AGENDA DOCUMENT NO. 10-24

FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 26, 2010

AGENDA ITEM

For Meeting of 04-29-10

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan
General Counsel

Rosemary C. Smith
Associate General Counsel

Robert M. Knop
Assistant General Counsel

Anthony Buckley
Attorney

Subject: Draft AO 2010-03
(National Democratic Redistricting Trust)

Attached are two proposed drafts of the subject advisory opinion. We request that these drafts be placed on the agenda for April 29, 2010.

Attachment

ADVISORY OPINION 2010-03

Marc E. Elias, Esq.
Kate S. Keane, Esq.
Perkins Coie LLP
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2003

DRAFT A

Dear Mr. Elias and Ms. Keane:

We are responding to your advisory opinion request on behalf of the National Democratic Redistricting Trust ("the Trust"), concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the solicitation of funds by Members of Congress on behalf of the Trust. The Commission concludes that the Trust's proposed activities are not in connection with an election and therefore Members of Congress may solicit funds on behalf of the Trust that do not comply with the Act's amount limitations and source prohibitions.

Background

The facts presented in this advisory opinion are based on your letter dated February 19, 2010 and your email dated March 2, 2010.

The Trust was established by individuals, but not Members of Congress, to raise funds to pay for the pre-litigation and litigation costs that arise following the next legislative redistricting process.[1] The Trust is run by a trustee and an executive director, both of whom are private citizens and neither of whom are Members of Congress. The Trust is not directly or indirectly established, financed, maintained, or controlled by any Member of Congress, any authorized candidate committee, or any national, State, district, or local party committee.

[1] The Trust will also spend some of its funds on administrative costs (*e.g.*, to pay the executive director's salary).

Though the Trust may work in concert with like-minded individuals, organizations, and political committees that will attempt to influence elections, the Trust itself will not fund attempts to influence elections. Indeed, the Trust will not use its funds to pay for communications that expressly advocate the election or defeat of any clearly identified candidate for office, nor will any of its solicitations of funds expressly advocate the election or defeat of any clearly identified candidate for office.

The Trust would like Members of Congress to solicit funds on its behalf. Such solicitations would seek funds that do not comply with the Act's amount limitations or source prohibitions, and also would not advocate the election or defeat of any candidate for office.

Question Presented

May Members of Congress solicit on behalf of the Trust funds that do not comply with the Act's amount limitations and source prohibitions?

Legal Analysis and Conclusions

Yes, Members of Congress may solicit funds on behalf of the Trust that do not comply with the Act's amount limitations and source prohibitions because the Trust's proposed activities are not in connection with any Federal or non-Federal election.

Federal candidates and officeholders, their agents, and entities directly or indirectly established, financed, maintained, or controlled by them (collectively, "covered persons") may not solicit, receive, direct, transfer, or spend any "funds in connection with an election for Federal office" or any "funds in connection with an election other than an election for Federal office" unless such funds are "subject to the limitations, prohibitions, and reporting requirements of this Act" or are consistent with FECA's amount limitations

and source prohibitions, respectively. 2 U.S.C. 441i(e)(1)(A) and (B); 11 CFR 300.61 and 300.62.

In analyzing the application of 2 U.S.C. 441i(e), the threshold question is whether the Federal candidate or officeholder is soliciting funds in connection with a Federal or non-Federal election under subsection (e)(1). *See* Advisory Opinion 2003-20. If so, then the analysis proceeds to whether the exceptions to subsection (e)(1) in subsections (e)(2) or (e)(4) apply. If the funds are not raised or spent in connection with an election, then the funds do not fall within the scope of section 441i(e).

Before 2 U.S.C. 441i(e) became law, the Commission approved proposals by Federal candidates or officeholders to establish and solicit funds for separate entities that were engaged exclusively in activities related to redistricting, including the defrayal of reapportionment-related legal expenses. Such entities were permitted to receive and spend funds that were not subject to the limitations and prohibitions of the Act. In approving such proposals, the Commission stated that the influencing of reapportionment decisions, although a political process, is not considered election-influencing activity subject to the requirements of the Act. Advisory Opinions 1982-37 (Edwards) and 1981-35 (Thomas). Because they were not considered to be "for the purpose of influencing any election for Federal office," the Commission determined that funds received and spent solely for reapportionment-related activities were not contributions or expenditures under the Act. *Id.*

Similarly, in Advisory Opinion 1990-23 (Frost), the Commission concluded that, although Congressman Frost could not set up a separate account within his own authorized committee to accept funds outside of the Act's limitations and prohibitions for

redistricting and reapportionment activities, "Nothing in this opinion should be construed to prohibit Mr. Frost from setting up a fund or entity, independent of the Frost Committee, for the purposes of paying expenses related to redistricting or reapportionment." The Commission added that even "a reference to Congressman Frost in the name of [such an independent] fund *would not by itself indicate a* purpose of influencing or a *connection with a Federal campaign*," but that "references to his candidacy would be viewed as something of value to his Federal campaign, and other references to him may or may not result in a contribution to his campaign, depending on all the facts and circumstances in a given situation." Advisory Opinion 1990-23 (Frost) at n.4 (emphasis added).[2]

The Commission concludes that 2 U.S.C. 441i(e)(1)(A) and (B) do not change this result. There is no indication in BCRA's legislative history that Congress intended sections 441i(e)(1)(A) or (B) to affect reapportionment or redistricting activities -- an area that is both familiar to Members of Congress and the subject of longstanding interpretation through Commission advisory opinions. The Commission's post-BCRA advisory opinions pertaining to whether certain activities are in connection with an election further support this conclusion. For example:

- In Advisory Opinion 2003-12 (Flake), the Commission concluded that the activities of a ballot measure committee that is not 'established, financed, maintained or controlled' by a Federal candidate . . . are not 'in connection with an[] election . . . prior to the committee qualifying an initiative or ballot measure

[2] Under the reasoning in Advisory Opinion 1990-23 (Frost), if a reference to a Federal candidate in the name of an independent redistricting fund is not in connection with a Federal campaign or election, then the redistricting fund itself also is not in connection with an election.

for the ballot, but are 'in connection with an[] election . . .' after the committee qualifies an initiative or ballot measure for the ballot."

- In Advisory Opinion 2003-15 (Majette), the Commission concluded that Representative Majette's costs of defending against a lawsuit seeking a special primary and special general election—which, if successful, would have essentially overturned the primary and general elections that Representative Majette had won—were not "in connection with" any election.
- In Advisory Opinion 2003-20 (Reyes), the Commission concluded that funds raised and spent by a scholarship organization are not in connection with an election.
- In Advisory Opinion 2005-10 (Berman-Doolittle), the Commission concluded that section 441i(e) does not prohibit Federal candidates and officeholders from raising funds for committees that have been formed solely to support or oppose ballot measures, provided such committees were not established, financed, maintained or controlled by a Federal candidate, officeholder, or anyone acting on their behalf, or by any party committee. In a concurring opinion, Vice Chairman Toner and Commissioner Mason explained that "ballot initiatives and referenda are not elections for office as a matter of law under Section 441i(e) and, therefore, the statute's soft-money fundraising restrictions do not apply to ballot measure activities." Similarly, Commissioners Weintraub and McDonald stated in a separate concurrence that, "where a federal candidate seeks to raise funds for a ballot measure committee that he or she does not establish, maintain, finance, or

control" and "where no federal candidate appears on the same ballot," the activities are not in connection with an election.

Here, the Trust will not seek to put any matters on the same ballot as a Federal candidate, or on any ballot whatsoever. *See* Advisory Opinion 2005-10 (Berman-Doolittle) (Concurring Statement of Commissioners Weintraub and McDonald); *see also* Advisory Opinion 2003-12 (Flake). Rather, the Trust's redistricting activities concern decisions by State legislatures and courts. Moreover, while the outcome of the Trust's activities may incidentally affect elections occurring subsequent to redistricting—for example, an individual's decision whether and where to run may depend on how a particular district is drawn—those strategic considerations can be impacted by any number of factors, such as: changes to campaign finance law, campaign issues that arise and fade with the vicissitudes of current events and pending legislation, changes in the electorate caused by migration, or the effect of State ballot measures on the general political climate, to name a few. The nexus between such considerations, like redistricting, and an individual's decision to run for office are far too attenuated to be considered *in connection with* an election.

Moreover, although the Supreme Court, in *McConnell v. FEC*, 540 U.S. 93, 182 (2003), noted that "Large soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder," the Court was addressing Section 441i(e)'s solicitation restrictions on contributions to the party committees—organizations whose very purpose is to advocate for the election of their candidates. The Court's reasoning did not extend to Federal candidates' and officeholders' solicitation of funds outside the Act's limits and

prohibitions for other purposes, such as the State ballot measures, election litigation, or scholarship funds at issue in Advisory Opinions 2003-12 (Flake), 2003-15 (Majette), 2003-20 (Reyes), and 2005-10 (Berman-Doolittle).

Therefore, the Commission concludes that donations to the Trust for the sole purpose of paying the pre-litigation and litigations costs associated with reapportionment and redistricting legal matters and related issues are neither "in connection with an election for Federal office" nor "in connection with any election other than an election for Federal office" for purposes of 2 U.S.C. 441i(e)(1)(A) and (B). As such, the funds are not subject to the limitations and prohibitions of the Act. Accordingly, a Member of Congress may solicit unlimited funds on behalf of the Trust to defray the legal expenses associated with the Trust's redistricting efforts.

The Commission expresses no opinion regarding the possible applicability of any Federal or State tax laws or other laws, or the rules of the Senate or House of Representatives, to the matters presented in your request, as those issues are outside its jurisdiction.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on

this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions and case law. The cited advisory opinions are available on the Commission's website at http://saos.nictusa.com/saos/searchao.

On behalf of the Commission,

Matthew S. Petersen
Chairman

ADVISORY OPINION 2010-03

Marc E. Elias, Esq.
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Perkins Coie LLP
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2003

DRAFT B

Dear Mr. Elias and Ms. Keane:

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Background

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Member of Congress, any authorized candidate committee, or any national, State, district, or local party committee.

Though the Trust may work in concert with like-minded individuals, organizations, and political committees that will attempt to influence elections, the Trust itself will not fund attempts to influence elections. Indeed, the Trust will not use its funds to pay for communications that expressly advocate the election or defeat of any clearly identified candidate for office, nor will any of its solicitations of funds expressly advocate the election or defeat of any clearly identified candidate for office.

The Trust would like Members of Congress to solicit funds on its behalf. Such solicitations would seek funds that do not comply with the Act's amount limitations or source prohibitions, and also would not advocate the election or defeat of any candidate for office.

Question Presented

May Members of Congress solicit on behalf of the Trust funds that do not comply with the Act's amount limitations and source prohibitions?

Legal Analysis and Conclusions

No, the Trust's proposed activities are in connection with Federal elections and therefore Members of Congress may only solicit funds on behalf of the Trust that comply with the Act's amount limitations and source prohibitions.

On November 6, 2002, the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002) ("BCRA") took effect. As amended by BCRA, the Act regulates certain actions of Federal candidates and officeholders ("covered persons") when they raise or spend funds "in connection with" either Federal or non-Federal

elections. 2 U.S.C. 441i(e)(1). Both BCRA and the Commission's regulations implementing BCRA prohibit covered persons from soliciting, receiving, directing, transferring, or spending any "funds in connection with an election for Federal office" unless such funds are "subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. 441i(e)(1)(A); 11 CFR 300.61. BCRA and the Commission's regulations also prohibit covered persons from soliciting, receiving, directing, transferring or spending any "funds in connection with an election other than an election for Federal office" unless the funds are consistent with FECA's amount limitations and source prohibitions. 2 U.S.C. 441i(e)(1)(A); 11 CFR 300.62.

The solicitation restrictions in 2 U.S.C. 441i(e) were challenged as part of *McConnell v. FEC*, 540 U.S. 93 (2003). The Supreme Court upheld the provisions against a facial challenge, stating that "[l]arge soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder." *Id.* ; *see also Republican National Committee v. FEC*, slip op. at 6 (D.D.C. Mar. 26, 2010); *cf Citizens United v. FEC* 558 U.S. ___, 130 S.Ct. 876, 910 (2010) (distinguishing independent expenditures, which do not pose a threat of *quid pro quo* corruption, from unlimited "soft money" donations such as those addressed by BCRA, which, as the BCRA record established, do pose such a risk). The Court went on to state in *McConnell* that a donation's value to a candidate or officeholder "is evident from the fact of the solicitation itself" regardless of whether the candidate or officeholder ultimately controls how the donated funds are spent. *McConnell*, 540 U.S. at 182. The corruption concerns addressed by the Court in *McConnell* and *Citizens United* are directly implicated in redistricting activity, as the

redistricting process is of considerable importance to elected officials. *McConnell v. FEC,* 251 F. Supp. 2d 462, 462 (D.D.C. 2003) (Kollar-Kotelly, J.) (noting that redistricting efforts "are of value to Members of Congress because the changes in the composition of a Member's district can mean the difference between reelection and defeat.").

As the Supreme Court has observed, "it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). This line-drawing process creates clear winners and losers. Redistricting "may pit incumbents against one another or make very difficult the election of the most experienced legislator." *Id.* Districts may be designed with a particular incumbent or party in mind, and the beneficiaries of such 'designer districts' may have a potentially decisive advantage over challengers over the course of several election cycles. The advantages of such districts may even prevent well-qualified challengers from emerging, allowing the officeholder to retain his or her 'designated' seat at a relatively low cost. This clear nexus between redistricting and electoral outcomes creates the potential for the reality or appearance of *quid pro quo* corruption. Indeed, in *Republican National Committee v. FEC,* a three judge panel of the U.S. District Court for the District of Columbia recently reaffirmed the constitutionality of BCRA's soft money limitations against an as-applied challenge by a national party committee seeking to raise and spend unlimited soft money in order to support State parties' redistricting efforts following the 2010 census. *RNC v. FEC,* Slip Op. at 6 (D.D.C. March 26, 2010).

In analyzing the application of 2 U.S.C. 441i(e), the threshold question is whether the funds involved are in connection with an election under subsection (e)(1). *See*

Advisory Opinion 2003-20 (Reyes). If the funds are not raised or spent in connection with an election, then the funds do not fall within the scope of section 441i(e).

Redistricting litigation is "in connection" with a Federal or non-Federal election because that litigation determines the boundaries and composition of the districts for which elections are held. The outcome of redistricting litigation affects decisions by individuals as to whether to become candidates and where to run for office and, ultimately, dictates the makeup of the electorate. Moreover, redistricting litigation has the potential to influence which party's candidates are more likely to win election in particular districts, and may even alter the balance of political power among parties. *See McConnell v. FEC*, 251 F. Supp. 2d 176, 468 (D.D.C. 2003) (Kollar-Kotelly, J.). For these reasons, "[re]districting inevitably has and is intended to have substantial political consequences." *Gaffney* at 753. Therefore, the Commission concludes that donations to the Trust are in connection with an election for Federal office under 2 U.S.C. 441i(e)(1)(A).[2] Accordingly, Members of Congress may only raise and spend funds on behalf of the Trust that are subject to the amount limitations, source prohibitions, and reporting requirements of the Act.

Prior to the enactment of BCRA, the Commission considered several proposals by candidates and officeholders to establish separate entities exclusively for activity related to redistricting, including the defrayal of reapportionment-related legal expenses. *See, e.g.,* Advisory Opinions 1990-23 (Frost), 1982-37 (Edwards), and 1981-35 (Thomas). Such entities were permitted to receive and spend funds that were not subject to the limitations and prohibitions of the Act. In approving such proposals, the Commission has

[2] The Commission also concludes that none of the exceptions to section 441i(e)(1)'s solicitation restrictions, in subsections (e)(2) or (e)(4), applies.

repeatedly concluded that funds donated for activity related to redistricting, including efforts to influence reapportionment decisions, are not for the purpose of influencing a Federal election and therefore are not contributions or expenditures subject to the requirements of the Act. Advisory Opinion 1982-37 (Edwards).

This advisory opinion does nothing to change the fundamental conclusion that activity related to redistricting and reapportionment decisions is not "for the purpose of influencing an election" under the Act. BCRA, however, introduced additional limitations on the fundraising activities of Federal candidates and officeholders that are broader than the standard for determining contributions and expenditures. Activity that is not considered "election influencing activity subject to the requirements of the Act," *see* Advisory Opinion 1981-35 (Thomas), may nonetheless be sufficiently connected to an election to be covered by the fundraising limitations applicable to candidates and office holders. *See* Advisory Opinions 2006-24 (Republican and Democratic Senatorial Campaign Committees) (concluding that a recount fund is "in connection with" Federal elections even though donations to such a fund would not become a contribution "for the purpose of influencing an election" under 2 U.S.C. 441a).

The Commission expresses no opinion regarding the possible applicability of any Federal or State tax laws or other laws, or the rules of the Senate or House of Representatives, to the matters presented in your request, as those issues are outside its jurisdiction.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any

of the facts or assumptions presented and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions and case law. The cited advisory opinions are available on the Commission's website at http://saos.nictusa.com/saos/searchao.

On behalf of the Commission,

Matthew S. Petersen
Chairman