

AGENDA DOCUMENT NO. 11-14-B



FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION COMMISSION
SECRETARIAT

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April 7, 2011

AGENDA ITEM

MEMORANDUM

For Meeting of 4-7-11

TO: The Commission

FROM: Christopher Hughey *-pch*
Acting General Counsel

SUBMITTED LATE

Rosemary C. Smith *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 C

Attached is a proposed draft of the subject advisory opinion. We have been asked that this draft be placed on the agenda for April 7, 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

7
8 Jessica Furst, Esq.
9 National Republican Congressional Committee
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11 Washington, D.C., 20003

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13 John R. Phillippe, Esq.
14 Republican National Committee
15 310 First Street, S.E.
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
21 700 13th Street, N.W., Suite 700
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 pay costs

1 associated with a lawsuit brought by Ralph Janvey seeking disgorgement of funds under
2 Texas state law. The Commission concludes that the National Party Committees may use
3 their recount funds for the proposed purpose.

4 ***Background***

5 The facts presented in this advisory opinion are based on your letter received on
6 February 7, 2011 and supplemental material received on March 3, 2011.

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

15 The Janvey Litigation principally concerns whether non-Federal donations
16 (colloquially referred to as “soft money”) made prior to the effective date of BCRA constitute
17 fraudulent transfers under applicable state law. *See* Request at 1 (“The bulk of [Mr.
18 Stanford’s] donations to the National Party Committees preceded the effective date of
19 [BCRA] and were made to non-Federal accounts.”); Janvey Complaint, Appendix;
20 Democratic Committee Defendants’ Brief in Support of Their Motion to Dismiss at 17
21 (“Nearly all of the transfers at issue in this case were soft money contributions made prior to
22 the enactment of BCRA.”). While the Janvey Litigation also concerns some Federal “hard
23 money” contributions made before and after the enactment of BCRA, these contributions are
24 much smaller in amount than the non-Federal donations at issue in the suit. Thus, for the

1 most part, Janvey seeks the disgorgement of funds that the National Party Committees have
2 been prohibited from raising and spending for almost a decade. *See* BCRA § 402(b)(2), 116
3 Stat. at 113; *see also* 11 CFR § 300.12(a), (c).

4 The National Party Committees have moved to dismiss the Janvey Litigation and
5 the parties are in the midst of litigating the claims in court. Each of the National Party
6 Committees maintains a recount fund and requests to draw on its fund to finance costs
7 associated with the Janvey Litigation.

8 ***Question Presented***

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

11 ***Legal Analysis and Conclusion***

12 Yes, the National Party Committees may use their recount funds to finance costs
13 associated with the Janvey Litigation.

14 The Bipartisan Campaign Reform Act of 2002¹ (“BCRA”) amended the Act to
15 prohibit national party committees, including those making this request, from soliciting,
16 receiving, directing, or spending “any funds [] that are not subject to the limitations,
17 prohibitions, and reporting requirements of th[e] Act,” regardless of whether those funds
18 meet the definitions of contribution or expenditure. 2 U.S.C. 441i(a)(1); 11 CFR
19 300.10(a).

20 In Advisory Opinion 2009-04 (DSCC/Franken), the Commission concluded that a
21 national party committee could establish a recount fund, separate from its other accounts

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

1 and subject to a separate limit – equivalent to its annual limit in 2 U.S.C. 441a(a)² – on
2 amounts received. Donations to this separate recount fund are subject to the source
3 prohibitions and reporting requirements of the Act. *See also* Advisory Opinion 2006-24
4 (NRSC/DSCC). As originally proposed, recount funds were to be used “to pay expenses
5 incurred in connection with recounts and election contests of Federal elections.”

6 Advisory Opinion 2009-04 (DSCC/Franken)

7 Subsequently, in Advisory Opinion 2010-14 (DSCC), the Commission provided
8 further guidance on the permissible uses of recount funds. In particular, the Commission
9 concluded that a national party committee could make disbursements from its recount
10 fund before the date of the general election for expenses related to recount preparation.³
11 The Commission also concluded that a committee could use its recount fund to pay the
12 costs associated with soliciting additional donations to the recount fund so long as the
13 recount solicitations clearly stated the purpose of the fund and noted that no donations to
14 the fund would be used for the purpose of influencing any Federal election. Finally, in
15 Advisory Opinion 2010-18 (DFL), the Commission concluded that recount funds raised
16 in connection with one Federal election could be used to fund recount-related activities in
17 subsequent Federal elections. Under the circumstances presented by this request, the

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). Since that time, the limit applicable to contributions from individuals has increased to \$30,800. Explanation and Justification for Price Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure Threshold, 76 FR 8368 (February 14, 2011).

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 Commission concludes that the National Party Committees may use donations to their
2 respective recount funds to defray expenses for defending against the Janvey Litigation.

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

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

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On behalf of the Commission,

Cynthia L. Bauerly
Chair