

AGENDA DOCUMENT NO. 11-14-A



FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION
COMMISSION
SECRETARIAT

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March 11, 2011

AGENDA ITEM

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey *pch*
Acting General Counsel

Rosemary C. Smith *AKR for RES*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

David C. Adkins *DA*
Attorney

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

For Meeting of 3-16-11

SUBMITTED LATE

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.
3 Counsel to the Democratic Senatorial Campaign Committee
4 Perkins Coie LLP
5 700 13th Street, N.W., Suite 700
6 Washington, D.C., 20005

DRAFT B

7
8 Jessica Furst, Esq.
9 National Republican Congressional Committee
10 320 First Street, S.E.
11 Washington, D.C., 20003

12
13 John R. Phillippe, Esq.
14 Republican National Committee
15 310 First Street, S.E.
16 Washington D.C., 20003

17
18 Brain G. Svoboda, Esq.
19 Counsel to the Democratic Congressional Campaign Committee
20 Perkins Coie LLP
21 700 13th Street, N.W., Suite 700
22 Washington, D.C., 20005

23
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 not 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 Stanford, Stanford’s associate James Davis, and the Stanford 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. Each of the National Party
16 Committees maintains a recount fund and would like to draw on those funds to finance
17 costs associated with the Janvey Litigation.

18 ***Question Presented***

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

21 ***Legal Analysis and Conclusion***

22 No, the National Party Committees may not use their recount funds to finance
23 costs associated with the Janvey Litigation.

1 The Bipartisan Campaign Reform Act of 2002¹ (“BCRA”) amended the Act to
2 prohibit national party committees, including those making this request, from soliciting,
3 receiving, directing, or spending “any funds [] that are not subject to the limitations,
4 prohibitions, and reporting requirements of th[e] Act,” regardless of whether those funds
5 meet the definitions of contribution or expenditure. 2 U.S.C. 441i(a)(1); 11 CFR
6 300.10(a). Therefore, a determination about whether amounts received or disbursed for
7 the purpose of defending the Janvey Litigation constitute contributions or expenditures
8 under the Act is not necessary for this advisory opinion.

9 The Commission has recognized a very limited exception to BCRA’s general rule
10 for national party committees in the case of recounts. Specifically, in Advisory Opinion
11 2009-04 (DSCC/Franken), the Commission concluded that a national party committee
12 could establish a recount fund, separate from its other accounts and subject to a separate
13 limit – equivalent to its annual limit in 2 U.S.C. 441a(a)² – on amounts received.
14 Donations to this separate recount fund were to be subject to the source prohibitions and
15 reporting requirements of the Act. Such funds were to be used only to pay expenses
16 incurred in connection with recounts and election contests of Federal elections. *See* AO
17 2009-04 (DSCC/Franken) (the proposed DSCC fund would be used “only to pay
18 expenses incurred in connection with the 2008 Senatorial recount and election contest.”).

19 Subsequently, in Advisory Opinion 2010-14 (DSCC), the Commission provided
20 further guidance on the permissible uses of recount funds. In particular, the Commission

¹ Pub. L. No. 107-155, 116 Stat. 81 (2002).

² At the time of AO 2009-04 (DSCC/Franken), 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).

1 concluded that a national party committee could make disbursements from its recount
2 fund before the date of the general election for expenses related to recount preparation.³

3 The Commission also concluded that a national party committee could use its recount
4 fund to pay the costs associated with soliciting additional donations to the recount fund so
5 long as the recount solicitations clearly stated the purpose of the fund and noted that no
6 donations to the fund would be used for the purpose of influencing any Federal election.

7 In short, the Commission has in recent years given national party committees
8 narrow leave to raise a separate, limited pot of money for a single, well-defined purpose:
9 to pay expenses incurred only in connection with recounts and election contests.

10 Importantly, the Commission has never permitted a national party committee to raise a
11 separate, limited pot of money for purposes other than recount- or election contest-related
12 activity, nor has it permitted a national party committee to use its recount funds to finance
13 activity entirely unrelated to a recount or election contest. It declines to do so here.

14 As the Commission has previously explained, recounts and election contests are
15 unique occurrences in the electoral context. In many ways, they are similar to a runoff
16 election, which triggers a contribution limit separate from the normal contribution limit. *See*
17 *Advisory Opinion 2006-24 (NRSC/DSCC)* (concluding that because a recount is similar to a
18 runoff election, recount funds are subject to a separate contribution limit and are not
19 combined with other contributions for purposes of the biennial contribution limits of 2 U.S.C.
20 441a(a)(3)). In that sense, allowing national party committees to raise a separate, limited

³ For purposes of the request in 2010-14 (DSCC), 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 fund is congruent with established campaign finance law and, importantly, does not
2 undermine the purpose of the Act or Commission regulations.

3 Expenses generated by defending the National Party Committees in the Janvey
4 Litigation, which seeks the disgorgement of donations and contributions, are not in
5 connection with a recount or election contest. Moreover, allowing the National Party
6 Committees to use their recount funds to finance activity unrelated to a recount or
7 election contest would transform “recount funds,” which exist for a specific, limited
8 purpose, to “non-Federal accounts.” These funds could then be used to finance all
9 manners of activity, and would effectively double BCRA’s limitation on the giving of
10 contributions, donations, or transfers of funds or any other thing of value to national party
11 committees in express violation of the Act and Commission regulations. *See* 2 U.S.C.
12 441i(a). Accordingly, the National Party Committees may not use their recount funds to
13 finance costs associated with the Janvey Litigation.

14 This response constitutes an advisory opinion concerning the application of the
15 Act and Commission regulations to the specific transaction or activity set forth in your
16 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
17 of the facts or assumptions presented and such facts or assumptions are material to a
18 conclusion presented in this advisory opinion, then the requester may not rely on that
19 conclusion as support for its proposed activity. Any person involved in any specific
20 transaction or activity which is indistinguishable in all its material aspects from the
21 transaction or activity with respect to which this advisory opinion is rendered may rely on
22 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or

1 conclusions in this advisory opinion may be affected by subsequent developments in the
2 law including, but not limited to, statutes, regulations, advisory opinions and case law.

3 The cited advisory opinions are available on the Commission's website,
4 www.fec.gov, or directly from the Commission's Advisory Opinion searchable database
5 at <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Cynthia L. Bauerly

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Chair

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