DISSENTING OPINION IN ADVISORY OPINION 2006-04

OF

CHAIRMAN MICHAEL E. TONER
AND COMMISSIONER HANS A. VON SPAKOVSKY

We write separately to express our disagreement with the approach taken in the majority opinion. We would have preferred to answer this advisory opinion request by concluding that regardless of whether a state ballot initiative committee is "financed" by a Federal candidate or officeholder, state ballot initiative committees are not restricted by the soft money restrictions of federal campaign finance law because their activities are not in connection with an election for office within the meaning of 2 U.S.C. § 441i(e). Thus, approaching the issues this way, the question of whether Defend Colorado Now ("DCN") is "financed" by the Tancredo for Congress Committee ("TFC") is irrelevant. We are also concerned with our colleagues' method of analysis in examining the question of "financing." We hope that the Commission will have occasion to revisit these issues in the future.

I. THE SOFT MONEY RESTRICTIONS IN SECTION 441i(e) ARE LIMITED TO ACTIVITIES IN CONNECTION WITH CANDIDATE ELECTIONS

TFC requested an advisory opinion from the Commission to seek assurances that certain contributions to DCN would not violate 2 U.S.C. § 441i(e)(1) or other provisions of the Federal Election Campaign Act of 1971 as amended (the "Act").[1] The requester sought "guidance as to whether the amount of the contribution both in nominal and percentage terms is not so large as to consider DCN being 'financed' by Congressman Tancredo" within the meaning of section 441i(e)(1). *See* Advisory Opinion Request of Jon Ponder, Treasurer, Tancredo for Congress Committee, Inc., November 18, 2005. The request noted that "DCN will solicit funds in excess of amounts permitted and from sources prohibited by the Act ('soft-money')." *Id*. Subsequent correspondence indicated that Congressman Tancredo had no plans to solicit donations to DCN. *See* Correspondence from Jon Ponder to Rosemary C. Smith, January 26, 2006.

[1] We agree with our colleagues' decision that the proposed donations are permissible under 2 U.S.C. § 439a(a)(1) and (6).

The threshold legal question in determining whether the fundraising restrictions of section 441i(e) apply is whether the activities in question are in connection with an election. Sections 441i(e)(1)(A) and (B) prohibit Federal candidates and officeholders, and entities directly or indirectly established, *financed*, maintained or controlled by a Federal candidate or officeholder, from soliciting, receiving, directing, transferring, or spending funds outside the prohibitions and limitations of the Act. However, those provisions apply only with respect to activities conducted "in connection with an election for Federal office" or "in connection with any election other than an election for Federal office."

We believe, as a matter of law, that state ballot initiatives and referenda are not elections for office under 2 U.S.C. § 441i(e)(1). The phrases "election for Federal office" and "election other than an election for Federal office" unambiguously refer to candidate elections for public office. This view was recently set forth in Advisory Opinion 2005-10, Concurring Opinion of Vice Chairman Toner and Commissioner Mason. There, it was noted that "the legislative history supports this interpretation of Section 441i(e). In debating the Bipartisan Campaign Reform Act of 2002 ('BCRA'), not a single Member of Congress, including the legislation's sponsors, indicated that the soft-money ban would apply to initiatives and referenda. Moreover, Members of Congress who voted for BCRA, including House Minority Leader Nancy Pelosi (D-CA), filed comments in this proceeding indicating that it was not their understanding that 441i(e)'s soft money restrictions would apply beyond the candidate elections to ballot measure activities."

Therefore, based on the plain meaning of section 441i(e) and the statute's legislative history, the state ballot initiative-related activities of DCN, even if "financed" by TFC, are not subject to the soft money restrictions of the Act.

II. ANALYZING "FINANCING" UNDER SECTION 441i(e)

The foregoing discussion notwithstanding, we also believe the Commission's method of analysis with regard to the matter of "financing" takes an insufficiently comprehensive view of the totality of the circumstances surrounding the proposed donations. The application of that analysis to the proposed donation in the amount of 25% of receipts reaches an incorrect conclusion.

The Act does not define the terms "establish, finance, maintain, or control." *See* 2 U.S.C. § 441i(e)(1). The Commission's regulations, at 11 CFR § 300.2(c)(2), state that

> To determine whether a sponsor directly or indirectly established, finances, maintains, or controls an entity, the factors described in paragraphs (c)(2)(i) through (x) of this section must be examined in the context of the overall relationship between sponsor and the entity to determine whether the presence of any factor or factors is evidence that the sponsor directly or indirectly established, finances, maintains, or controls the entity.

The regulation then lists 10 factors, but notes that they are not exclusive. In other words, the regulations create a "totality of the circumstances" test.

A. Proposed Alternative One

With respect to Alternative One, the majority opinion contains no examination of the relevant facts and circumstances. The Commission simply concludes that "[a] donation of 50% of an organization's total receipts must be considered a 'significant amount.'" While we agree with the result here, we believe that 11 CFR § 300.2(c)(2) requires an actual examination of the surrounding facts and circumstances. The two organizations (TFC and DCN) are, and would continue to be, independent of each other, with distinct leadership not indicative of a formal or ongoing relationship.[2] DCN would like to share polling data and campaign strategy with TFC. Representative Tancredo is closely associated with the issues promoted by DCN, intends to endorse the ballot initiative, and will appear on the same ballot as the initiative. Thus, the "overall relationship" between TFC and DCN is one in which the former has an interest in the latter's success. In light of these facts, this donation may represent much-needed "seed money" for DCN.

The facts provided in the request indicate that through the fourth quarter of 2005, DCN had received donations of $9,285.40, plus pledges for an additional $45,500. Whether these pledges have been realized is unknown. A donation of 50% of DCN's total actual receipts as of the time of the request, would equal $4,642.70. While this is not an especially large amount of money, it may represent a substantial sum for a nascent organization, especially if this donation is required to fund efforts to collect the additional $45,600 in pledges. The facts set forth above and the overall relationship between TFC and DCN indicate that the proposed donation of 50% of receipts *could be* a "significant amount" that results in "financing" for purposes of 2 U.S.C. §441i(e)(1) and 11 CFR § 300.2(c).

However, we disagree with our colleagues that "[a] donation of 50% of an organization's total receipts *must be* considered a 'significant amount'" (emphasis added). *See* Advisory Opinion 2006-04, at page 4. 11 CFR § 300.2(c) does not impose any *per se* thresholds, but rather, requires a full examination of the relevant facts. If, for example, DCN receives the additional $45,600 in pledges, the $4,642.70 contributed by Representative Tancredo may not be a "significant amount" in comparison to the total of $59,406.10 raised by DCN Under such circumstances, Representative Tancredo's donation would represent less than 8% of DCN's total funding.

[2] The Advisory Opinion Request states that "Congressman Tancredo did not establish and will not control DCN."

B. Proposed Alternative Two

The Commission examines the overall relationship of TFC and DCN for purposes of analyzing Alternative Two, and concludes that a donation from TFC to DCN in an amount up to 25% of the total receipts of DCN at the time of the donation is a "significant" amount that would result in TFC "financing" DCN for purposes of 2 U.S.C. § 441i(e)(1) and 11 CFR § 300.2(c). We disagree with this conclusion.

DCN has received donations of $9,285.40. A donation of 25% of DCN's total actual receipts as of the time of the request would equal $2,321.25. In light of the overall relationship between TFC and DCN, as examined above, we do not agree that this relatively modest amount constitutes TFC "financing" DCN. This amount is less than half the permissible annual individual contribution limit to a federal political action committee, and would be less than 4% of the total funding collected by DCN if all its pledges are fulfilled.

We do not read our colleagues' opinion to stand for the proposition that a donation of 25% of total receipts must always lead to a finding that one entity is financed by another. Rather, "the context of the overall relationship between TFC and DCN" appears to be the crucial predicate for their conclusion. *See* Advisory Opinion 2006-04, at page 5. Regardless, we hope the Commission soon has an opportunity to revisit soon the issues raised in this advisory opinion so that it can provide further guidance to the regulated community.

May 16, 2006

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Michael E. Toner, Chairman Hans A. von Spakovsky, Commissioner