

OCT 28 2005

BEFORE THE FEDERAL ELECTION COMMISSION

FEDERAL ELECTION
COMMISSION
SECRETARIAT

In the Matter of)

U.S. Rep. Darrell Issa)

Rescue California... Recall Gray Davis and Vona L. Copp,)

in her official capacity as treasurer)

2005 OCT 28 A 9:17

MUR 5367

GENERAL COUNSEL'S REPORT #2

SENSITIVE

I. DISCUSSION

The Commission previously found reason to believe ("RTB") that U.S. Representative Darrell Issa violated 2 U.S.C. § 441i(e)(1)(B) in connection with his activities on behalf of Rescue California . . . Recall Gray Davis ("Rescue California") during the 2003 effort to recall former California Governor Gray Davis.¹ The Commission further found RTB that Rescue California violated 2 U.S.C. § 441i(e)(1)(B) by receiving and spending non-Federal funds,² and authorized an investigation. Based on our analysis of a recent Advisory Opinion, we recommend the Commission close MUR 5367.³

The Federal Election Campaign Act of 1971, as amended ("the Act"), prohibits Federal officeholders and the committees they directly or indirectly establish, finance, maintain, or control ("EFMC") from soliciting, receiving, directing, transferring or spending non-Federal funds "in connection with any election other than an election for Federal office." 2 U.S.C. § 441i(e)(1)(B). The Factual and Legal Analysis sent to the respondents in this matter had concluded that the 2003 California recall election was an "election other than an election for

¹ Under California recall procedures, voters faced both a ballot measure presenting the question of whether Davis should be recalled, and a replacement candidate election, the results of which were to become effective if a majority of voters on the ballot measure voted "yes." Rescue California was a committee formed as a ballot measure committee under California law to advocate a "yes" vote on the recall.

² Non-Federal funds are defined as "funds that are not subject to the limitations and prohibitions of the Act." 11 C.F.R. § 300.2(k)

³ Counsels for Rescue California and for Rep. Issa have written letters addressing the impact of this Advisory Opinion. Attachments 1, 2

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1 Federal office" under 2 U.S.C. § 441i(e)(1), relying on Advisory Opinion 2003-12 (Flake). *See*
2 MUR 5367, Factual and Legal Analysis to U.S. Representative Darrell Issa ("Issa F&LA"),
3 attached to reason to believe notification letters dated February 20, 2004. In Flake, the
4 Commission determined that activities of ballot measure committees EFMC'd by a Federal
5 candidate or officeholder are "in connection with any election other than an election for Federal
6 office," and therefore subject to 2 U.S.C. § 441i(e)(1)(B) regardless of when those activities
7 occur. It further determined that activities of all other ballot measure committees are in
8 connection with elections other than elections to Federal office after the relevant ballot measure
9 qualifies for the ballot.

10 Recently, in Advisory Opinion 2005-10 (Doolittle), the Commission concluded that
11 2 U.S.C. § 441i(e)(1)(A) and (B) would not restrict Federal candidates and officeholders in their
12 fundraising activities for ballot measure committees that support or oppose ballot initiatives on
13 the November 8, 2005, California special election ballot. In separate statements, four
14 Commissioners rejected the reasoning of the Flake AO. Two Commissioners concluded that
15 ballot measures are not elections to any office and therefore can never be considered elections
16 for purposes of 2 U.S.C. § 441i(e). Concurring Opinion in Advisory Opinion 2005-10 of Vice
17 Chairman Michael E. Toner and Commissioner David M. Mason. Two other Commissioners,
18 reexamining Flake, set forth a different test:

19 [W]here a federal candidate establishes, maintains, finances or controls a ballot
20 measure committee, on an issue with which that candidate is closely identified, and
21 the committee raises and spends soft money to influence voting on a day on which
22 that candidate is himself on the ballot, then the candidate and the committee's
23 activities are "in connection with an election for *Federal* office," that is, the
24 candidate's own election.

25 Concurring Statement in Advisory Opinion 2005-10 of Commissioner Ellen L. Weintraub,

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Commissioner Danny Lee McDonald, at p. 2.⁴

No Federal office was on the ballot in California's October 7, 2003 special recall election and Rep. Issa did not appear on the ballot in any capacity on that date. Based on the concurring statements in AO 2005-10, it is our understanding that the Commission would not find that the recall ballot measure was an "election other than an election to Federal office," within the meaning of 2 U.S.C. § 441i(e)(1)(B). Based on the above, we recommend the Commission take no further action with respect to all respondents in this matter and close the file.

In addition, any theory of liability based on Rep. Issa's spending his own personal funds could no longer be sustained because AO 2004-25 (Corzine) negated this aspect of the Commission's reason-to-believe findings in this matter. The statute prohibits Federal candidates and officeholders from "spending" non-Federal funds in connection with covered elections. 2 U.S.C. § 441i(e)(1)(A), (B). Representative Issa had spent \$85,000 of his personal funds on donations to Rescue California and had caused Greene Properties, a closely held corporation he owns with his spouse, to spend an additional \$1.76 million on donations to Rescue California. Thus the Commission found reason to believe that Rep. Issa violated 2 U.S.C. § 441i(e)(1)(B). Issa F&LA at 7-8. Since then, however, the Commission concluded in AO 2004-25 at pp. 5-6 that the anti-corruption purpose of section 441i(e) is not furthered by restricting federal officeholders from donating their personal funds.⁵

⁴ One Commissioner dissented, rejecting the reading that "any election" under 2 U.S.C. § 441i(e)(1)(B) is limited to candidate elections, and concluding that the questioned fundraising was subject to the limitations and prohibitions of the Act. Dissenting Opinion in Advisory Opinion 2005-10 of Chairman Scott E. Thomas

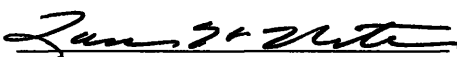
⁵ Senator Corzine's request did not raise the issue of donations to an entity he established, financed, maintained or controlled, and the Commission's opinion in AO 2004-25 assumed that his donations would "not be in amounts that are so large or in amounts that comprise such a substantial percentage of the [recipient] organization's receipts that the organization would be considered one that is 'financed' by Senator Corzine." *Id.* Here, Representative Issa's donations, when combined with the donations through Greene Properties described *infra*, constituted a substantial percentage of Rescue California's receipts. Nonetheless, the same principle applies - the

Furthermore, while Rep. Issa made most of his donations to Rescue California through Greene Properties, he has provided information demonstrating that he actually used his personal funds to make the Greene Properties donations—in a sense making donations to Rescue California in the name of Greene Properties.⁶ Under these unusual circumstances, Rep. Issa effectively donated his personal funds to Rescue California through Greene Properties. Thus, as a matter of prosecutorial discretion, the Commission may treat the Greene Properties donations in the same manner as his donation of personal funds.

II. RECOMMENDATIONS

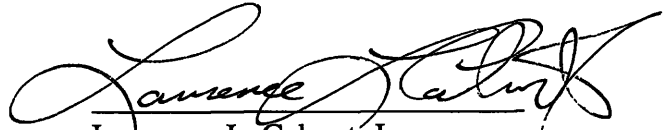
1. Take no further action with respect to U.S. Rep. Darrell Issa and Rescue California . . . Recall Gray Davis and Vona L. Copp, in her official capacity as treasurer.
2. Close the file in MUR 5367.
3. Approve the appropriate letters.

10/27/05
Date


Lawrence H. Norton
General Counsel

purpose of 2 U.S.C. § 441(e) was to break the potentially corruptive link between large donors and officeholders, and an officeholder presumably cannot corrupt himself with his own money.

⁶ In short, Rep. Issa deposited personal funds in the Greene Properties account and made sometimes same-day donations to Rescue California in amounts identical to the corresponding deposit. *See* Letter from B. Ginsberg and G. Willard to Commissioner Smith at 6, and Merrill Lynch documentary attachments (April 14, 2004). Rep. Issa apparently structured the donations in that manner for convenience, Merrill Lynch required two signatures (Rep. Issa's and his spouse's) on transfers made from their joint personal account to what Merrill Lynch considers "outside entities" such as Rescue California, but only one signature on transfers to "related accounts" such as Greene Properties. By contrast, transfers out of the Greene Properties account required only Rep. Issa's signature. Thus, in order to make contributions from the joint personal account to Rescue California without the need for two signatures, Rep. Issa transferred funds to the Greene Properties account and then on to Rescue California.



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Attachments:

1. Letter from Charles Bell to Jesse Christensen (Aug. 22, 2005)
2. Letter from Benjamin L. Ginsberg to Commissioners (Sept. 1, 2005)

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