



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**CONCURRING OPINION OF
VICE CHAIRMAN DAVID M. MASON**

AND

COMMISSIONER HANS A. von SPAKOVSKY

ON ADVISORY OPINION 2007-11

**(Including name of Federal candidate/officeholder as “Featured Speaker” or
“Honored Guest” on invitation to State or local party non-Federal fundraiser does
not violate FECA)**

On August 1, 2007, the Commission concluded that the activity described in Question #3 of the Advisory Opinion Request¹ is permissible under the Federal Election Campaign Act of 1971, as amended by the Bipartisan Campaign Reform Act of 2002 (together, the “Act”), but was unable to provide a four-vote response to Question #1 and #2. We write separately to explain our views.

I. BACKGROUND

The Requestors in this matter asked us to determine if the analytical structure for evaluating certain pre-event publicity created by Advisory Opinion 2003-03 (Cantor) and Advisory Opinion 2003-36 (Republican Governors Association) applies to Federal candidate and officeholder appearances on pre-event publicity for State and local political party committee fundraisers governed by 2 U.S.C. § 441i(e)(3) and 11 C.F.R. § 300.64. We conclude that the analysis in these advisory opinions is not applicable to the circumstances described in the Advisory Opinion Request.

The Bipartisan Campaign Reform Act of 2002 (“BCRA”) established a three-pronged framework for Federal candidate and officeholder fundraising. However, this relatively simple framework has proven to be more difficult to implement than perhaps contemplated. First, a Federal candidate or officeholder may only raise and spend Federal funds in connection with Federal elections.² Second, a Federal candidate or

¹ Advisory Opinion Request of the California Republican Party and the California Democratic Party, June 8, 2007, *available at* <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=1950>.

² *See* 2 U.S.C. § 441i(e)(1)(A) (“A candidate, individual holding Federal office, agent of a candidate or an individual holding Federal office, . . . shall not . . . solicit, receive, direct, transfer,

officeholder may raise and spend non-Federal funds (*i.e.*, “soft money”) in connection with a non-Federal election, so long as those funds are within the Federal amount limitations and source prohibitions.³ By regulation, the Commission has required that these funds also comply with relevant State campaign finance law.⁴ Third, “[n]otwithstanding [2 U.S.C. § 441i(e)(1)(A) and (B)], a candidate or an individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party.”⁵

The Commission implemented this third rule, 2 U.S.C. § 441i(e)(3), at 11 C.F.R. § 300.64, which states that notwithstanding the Federal candidate and officeholder soft money restrictions set forth in 11 C.F.R. §§ 300.61 and 300.62 (which implement 2 U.S.C. § 441i(e)(1)(A) and (B), respectively):

[A] Federal candidate or individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party, including but not limited to a fundraising event at which Levin funds are raised, or at which non-Federal funds are raised. In light of the foregoing:

(a) State, district, or local committees of a political party may advertise, announce or otherwise publicize that a Federal candidate or individual holding Federal office will attend, speak, or be a featured guest at a fundraising event, including, but not limited to, publicizing such appearance in pre-event invitation materials and in other party committee communications; and

(b) Candidates and individuals holding Federal office may speak at such events without restriction or regulation.⁶

or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act.”); 11 C.F.R. § 300.61.

³ See 2 U.S.C. § 441i(e)(1)(B) (“A candidate, individual holding Federal office, agent of a candidate or an individual holding Federal office, . . . shall not . . . solicit, receive, direct, transfer, or spend funds in connection with any election other than an election for Federal office or disburse funds in connection with such an election unless the funds . . . are not in excess of the amounts permitted with respect to contributions to candidates and political committees under [Federal law]; and . . . are not from sources prohibited by this Act from making contributions in connection with an election for Federal office.”); 11 C.F.R. § 300.62. These types of funds (*i.e.*, non-Federal funds that comply with the Federal amount limitations and source prohibitions) have been referred to as “clean money.”

⁴ See 11 C.F.R. § 300.62.

⁵ 2 U.S.C. § 441i(e)(3).

⁶ See *Revised Explanation and Justification for Candidate Solicitation at State, District and Local Party Fundraising Events*, 70 Fed. Reg. 37,649 (June 30, 2005); *Final Rule on Prohibited and*

The issue of the Federal candidate's or officeholder's solicitations in connection with these events was debated by the Commission in 2002, and again in 2005.⁷ The Commission concluded that the Federal candidate or officeholder may say absolutely anything he wants *at the fundraising event* – which includes soliciting non-Federal funds for the party committee that are not within the Federal amount limitations and source prohibitions.⁸ However, the Commission also concluded that the Federal candidate or officeholder may not serve on the event's "host committee" or "personally sign[] a solicitation in connection with a State, local, or district party fundraising event."⁹ The rationale was that "pre-event activities are outside the permissible activities described above flowing from a Federal candidate's or officeholder's appearance or attendance at the event."¹⁰ The Commission reiterated this view in 2005, stating that "[t]he limited nature of this statutory exemption embodied in 11 CFR 300.64 is evident in that it does not permit Federal officeholders and candidates to solicit non-Federal funds for State parties in written solicitations, pre-event publicity or through other fundraising appeals." To the extent the above quoted language can be read to prohibit the activities described in the Advisory Opinion Request, we believe it contravenes the plain language of the Act.

II. THE CALIFORNIA STATE PARTIES' REQUEST

A. Requestors' Question #1

The Requestor first asks for clarification of the law where "[a]n invitation from a State or County Committee raising non-federal funds that references the federal candidate/officeholder on the invitation as the featured speaker/honored guest and that also includes a request for non-federal funds over and above the limitations and prohibitions of federal law. The reply card also references the federal candidate/officeholder." In other words, the Requestor is asking the Commission if the rules of Advisory Opinions 2003-03 and 2003-36 apply to a State or local party committee fundraising event.

We do not believe that Advisory Opinions 2003-03 and 2003-36, which were issued in response to questions posed under 2 U.S.C. § 441i(e)(1)(B) and 11 C.F.R.

Excessive Contributions; Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,107 (July 29, 2002).

⁷ *See id.*

⁸ *See* 67 Fed. Reg. at 49,108 ("candidates and officeholders are free under the rule to speak at such functions without regulation or restriction"); 70 Fed. Reg. at 37,651 (referring to section 441i(e)(3) as "a complete exemption from the solicitation restrictions in section 441i(e)(1)").

⁹ *Id.* at 49,108; *see also* 70 Fed. Reg. at 37,651 ("However, Federal officeholders and candidates are prohibited from serving on 'host committees' for a party fundraising event at which non-Federal funds are raised or from signing a solicitation in connection with a party fundraising event at which non-Federal funds are raised . . .").

¹⁰ 70 Fed. Reg. at 37,651.

§ 300.62, are applicable to the resolution of questions posed under 2 U.S.C. § 441i(e)(3) and 11 C.F.R. § 300.64. Rather, we believe the plain language of the Act and the Commission's regulations provide the answer to the Requestors' questions.

As noted, the Act expressly permits Federal candidates and officeholders to "attend, speak, or be a *featured guest* at a fundraising event for a State, district, or local committee of a political party." 2 U.S.C. § 441i(e)(3) (emphasis added). Congress was certainly aware that the term "featured guest" is an expression commonly used on fundraising invitations to identify the event's main attraction, *i.e.*, its "draw." The Commission drew on this presumption when it adopted 11 C.F.R. § 300.64(a), which states that "State, district, or local committees of a political party may *advertise, announce or otherwise publicize* that a Federal candidate or individual holding Federal office will attend, speak, or be a featured guest at a fundraising event, including, but not limited to, *publicizing such appearance in pre-event invitation materials* and in other party committee communications" (emphasis added).

Congress clearly intended, and the Commission seems to have previously understood, that Federal candidates and officeholders would continue to participate in State and local political party fundraisers, and that the State and local political parties would continue to advertise that fact on pre-event publicity for these fundraisers.¹¹ We decline to conclude, then, that while a State or local party committee may identify a Federal candidate or officeholder as a "Featured Guest" on an invitation, that it must also alter the standard format of its invitation to exclude requests for funds that do not comply with the Act's limitations.¹² Rather, 2 U.S.C. § 441i(e)(3) creates a limited exception to the otherwise applicable rule that Federal candidates and officeholders may not solicit non-Federal funds that do not comply with the Act's amount limitations and source prohibitions.¹³ In fact, the Requestors' proposals are squarely addressed, and approved,

¹¹ As one commenter stated, "The statute expressly allows a candidate or officeholders to be 'a featured guest.' If the candidate or officeholder cannot be featured in the invitations to the event, it is difficult to determine what the exemption accomplishes. A featured guest is commonly understood to be someone who is singled out for particular attention or publicity. A featured guest is certainly not a mystery guest. Congress understood that it was creating an exemption that would permit State and local party committees to widely publicize the attendance of Federal candidates and officeholders at State party fundraising events. The Commission should not undercut Congress's clear intent by essentially reading the exemption out of the law." *Comments of the Association of State Democratic Chairs*, July 30, 2007, available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=1950>.

¹² As one commenter stated, "It makes absolutely no sense for the Commission to interpret the statute as allowing federal officeholders/candidates to solicit without restriction at a state party fundraiser, but not even to allow their names to be included on a normal invitation to the event." *Comments of Joseph E. Sandler and Neil P. Reiff*, July 31, 2007, available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=1950>.

¹³ This Advisory Opinion Request does not ask us to overturn specific language in our prior *Explanations and Justifications*, see *supra* footnote 9, nor do we understand the limited exception to permit a Federal candidate or officeholder to serve on a host committee for a party fundraising

by 11 C.F.R. § 300.64(a). A Federal candidate's or officeholder's appearance on a State or local political party committee's pre-event publicity as the "Featured Guest," even if that publicity solicits non-Federal funds that do not comply with the Act's restrictions, and even if that appearance on the publicity is consented to by the Federal candidate or officeholder, is entirely consistent with the terms of both 2 U.S.C. § 441i(e)(3) and 11 C.F.R. § 300.64(a).¹⁴

Our colleagues' preferred approach – to apply the analytical structure of Advisory Opinions 2003-03 and 2003-36, as reflected in the draft Advisory Opinion¹⁵ – leads to bizarre results. First, it would effectively strike 11 C.F.R. § 300.64(a) from our regulations. *See supra* footnote 11. Second, our colleagues would impute a solicitation to the Federal candidate or officeholder and proclaim that solicitation illegal, despite the fact that the Federal candidate or officeholder could make precisely the same solicitation when he speaks at the event.

B. Requestors' Question #2

Next, the Requestor seeks clarification where "[a] State Party or County Committee invitation the same as #1 above that includes reference to the federal candidate/officeholder on the invitation as speaker/honored guest but does not actually solicit non-federal donations on the invitation itself. However, the reply card contains the non-federal donation request but does not reference a federal candidate/officeholder." In this scenario, the Federal candidate is separated from the State or local party's solicitation, but the materials are contained in a single envelope.

The analysis set forth above in response to Question #1 is equally applicable here, and the slight variation of the facts does not change our conclusions.

event at which non-Federal funds beyond the Federal limits are raised, or to sign a solicitation in connection with such an event. Rather, the limited exception allows the State or local political party to list a Federal candidate or officeholder as a "Featured Speaker" or "Honored Guest" on an invitation to such an event, regardless of what types of funds the party solicits on that invitation, and regardless of whether the Federal candidate or officeholder has consented to the use of his name on the invitation.

¹⁴ Vice Chairman Mason believes that a Federal candidate's appearance on pre-event publicity that solicits non-Federal funds beyond Federal limits, if consented to, constitutes a "solicitation" by the Federal candidate or officeholder in accordance with the two-step solicitation analysis set forth in Advisory Opinion 2003-03. He believes, however, that 2 U.S.C. § 441i(e)(3) creates a solicitation exemption for the circumstances described in the Advisory Opinion Request. Commissioner von Spakovsky agrees that 2 U.S.C. § 441i(e)(3) creates an exemption from the otherwise applicable solicitation rules, but disagrees with the two-step solicitation analysis of Advisory Opinion 2003-03 and believes that what is described in the Advisory Opinion Request (even assuming it is consented to) does not constitute a "solicitation" by the Federal candidate or officeholder.

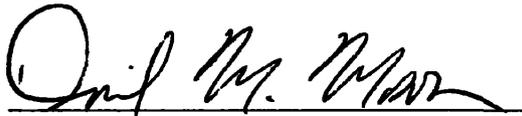
¹⁵ Draft Advisory Opinion 2007-11, *available at* <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=1950>.

C. Requestors' Question #3

Finally, the Requestor seeks clarification on a variation of Question #2. The Requestor asks about “[a] State Party or County Committee ‘Save the Date’ notice for a non-federal fundraiser that references a federal candidate/officeholder as the honored guest but does not ask for any donation, just noting the name of the event and date of the event and further noting that more information would follow. The actual solicitation would be made in a separate mailing that identifies the event and the date but does not make any reference to a federal candidate/officeholder.”

The Commission concluded by a vote of 4-0 that this practice was permissible under the Act and Commission regulations. We agree, but regard what is described in the Request as wholly unnecessary in light of our conclusions with respect to Questions #1 and #2. Our colleagues, on the other hand, would approve the practice described in Question #3, but not Question #1 and #2. We note that our colleagues’ position appears to promote form over substance, insofar as the difference between Questions #2 and #3 is simply the number of envelopes mailed. We think members of Congress would be quite surprised to learn that they may do something that would otherwise be prohibited if they simply use more envelopes and double their postage costs.

August 3, 2007



David M. Mason
Vice Chairman



Hans A. von Spakovsky
Commissioner