FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

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

FROM: ACTING COMMISSION SECRETARY AND CLERK

DATE: SEPTEMBER 22, 2010

SUBJECT: COMMENTS ON AO 2010-20
National Defense PAC

Transmitted herewith is a timely submitted comments from Stephen M. Hoersting on behalf of Center for Competitive Politics regarding the above-captioned matter.

Proposed Advisory Opinion 2010-20 is on the agenda for Thursday, September 23, 2010.

Attachment

CENTER *for*
COMPETITIVE
POLITICS
Congress shall make no law...

September 22, 2010

Ms. Rosie Smith
Associate General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Via electronic mail

Re: Comments on AOR 2010-20, National Defense PAC,

Dear Ms. Smith:

Recently released Draft B is the correct answer. The *Citizens United* and *EMILY's List* opinions dictate that National Defense PAC and other non-connected committees be permitted to establish a separate fund to make independent expenditures ("IEs") out of unlimited corporate, union or individual funds, whether or not they maintain a PAC that contributes to candidates. Further, *EMILY's List's* correct understanding of the *CalMed* opinion means the Commission may require National Defense PAC to pay, from a hard money account, that share of administrative costs incurred in making contributions to candidates.

Discussion

National Defense PAC is a non-connected committee. We may presume, then, that it claims a major purpose of campaign activity. Yet, its major purpose cannot be the basis for Draft A's (incorrect) determination that National Defense cannot establish a separate account and make IEs from unlimited funds. This is because SpeechNow.org claims a major purpose of campaign activity and yet the *SpeechNow.org* opinion permits the SpeechNow organization to make IEs from unlimited funds. Draft A's reasoning, then, must be based upon some form of corruption.

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That potential for corruption would have to be based upon National Defense PAC's connection to candidates in some way. *See Buckley v. Valeo,* 424 U.S. 1 (1976). This connection to candidates can manifest itself in one of three ways.

A) An organization can be comprised of or controlled by candidates, as in the case of national party committees. But National Defense PAC is not a party committee, and the *EMILY's List* opinion makes plain that non-profits do not pose the threat of corruption posed by party committees. *See EMILY's List v. FEC,* 581 F.3d 1, 13 (2009) ("*[M]cConnell* does not support such regulation of non-profits).

B) A non-party organization can make contributions to candidates. But so long as that organization creates a separate fund, the corrupting nexus created by contributions to candidates is broken for the purpose of making IEs.

It remains a crime for unions to make contributions to candidates from treasury funds. *See* 2 U.S.C. 441b. At the same time, labor unions are permitted to use treasury funds to pay the administrative expenses for PACs that make contributions to candidates and to make unlimited IEs. If the use of separate accounts for both the making of independent expenditures and for the costs of administering the PAC were not enough to stem corruption, unions who make contributions to candidates would have to forgo the making of independent expenditures from their general treasury funds under the reasoning put forth by Draft A. Yet, we all know that the *Citizens United* opinion says otherwise. Creating a separate account is the wall that permits unions to use treasury funds to 1) administer PACs that make hard-money contributions to candidates and to 2) make unlimited IEs.

Making contributions from a PAC cannot cause a non-profit to forfeit its right to make unlimited IEs. Indeed, the Citizens United organization operated a PAC for a decade and made contributions to candidates. Yet this did not prevent the Court from overruling *Austin v. Michigan Chamber of Commerce* on its behalf and recognizing its right to make independent expenditures. Justice Stevens noted the fact of Citizens United's active PAC in his dissenting opinion.

> In the case at hand, all Citizens United needed to do to broadcast *Hillary* right before the primary was to abjure business contributions or use the funds in its PAC, which by its own account is "one of the most active conservative PACs in America," Citizens United Political Victory Fund, http://www.cupvf.org/. [40]
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> ***
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> 40. Citizens United has administered this PAC for over a decade. [citation omitted]. Citizens United also operates multiple "527" organizations that engage in partisan political activity. *See* Defendant FEC's Statement of Material Facts as to Which There Is No Genuine Dispute in No. 07-2240 (DC), PP 22-24.

130 S. Ct. 876, 944 n.40 (2010), Stevens, J., dissenting. To get an idea of just how robust are Citizens United's direct contributions to candidates, visit its website at http://www.cupvf.org.

C. A non-party organization could pose a threat of corruption by coordinating its expenditures with a candidate, that is, by spending some of its funds on in-kind contributions. But making in-kind contributions cannot forfeit the organization's right to attempt to separately make unlimited IEs. And, because nonprofits do not pose the threat posed by party committees, the nonprofit cannot be stopped from making independent expenditures with unlimited funds.

McConnell v. FEC is the most sweeping upholding of campaign finance laws in a generation. It recognized that party committees pose a unique form of corruption because party committees are controlled by or comprised of federal candidates. Yet, despite this recognition of the unique form of corruption posed by the party committee, the Court would not uphold a provision that forced party committees to choose between making independent expenditures on behalf of candidates and making in-kind contributions to candidates. *See McConnell v. FEC,* 540 U.S. 93 (2003). National party committees were limited in the amounts they could take in for all spending—the Court permitted the banning of soft money. *Id.* But this is because party committees pose a unique threat of corruption not posed by the non-profit—and not because a portion of the party committee's activity was either the making of contributions or in-kind contributions to candidates.

So, all modes of corruption assumed in Draft A are found to be wanting.

Finally, this question has already been decided by *EMILY's List v. FEC, 581 F.3d 1 (2009).* The opinion in Cal Med does not counsel otherwise. The D.C. Circuit has already decided this question:

> What about a non-profit entity that falls into both categories -- in other words, a non-profit that makes expenditures *and* makes contributions to candidates or parties? EMILY's List is a good example of such a hybrid non-profit: It makes expenditures for advertisements, get-out-the-vote efforts, and voter registration drives; it also makes direct contributions to candidates and parties. In all of its activities, its mission is to promote and safeguard abortion rights and to support the election of pro-choice Democratic women to federal, state, and local offices nationwide.
> The constitutional principles that govern such a hybrid non-profit entity follow ineluctably from the well-established principles governing the other two categories of non-profits. To prevent circumvention of contribution limits by individual donors, non-profit entities may be required to make

> their own contributions to federal candidates and parties out of a hard-money account -- that is, an account subject to source and amount limitations ($ 5000 annually per contributor). Similarly, non-profits also may be compelled to use their hard-money accounts to pay an appropriately tailored share of administrative expenses associated with their contributions. *See Cal. Med, 453 U.S. at 198-99 n.19* (opinion of Marshall, J.). But non-profit entities are entitled to make their expenditures -- such as advertisements, get-out-the-vote efforts, and voter registration drives -- out of a soft-money or general treasury account that is not subject to source and amount limits. Stated another way: A non-profit that makes expenditures to support federal candidates does not suddenly forfeit its *First Amendment* rights when it decides also to make direct contributions to parties or candidates. Rather, it simply must ensure, to avoid circumvention of individual contribution limits by its donors, that its contributions to parties or candidates come from a hard-money account.

EMILY's List, 581 F.3d at 12.

Conclusion

In 1994, the Fourth Circuit awarded attorneys fees to plaintiffs Christian Action Network because the FEC's then-general counsel convinced four then-commissioners to support the argument that no words of advocacy are necessary to expressly advocate the election or defeat of a candidate. The Fourth Circuit called the FEC's position lacking in good faith and unjustified.

> In the face of the unequivocal Supreme Court and other authority discussed, an argument such as that made by the FEC in this case, that "no words of advocacy are necessary to expressly advocate the election of a candidate," simply cannot be advanced in good faith..., much less with "substantial justification."

FEC v. Christian Action Network, 110 F.3d 1049 (4th Cir. 1997). Openly defying the D.C. Circuit opinion in *EMILY's List* on the proposed question is no more justified.

National Defense PAC, and all other non-connected committees, must be permitted to make IEs out of unlimited corporate, union or individual funds, whether or not they maintain a fund that contributes to candidates. Unlike unions and corporations, however, who enjoy a statutory dispensation, the Commission can require the National Defense PAC to pay a portion of administrative expenses from a hard money account. This will accord the Court's decision in *CalMed. See CalMed,* 453 U.S. at 198-99 n.19 (opinion of Marshall, J.).

Thank you for the opportunity to comment on this advisory opinion.

Respectfully submitted,

/s/ S.M. Hoersting

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Cc: Chairman Petersen
Vice Chairman Bauerly
Commissioner Weintraub
Commissioner Walther
Commissioner McGahn
Commissioner Hunter