FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
ACTING STAFF DIRECTOR
ACTING GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: OFFICE OF THE COMMISSION SECRETARY

DATE: June 29, 2011

SUBJECT: Comment on Draft AO 2011-12
Majority PAC and House Majority PAC

Transmitted herewith is a timely submitted comment from the Republican Super PAC by James Bopp, Jr. and Richard E. Coleson regarding the above-captioned matter.

Draft Advisory Opinion 2011-12 is on the agenda for Thursday, June 30, 2011.

Attachment

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June 29, 2011

By Fax to: 202/208-3333 (16 pages total)
Federal Election Commissioners
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Re: **Comments on Draft Advisory Opinions; AOR 2011-12 (Majority PAC & House Majority PAC)**

Dear Commissioners:

On behalf of our client Republican Super PAC ("RSPAC"), we comment on the two draft advisory opinions ("AOs") in response to advisory opinion request 2011-12 (the "AOR") by Majority PAC and House Majority PAC (collectively, the "Democratic PACs").

Original Draft A took a simplistic approach to the AOR, largely ignoring the fact that there is a controlling line of cases—showing that the independence of independent expenditure communications breaks the link of cognizable benefit to candidates and resultant quid-pro-quo corruption risk—that controls the present analysis. And it failed to deal with the many nuances that should be addressed in a comprehensive analysis. For example, Original Draft A failed to recognize that solicitations statutorily proscribed in a "covered official's" *official* capacity may be undertaken in their *individual* capacities and covered officials may vigorously, robustly "*endorse*" political committees without even raising a "solicitation" issue. And a full analysis would discuss why coordination is not at issue here. These topics are addressed herein and should be discussed in any AO that is issued.

Revised Draft A, however, comes to the right conclusion that candidates and political party officials, in their official capacities, may solicit contributions to a Super PAC (an independent-expenditures-only PAC or "IE-PAC"), but erroneously requires a disclaimer limiting the solicitation to $5,000 from individuals only.

Draft B, though succinct, reaches the right conclusion overall, providing an analysis similar to that included herein.

Prior RSPAC comments on the AOR were submitted to the OGC. This comment addresses Revised Draft A and Draft B. Revised Draft A accepts the results of our analysis in our prior RSPAC comments, without explaining it, but makes little effort to show why it is justified to limit solicitations by candidates and political party officials, in their official capacity, to $5,000 from individuals and to still prohibit solicitations from corporations and labor unions.

In any event, acceptance by the FEC of either Revised Draft A or Draft B will allow endorsement of a Super PAC and solicitation of contributions to it by candidates and political party officials, in their official capacity,[1] which is what RSPAC and the Democratic PACs seek, and hopefully, with the improvements suggested herein, one of these drafts will be approved.

The AOR's Significance

The Democratic PACs state their understanding of how RSPAC intends to operate, assert a desire to do likewise, and seek confirmation that they may. That these Democratic PACs seek to operate in this fashion is in itself significant. It means that they see no inherent corruption, appearance of corruption, circumvention, or other public-policy evil in a PAC operating in this fashion. Rather, they embrace the concept and seek guidance on the possible technical problem, the soft-money ban, that might stand in the way of doing what they otherwise want to do. If the technical legal problems are resolved, as they are below, the Democratic PACs will embrace the permission to do what they want to do. Thus, this is not a Republican or Democratic issue.

In contrast, the so-called campaign-finance "reformers" have called such a federal IE-PAC a "shadow group" and "obviously corrupting," despite the IE-PAC's status as a regulated federal political committee in compliance with applicable Federal Election Campaign Act ("FECA") restrictions requirements.[2] This now stands as the reformers' attack on both Republicans and Democrats.

Campaign Legal Center and Democracy 21 recently sent a letter to members of Congress claiming that, if they solicit for either RSPAC or any other Super PAC, doing so would violate the ban on soliciting funds that are not FECA-compliant, but they helpfully acknowledge that "the coordination provision is not the provision that is applicable here."[3] The "reformers,"

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[1] It is not disputed that political party officials may solicit contributions to Super PACs, without limit, in their *individual* capacity.

[2] *See* Campaign Legal Center Press Release, "Legality of Proposed Soft Money Activities by RNC Shadow Group Challenged by Campaign Legal Center and Democracy 21" (May 17, 2011), available at http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1337:may-17-2011-legality-of-proposed-soft-money-activities-by-rnc-shadow-group-challenged-by-campaign-legal-center-and-democracy-21&catid=63:legal-center-press-releases&Itemid=61.

[3] *See* Campaign Legal Center Press Release, "Campaign Legal Center and Democracy 21 Inform

however, made several erroneous representations, including that "officeholders and candidates . . . will be able to earmark" contributions (only donors can earmark contributions, if they choose) and that officeholders "could solicit . . . with the understanding that the PAC will spend the money on 'independent' expenditures to benefit that particular officeholder . . ." (while the officeholder may understand that the Super PAC will spend the money on an independent expenditure in his or her race with the earmarked contributions the candidate is soliciting, the "independence" of subsequent independent expenditures ("IEs") means the IE may or may not actually "benefit" the candidate, as the Supreme Court has recognized).

The recent losses the "reformers" have suffered in the courts and before the Commission counsel against heeding their persistent claims that political speech is, or can be made, illegal. *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010); FEC AO 2010-09 (Club for Growth); FEC AO 2010-11 (Commonsense Ten). The cited authorities establish, as did *Buckley v. Valeo*, 424 U.S. 1, 47 (1976), that the independence of an independent expenditure breaks any link that would permit recognition of any constitutionally cognizable quid-pro-quo corruption. As *Buckley* put it:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.

Id. That settled constitutional analysis, reiterated in *Citizens United*, 130 S. Ct. at 909 ("independent expenditures . . . do not give rise to corruption or the appearance of corruption"), and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, slip op. at 26, No. 10-238 (U.S. June 27, 2011) ("The separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the same sort of *quid pro quo* corruption with which our case law is concerned."), is the controlling analysis here, along with a proper understanding of the statutory scheme. The statutory scheme only regulates the coordination of expenditures and communications, *see infra*, and so long as there is no coordination as to these (which the "reformers" concede there is not, *see supra*), there is no cognizable corruption or circumvention.

It is also significant that the Democratic PACs raise a second question seeking "confirm[ation]" concerning the ability of "covered officials" to "participate in fundraisers for

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Members of Congress it Is Illegal for Them to Solicit Unlimited Contributions for a Super PAC," available at http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1346:may-25-2011-campaign-legal-center-and-democracy-21-inform-members-of-congress-it-is-illegal-for-them-to-solicit-unlimited-contributions-for-a-super-pac&catid=63:legal-center-press-releases&Itemid=61.

[IE-PACs] at which unlimited individual, corporate, and union contributions are raised, provided that they do not solicit such [unlimited] contributions by complying with 11 C.F.R. § 300.64." AOR at 1. Though there is no reason to consider this question because contributions to IE-PACs are federal funds, *see infra*, by assuming that IE-PACs must be treated like any other political committee or political party committee with respect to how the law should treat them, the Democratic PACs also support an affirmative answer to their first question.

The AOR's Questions

The Democratic PACs pose two questions, first stated thus:

> 1. Despite the Supreme Court's decision in *McConnell v. FEC* upholding the soft money solicitation ban, may Federal officeholders and candidates, and officers of national party committees (hereinafter, "covered officials") solicit unlimited individual, corporate, and union contributions on behalf of the PACs without violating 2 U.S.C. 441i?
>
> 2. If the answer to the first question is "no," please confirm that covered officials do not violate 2 U.S.C. § 441i if they participate in fundraisers for the PACs at which unlimited individual, corporate, and union contributions are raised, provided that they do not solicit such contributions by complying with 11 C.F.R. § 300.64.

AOR at 1. Then they state them thus:

> 1. May covered officials solicit unlimited individual, corporate, and union contributions on behalf of the PACs without violating 2 U.S.C. § 441i?
>
> 2. If the answer to Question 1 is "no," may covered officials participate in fundraisers for the PACs at which unlimited individual, corporate, and union contributions are raised provided that they do not solicit such contributions by complying fully with 11 C.F.R. § 300.64?

AOR at 3-4.

Initial Response

Regarding AOR Question 1, "Analytical Question 1," *infra*, restates AOR Question 1 in an analytically more useful form, which is then analyzed below.

Regarding AOR Question 2, because IE-PAC funds are federal funds, *see infra*, there is no reason to reach AOR Question 2. "[T]he rule [does not] cover fundraising events at which only Federal funds are solicited . . . ." Explanation and Justification, Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events, 75 Fed. Reg. 24375, 24378 (May 5, 2010). But if IE-PAC funds were nonfederal funds, this regulation would clearly permit

federal candidates and officeholders[4] to attend and participate in IE-PAC fundraisers as described in the regulation. The regulation does not address political parties and their officials speaking at such fundraisers, but they may already solicit funds for IE-PACs in their "individual capacity" even if IE-PAC funds were deemed nonfederal funds, *see McConnell v. FEC*, 540 U.S. 93, 139, 157, 160-61, 178 (2003), and the logic of allowing candidates and officeholders to speak as the rule permits extends to also allowing political party officials to do so.[5]

Analytical Question 1

AOR Question 1 is here restated in an analytically more useful form:

1. Given that political party officials may solicit[6] contributions to federal PACs, 2 U.S.C. § 441i(d), and covered officials[7] may solicit FECA-compliant contributions, 2 U.S.C. § 441i, must funds that IE-PACs may use ("IE-PAC federal funds"[8]) be considered federal funds for purposes of section 441i because

(a) IE-PAC federal funds are contributions lawfully given to a federal PAC,

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[4] The regulation addresses only candidates and officeholders, not all "covered officials" as identified in the AOR. *See* 11 C.F.R. § 300.64 ("This section covers participation by Federal candidates and officeholders . . . .").

[5] While now superseded, the Commission's 2005 E&J on the rule noted that even having federal candidates and officeholders *solicit* funds at what were, after all, *fundraising* events posed little risk of corruption. *See* Candidate Solicitation at State, District, and Local Party Fundraising Events, 70 Fed. Reg. 37649, 37651 (June 30, 2005).

[6] The question and analysis are framed in terms of "solicit," i.e., "to ask, request, or recommend, explicitly or implicitly, that another person make a contribution . . . ." 11 C.F.R. § 300.2(m). For analytical purposes, "direct" could be substituted (where factually applicable), i.e., "to guide, directly or indirectly, a person who has expressed an intent to make a contribution . . . ." 11 C.F.R. § 300(n). There are constitutional vagueness and overbreadth problems with "implicitly" and "indirectly" in these definitions, along the lines of the problem identified with certain language in *Buckley*, 424 U.S. at 42-44, but these problems are not further addressed other than to note that *McConnell* said covered officials could "endorse" PACs. 540 U.S. at 139.

[7] "Covered officials" herein means national political party officials in their *official* capacities and federal candidates, because the former may solicit nonfederal funds in their *individual* capacities. *See supra*. "Covered officials" also excludes state candidates and officeholders, who are limited regarding *spending* nonfederal funds in certain situations, but not in *soliciting* them. *See* 2 U.S.C. § 441i(f).

[8] "IE-PAC federal funds" are FECA-compliant funds for IE-PACs. Contributions to the IE-PAC are unlimited in amount and may be from corporations and unions. IE-PAC federal funds remain source-restricted by all constitutionally permissible FECA provisions applicable to PACs, e.g., contributions may not be from foreign nationals or federal contractors, and they remain subject to all disclaimer and reporting requirements.

(b) IE-PACs and IE-PAC federal funds are FECA-compliant, remaining statutorily subject to all PAC restrictions that may be constitutionally applied to them,

(c) covered officials may solicit FECA-compliant contributions for other entities based on the limits of the *entity* for which they solicit the funds, not their *own* limits, and

(d) there are no constitutionally cognizable justifications for not considering IE-PAC federal funds as federal funds for purposes of section 441i?

Analytical Question 1 Analyzed

Initially, RSPAC notes that the Democratic PACs recite AO 2010-11 (Commonsense Ten), which established that IE-PAC federal funds properly include corporate and union contributions. The Democratic PACs only briefly mention AO 2010-09 (Club for Growth), which recognized that the independence of IEs breaks the link of possible quid-pro-quo corruption and circumvention,[9] and established that (1) IE-PAC federal funds include amount-unlimited contributions, *id.* at 4; (2) the Club for Growth President, who served as treasurer of CFG's federal PAC, could also serve as its IE-PAC treasurer, based on the representation of non-coordination (especially so where recommended firewalls were implemented), *id.*; and (3) the IE-PAC "may solicit and accept funds earmarked for specific independent expenditures," *id.* at 5.

The reported RSPAC activity that the Democratic PACs wish to emulate simply puts these pieces together, based on the fact that IE-PAC funds are federal funds referred to in section 441i, both by statutory interpretation and because of the lack of any corruption or circumvention rationale for constitutionally deeming them otherwise. Thus, covered officials may ask persons to make earmarked contributions to an IE-PAC, the contributors of IE-PAC federal funds may earmark them for specific independent expenditures, and the IE-PAC may use earmarked contributions for IEs as earmarked.

The Democratic PACs, in analyzing what they seek to do, only offer one paragraph on AOR Question 1. There they acknowledge that "covered officials may clearly solicit federally permissible funds on behalf of the PACs," AOR at 3, but indicate their concern that IE-PAC federal funds may not be "federally permissible funds" under 2 U.S.C. § 441i. In addressing their concern, the Democratic PACs cite two decisions that upheld the "soft money" ban and two cases that "did not even challenge" the soft-money solicitation ban. AOR at 3-4. Thus, the

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[9] As the Commission put it, *id.* at 5:

> [T]he Club has represented that the Committee will not, itself, make any contributions or transfer any funds to any political committee if the amount of a contribution to the recipient committee is governed by the Act, nor will the Committee make any coordinated communications or coordinate any expenditures with any candidate, authorized committee, political party committee, or agent of such persons Thus, because there is no possibility of circumvention of any contribution limit, section 110.1(h) and its rationale do not apply to the Committee's solicitations or any contributions it receives that are earmarked for specific independent expenditures.

Democratic PACs' analysis fails to explain why they think they may not be able to do what they seek to do. Neither AO 2009-09, AO 2009-11, nor the judicial decisions to which the Democratic PACs refer, ever said that IE-PAC federal funds are soft money or otherwise "federally [im]permissible funds." IE-PAC federal funds are not soft money, and the Democratic PACs don't say that they are in their AOR. So to the extent that section 441i was designed to get rid of the "[s]oft money of political parties" (as its title indicates), we do not deal here with what is commonly understood as soft money. Regarding soliciting funds for PACs, the "soft money" statute expressly permits political party officials to solicit contributions for "political committees," *see* 2 U.S.C. § 441i(d)(2), and no one disputes that IE-PACs are political committees.

Furthermore, there are deeper analytical questions in RSPAC's Analytical Question 1 to which we now turn.

> **1. Given that political party officials may solicit contributions to federal PACs, 2 U.S.C. § 441i(d), and covered officials may solicit FECA-compliant contributions, 2 U.S.C. § 441i, must funds that IE-PACs may use ("IE-PAC federal funds") be considered federal funds for purposes of section 441i . . . .**

This core question asks whether the funds that IE-PACs may use and that covered officials would solicit for them must be considered FECA-compliant federal funds for purposes of section 441i in light of four analytical points that are considered next.

> **(a) IE-PAC federal funds are contributions lawfully given to a federal PAC**
> . . . .

The core question begins with the premises that political party officials may "solicit . . . funds for . . . a political committee," 2 U.S.C. § 441i(d), and covered officials may solicit FECA-compliant contributions, 2 U.S.C. § 441i. IE-PACs are federal PACs, IE-PAC federal funds are fully FECA-compliant, and IE-PAC federal funds are contributions lawfully given to a federal PAC. For these reasons alone, IE-PAC federal funds should be deemed federal funds for purposes of section 441i.

In section 441i, which was Congress's plan (as its title indicates) to eliminate the "[s]oft money of *political parties*" (emphasis added), Congress thought it permissible for political party officials to solicit PAC funds.[10] This is because Congress understood that PACs were not themselves political parties and did not view PACs as any part of the perceived soft-money

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[10] As the Supreme Court stated in *McConnell*, "Even [2 U.S.C. § 441(d)], which on its face enacts a blanket ban on party solicitations of funds to certain tax-exempt organizations, nevertheless allows parties to solicit funds to the organizations' federal PACs." 540 U.S. at 139. Moreover, as *McConnell* noted, there are "no limits on other means of endorsing tax-exempt organizations or any restrictions on solicitations by party officers acting in their individual capacities." *Id.* Consequently, there is no question that political party officials may *endorse* IE-PACs in their official capacities, and may solicit for them in their individual capacities.

problem. PACs have not, and do not (even if they are IE-PACs), deal in soft money. Donations to them are by definition FECA "contributions,"[11] i.e., federal funds. As such, they are properly classed as federal funds that covered officials may solicit.

> **(b) IE-PACs and IE-PAC federal funds are FECA-compliant, remaining statutorily subject to all PAC restrictions that may be constitutionally applied to them . . . .**

It has been argued by the "reformers" that, since section 441i(a)(1) describes soft money as funds "not subject to the limitations, prohibitions, and reporting requirements of this Act," contributions to IE-PACs are soft money. This is so, as the argument goes, because while IE-PACs comply with reporting requirements and are subject to all source restrictions except for contributions from corporations and unions, they are not subject to contribution-amount restrictions. But such a wooden analysis overlooks the goals of Congress, the considerations of the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003), and the fact that the specific statutory terms were a simple way of describing soft money that must take into account the different restriction imposed on different entities based on the applicable provisions of the FECA as construed by court rulings and Commission advisory opinions.

McConnell described its concerns, and those of Congress, in ridding political parties of soft money. The Court noted fundamentally that contributions are defined as gifts for the purpose of influencing federal elections. 540 U.S. at 123 (citing 2 U.S.C. § 431(8)(A)(i)). "Donations made solely for the purpose of influencing state or local elections are therefore unaffected by FECA's requirements and prohibitions." *Id.* As the Court noted, allocation rules allowed large quantities of soft money to be used by national political parties, including for get-out-the-vote drives, generic party advertising, issue ads, and administrative expenses. *Id.* at 123-24. The Court said that political parties had "a special relationship and unity of interest" with candidates, *id.* at 145, and based on that, "parties promised and provided special access to candidates and senior Government officials in exchange for large soft-money contributions." *Id.* at 130.[12]

Of course, none of that would happen in the present situation involving FECA-compliant funds being solicited for a federal political committee. No political party would get any nonfederal funds. No IE-PAC has a political party's special relationship with candidates. None would provide special access to candidates and officeholders. None would be making issue ads or doing other activity with nonfederal funds. All of that is gone. PACs are not political parties. They lack the connection with candidates and officeholders that political parties have. They

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[11] The Commission treats donations to IE-PACs as "contributions" that do not "circumvent[] . . . contribution limits" under 11 C.F.R. § 110.1(h). AO 2010-09 at 5. *See also id.* at 3 ("Committee may solicit and accept *contributions* from the general public" (emphasis added)).

[12] The Court's concerns were all framed in terms of soft-money contributions *to national party's*, not to any other entity such as a PAC. *See, e.g., id.* at 144-45 (in this key analytical portion of the opinion, the *to*-a-political-party formulation occurs six times).

cannot provide privileged access. All of a PAC's activities are fully regulated and disclosed. And IE-PACs do fully disclosed IEs, that are not "so-called issue ads," *id.* at 126.[13]

These were concerns that Congress and the Supreme Court had in mind when Congress banned nonfederal funds for political parties and the Supreme Court upheld the ban. Because IE-PACs had not yet been recognized,[14] Congress did not address them. It chose to define nonfederal funds by reference to whether they were subject to the FECA's limits, prohibitions, and disclosure provisions. But that was done as a way of describing money that was not FECA-compliant, i.e., soft money, not to resolve whether there were legitimate soft-money concerns in the IE-PAC context. So Congress was obviously referring to "*applicable*" limits, prohibitions, and reporting requirements, not "inapplicable" ones. As already noted, IE-PAC funds are subject to FECA's limits, prohibitions, and reporting that are applicable to them and thus remain fully FECA-compliant. Such funds are not soft money. So the issue ought to be framed at the level at which the public, congressional, and litigation debates occurred, i.e., at the level of FECA compliance. The debate over soft money primarily had to do with the fact that it was federally unregulated. IE-PAC federal funds are fully federally regulated.

Moreover, unlike soft money, IE-PAC federal funds are FECA compliant to the full extent that FECA restrictions may be applied under the First Amendment and corresponding FEC Advisory Opinions. Contributions and expenditures are fully disclosed on regular PAC reports. IEs carry disclaimers. IE-PAC funds are subject to all the source restrictions applicable to PACs, but as applied to them the statutory prohibitions that govern them have been held unconstitutional as to contributions from corporations and unions. And even the amount restrictions on contributions *statutorily* apply to IE-PACs, because they are governed by PAC laws like all other PACs, except that these are unconstitutional as applied to IE-PACs. The reason there are unconstitutional applications also bears on whether IE-PAC federal funds are rightly deemed federal funds, to which topic we shall return. For now, it is sufficient to note that because IE-PAC federal funds are fully FECA-compliant, do not involve these articulated concerns of Congress and the Court, and are compliant with all PAC requirements that may constitutionally be applied to them, they are indisputably federal funds.

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[13] *McConnell*'s concerns about soft money being used for issue ads, 540 U.S. at 131, is completely gone because (1) all funds involved with parties, candidates, officeholders, PACs, and IE-PACs are now fully federally regulated and (2) the electioneering-communications restrictions have brought issue ads under federal regulation.

[14] The first court of appeals decision recognizing the special status of IE-only PACs is *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008), decided six years after the passage of McCain-Feingold.

> **(c) covered officials may solicit FECA-compliant contributions for other entities based on the limits of the *entity* for which they solicit the funds, not their *own* limits . . . .**

It may be argued that though IE-PAC federal funds are in fact federal funds for IE-PACs, they are not so for covered officials that might wish to solicit for them. Under this view, covered officials would be barred from soliciting for IE-PACs because the funds would be soft money for the covered officials and so solicitation would be barred under 2 U.S.C. § 441i. But this analysis fails when one considers that the law looks to the recipient to determine whether the solicited funds are FECA-compliant, not to the solicitor. Suppose covered candidate Alpha wants to solicit funds for the Democratic National Committee. Alpha's own limit for contributions to her campaign committee is $2,500. If the scope of permissible solicitations is determined by what is legal for her, then she could only solicit $2,500 for the DNC. But that is not correct. The law looks to what is legal for the recipient and allows Alpha to solicit $30,800 for DNC. This happens regularly where a prominent federal candidate signs a fundraising letter for a national political party committee, soliciting funds at the political party's level, not the solicitor's, and soliciting funds that are then used for IEs supporting the candidate. The same rule applies here, so that what is legal for the IE-PAC controls what may be solicited.

In similar situations, the FEC has already recognized that one looks to the entity solicited for to determine what limits appley. In AO 2006-24, the Commission decided that NRSC and DSCC and their members were prohibited by 2 U.S.C. § 441i from raising unlimited funds for recount and election contest expenses, but that such recount committees enjoyed special treatment:

> However, because section 441i(e)(1)(A) does not convert the donations into "contributions" for purposes of 2 U.S.C. 441a, donations to a Federal candidate's recount fund will not be aggregated with contributions from those persons to the Federal candidate for the general election. For these purposes, a recount is similar to a runoff election, which is also subject to a contribution limit separate from the general election contribution limit. Similarly, the aggregate biennial contribution limits of 2 U.S.C. 441a(a)(3) do not apply to an individual's donations to recount funds. Federal candidates may advise prospective donors that donations to recount funds will not be aggregated with contributions from individuals for purposes of the contribution limits for the general election set forth in 2 U.S.C. 441a(a)(1)(A) or (2)(A) or the aggregate biennial contribution limits set forth in 2 U.S.C. 441a(a)(3).

Id. at 6. Consequently, when soliciting for recount committees, the limits for the recipient control, and these funds can be solicited. The same rule and extra-limit principle applies with special elections. *See* AO 2006-26.

Similarly, contributors to an exploratory committee may make unlimited donations because that is what the recipient entity may receive, there being no cognizable quid-pro-quo candidate corruption concern as is the case with IEs. *See* FEC, *Testing the Waters* (March 2011). There is

also no quid-pro-quo candidate corruption interest in raising unlimited funds for nonprofits that don't engage in activity in connection with federal elections, just as there is no candidate corruption interest with IEs. *See* 2 U.S.C. § 441i(d). In both cases, one looks to the recipient committee to determine what is the statutory limit on contributions.

In AO 2007-28, the Commission decided that federal candidates could solicit funds for a 501(c)(4) non-PAC committee seeking to qualify a ballot initiative regarding California redistricting of state and congressional districts. The commission decided that federal candidate could solicit up to $20,000 for the effort. Again the limit was decided based on the recipient's limits.

> **(d) there are no constitutionally cognizable justifications for not considering IE-PAC federal funds as federal funds for purposes of section 441i[.]**

As mentioned above, key concerns of Congress and the Supreme Court are simply absent from IE-PACs. IE-PACs lack political parties' "special relationship" with candidates and officeholders, cannot provide the access that political parties could provide, are not political parties, do not deal with federally unregulated funds, and do make fully-federally-regulated IEs instead of "so-called issue ads." But what about *McConnell*'s concern that where

> corporate, union, and wealthy individual donors have been free to contribute substantial sums of soft money to the national parties, which the parties can spend for the specific purpose of influencing a particular candidate's federal election[,] [i]t is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude[?]

540 U.S. at 145. That concern is inapplicable in the present situation for three reasons.

First, that concern was expressed where (a) soft money was given (b) to political parties. *Id.* The present situation involves (a) no soft money and (b) no money given to political parties.

Second, even were the situations comparable, the gratitude-access-influence theory of corruption was rejected in *Citizens United* and can no longer be relied on:

> When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption. . . . The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt:
>
> > "Favoritism and influence are not ... avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness."

> Reliance on a "generic favoritism or influence theory ... is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle."
>
> The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse "'to take part in democratic governance'" because of additional political speech made by a corporation or any other speaker.

909-10 (citations omitted). "Ingratiation and access . . . are not corruption." *Id.* at 910.

Third, regarding the surviving quid-pro-quo corruption interest, the *Citizens United* Court held that (a) "[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate," *id.* at 910, and (b) "independent expenditures . . . do not give rise to corruption or the appearance of corruption, *id.* at 909. The Court distinguished *McConnell* in a manner directly applicable here: "The BCRA record establishes that certain donations to political parties, called 'soft money,' were made to gain access to elected officials. This case, however, is about independent expenditures, not soft money." *Id.* at 910-11.

The present analysis likewise is about independent expenditures by a federal PAC using FECA-compliant contributions, not soft money donations to political parties. So long as there is no coordination by the IE-PAC with candidates or political parties concerning the communications—which, as noted above, the "reformers" concede is not a problem here—there is no cognizable quid-pro-quo corruption involved with the making of independent expenditures.[15] As *Buckley* held, "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." 424 U.S. at 47. That settled constitutional analysis was reiterated in *Citizens United*, 130 S. Ct. at 909 ("independent expenditures . . . do not give rise to corruption or the appearance of corruption").

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[15] In its E&J on the 2003 post-BCRA coordination regulations, the Commission made clear that "the regulations in 11 C.F.R. § 109.21 . . . address the meaning of the phrase 'made in cooperation, consultation, or concert, with, or at the request or suggestion of' in the context of communications . . . . 68 Fed. Reg. 425 (emphasis added). So for *communications*, section 109.21 controls, not vague section 109.20, and the former focuses on coordination as to the independent expenditure "communication" itself, not how it was funded. So a candidate soliciting contributions to an IE-PAC that are used for independent-expenditure communications by the IE-PAC favoring that candidate is not coordinating the independent-expenditure communication with the IE-PAC under section 109.21.

The restrictions on soft money solicitations at 2 U.S.C. § 441i must be justified by some underlying anti-corruption interest. But the independence of the IEs breaks the link of possible quid-pro-quo corruption and circumvention. *See, e.g.*, AO 2010-09 at 5.

Thus, as a matter of law (since *Buckley*, 424 U.S. at 47), the *independence* of an IE means that *no* IE creates a cognizable quid-pro-quo benefit for a candidate, even if the candidate is named, even if the FECA-compliant funds for the IE originated from a candidate asking a person to contribute the funds to the person who makes the IE, even if the candidate asks that FECA-compliant funds be given to an IE-PAC, even if the solicited contributor chooses to earmark the contributions for specific IEs mentioning that candidate. So long as the candidate and the IE-PAC do not coordinate the actual expenditure for the communication, there is no cognizable anti-corruption interest.

Consequently, there being no corruption inherent in an IE, no corruption interest justifies banning solicitation of FECA-compliant funds to the entity making the IE. So it would be unconstitutional to ban covered officials from soliciting contributions of IE-PAC federal funds to IE-PACs for making IEs. The Commission should not construe 2 U.S.C. § 441i in an unconstitutional manner by deciding that IE-PAC federal funds are not federal funds for purposes of section 441i. Thus, IE-PAC funds are federal funds for IE-PACs and for the purposes of 2 U.S.C. § 441i. And the Commission should issue an advisory opinion telling the Democratic PACs that they may do what they say they want to do.

Solicitations by Senators Reed & Kerry

OpenSecretsblog reports that both Senate Majority Leader Harry Reid and Senator John Kerry have already e-mailed letters endorsing and soliciting contributions to Majority PAC,[16] and it provides copies of these letters, which are available at the cited website. The Kerry letter is apparently cut off at the bottom, but we assume that it had the second disclaimer, below the "paid for by" disclaimer, that is in the Reid letter.[17] This second disclaimer states: "Senator Reid is only asking for a donation of up to $5000 from individuals and federal PACs. He is not asking for funds from corporations, labor unions or other federally prohibited sources."

While the Democratic PACs framed their AOR questions in terms of soliciting "*unlimited* individual, corporate, and union contributions," *see* AOR at 3 (emphasis added), the Campaign Legal Center ("CLC") and Democracy 21 raised the possible reading of 2 U.S.C. § 441i(e) as

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[16] *See* http://www.opensecrets.org/news/2011/06/senate-majority-leader-harry-reid-solicits.html. The Reid letter is at http://www.scribd.com/doc/58475431/Reid-Majority-PAC-Solicitation, and the Kerry letter is at http://www.opensecrets.org/news/johnkerryemail.jpg.

[17] We also assume that the Senators worked with Majority PAC on their solicitaion. Thus, theri fundraising letters would be in-kind contributions from the Senators to Majority PAC that must be reported if over $200. Of course, candidates may contribute to PACs, including Super PACs, and the Senators already have.

permitting candidates to solicit contributions up to $5,000 for IE-PACs from individuals, CLC & Democracy 21 Comments at 11, thus introducing that element in the AOR.

Significant implications arise from the Reid and Kerry solicitations, which include the following. First, their solicitations underscore the fact that this AOR is not about a Democratic or Republican issue.

Second, we now have candidates actually soliciting for Majority PAC, without awaiting the AO. Thus, these prominent Senate officials considered the state of the law sufficiently clear to solicit without awaiting Commission guidance.

Third, Senators Reid and Kerry apparently see no corruption or appearance of corruption in federal officials soliciting funds for an IE-PAC that is favorable to them, will make independent expenditures on behalf of candidates they favor, and may at some point make independent expenditures supporting these Senators. They see no corruption risk or appearance thereof despite the fact that these Senators expressly represented that Majority PAC will do something the Senators want done, i.e., defeat Republicans and retain Democratic control of the Senate. These Senators also apparently think that this poses no cognizable benefit to them that would raise any quid-pro-quo corruption or appearance thereof despite the fact that when solicited contributors do even minimal inquiry they will discover (in the unlikely event they don't already know it) that the endorsed IE-PAC can accept unlimited contributions, including from corporations and unions. The "thanks" comments indicate their gratitude to contributors who will respond favorably to their endorsement and solicitation. And clearly the Senators will know who those contributors are because contributors will be listed in FEC reports.

Fourth, these Senators clearly believe that the ability to "endorse" PACs that *McConnell* recognized for political party committee officials extends to federal officeholders and candidates. *See McConnell v. FEC*, 540 U.S. 93, 139 (2003) ("And as with § [441i](a), § [441i](d) places no limits on other means of endorsing tax-exempt organizations or any restrictions on solicitations by party officers acting in their individual capacities."). And this endorsement right extends to glowingly endorsing an IE-PAC that contributors will know raises unlimited funds, including from corporations and unions, which information is readily available in this AOR, FEC records (*see* IE-PAC notice), numerous Internet and newspaper stories, and from Majority PAC sources.

Fifth, these Senators clearly believe that they may solicit contributions to IE-PACs under 2 U.S.C. § 441i(e), which bans federal candidates and officeholders from soliciting "funds [that] are [not] subject to the limitations, prohibitions, and reporting requirements of this Act," 2 U.S.C. § 441i(e)(1)(A). The letters contain a disclaimer that they are limiting the solicitation to $5,000 contributions by individuals. But nowhere in FECA or federal court decisions are *these* source-and-amount restrictions associated with *IE-PACs*. These are *not* FECA limits and prohibitions applicable to *IE-PACs*.

Thus, the Senators seem to think that their solicitations for a Super PAC are permissible as long as they *pick* a source-and-amount limitation that does *not* apply to IE-PACs and solicit funds pursuant to it in order to be in compliance. They did not pick the limit for contributions by

individuals (and non-multicandidate PACs) to the *Senators* who are soliciting the contributions, which limit is $2,500 per election.[18] So clearly they assumed that the limit they may pick must be for the entity *receiving* the contributions, not that of the solicitor. But they selected the $5,000 contribution limit applicable to *other* PACs, not IE-PACs. So the $5,000 limit they chose is an arbitrary line because *IE-PACs* have no such limit on contributions to them. The $5,000 limit has nothing to do with IE-PACs in FECA or case law.

But we believe the Senators' solicitations *are* permissible under a *proper* analysis, as set forth in these comments. Since the Majority PAC is an IE-PAC, limits on contributions to it are unlimited, and may be from corporations and unions. So the greater potential for solicitations includes the lesser of soliciting individual $5,000 contributions. However, as noted next, Original Draft A did not authorize the Senators' solicitations.[19]

Revised Draft A

Under Original Draft A, the solicitations of Senators Reid and Kerry were not permitted. But Revised Draft A permits them. If the FEC insists on this $5,000 limit on solicitations by candidates in order to approve such solicitation, then Revised Draft A should be approved. While we think that Draft B more fully complies with FECA and case law, under Revised Draft A, Super PACs will be able to do what they want to do, i.e, have candidates and political party officials, in their official capacities, endorse and solicit contributions to Super PACs.

Importantly, Revised Draft A has shifted analytical ground from a statutory argument to a constitutional argument. Because its drafters can point to no *FECA* contribution or source limit that applies to *IE-PACs*, Revised Draft A points to no statutory limit *for IE-PACs* to which solicitors must adhere. Instead, it picks a $5,000 limit that applies to *other* PACs, but does *not* apply to IE-PACs. There being no *statutory* basis for this choice, the drafters of Revised Draft A are apparently relying on an unarticulated *constitutional* argument, namely, that the $5,000 limit protects against quid-pro-quo corruption of candidates. But by shifting the issue to the *constitutional* ground, the drafters cannot justify their $5,000 limit. This is so because, while the $5,000 limit may fix a quid-pro-quo problem for ordinary PACs, it is not justified as to IE-PACs. Under the constitutional analysis, the courts have held that the independence of independent-expenditure communications breaks the link of cognizable "benefit" to candidates and the

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[18] The Senators did solicit *PAC* contributions to Majority PAC. Multicandidate PACs may contribute $5,000 to candidates, but the Senators also solicited *individuals* for up to $5,000, so the multicandidate PAC limit is not the source of their chosen limitation.

[19] A final interesting point regarding the Reid and Kerry solicitation for the Majority PAC is the silence of the campaign "reformers." When it was suggested that RSPAC would have, among others, candidates doing fundraising, the "reformers" went ballistic. They immediately sent out a press release threatening jail for participants and sent a letter to members of Congress threatening criminal prosecution if they solicited for RSPAC. After about a week, nothing is yet heard from the reformers about the Senators' solicitations. Perhaps they think the solicitations permissible, despite their lack of FECA authorization. Hopefully no partisan motive is involved.

potential for quid-pro-quo corruption or the appearance thereof, including for corporate and union contributions. Thus, the drafters cannot have it both ways, i.e., they cannot provide protection for $5,000 solicitations without justifying unlimited solicitations, including from corporations and unions. But by shifting to a constitutional analysis, the drafters agree with the constitutional analysis herein, which is proper. Simply applying the logical implications of their new-found analysis inevitably leads to the position taken herein and in Draft B. Thus, Revised Draft A actually justifies Draft B.

Draft B

Draft B recognizes the applicability of the independent-expenditure line of cases discussed herein. As a result, it reaches the correct conclusion. And because all "covered officials" may solicit unlimited funds for IE-PACs, it does not suffer from needing to clarify which "covered officials" are really at issue and the scope of permissibly "endorsing" IE-PACs. Draft B, or an AO reaching the same conclusions on the same rationale, is the AO that the Commission should issue. But if the FEC thinks that the law requires a disclaimer such as Senators Reid and Kerry employed, then the Commissioners should issue such an AO.

Sincerely,

BOPP, COLESON & BOSTROM

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