden. Mr. Breeden left the funds to a friend, in trust, to be used for**
17 **the purpose of advancing the principles of socialism. You state that since its formation, the**
18 **Foundation has not solicited nor received funds from any other source. Its only receipts have**
19 **been income on the investment of the "original charitable contribution" from the estate of**
20 **Mr. Breeden.¹**

21 **You explain that periodic distributions are made from Foundation assets for various**
22 **purposes that its Board of Trustees deem to be in accordance with the principles of the**
23 **Foundation's creation. The Foundation has made political contributions to Federal candidates in**
24 **the past and proposes to continue making them, but wishes to know whether this action would**

¹ Your request states that the Foundation is unincorporated and is not a labor union. Furthermore, the trust documents included with your request state that the Foundation "is not intended to be a charitable trust for tax purposes, although the trustees may, if they unanimously determine, apply for such designation and tax status."

1 cause the Foundation to become a political committee. If it does become a political committee,
2 the Foundation inquires as to the requirements that govern its contributions in Federal elections.

3 The term "political committee" means any committee, club, association, or other group of
4 persons which receives contributions aggregating in excess of \$1,000 during a calendar year, or
5 which makes expenditures aggregating in excess of \$1,000 during a calendar year. 2 U.S.C.
6 §431(4)(A).² The Commission notes, however, that when determining if an entity should be
7 treated as a political committee, the standard used is whether a major purpose of the organization
8 is campaign activity; that is, making payments or donations to influence any election to public
9 office. See 26 U.S.C. §527(e)(1), (2); Advisory Opinions 1995-11 and 1994-25; and *Akins v.*
10 *Federal Election Commission*, No. 92-1864 (D.D.C. March 30, 1994). Appellate court judgment
11 vacated-rehearing *en banc* granted, No. 94-5088 (D.C. Cir. Jan 26 1995). See also *Federal*
12 *Election Commission v. Massachusetts Citizens for Life, Inc.* ("MCFL"), 479 U.S. 238, 262
13 (1986) (The Court stated that if MCFL's independent expenditures "become so extensive that the
14 organization's major purpose may be regarded as campaign activity, the corporation would be
15 classified as a political committee.")

16 The declaration of trust under which the Foundation was created states that the funds of
17 the Foundation are to be used to:

18 pay out such sums as contributions and subsidies and for
19 conducting operations themselves to persons, entities and causes
20 advancing the principles of Socialism and those causes related to
21 Socialism. This shall include, but not be limited to, subsidizing
22 publications, establishing and conducting reading rooms,

² Other definitions, not applicable here, apply to separate segregated funds and local committees of political parties. See 2 U.S.C. §431(4)(B), (4)(C).

1 supporting radio, television and the newspaper media and
2 candidates for public office.

3
4 You also included information in your request regarding the number of political contributions
5 that the Foundation has made since its formation. The approximate total amounts of various
6 disbursements and political contributions for Federal elections for the years 1990 to 1995 are
7 shown below. The percentages of contributions compared to all outlays is also stated.

	1990	1991	1992	1993	1994	1995
Total outlays	3,137	14,187	46,608	83,438	50,125	NA
"Nonpolitical" donations and programs ³	1,347	12,688.	16,878	38,415	19,765	25,500
Taxes/operating expenses	290	499	24,930	41,423	26,260	NA
Contributions to State and local candidates	1,000	500	1,000	3,000	1,000	
Contributions to Federal candidates	500	500	3,800	600	3,100	1,500
Total contributions	1,500	1,000	4,800	3,600	4,100	1,500
% of total outlays	48%	7%	10%	4%	8%	NA ⁴

³ The organizations receiving donations from the Foundation include educational libraries and groups such as the American Civil Liberties Union. Your March 1st response indicates that funds were expended to assist various programs, meetings and conventions of the Democratic Socialists of America and the Communist Party. However, these groups, according to public records, did not nominate Federal candidates from 1992 to 1995. Information available to the Commission also indicates that these organizations did not nominate state candidates during the same period of time

⁴ In your April 6 letter, you state that while complete figures for 1995 were not yet available, the amounts spent for administrative expenses and the total outlays of the Foundation would be similar to the 1994 amounts.

1 For the period from 1991 to 1994, the annual amount of the Foundation's political contributions
2 for both State and Federal elections varied from 7% to 10% of total distributions for each year.⁵
3 In Federal election years (1992 and 1994), the yearly contribution range was 10% and 8% of the
4 total disbursements for the year. In other years, the variation was 7% and 4%. The highest
5 contribution total in any one year was under \$5,000 and for the six year period (1990 to 1995)
6 contributions totaled \$16,500 in Federal and State election contributions. It is also relevant that
7 the supporting documents, you provided, do not indicate that the Foundation's disbursements,
8 other than its political contributions, are used in any way related to election campaigns. For
9 example, the documents do not state that the Foundation publishes a newsletter or distributes
10 other materials that feature candidates or Members of Congress. Furthermore, there is no
11 indication that the Foundation attempts to recruit candidates for public office or solicit other
12 personnel to assist as volunteers, or otherwise, in the campaigns of candidates for public office.⁶

13 The pattern of the Foundation's contributions indicates that, while the declaration of trust
14 empowers the Foundation to make political contributions, these have not been of a magnitude,
15 either in absolute terms or in relation to total distributions, to be a major purpose of the
16 Foundation. Taking all these factors together, therefore, the Commission concludes that, in the
17 specific circumstances presented in your request, the Foundation's activities would not cause it to
18 be considered a political committee under the Act. The Commission cautions you that this

⁵ The Commission notes that the 1990 political contributions were 48% of all outlays. However, this percentage is not viewed as significant as it occurred in the initial year of the Foundation's operation when outlays were, in absolute terms, small compared with subsequent years, and the Foundation's disbursement programs were not yet fully developed..

⁶ The documents also do not indicate that the Foundation sponsors events where candidates appear to speak about campaign issues.

1 conclusion is valid only insofar as the Foundation does not alter the recent pattern of its activities
2 (including its disbursements) which is to make only occasional contributions in a total amount
3 that does not constitute a major part of the Foundation's yearly disbursements.⁷

4 Although not explicitly asked in your request, your inquiry raises the issues of attribution
5 of the contributions made by the Foundation. The Commission notes again that the Foundation
6 is the successor in interest to the estate of Mr. Breeden and was created by a testamentary trust.
7 Furthermore, the ability of the Foundation, through its trustees, to make contributions is
8 explicitly limited by the purposes and conditions set forth by Mr. Breeden. In this respect, the
9 situation of the Foundation is somewhat similar, though not identical, to contributions made by
10 the testamentary estate of a decedent. See Advisory Opinions 1983-13, 1986-24, and 1988-8. In
11 these opinions, because the Commission viewed the testamentary estate of a decedent as the
12 successor legal entity to the testator, it applied the Act and its limits to the estate as the alter ego
13 of the living testator. Applying that principle to the specific circumstances here, the Commission
14 concludes that the contributions made by the Foundation should be attributed to the successor in
15 interest to Mr. Breeden and his estate, the Foundation, rather than to the Foundation's trustees.

16 The Commission expresses no opinion regarding any tax ramifications of the
17 Foundation's proposed activities because these issues are not within its jurisdiction.

⁷ Insofar as the activity of the Foundation is to make disbursements, the analysis of its activities has focused on the political contributions the Foundation has made and their relationship to other disbursements. A more extensive and different analysis would be required for other types of organizations, especially for those that promote volunteer activities on public policy issues.

