

AGENDA DOCUMENT NO. 11-14



FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION
COMMISSION
SECRETARIAT

2011 MAR -9 P 5:06

March 9, 2011

AGENDA ITEM

For Meeting of 3/16/11

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey *ACK for CH*
Acting General Counsel

Rosemary C. Smith *RRP PWS*
Associate General Counsel

Robert M. Knop *DEK for RML*
Assistant General Counsel

David C. Adkins *DAK*
Attorney

Subject: AO 2011-03 (DNCC, RNC, NRCC, DCCC, and NRSC)—Draft A

Attached is a proposed draft of the subject advisory opinion. We have been asked that this draft be placed on the agenda for March 16, 2011.

Attachment

1 ADVISORY OPINION 2011-03

2 Marc E. Elias, Esq.
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4 Perkins Coie LLP
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6 Washington, D.C., 20005

DRAFT A

7
8 Jessica Furst, Esq.
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13 John R. Phillippe, Esq.
14 Republican National Committee
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16 Washington D.C., 20003

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18 Brain G. Svoboda, Esq.
19 Counsel to the Democratic Congressional Campaign Committee
20 Perkins Coie LLP
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22 Washington, D.C., 20005

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24 Michael E. Toner, Esq.
25 Counsel to the National Republican Senatorial Committee
26 Wiley Rein LLP
27 1776 K Street NW
28 Washington, D.C., 20006

29 Dear Ms. Furst and Messrs. Elias, Phillippe, Svoboda, and Toner:

30 We are responding to your advisory opinion request on behalf of the Democratic
31 Senatorial Campaign Committee (“DSCC”), the National Republican Congressional
32 Committee (“NRCC”), the Republican National Committee (“RNC”), the Democratic
33 Congressional Campaign Committee (“DCCC”), and the National Republican Senatorial
34 Committee (“NRSC”) (collectively, the “National Party Committees” or “Committees”),
35 concerning the application of the Federal Election Campaign Act of 1971, as amended
36 (the “Act”), and Commission regulations to the use of recount funds to finance non-

1 recount-related litigation expenses. The Commission concludes that the National Party
2 Committees may use their recount funds for the proposed purpose.

3 ***Background***

4 The facts presented in this advisory opinion are based on your letter received on
5 February 7, 2011.

6 In February of 2010, the National Party Committees were sued in the United
7 States District Court for the Northern District of Texas by Ralph Janvey (the “Janvey
8 Litigation”). Janvey was appointed receiver over property, assets, and records of Allen
9 Sanford, Sanford’s associate James Davis, and the Sanford Financial Group, among
10 others, who together are alleged to have run a Ponzi scheme. Janvey claims that proceeds
11 from this scheme were donated and contributed to the National Party Committees, and he
12 is seeking disgorgement of those donations and contributions along with the payment of
13 interest and attorneys fees.

14 The National Party Committees have moved to dismiss the Janvey Litigation and
15 the parties are in the midst of litigating the claims in court.

16 ***Question Presented***

17 *May the National Party Committees use recount funds to finance costs associated*
18 *with the Janvey Litigation?*

19 ***Legal Analysis and Conclusion***

20 Yes, the National Party Committees may use recount funds to finance costs
21 associated with the Janvey Litigation.

1 The Bipartisan Campaign Reform Act of 2002¹ (“BCRA”) amended the Act, in
2 pertinent part, by prohibiting the national party committees from soliciting, receiving, or
3 directing to another person a contribution, donation, or transfer of funds or any other
4 thing of value, or spending any funds, that are not subject to the limitations, prohibitions
5 and reporting requirements of the Act. 2 U.S.C. 441i(a)(1); *see also* 11 CFR 300.10(a).

6 In Advisory Opinion 2009-04 (DSCC/Franken), the Commission concluded that a
7 national party committee could establish a recount fund, separate from its other accounts
8 and subject to a separate limit – equivalent to its annual limit in 2 U.S.C. 441a(a)² – on
9 amounts received. Donations to this separate recount fund were to be subject to the
10 source prohibitions and reporting requirements of the Act, and were not aggregated with
11 the donors’ aggregate biennial contribution limits set forth in 2 U.S.C. 441a(a)(3). The
12 Commission permitted such funds “to pay expenses incurred in connection with recounts
13 and election contests of Federal elections.”

14 Subsequently, in Advisory Opinion 2010-14 (DSCC), the Commission provided
15 further guidance on the permissible uses of recount funds. In particular, the Commission
16 concluded that a national party committee could make disbursements from its recount
17 fund before the date of the general election for expenses related to recount preparation.³
18 The Commission also concluded that a committee could use its recount fund to pay the

¹ Pub. L. 107-155, 116 Stat. 81 (2002).

² At the time of this advisory opinion, the limits applicable to national party committees were \$30,400 from an individual and \$15,000 from a multicandidate political committee per calendar year. *See* 2 U.S.C. 441a(a)(1)(B) and 441a(a)(2)(B) (2009); 11 CFR 110.1(c) and 110.2(c) (2009).

³ For purposes of that request, recount preparation expenses included payments for the services of attorneys and staff to prepare for the post-election period, such as by conducting recount-related research in States where recounts were most likely. Examples of recount-preparation activities included researching State laws on recounts and election contests, developing plans and budgets for anticipated recounts and election contests, and recruiting volunteers to engage in recounts.

1 costs associated with soliciting additional donations to the recount fund so long as the
2 recount solicitations clearly stated the purpose of the fund and noted that no donations to
3 the fund would be used for the purpose of influencing any Federal election.

4 The Commission further concluded that to the extent the committee engaged in
5 dual-purpose activities – that is, joint campaign and recount preparation activities – the
6 committee would be required to allocate the expenses associated with those activities
7 using the “funds received” method in 11 CFR 106.1(a).

8 Finally, in Advisory Opinion 2010-18 (DFL), the Commission concluded that
9 recount funds raised in connection with one Federal election could be used to fund
10 recount-related activities in subsequent Federal elections.

11 The Commission’s reasoning in its three post-BCRA advisory opinions
12 concerning recount funds has never explicitly limited the national party committees to
13 using such funds exclusively to finance recount activities. However, the Commission has
14 noted that certain uses of recount funds would be permissible because “none of the
15 activities, or the results of those activities, can or will be used for campaign activities
16 before Election Day.” Advisory Opinion 2010-14 (DSCC). Relatedly, the Commission’s
17 “regulations explicitly exempt from the definitions of ‘contribution’ and ‘expenditure’ ‘a
18 gift, subscription, loan, advance, or deposit of money or anything of value made with
19 respect to a recount of the results of a Federal election, or an election contest concerning
20 a Federal election.’” *Id.*

21 Both of these aspects that the Commission found to be salient in approving
22 disbursements from the national party committees’ recount funds apply here. First, the
23 National Party Committee’s proposal to use their recount funds for the Janvey Litigation

1 will not be used in any way for any campaign activities or for the purpose of influencing
2 any Federal election. Rather, the National Party Committees represent the proposed
3 disbursements would cover the costs of defending against litigation relating
4 predominantly to donations the committees received in their non-Federal accounts prior
5 to the passage of BCRA, which the donor's receiver now seeks to recover pursuant to a
6 "fraudulent transfer" theory under state law. Second, like funds received and disbursed
7 for recount activities, the Commission repeatedly has recognized that funds received and
8 disbursed with respect to legal defense activities are not "contributions" or
9 "expenditures" under the Act. *See, e.g.*, Advisory Opinions 2011-01 (Carnahan)
10 (litigation concerning copyright infringement), 2003-15 (Majette) (litigation concerning
11 open primary elections), 1983-37 (Massachusetts Democratic State Committee)
12 (litigation concerning a party's ballot access rules), 1981-16 (Carter-Mondale Presidential
13 Committee) (potential commercial contract litigation), 1981-13 (Moss) (litigation
14 concerning slander claim), and 1980-04 (Carter-Mondale Presidential Committee)
15 (alleged violations of the Appropriations Act and Hatch Act, and infringements of
16 constitutional rights). Accordingly, the Commission concludes the National Party
17 Committee's proposal to use recount funds to defend against the Janvey Litigation is in
18 accordance with its prior advisory opinions on recount funds.⁴

⁴ In Advisory Opinion 2010-18 (DFL), the Commission was not able to agree on whether a State party committee could convert recount funds – whether by transfer or redesignation to its main Federal campaign account – for use “in connection with the 2010 elections.” Putting aside the differences between the rules governing the State and national party committees’ ability to transfer funds to their Federal accounts (*see* 11 C.F.R. 300.31(b)(3)(v)), the Commission’s inability to provide an answer to that question in AO 2010-18 is immaterial here because the National Party Committees’ proposal to use their recount funds to defend their legal entitlement to retain certain donations is not in connection with any Federal elections. *See* Advisory Opinion 2003-15 (Majette) (litigation concerning open primary elections was not “in connection with a Federal election”).

1 This response constitutes an advisory opinion concerning the application of the
2 Act and Commission regulations to the specific transaction or activity set forth in your
3 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
4 of the facts or assumptions presented and such facts or assumptions are material to a
5 conclusion presented in this advisory opinion, then the requester may not rely on that
6 conclusion as support for its proposed activity. Any person involved in any specific
7 transaction or activity which is indistinguishable in all its material aspects from the
8 transaction or activity with respect to which this advisory opinion is rendered may rely on
9 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
10 conclusions in this advisory opinion may be affected by subsequent developments in the
11 law including, but not limited to, statutes, regulations, advisory opinions and case law.
12 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
13 directly from the Commission's Advisory Opinion searchable database at
14 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Cynthia L. Bauerly
Chair