FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
CHIEF COMMUNICATIONS OFFICER
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY

DATE: DECEMBER 13, 2007

SUBJECT: COMMENT ON DRAFT AO 2007-28
Representatives Kevin McCarthy and
Devin Nunes

Transmitted herewith is a timely submitted comment from Donald J. Simon on behalf of Democracy 21 and the Campaign Legal Center regarding the above-captioned matter.

Proposed Advisory Opinion 2007-28 is on the agenda for Friday, December 14, 2007.

Attachment

December 12, 2007

By Electronic Mail

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

Re: Comments on Draft Advisory Opinion 2007-28

Dear Ms. Duncan:

These comments are filed on behalf of Democracy 21 and the Campaign Legal Center in response to alternative Drafts A and B for Advisory Opinion 2007-28, an advisory opinion request filed by U.S. Representatives Kevin McCarthy (R-CA) and Devin Nunes (R-CA). The AOR concerns the important issue of whether federal candidates and officeholders can solicit unrestricted soft money for a ballot initiative committee which will use the funds to qualify and support a ballot proposition that will be on the same ballot that federal candidates will be on. We previously filed comments, dated November 5, 2007, on this advisory opinion request.

For the reasons set forth below, we strongly oppose both Draft A and Draft B, and we urge the Commission to reject both approaches. Using different, but equally flawed, legal theories, both Draft Opinions would open the door to federal candidates and officeholders raising unrestricted soft money in contravention of the federal campaign finance laws. This result is even more egregious because it sanctions the raising of soft money by federal candidates for ballot committees that will use the money for voter registration and GOTV activities to influence the same ballot that these federal candidates will appear on. The proposed activity is squarely within the boundaries of what the solicitation provisions of BCRA restrict.

Draft A

Draft A focuses on the fact that the ballot initiative committee here, the People's Advocate Initiative Committee (PAIC), is a 501(c)(4) organization. The Draft correctly notes that the BCRA provisions restricting solicitations by federal candidates and officeholders, 2 U.S.C. § 441i(e), permits such a candidate or officeholder to make a "general" solicitation of funds – *i.e.,* where the solicitation "does not specify how the funds will or should be spent" – for a section 501(c) organization, but not if the organization is one "whose principal purpose is to conduct" so-called Type I and Type II "federal election activities." 2 U.S.C. § 441i(e)(4)(A).

(These are voter registration, voter identification, get-out-the-vote activities and generic campaign activities in connection with a federal election. 2 U.S.C. § 431(20)(A)(i), (ii)). Solicitations that fall within the scope of this exemption from the ban on soliciting soft money are unrestricted as to whom the solicitations can be made and as to the amount that can be solicited.

The Commission's regulations specify that this exemption applies only in two circumstances: first, it applies if the organization "does not engage in activities in connection with an election, including any activity described in paragraph (c)...." 11 C.F.R. § 300.65(a)(1). (Paragraph (c) in turn describes Type I and Type II FEA). Second, the exemption applies if the organization does engage in some activities in connection with an election, "but the organization's principal purpose is not to conduct election activities or any activity described in paragraph (c)...." *Id.* at § 300.65(a)(2)(i).

The language of the regulation makes clear that "activities in connection with an election" or "election activities" both describe a category of activities broader than just the Type I and Type II FEA. Thus, a section 501(c) organization which has a "principal purpose" to conduct "election activities" falls outside the scope of this exemption, even if those activities extend beyond (but include) voter registration and GOTV.

We strongly believe that PAIC has a "principal purpose" to conduct "election activities" and therefore that this exemption does not apply to PAIC.[1]

But instead of making a determination about whether the exemption does or does not apply, Draft A simply punts. It invokes section 300.65(e), which is titled a "Safe Harbor" provision, and which permits a federal candidate or officeholder to rely on a "certification" from a section 501(c) organization as to whether the organization "is one whose principal purpose is to conduct election activities, including activity described in subparagraph (c)...." 11 C.F.R. § 300.65(e). The regulations, of course, provide that a federal candidate or officeholder cannot rely on a certification if he has "actual knowledge that the certification is false." *Id.* at 300.65(f) (emphasis added).

The problem with this approach taken by Draft A – in the specific context of a committee whose sole purpose is to qualify and support a ballot proposition in a federal election year – is that it permits the ballot committee simply to provide a certification to the federal candidate that it does not have a "principal purpose to conduct election activities." *Id.* at 300.65(e). If the ballot committee provides that certification, it is the end of the matter: the federal candidate can rely on

---

[1] In addition, section 441i(e)(4) provides that a federal candidate or officeholder may make a solicitation for a section 501(c) organization, even if the organization does have a principal purpose to carry out Type I and II FEA, but the permissible solicitation is restricted: the solicitation can be made only to individuals and the amount solicited from any individual may not exceed $20,000 in a calendar year. 2 U.S.C. § 441i(e)(4)(B). The Commission's regulations implementing this second exemption are at section 300.65(b), and permit such restricted solicitations in two cases: first, where a solicitation is to be made for donations to an organization "explicitly to obtain funds for" Type I and Type II FEA, and second, where a solicitation is to be made for an organization "whose principal purpose is to conduct that activity," *i.e.*, Type I and Type II FEA.

that certification and can invoke the exemption in section 300.65(a)(2)(i) to engage in the unrestricted and unlimited solicitation of soft money for the certifying group.

But the key question presented by the AOR is whether a ballot committee's activities in support of a ballot proposition in a federal election year do or do not constitute "election activities" – and for that question Draft A provides no answer whatsoever.

Thus, Draft A does not answer the question asked by Reps. McCarthy and Nunes – whether they can "freely raise" funds for PAIC – so much as it simply refers them to PAIC for an answer.

If the Commission issues Draft A, PAIC can take the position that its "principal purpose" is not to conduct "election activities" because, it might erroneously reason, its activities are directed to influencing a ballot measure election, and not candidate elections. Based on this faulty reasoning, it can issue a "certification" to this effect to Reps. McCarthy and Nunes. And in reliance on that certification, they can engage in unrestricted solicitations for PAIC.

But the Commission should not duck the question before it. PAIC is not the Red Cross.[2] The principal purpose of any ballot committee is to conduct "election activities," as that term is used in section 300.65(a)(2), namely, activities to win a ballot measure election. Further, in the case of PAIC, it intends to raise and spend money for "election activities" to influence a ballot proposition in a federal election year, where the proposition will appear on the same ballot as multiple federal candidates. Indeed, as Draft A correctly notes, citing the AOR, PAIC "may engage in voter registration or get-out-the-vote efforts." Draft A at 4. "[F]ederal candidates reap substantial rewards from any efforts that increase the number of like-minded registered voters who actually go to the polls....Because voter registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on federal candidates, the funding of such activities creates a substantial risk of actual and apparent corruption." *McConnell v. FEC*, 540 U.S. 93, 167-68 (2003) (emphasis added).

As we discussed at length in our earlier comments on this AOR, the election activities of a ballot committee are closely related to the campaigns of the federal candidates appearing on the same ballot in a federal election year. The activities of a ballot committee in building support for a ballot proposition and in bringing voters to the polls certainly constitute "election activities." Furthermore, whatever voter registration and GOTV efforts a ballot committee engages in will affect the turnout and voting for the federal candidates on the same ballot. And as we earlier

---

[2] *See* Cong. Rec. S.2140 (March 20, 2002) (statement of Sen. Feingold) ("For example, the bill's solicitation restrictions would not apply to a Federal candidate soliciting funds for the Red Cross explicitly to be used for a blood drive – as this is not an organization whose principal purpose is to engage in get-out-the-vote or voter registration activities and the solicitation is not expressly to obtain funds for such activities."); *see also* "Prohibited and Excessive Contributions: Non-Federal Funds for Soft Money; Final Rule (Explanation and Justification), 67 Fed. Reg. 49064, 49109 (July 29, 2002) ("The Commission agrees that 11 CFR 300.65 should not be misinterpreted to prohibit candidates, officeholders, or their agents from soliciting funds for a 501(c) organization that engages in no election activity, such as the Red Cross.").

explained, empirical political science research has documented the impact that spending by ballot committees has on federal elections taking place at the same time. *See* November 5 Comments at 6-7.

Finally, even as an effort to side-step the central question presented by the AOR, Draft A fails on its own terms. It simply states that Reps. McCarthy and Nunes "may rely on the safe harbor provisions...." Draft A at 6. But falling outside a safe harbor does not mean that an activity is proscribed. As the Commission recently recognized in a different context, "a communication that does not qualify for either of the safe harbors may still come within the general exemption...." NPRM 2007-16, 72 Fed. Reg. 50261, 50264 (Aug. 31, 2007) (*WRTL II*). So too here, even if Reps. McCarthy and Nunes are unable to obtain a certification from PAIC, and thus are unable to rely on the "safe harbor," they might still claim to come within the scope of the section 300.65(a)(2) exemption for unrestricted fundraising, on the (again, faulty) theory that a ballot committee organized under section 501(c) does not have a "principal purpose...to conduct election activities...." But Draft A takes no position on this question, and thus provides no meaningful guidance.

In short, the Commission has been asked whether federal candidates and officeholders can raise unrestricted soft money for a ballot committee active in a federal election year. The Commission should answer the question – and it should say no, because by definition the principal purpose of a ballot committee is to conduct "election activities" relating to ballot elections. Not only does Draft A avoid giving the right answer, it invites the ballot committee itself to provide the answer in the absence of any guidance from the Commission. Doing that will simply open the door to abuse.

Draft B

Draft B provides that Reps. McCarthy and Nunes may raise unrestricted soft money for PAIC on the theory that the activities of a ballot committee – even in a federal election year – are not "in connection with an election for Federal office," within the meaning of 2 U.S.C. § 441i(e)(1)(A), nor "in connection with any election other than an election for Federal office," within the meaning of section 441i(e)(1)(B).

This Draft follows the reasoning of the concurrence by Commissioners Toner and Mason in Ad. Op. 2005-10 (Berman/Doolittle), which similarly concluded that the activities of a ballot committee (there, operating in a non-federal election year) "do not implicate the ban on soft money fundraising under Section 441i(e)." Concurring Opinion in Advisory Opinion 2005-10 of Vice Chairman Michael E. Toner and Commissioner David M. Mason, at 1.

That view did not receive the support of a majority of the Commission in Ad. Op. 2005-10 nor, for the reasons we explain at length in our November 5 comments, should it receive support here. Indeed, the facts here present a much stronger case against Draft B because Reps. McCarthy and Nunes seek to "freely raise funds for PAIC," Draft B at 1, in a federal election year, whereas the Toner-Mason concurrence in Ad. Op. 2005-10 addressed the activities of a ballot committee in a non-federal year.

We will not repeat the arguments against the Draft B position that we previously set forth, but we do ask the Commission to carefully consider those arguments, at pages 2-8 of our November 5 comments.

We appreciate the opportunity to submit these comments.

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