

November 5, 2007

By Electronic Mail

Thomasenia Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

2007 NOV -6 A 10:48

Re: Comments on Advisory Opinion Request 2007-28

Dear Ms. Duncan:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to AOR 2007-28, an advisory opinion request submitted by U.S. Representatives Kevin McCarthy (R-CA) and Devin Nunes (R-CA), seeking the Commission's opinion as to whether the Congressmen may "freely raise funds" – *i.e.*, solicit soft money – for committees formed to support the qualification and/or passage of a California state ballot initiative on either the June 3, 2008 primary election ballot or the November 4, 2008¹ general election ballot. *See* AOR 2007-28 at 1. Both requestors are candidates for the U.S. House of Representatives on the June 3 primary election ballot and, if successful in that election, will be candidates on the November 4 general election ballot. *See* AOR 2007-28 at 2.²

The Federal Election Campaign Act (FECA), as amended by Bipartisan Campaign Reform Act of 2002 (BCRA), along with existing Commission regulations, require the Commission to advise Congressmen McCarthy and Nunes that they may not "freely raise funds" in connection with California's 2008 June 3 primary or November 4 general elections. *See* 2 U.S.C. §§ 431(1) (defining "election") and 441i(e)(1) (ban on soft money solicitation by federal candidates in connection with any election). *See also* 11 C.F.R. §§ 300.60 and 300.62.

Despite the requestors' best efforts to complicate the matter, the appropriate legal analysis is simple. The Commission need answer only two straightforward questions:

¹ AOR 2007-28 mistakenly identifies the November 2008 general election as taking place November 5, when in fact the general election will be held November 4. *See* Cal. Secretary of State Debra Bowen, 2008 Cal. Election Calendar; *available at* http://www.sos.ca.gov/elections/elections_calendar2008.htm.

² The requestors state that the initiative committees for which they seek to raise funds are "neither established, financed, maintained or controlled by" by the requestors or by other persons covered by the BCRA soft money fundraising prohibition. *See* AOR 2007-28 at 1.

- Are the requestors within the class of persons restricted by the soft money solicitation prohibition of section 441i(e)(1) – *i.e.*, are the requestors federal candidates, federal officeholders, or agents of federal candidates or officeholders?
- If so, is the proposed activity covered by the soft money solicitation prohibition of section 441i(e)(1) – *i.e.*, are the funds being solicited or directed in connection with an “election”?

As to the first question, Congressmen McCarthy and Nunes are both federal officeholders and federal candidates and thus are clearly subject to the soft money prohibition of section 441i(e)(1).

And as to the second question, the activity proposed by Congressmen McCarthy and Nunes – soliciting and directing funds for an initiative committee whose activities relate to a ballot proposition that will appear on the same ballot that they will be on as candidates for federal office – is not only in connection with “an election,” but is in connection with an “election for Federal office” where federal candidates are on the ballot and stand to benefit from the soft money expenditures that the initiative committee makes.

Because both questions above are answered in the affirmative, section 441i(e) clearly restricts the Congressmen’s proposed activities.

We strongly urge the Commission to advise Congressmen McCarthy and Nunes that their solicitation and direction of funds in connection with California’s 2008 June and November elections must comport with FECA amount limitations, source prohibitions and reporting requirements as required by section 441i(e)(1)(A).

1. BCRA’s legislative history, purpose and text make clear that Congressmen McCarthy and Nunes are prohibited from soliciting soft money in connection with California’s 2008 June and November elections.

FECA, as amended by BCRA, states that federal candidates, officeholders and their agents shall not “solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office ... unless the funds are subject to the limitations, prohibitions and reporting requirements” of FECA. 2 U.S.C. § 441i(e)(1)(A).³

In other words, when a federal candidate or officeholder raises funds “in connection with” a federal election, BCRA requires that he or she raise only hard money, subject to FECA amount limitations, source prohibitions, and reporting requirements.

³ Section 441i(e) also provides that federal candidates and officeholders shall not solicit or spend money in connection with non-federal elections “unless the funds are not in excess of the amounts permitted” by FECA, and “are not from sources prohibited [by FECA] from making contributions in connection with an election for Federal office.” 2 U.S.C. § 441i(e)(1)(B); *see also* 11 C.F.R. §§ 300.60 and 300.62. Though we believe this provision is applicable to state ballot measure elections, such as described by this AOR, the Commission need not reach that issue here. *See* n.13, *infra*.

BCRA's legislative history makes clear that this prohibition on soft money fundraising by federal candidates and officeholders is the very foundation of BCRA. One of BCRA's principal sponsors explained: "It is a key purpose of [BCRA] to stop the use of soft money as a means of buying influence and access with Federal officeholders and candidates." 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). Even opponents of BCRA understood the intent and effect of BCRA's soft money ban. Senator Hatch (R-UT) explained to his colleagues on the Senate floor: "The primary provision of McCain-Feingold essentially bans soft money by making it unlawful for national political parties and Federal candidates to solicit or receive any funds not subject to the hard money limitations of the Federal Election Campaign Act." 147 Cong. Rec. S3240 (daily ed. April 2, 2001) (statement of Sen. Hatch).

Congress recognized that the improper influence of soft money on federal officeholders depends not simply on an officeholder's actual receipt of soft money contributions, but on an officeholder's successful solicitation of soft money contributions – regardless of whether or not the officeholder controls the recipient organization. One BCRA sponsor bluntly stated: "[W]e will be taking the solicitation of big money by people in power ... out of American politics and with it will go the appearances of favoritism and corruption." 148 Cong. Rec. S2116 (daily ed. Mar. 20, 2002) (statement of Sen. Levin) (emphasis added). Senator McCain (R-AZ) likewise emphasized the importance of BCRA's ban on the solicitation of soft money:

These [BCRA] provisions break no new conceptual grounds in either public policy or constitutional law. ... Indeed, statutes like these have been on the books for over 100 years for the same reason that we're prohibiting certain solicitations – to deter the opportunity for corruption to grow and flourish, to maintain the integrity of our political system, and to prevent any appearance that our Federal laws, policies, or activities can be inappropriately compromised or sold.

148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

Furthermore, and most importantly with respect to this AOR, Congress understood that BCRA's prohibition on the solicitation of soft money was vital to preventing circumvention of the prohibition on candidate and party receipt of soft money. Senator Snowe (R-ME), another key BCRA co-sponsor, explicitly noted the importance of the solicitation ban to preventing circumvention of BCRA's ban on officeholder and party receipt of soft money:

Now, some of our opponents have said that we are simply opening the floodgates in allowing soft money to now be channeled through these independent groups for electioneering purposes. To that, I would say that this bill would prohibit members from directing money to these groups to affect elections, so that would cut out an entire avenue of solicitation for funds, not to mention any real or perceived "quid pro quo."

148 Cong. Rec. S2136 (daily ed. Mar. 20, 2002) (statement of Sen. Snowe) (emphasis added).

BCRA's legislative history, purpose and text confirm that section 441i(e)(1) was intended to eliminate the threat of real and apparent corruption resulting from federal officeholder solicitation of soft money for themselves or for other groups in connection with elections. Nowhere does BCRA's legislative history, purpose, or text provide or suggest that the application of section 441i(e)(1) depends on an officeholder's control of the recipient group or committee, or on the type of the election (*i.e.*, federal or non-federal) for which the funds are solicited.⁴

2. The Supreme Court in *McConnell* upheld BCRA's prohibition on federal officeholder solicitation of soft money for committees over which the officeholder has no control, and regardless of the ends to which the funds are ultimately put.

The Supreme Court in *McConnell v. FEC*, 540 U.S. 93, 181-84 (2003), upheld against constitutional challenge the section 441i(e)(1) ban on solicitation of soft money by federal candidates and officeholders. The Court began its analysis by examining the BCRA prohibition on direct receipt of soft money by federal candidates and officeholders. The Court noted:

No party seriously questions the constitutionality of [BCRA's] general ban on donations of soft money made directly to federal candidates and officeholders, their agents, or entities established or controlled by them. Even on the narrowest reading of *Buckley*, a regulation restricting donations to a federal candidate, regardless of the ends to which those funds are ultimately put, qualifies as a contribution limit subject to less rigorous scrutiny. Such donations have only marginal speech and associational value, but at the same time pose a substantial threat of corruption. By severing the most direct link between the soft-money donor and the federal candidate, [BCRA's] ban on donations of soft money is closely drawn to prevent the corruption or the appearance of corruption of federal candidates and officeholders.

McConnell, 540 U.S. at 182 (emphasis added).

The Court then went on to examine the constitutionality of the BCRA ban on soft money solicitations by federal candidates and officeholders, such as Congressmen McCarthy and Nunes. The Court upheld the solicitation ban, reasoning:

[the] restrictions on solicitations are justified as valid anticircumvention measures. Large soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how

⁴ Although the type of election (*i.e.*, federal or non-federal) does not affect the application of section 441i(e)(1), the type of election does affect the scope of regulation under section 441i(e)(1). Funds raised in connection with federal elections must comport with FECA amount limitations, source prohibitions, and reporting requirements under section 441i(e)(1)(A), while funds raised in connection with non-federal elections must comport with FECA amount limitations and source prohibitions, but not reporting requirements. See 2 U.S.C. §§ 441i(e)(1)(A) and (B).

the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself.

McConnell, 540 U.S. at 182 (emphasis added).

The *McConnell* Court thus upheld the soft money solicitation ban for federal candidates and officeholders as a closely drawn, constitutionally permissible means of preventing corruption and circumvention of existing contribution limits, even when the candidate's solicitation is for the benefit of a committee over which the candidate has no control and regardless of the election-related ends to which those funds are ultimately put.

Thus, neither the candidate's control of the recipient committee (or lack thereof), nor the recipient committee's use of the funds, are relevant factors in the application of section 441i(e)(1). The argument by Congressmen McCarthy and Nunes that such factors are relevant is without merit.

3. Commission regulations reinforce the BCRA provision prohibiting Congressmen McCarthy and Nunes from soliciting soft money in connection with California's 2008 June and November elections.

Commission regulations define "election" to mean the "process by which individuals, whether opposed or unopposed, seek nomination for election, or election, to Federal office." 11 C.F.R. § 100.2(a).⁵ California's 2008 June 3 and November 4 elections clearly meet this definition. Furthermore, Congressmen McCarthy and Nunes clearly state that they "will be appearing on the June 3, 2008 California Statewide Primary election [ballot] as candidates for re-election to the seats they currently hold[.]" AOR 2007-28 at 2, and, if successful, will then appear on the November 4, 2008 California general election ballot. *Id.*

Commission regulations implementing the section 441i(e)(1) soft money ban state that individuals holding federal office shall not:

solicit, receive, direct, transfer, spend, or disburse funds in connection with an election for Federal office, including funds for any Federal election activity as defined in 11 CFR 100.24, unless the amounts consist of Federal funds that are subject to the limitations, prohibitions, and reporting requirements of the Act.

11 C.F.R. §§ 300.60 and 300.61 (emphasis added).⁶

⁵ FECA itself defines "election" more broadly to include any "general, special, primary, or runoff election." 2 U.S.C. § 431(1)(a).

⁶ In the Commission's Explanation and Justification for sections 300.60 and 300.61, the Commission noted that a commenter in the rulemaking "urged the Commission to construe [section 441i(e)] to prohibit a candidate only from raising non-Federal funds that would eventually benefit the candidate's own campaign." See Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, Final Rules and Explanation and Justification, 67 Fed. Reg. 49064, 49106 (July 29, 2002). The

BCRA and the Commission's regulations in turn define "Federal election activity" ("FEA") to include voter registration activity (*i.e.*, contacting individuals to assist them in registering to vote) within 120 days preceding a federal election, as well as all of the following activities conducted "in connection with an election in which one or more candidates for Federal office appears on the ballot (regardless of whether one or more candidates for State or local office also appears on the ballot)":

- voter identification (*i.e.*, acquiring information about potential voters);
- generic campaign activity (*i.e.*, a public communication that promotes or opposes a political party and does not promote or oppose a clearly identified candidate); and
- get-out-the-vote activity (*i.e.*, contacting registered voters to assist them in engaging in the act of voting).

See 2 U.S.C. § 431(20)(A)(ii) (emphasis added); *see also* 11 C.F.R. §§ 100.24 and 100.25.

Congressmen McCarthy and Nunes propose to raise soft money that will be spent directly in connection with the 2008 June and November federal elections – to engage and turn out voters in those elections, generally; and most likely to pay for activities that meet the federal law definition of FEA (*e.g.*, voter registration, voter identification and GOTV). Indeed, the Congressmen explicitly acknowledge that "they cannot affirm that such committees [that they propose to raise soft money for] will not engage in *any* federal election activity." AOR 2007-28 at 7 (emphasis in original). Further, the Congressmen explicitly acknowledge that ballot measure committees "usually engage in get-out-the-vote efforts," but argue, implausibly, that such ballot measure GOTV efforts "are solely to obtain votes for the ballot initiative and never to mobilize voters for candidates." AOR 2007-28 at 8.

Putting aside the Congressmen's claims that ballot measure GOTV efforts are not intended to mobilize voters for candidates, the simple fact is that such GOTV efforts do mobilize voters for candidates. Political scientists have demonstrated empirically that "voter turnout rates are significantly higher in presidential elections in states with more initiatives on the ballot," such as California, and that "each initiative appearing on a state's ballot increases turnout by one third of a percent, all else equal." Caroline J. Tolbert & Daniel A. Smith, *The Educative Effects of Ballot Initiatives on Voter Turnout*, Am. Pol. Research 33(2), 296 (2005).⁷ According to Tolbert and Smith, "[i]ncreased turnout in presidential elections from ballot initiatives could have significant impacts on candidate races, reshaping the electorate in favor of one candidate or the other." *Id.* at 299. And these effects are even stronger in midterm elections, when presidential candidates are not on the ballot. *Id.* Tolbert and Smith predict:

Commission flatly rejected this suggestion on the ground that it did "not find support in the statutory language for this approach." *Id.*

⁷ Available at <http://www.carolinetolbert.org/2005APR.PDF>.

As initiative elections gain use and in importance, they may play a growing role in presidential and midterm elections. As we have witnessed in California and several other states during the past decade, ballot measure proponents and opponents likely will continue to fuse their campaigns with the presidential, U.S. Senate, and gubernatorial candidates and vice versa.

Id. at 304.

The assertion by Congressmen McCarthy and Nunes that the soft money they wish to raise for ballot initiative committees will have no impact on their own elections – when they are on the same ballot as the initiative – is flatly contradicted by the leading empirical research on the subject. The spending of the ballot committee supported by the requestors is likely to have significant impact on voter turnout in the November 2008 general election and even greater impact in the June 2008 election, when there are no presidential candidates on the ballot.⁸

The Commission's regulations already acknowledge this point: they carve out an exception from the definition of FEA for ballot initiative campaigns that are not held on the date of a federal election. Under the Commission's FEA regulation, the phrase "in connection with an election in which a candidate for Federal office appears on the ballot does not include any activity or communication that is in connection with a non-Federal election that is held on a date separate from a date of any Federal election and that refers exclusively to" non-federal candidates, ballot initiatives, or the date, polling hours and locations of the non-federal elections. 11 C.F.R. § 100.24(a)(1)(iii)(A) (emphasis added). This provision makes clear that when a candidate for federal office appears on the same ballot, on the same day, as a state ballot initiative, activity meeting the definition of FEA falls within the scope of the federal candidate soft money ban at 11 C.F.R. §§ 300.60 and 300.61, which explicitly cross references this regulatory definition of FEA.

The Commission should be clear as to what is at stake in this AOR. Requestors seek permission to raise soft money for ballot committees to spend on activities that – according to empirical studies as well as common sense – will shape the electoral environment in which the federal candidates themselves are running for office: those committees will motivate voters (often on hot-button issues that are frequently the subject of ballot propositions); they will seek to register voters, and they will turn out voters to the polls, all of whom will then participate in the federal candidates' elections as well.

If the Commission mistakenly reads section 441i(e) so narrowly as to permit the solicitation of soft money here by federal candidates in a federal election year for a federal ballot, it will be authorizing massive and illegal circumvention of BCRA by federal candidates and officeholders, and in effect reconstituting the soft money system that Congress enacted legislation to ban.

⁸ See also Caroline J. Tolbert, John A. Grummel & Daniel A. Smith, *The Effects of Ballot Initiatives on Voter Turnout in the American States*, Am. Pol. Rev. 29, 643 (2001) ("states with frequent usage of citizen initiatives have higher voter turnout ... than noninitiative states in both presidential elections and midterm elections"); available at <http://www.carolinetolbert.org/2001APR.pdf>.

In short, Congressmen McCarthy and Nunes propose to engage in precisely the type of scheme to circumvent BCRA's soft money ban that Congress considered, addressed and foreclosed. Senator Snowe (R-ME) explained that BCRA's soft money ban could not be circumvented through the simple expedient of routing money through "independent groups for electioneering purposes," and that BCRA "would prohibit members from directing money to these groups to affect elections." 148 Cong. Rec. S2136 (daily ed. Mar. 20, 2002) (statement of Sen. Snowe) (emphasis added).

The Commission's regulations could not be clearer. The soft money solicitation prohibition of section 441i(e)(1)(A) applies to the fundraising activities of any federal officeholder in connection with any election for federal office, including "Federal election activities." Neither the text of the regulations, nor the Commission's Explanation and Justification for the regulations, suggest that the phrase "an election for Federal office" does not include elections in which candidates for federal office will be on the ballot simply because there will also be state ballot measures on the same ballot.

Here, the June 3, 2008 primary election and the November 4, 2008 general election will both have federal candidates – including the requestors themselves – on the ballot. Those elections thus are plainly each "an election for Federal office." For that reason, Commission regulations at sections 100.2(a), 100.24, 100.25, 300.60 and 300.61 explicitly prohibit Congressmen McCarthy and Nunes from "freely raising funds" in connection with those elections.

4. The Commission's Opinion in Ad. Op. 2005-10 pertained to an election with no federal candidates on the ballot and thus is inapplicable here.

The central issue in this AOR is whether federal candidates can raise soft money for a ballot committee that will spend that money on activities – such as get-out-the-vote drives – that are directed to the ballot in a federal election year on which those candidates appear. In this light, the only significant question presented by this AOR is whether funds solicited and directed by federal candidates to support an initiative measure that will appear on the same ballot as those federal candidates constitutes funds solicited and directed "in connection with an election for Federal office" within the meaning of section 441i(e)(1)(A).

But requestors ignore the application of section 441i(e)(1)(A), stating only that "this advisory opinion request does not seem to implicate subdivision A as the Requestors seek only to raise funds to support the qualification and campaign for a statewide ballot initiative." AOR 2007-28 at 2. For the reasons discussed above, this assertion is flatly incorrect.

Instead, the requestors characterize the issue here as "whether the qualification and/or campaign for a statewide ballot initiative constitutes *any election other than an election for Federal office.*" AOR 2007-28 at 2 (emphasis in original). Requestors rely heavily on Ad. Op. 2005-10 (Berman/Doolittle), where the Commission held that Members of Congress could raise soft money for ballot committees active in the 2005 California election.

But there is a fundamental difference between the Berman/Doolittle opinion and this AOR: in Berman/Doolittle, the solicitation by federal officeholders was directed to a ballot initiative in a non-federal, off-year election where no federal candidates were on the ballot, while here the solicitation is to be directed to an initiative taking place in a federal election year where multiple federal candidates are on the same ballot. The Commission's prior ruling in the context of a ballot campaign taking place in a non-federal election year has no bearing on the very different situation of ballot committee activities directed to a ballot that includes federal candidates.

There is an additional reason that the Berman/Doolittle opinion is of little precedential value here: there is no controlling rationale for the opinion because none of the several opinions in the case commanded a four-vote majority among Commissioners.

Berman/Doolittle distinguished (but did not expressly overrule) an earlier advisory opinion, Ad. Op. 2003-12 (Flake). In the Flake opinion, the Commission held that a federal officeholder's activities with regard to a ballot committee would be "in connection with" a non-federal election, within the meaning of section 441i(e)(1)(B). The Commission did not rely on the fact that the ballot initiative campaign was to take place in a federal election year (2004), but rather said that the ballot campaign was itself a non-federal election, within the scope of section 441i(e)(1)(B). The Commission said section 441i(e)(1)(B) "is not limited to elections for a political office, and that the activities of [the ballot committee] ... are in connection with an election other than an election for federal office."

In Berman/Doolittle, by contrast, the Commission held that Members of Congress could raise soft money for ballot committees active in the 2005 California elections.

Requestors' reliance here on the Berman/Doolittle opinion is misplaced, and based on an erroneous reading of that opinion. Although the Commission there approved a request that federal officeholders be permitted to solicit funds for a ballot initiative in an off-year (*i.e.*, non-federal) election, there was no majority reasoning in support of that conclusion. The "bare bones" Advisory Opinion itself stated only, "The Commission concludes that the restrictions on Federal candidates and officeholders in 2 U.S.C. 441i(e)(1)(A) and (B) do not apply to the fundraising activities of Representatives Berman and Doolittle in the circumstances you describe." Ad. Op. 2005-10.

Commissioner Smith voted for this opinion without explanation. Commissioners Toner and Mason supported the result and filed a concurring opinion stating that "ballot initiatives and referenda are not elections for office as a matter of law under Section 441i(e) and, therefore, the statute's soft-money fundraising restrictions do not apply to ballot measure activities."⁹

⁹ Concurring Opinion in Advisory Opinion 2005-10 of Vice Chairman Michael E. Toner and Commissioner David M. Mason, at 1. These two Commissioners noted, however at "[a]t the very least, Section 441i(e)'s fundraising restrictions do not apply to referenda and initiatives where, as here, no federal candidate appears on the ballot along with the referendum or initiative...." *Id.* at 2. This leaves open the possibility that they would agree that in the situation presented by the AOR here – where a federal candidate does appear on the ballot – section 441i(e) would apply.

But Commissioners Weintraub and McDonald supported the advisory opinion result on different, and far narrower, grounds.¹⁰ They noted a crucial difference between the Berman/Doolittle request and the Commission's earlier Flake advisory opinion: that with regard to Berman/Doolittle, "[n]either the requestors, nor any other federal candidate, will appear on the November 2005 ballot." Concurring Statement at 3. By contrast, Rep. Flake was to appear on the November 2004 ballot at issue in Ad. Op. 2003-12. Commissioners Weintraub and McDonald reiterated that the result in the Berman/Doolittle opinion "is fairly narrow in scope" and limited "to those circumstances where ... no federal candidate appears on the same ballot...." *Id.* at 5.

Commissioners Weintraub and McDonald took pains to distinguish the scenario presented by the Berman/Doolittle advisory opinion from that which was presented by the Flake opinion – opining that where a federal candidate proposes to raise "soft money to influence voting on a day on which that candidate is himself on the ballot," the fundraising and spending then is "'in connection with an election for *Federal* office,' that is, the candidate's own election." *Id.* at 2 (emphasis in original). That reasoning here would result in the application of section 441i(e)(1)(A) to the activities proposed by requestors.

Chairman Thomas dissented at length from the Berman/Doolittle advisory opinion, and would have held that section 441i(e) applies to solicitations for ballot committees by federal officeholders in an off-year election.¹¹

Thus, the Berman/Doolittle advisory opinion itself provides no analysis in support of its result, nor were there four votes in support of any one analysis.¹²

¹⁰ Advisory Opinion 2005-10, Concurring Statement of Commissioner Ellen L. Weintraub, Commissioner Danny Lee McDonald (Sept. 2, 2005).

¹¹ Dissenting Opinion of Chairman Scott E. Thomas, Advisory Opinion 2005-10 (Sept. 6, 2005). Although the vote on remanding the matter back to the General Counsel for drafting a "bare bones" advisory opinion was unanimous, Chairman Thomas makes clear in his separate dissenting statement that he viewed this "as simply a procedural vote" and it "should not be viewed as an endorsement of the eventual result produced by that redraft." He said, "I disagree with that result." Thomas Dissent at 1 n.1.

¹² For this reason, we agree with the comment made by Chairman Thomas that the Berman/Doolittle advisory opinion fails to establish any precedent:

Because the Act "clearly requires that for any *official* Commission decision there must be at least a 4-2 majority," a position adopted by less than four Commissioners is not "binding legal precedent or authority for future cases," *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988) (emphasis in original), and thus is not a statement of Commission policy. Indeed, given the failure of four Commissioners to agree on any reasoning in Advisory Opinion 2005-10, the significance of this Advisory Opinion is greatly limited. Clearly, it cannot be said that this opinion supersedes Advisory Opinion 2003-12 or other opinions construing the statutory solicitation regulations.

Thomas Dissent at 4.

Ad. Op. 2005-10 accordingly does not provide precedent for the AOR now before the Commission: the broad grounds for the holding in the Toner-Mason concurrence did not command four votes, and the narrow grounds for the holding in the Weintraub-McDonald concurrence is based on an analysis that is distinguishable here in a key element. The Berman/Doolittle advisory opinion thus does not establish Commission precedent for allowing federal candidates and officeholders to raise soft money for a ballot initiative committee in a year when those federal candidates do appear on the same ballot as the ballot proposition, the situation presented here.¹³

Conclusion

According to the facts presented in AOR 2007-28, Congressmen McCarthy and Nunes wish to solicit and direct soft money contributions in connection with an election in which they are on the ballot, *i.e.*, a federal election – activity which is clearly prohibited by section 441i(e)(1)(A).

To be clear, the fundraising activities of state ballot measure committees are not at issue in this AOR. At issue are the fundraising activities of federal candidates and officeholders with regard to an election in which those federal candidates are on the ballot.

Congress and the Supreme Court have both recognized that soft money contributions made as the result of solicitations by federal officeholders threaten real and apparent corruption of such officeholders. BCRA's legislative history, purpose and text, as well as this Commission's regulations, make clear that federal candidates and officeholders are prohibited from soliciting soft money contributions in connection with elections in which they are on the ballot – *i.e.*, federal elections.

For the above stated reasons, we urge the Commission to advise Congressmen McCarthy and Nunes that they are prohibited by 2 U.S.C. § 441i(e)(1)(A) from soliciting or directing funds in connection with California's 2008 June and November elections unless the funds are subject to the limitations, prohibitions, and reporting requirements of FECA.

We appreciate the opportunity to submit these comments.

¹³ In the event the Commission incorrectly finds that the activity proposed by Congressmen McCarthy and Nunes is not in connection with an election for federal office, the Commission should, in the alternative, find that the proposed activity is in connection with an "election other than an election for Federal office" and thus prohibited under 2 U.S.C. § 441i(e)(1)(B). This is the holding of Ad. Op. 2003-12 (Flake), where the Commission correctly concluded that the "scope of section 441i(e)(1)(B) is not limited to elections for a political office, and that the [ballot measure] activities of STMP as described in [its] request ... are in connection with an election other than an election for Federal office." Ad. Op. 2003-12 at 6. We agree with the argument presented by Chairman Thomas in support of this position in his dissent in the Berman/Doolittle advisory opinion. Thomas Dissent in Ad. Op. 2005-10 at 2-6.

Sincerely,

/s/ Fred Wertheimer

**Fred Wertheimer
Democracy 21**

/s/ J. Gerald Hebert

**J. Gerald Hebert
Paul S. Ryan
Campaign Legal Center**

**Donald J. Simon
Sonosky, Chambers, Sachse
Endreson & Perry LLP
1425 K Street NW – Suite 600
Washington, DC 20005**

Counsel to Democracy 21

**Paul S. Ryan
The Campaign Legal Center
1640 Rhode Island Avenue NW – Suite 650
Washington, DC 20036**

Counsel to the Campaign Legal Center

**Copy to: Each Commissioner
 Commission Secretary**