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December 5, 2003

**BY FACSIMILE** (AND REGULAR MAIL)

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General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, DC 20463

AOR 2003-38

**Re: Engel for Congress**

Dear Mr. Norton:

Pursuant to 2 U.S.C. § 437f (2003), this letter requests an advisory opinion from the Federal Election Commission on behalf of Engel for Congress ("Requestor"). Requestor asks whether the Federal Election Campaign Act, as amended, 2 U.S.C. § 431 *et seq.*, limits his ability to participate in raising and spending funds for reapportionment-related activities in his home state.

**FACTUAL DISCUSSION**

Requestor is a Member of the United States House of Representatives from the Seventeenth Congressional District of New York. He is a candidate for re-election to that seat in 2004, having filed a Statement of Candidacy with the Commission.

Democratic leaders in Requestor's home state, including Democratic Members of Congress such as himself, have traditionally attempted to influence the state legislature's congressional reapportionment decisions and become involved in litigation concerning the redistricting process. Toward this end, in previous years, they have formed organizations not registered with the Commission and exempt from taxation under the Internal Revenue Code. House rules have allowed Members to associate and raise money freely for such funds, provided that they represent the views of a wide range of constituents, and are not subject to the Act's restrictions. *See, e.g.,* Committee on Standards of Official Conduct, HOUSE ETHICS MANUAL, at 278 (Apr. 1992).

This year, there were lengthy court proceedings involving the New York Congressional map, including an action captioned Rodriguez v. Pataki, (02 Civ. 618). This lawsuit proceeded before a three-judge panel in federal court in the Southern District of New York. Interested voters and the Requestor participated in this lawsuit and incurred legal fees. Requestor's involvement in redistricting proposals was not intended to influence any election and has not involved any advocacy of any candidate to office. Requestor would like to participate in the formation and operation of a redistricting committee, as he has done in years past, to pay for the legal fees incurred in connection with the redistricting litigation.

### **LEGAL DISCUSSION**

#### **A. As a Federal Candidate and Officeholder, the Requestor May Freely Raise and Spend Funds for Redistricting and Reapportionment**

The Commission has consistently held that the "influencing of the reapportionment decisions of a state legislature, although a political process, is not considered election-influencing activity subject to the requirements of the Act." Advisory Opinion 1981-35.

Accordingly, the Commission has consistently allowed Members of Congress to raise and receive unrestricted funds for redistricting expenses. See Advisory Opinion 1982-37. While a principal campaign committee itself could not accept unrestricted funds, a Member remained free to set up a separate entity "for the purposes of paying expenses related to redistricting or reapportionment." Advisory Opinion 1990-23.

When Congress passed the Bipartisan Campaign Reform Act of 2002, it showed no clear intent to disturb this practice. While the Commission had consistently held redistricting and reapportionment activity not to be in connection with *any* election, BCRA limited Federal candidate and officeholder fundraising *only* in connection with elections. Section 441i(e)(1)(A) limits activity "in connection with an election for Federal office," and section 441i(e)(1)(B) limits activity "in connection with any election other than an election for Federal office . . ."

Relying on the fact that BCRA's restrictions on officerholder and candidate fundraising apply only in connection with elections, the Commission recently allowed

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Federal officeholders to establish, maintain and raise funds for legal defense trusts, even when the funds exceed the Act's source restrictions and contribution limits. *See* Advisory Opinion 2003-15 (issued to Rep. Majette). The Commission cited the clear line of pre-BCRA advisory opinions that had allowed such fundraising, and concluded that BCRA "does not change this result." *Id.* at 4. It held that there had been "no indication in the legislative history of BCRA that Congress intended section 441i(e)(1)(A) to change an area that is both well-familiar to members of Congress and subject of longstanding interpretation through statements of Congressional policy and Commission advisory opinions." *Id.*

The facts in Advisory Opinion 2003-15 may not be materially indistinguishable from those presented here. Yet the same legal rule applies, and the same outcome should result. Section 441i(e)(1) restricts officeholder activity only in connection with elections. The Commission has consistently held both officeholder legal defense funds and redistricting activities not to be in connection with any election. It has allowed officeholders to continue raising and spending funds on an unrestricted basis for the former, and should do the same for the latter.

For these reasons, the Committee respectfully requests that the proposed transactions be allowed.

Very truly yours,

  
Cassandra Lentchner