



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

ADVISORY OPINION 2005-10

**CONCURRING STATEMENT OF
COMMISSIONER ELLEN L. WEINTRAUB
COMMISSIONER DANNY LEE McDONALD**

In the Bipartisan Campaign Reform Act ("BCRA"), Congress prohibited federal officeholders and candidates from raising and spending funds, outside the limits and prohibitions contained in the Act, "in connection with an election for Federal office" or "in connection with an election other than an election for Federal office." 2 U.S.C. 441i(e)(1). This request presents the question of whether a federal officeholder's activities in support of or opposition to a ballot measure are in all instances limited by this restriction. We conclude that while the Commission in other circumstances has appropriately restricted such fundraising activities, they are not *per se* limited, and need not be limited in the circumstances presented by the requestors.

The request was submitted by Representatives Howard Berman and John Doolittle and pertains to ballot measures to be decided through a special referendum in November of 2005. Although Reps. Berman and Doolittle are candidates for reelection to the seats they currently hold, neither they nor any other federal candidate will appear on the November 2005 ballot.

The law has long distinguished between efforts related to ballot measures and those intended to influence candidate elections. Advocacy related to ballot measures is generally seen as issue-, rather than candidate-driven, and the funding of such efforts has been acknowledged to present less potential for corruption. This distinction has been recognized by the Supreme Court,¹ the IRS,² and in a series of opinions by this agency.³

¹ See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue."); accord *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 298 (1981).

² See Private Letter Ruling 99-25-051 (June 25, 1999); 26 C.F.R. 56.4911-2(b)(1)(iii), 56-4911-2(d)(1)(ii).

³ See Advisory Opinions 1989-32; 1984-62, n.2; 1982-10; and 1980-95.

This was the backdrop against which BCRA was enacted. There is no legislative history identifying ballot measure activity as a source of corruption that BCRA aimed to remedy. BCRA did not direct any change to the Commission regulation defining an "election" as the process by which individuals seek office,⁴ nor did the Commission make any change to that regulation in its post-BCRA rulemakings. Despite heavy scrutiny by the law's sponsors of all of the Commission's rulemakings implementing BCRA, the sponsors never challenged that omission.

The foregoing merely establishes that a federal officeholder's efforts to support or oppose a ballot measure are not *per se* restricted under BCRA. It does not end the analysis. As has been noted, the risks of corruption may be minimized in the ballot initiative context, but preventing corruption (or the appearance of corruption) was only one of the goals of BCRA. The second animating philosophy of the law is to prevent circumvention.

In BCRA, Congress made a conscious decision to limit certain non-federal activity that had the potential to influence federal elections.⁵ The concern was that without such limits, federal candidates could circumvent the law by raising non-federal funds for State party or candidate activities that would benefit all the party's candidates, federal and non-federal. Where a federal candidate proposes to establish, finance, maintain, and control a ballot measure committee that will raise and spend non-federal funds to promote (or oppose) an initiative that is on the same ballot on which he is running for election, that anti-circumvention purpose is implicated. That is the circumstance that was presented to the Commission by Representative Flake in Advisory Opinion Request 2003-12, and our analysis of the instant request requires some discussion of that earlier opinion.

When considering Rep. Flake's request, Commission consensus developed around a compromise ruling with which perhaps no Commissioner was completely satisfied. While we continue to believe that the result in AO 2003-12 was substantially correct, we believe that the reasoning was faulty. In that opinion, the Commission concluded that much of what Rep. Flake proposed to do should be regulated because it was "in connection with an election *other than* an election for Federal office."⁶ We believe that the better analysis, and one more reflective of the real issues presented by Rep. Flake, would have rested on a conclusion that where a federal candidate establishes, maintains, finances or controls a ballot measure committee, on an issue with which that candidate is closely identified, and the committee raises and spends soft money to influence voting on a day on which that candidate is himself on the ballot, then the candidate and the committee's activities are "in connection with an election for *Federal* office," that is, the candidate's own election.

⁴ See 11 C.F.R. 100.2.

⁵ See 2 U.S.C. 441i(b).

⁶ For the sake of compromise, the Commission drew a distinction between activities that occur before the initiative qualifies for the ballot (which were not regulated under the opinion), and those that take place after the initiative so qualifies (which were regulated). We would have preferred to have regulated the pre-qualification activities as well.

Representative Flake's proposal to use the money he raised to air ads that would prominently feature him during the height of his reelection race underscores the common sense of the rationale that we are advocating. Such a rationale would have been consistent with Commission precedent establishing that while ballot measure activities are not generally regulated under the Federal Election Campaign Act ("FECA"), a ballot measure committee can be subject to that law when it is inextricably linked to a candidate who is running on the same ballot.⁷ Such a conclusion would have been consistent with Congress's determination in BCRA that proximity in time to a federal election can support an inference that what would otherwise be considered non-federal activity may be deemed to be "federal election activity."⁸ And such a conclusion would have been consistent with the result then urged upon the Commission by prominent campaign finance reformers. During the Commission's consideration of Rep. Flake's request, the Center for Responsive Politics, for example, submitted comments that affirmed:

[W]e first emphasize two things that the FECA and BCRA do not regulate. First, these statutes do not limit Representative Flake's ability to publicly express his support for the ballot referendum, which he has the right to do without limitation. Second, FECA and BCRA generally do not impact the activities of a ballot initiative and ballot referenda committee, so long as the committee is not established, financed, maintained or controlled by a federal candidate of officeholder.⁹

Our analysis also draws directly on the Supreme Court's reasoning in *McConnell v. FEC*. In that opinion, the Court upheld the candidate and officeholder solicitation restrictions of section 441i(e) as "valid anti-circumvention measures." Focusing on the practical impact on federal elections, the Court stated:

Without some restriction on solicitations, federal candidates and officeholders could easily avoid FECA's contribution limits by soliciting funds from large donors and restricted sources to like-minded organizations engaging in *federal* election activities.¹⁰

What are the ramifications for the current request of such an analysis? The current request differs from AO 2003-12 in two key respects: (1) Neither the requestors, nor any other federal candidate, will appear on the November 2005 ballot. (2) The ballot measure committees that the requestors propose to support have not been established, financed, maintained, or controlled by a federal candidate or officeholder. Thus, there is

⁷ See Advisory Opinion 1989-32.

⁸ See 2 U.S.C. 441i(b), 431(20)(A).

⁹ Comment on AO 2003-12, submitted by Lawrence Noble on behalf of the Center for Responsive Politics and Paul Sanford on behalf of CRP's FEC Watch, at 2 (April 21, 2003), available at <<http://www.fec.gov/aos/2003/aor2003-12com-b.pdf>>.

¹⁰ *McConnell v. FEC*, 540 U.S. 93, 182-83 (2003) (emphasis added). See also *id.* at 167 (tailored restrictions on federal election activity by state parties upheld based on the direct benefit that such activity confers on federal candidates).

no nexus to an "election," as historically and currently defined under FECA. In light of these facts, we supported the conclusion adopted by the Commission that the activities proposed by the requestors are permissible in that they are neither "in connection with an election for Federal office" nor "in connection with an election other than an election for Federal office."¹¹

It has been suggested that BCRA generally prohibits federal officeholders from raising money outside the scope of the Act, regardless of whether that money would be used to influence federal elections. While some may believe this is consistent with the spirit of BCRA, it is not consistent with the plain language. For example, nothing in BCRA or FECA limits an officeholder in raising contributions for foundations, educational institutions, or policy institutes from sources that are otherwise prohibited from contributing to campaign committees. In 2 U.S.C. 441i(e)(4), BCRA expressly permits a federal candidate or officeholder to raise unlimited funds for a 501(c) organization as long as its principal purpose is not to carry out voter registration and GOTV activities for a federal election and the solicitation does not specify how the funds are to be spent.

This is one of the ironies of the current request and the heat it has generated. Most ballot measure committees are organized under section 501(c)(4) of the tax code.¹² Thus, BCRA explicitly authorizes most of the activity in which the requestors seek to engage.

The Commission received comments from a number of strong supporters of BCRA, both within and outside of Congress, supporting the result that the Commission reached in this opinion and finding it fully consistent with the letter, spirit, and intent of BCRA. As pointed out by Professor Daniel H. Lowenstein (a former chair of the California Fair Political Practices Commission and a former Common Cause board member):

[M]ost of the specific concerns of BCRA are far removed from the activities at issue here. Members of Congress who raise money for their side of the controversial ballot questions will not realize the sort of advantage to their campaigns that BCRA restrictions aim to limit. This is not a federal election year; the monies raised for these ballot initiatives will not be devoted to "Federal election activity," . . . that will enhance any federal candidate's competitive position if he chooses to run for reelection a full year later. . . .

Congressmen Berman and Doolittle do not seek to control either the campaigns or the committees that will be running the campaigns on these issues. They are not running for office and cannot,

¹¹ 2 U.S.C. 441i(e)(1).

¹² See comment submitted by Joseph E. Sandler on behalf of the Ballot Initiative Strategy Center, Inc. (August 17, 2005), available at <<http://www.fec.gov/acs/2005/acr2005-10xparte4.pdf>>.

in theory or practice, derive electoral benefit from the campaign activity they seek to support.¹³

We believe it is important to emphasize that in our view, this Advisory Opinion is fairly narrow in scope. Its import is limited to those circumstances where a federal candidate seeks to raise funds for a ballot measure committee that he or she does not establish, maintain, finance, or control; where no federal candidate appears on the same ballot; and where the ballot measure committee is not (as most are) a 501(c) organization for which federal candidates are already explicitly authorized to raise funds under 2 U.S.C. 441i(e)(4).

September 2, 2005


Ellen L. Weintraub, Commissioner


Danny Lee McDonald, Commissioner

¹³ Comment submitted by Professor Daniel H. Lowenstein, at 3 (August 16, 2005), available at <<http://www.fec.gov/aoe/2005/aor2005-10comments2.pdf>>.