FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

To: Commission Secretary

From: Vice Chair Cynthia L. Bauerly

Date: April 28, 2010

Re: *Ex Parte* Communication
Advisory Opinion 2010-03

Today I received a phone call from Marc Elias of the Perkins Coie law firm regarding his request for an Advisory Opinion on behalf of his client, the National Democratic Redistricting Trust. Mr. Elias explained that he had submitted a comment on April 28, 2010 regarding the public drafts of the opinion that had been placed on the Commission website. He acknowledged that he was aware our conversation would constitute an *ex parte* communication and that I would put a summary of our conversation on the record.

The substance of our conversation consisted of Mr. Elias explaining his arguments as contained in his comment, which is attached. During the phone conversation, as in the comment, he asked that the Commission follow the reasoning of prior AOs and find that the activities of the Trust are not in connection with an election.

Attachment

Perkins Coie

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April 28, 2010

VIA FACSIMILE

Ms. Darlene Harris
Acting Commission Secretary
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Comments on Drafts of Advisory Opinion 2010-03

Dear Ms. Harris:

We are writing on behalf of the National Democratic Redistricting Trust (the "Trust"). The Commission should adopt Draft A of Advisory Opinion 2010-03, which is grounded in the plain language of 2 U.S.C. § 441i and consistent with the Commission's past advisory opinions. It should reject Draft B, which improperly interprets the statute and is belied by those same opinions.

The core question for the Commission is whether the activities of the Trust – which is neither a federal political committee nor a nonfederal political organization, and which engages in no Federal Election Activity whatsoever, *see* 2 U.S.C. § 431(20) – are in connection with a Federal or non-Federal election. If the Trust's activities are not in connection with a Federal or non-Federal election, then it follows inexorably that Members of Congress may solicit funds freely on its behalf.

None of the Trust's activities is in connection with any election. The sole purpose of the Trust is to pay for the pre-litigation and litigation costs that arise *following* the next legislative redistricting process. The Trust will fund no effort to influence the outcome of any particular election: it will not seek to put any matters on any ballot, nor will it use its funds to expressly advocate the election or defeat of any candidate for office or to support or oppose any ballot measure. As Draft A correctly states, the Trust's proposed activities will no more affect elections than seeking changes to campaign finance laws. *See, e.g.,* Shays v. FEC, 414 F.3d 76, 84 (D.C. Cir. 2005) (quoting plaintiffs' declarations: "I face the strong risk that unregulated soft

money contributions will again be used in an attempt to influence federal elections in which I am a candidate ... I will be open to attack, during critical time periods just before the primary and general elections, in broadcast advertising campaigns mounted by groups seeking to evade the contribution limits, source prohibitions, and disclosure requirements imposed by Congress.")

Indeed, as the Commission correctly found in Advisory Opinion 2003-15 (Majette), the mere fact that a lawsuit may have an *impact* on an election does not mean that its costs were "in connection with" that election. There must be some effort involved to influence voting behavior, or at least to determine which votes are counted. *See* Advisory Opinion 2009-04 (Franken). Here, in stark contrast with both the Majette and Franken opinions, one cannot identify the election with which the Trust's analysis and litigation activities are supposed to be "in connection." The Trust's activities may ultimately shape the environment in which some future elections occur – whether in 2012, 2014, 2018 or 2020. But the same is true – and even more so – of other efforts to shape public policy, that are entirely unaffected by 441i(e)'s restrictions.

Thus lies the core failure of Draft B: it eschews statutory analysis, and the vast preponderance of earlier Commission decisions, in order to leap to an intuitive conclusion that the shaping of legislative district lines must be "in connection with" an election. It is impossible to square Draft B with the whole line of pre-BCRA advisory opinions that found no election-influencing purpose in efforts to affect the redistricting process. Nor can Draft B be reconciled with Advisory Opinion 2003-15, a post-BCRA opinion, that found litigation expenses related to *a particular* election to be outside 441i(e)'s scope.

Draft B finds that the Trust's activities are "of value to Members of Congress," infers a risk of quid pro quo corruption, and hence concludes that BCRA restricts the solicitation. But this evades – and does not answer – the core question, which is whether the Trust's activities are *in connection with an election.* The activities of a non-politically active charity can be "of value to Members of Congress." And Members may solicit for such charities, without limit. *See* 2 U.S.C. § 441i(e)(4)(A). "[I]t requires no special genius to recognize the political consequences" of reversing a candidate's primary victory through the court system. And yet the Commission has said clearly that the costs of such defensive litigation lie beyond the scope of § 441i(e). *See* Advisory Opinion 2003-15.

Draft B also cites the recent *RNC v. FEC* decision for the proposition that, because national parties may not raise soft money to affect redistricting, Members of Congress may not do so either. But this, too, evades the question. There is no question that 441i(a)'s restrictions on the national parties are different – and indeed significantly broader than – 441i(e)'s restrictions on individual Members of Congress. *See, e.g.,* Public Financing of Presidential Candidates and Nominating Conventions, 68 Fed. Reg. 47, 386, 47,404-05 (2003) (determining that, while national party committee agents may solicit only up to $5,000 from federally permissible sources

for convention host committees, federal officeholders may make general solicitations for such committees, regardless of source or amount).

Finally, Draft B reaches the tortured conclusion that some conduct is not "election influencing activity subject to the requirements of the Act," and yet is "nonetheless ... sufficiently connected to an election to be covered by the fundraising limitations applicable to candidates and office holders." *See* Draft B at 6. Draft B does not bother to say when this is true, or how the Commission is supposed to tell whether it is true: presumably a Commissioner is expected simply to "know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

It is thus no surprise that Draft B does not bother to say which of the Act's limitations should apply to a Member's solicitation. To comply with 2 U.S.C. § 437f(a)(1), Draft B should at least respond to our client's request and disclose the limit that would apply to Member solicitations. *Cf.* Advisory Opinion 2005-02 (Corzine) (finding different limits to apply to different solicitations for different types of entities).

Draft A reaches a logical result that is consistent with the statute and prior Commission advice. Draft B reaches an intuitive conclusion, ungrounded in law or logic, and plainly inconsistent with the Commission's previous actions. The Commission should adopt Draft A.

Very truly yours,

Marc Erik Elias
Kate Sawyer Keane
Counsel to the National Democratic Redistricting Trust

cc: Rosemary C. Smith, Associate General Counsel