

March 15, 2010

**By Electronic Mail**

Thomasenia Duncan, Esq.  
General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

**Re: Comments on Advisory Opinion Request 2010-03 (National Democratic Redistricting Trust)**

Dear Ms. Duncan:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to Advisory Opinion Request 2010-03, a request submitted by the National Democratic Redistricting Trust (the “Trust”) seeking the Commission’s opinion as to whether “Members of Congress may solicit funds for the Trust outside the limits and source restrictions prescribed by the Federal Election Campaign Act” (FECA). AOR 2010-03 at 1.

The Trust correctly notes that FECA, as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA):

[P]rohibits federal candidates from soliciting, receiving, directing, transferring, or spending 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 the Act’s contribution limits and source restrictions, respectively.

AOR 2010-03 at 1-2 (emphasis added) (citing 2 U.S.C. § 441i(e)(1)(A) and (B); 11 C.F.R. §§ 300.61, 300.62).

The Trust further notes that it has been established “for the purpose of raising funds to spend on legal fees associated with the legislative redistricting process that follows the 2010 census.” AOR 2010-03 at 1. The Trust elaborated in a phone call with Commission staff and a follow-up email to the Commission that funds raised by the Trust “will be spent only on the pre-litigation and litigation costs that arise out of the redistricting processes following the 2010 census as well as on the costs associated with administering [the Trust] (*e.g.*, the executive director’s salary).” AOR 2010-03 Attachment (email exchange between David Adkins and Marc Elias).

The question posed by AOR 2010-03 is a simple one: Are funds raised for, and spent on, legal and administrative costs associated with redistricting to be treated as funds raised and spent “in connection with an election” for purposes of the soft money solicitation ban?

The briefs filed by the Commission and the Democratic National Committee in *Republican National Committee v. FEC* make clear that redistricting activities occur “in connection with elections.” Consequently, the Commission should advise the Trust that Members of Congress are prohibited by 2 U.S.C. § 441i(e)(1) from soliciting funds for the Trust outside the limits and source restrictions prescribed by FECA.

### Discussion

The Trust recognizes that the standard for applying section 441i(e) is whether an activity is “in connection with” a federal or non-federal election. AOR 2010-03 at 2. Yet, with regard specifically to redistricting, it cites as authority only two pre-BCRA advisory opinions for the different proposition that redistricting activities are not “election-influencing” activities under FECA. *See id.* (citing Ad. Ops. 1981-35 and 1982-37).

These dated opinions are of little relevance here.<sup>1</sup> Section 441i(e) applies to activities “in connection with” an election, not activities “for the purpose of influencing” an election.

As to the relevant standard, the brief recently filed by the Commission in the *RNC* litigation demonstrates that the Commission takes the firm position that redistricting activities are “in connection with” elections.

In the *RNC* case, the Commission defends the application of the party soft money ban, 2 U.S.C. § 441i(a), to funds raised and spent by a party for redistricting activities—precisely because, the Commission says, redistricting activities affect federal elections. The Commission argues: “[T]he record from *McConnell* demonstrates that ‘[r]edistricting efforts affect federal elections no matter when they are held.’” Brief for Defendant FEC in Opposition to Plaintiffs’ Motion for Summary Judgment at 46, *RNC v. FEC* (No. 08-1953) (D.D.C. Mar. 9, 2009) (citing *McConnell v. FEC*, 251 F. Supp. 2d 176, 468 (D.D.C. 2003) (Kollar-Kotelly, J.)).<sup>2</sup> The Commission continued:

The most important legislative activity in the electoral lives of U.S. House members takes place during redistricting, a process that is placed in the hands of

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<sup>1</sup> As a general matter, pre-BCRA advisory opinions are inapplicable today to the extent that they do not take into account BCRA’s express purpose of prohibiting federal officeholders from raising and spending non-federal funds—and the court’s conclusion in *McConnell*, detailed herein, that redistricting efforts are most certainly connected to elections.

<sup>2</sup> Although not quoted by the Commission in its *RNC* brief, Judge Kollar-Kotelly also found in *McConnell* that, in the pre-BCRA era, “[t]he national parties use[d] nonfederal funds, as well as federal funds, toward their redistricting efforts, and these efforts [were] 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.” *McConnell*, 251 F. Supp. 2d at 462.

state legislatures. The chances that a House incumbent will be ousted by unfavorable district boundaries are often greater than the chances of defeat at the hands of the typical challenger. Thus, federal legislators who belong to the state majority party have a tremendous incentive to be attuned to the state legislature and the state party leadership.

*Id.* (emphasis added) (citing *McConnell*, 251 F. Supp. 2d at 462 (Kollar-Kotelly, J.)). The Commission brief goes on to elaborate precisely how soft money contributions in the redistricting context pose a threat of corruption, noting that the “importance of redistricting to federal officeholders has not been lost on large soft money donors,” quoting “one memorandum to a high-level Fortune 100 company executive from the company’s own governmental affairs staff” explaining:

[B]ecause both parties will be working to influence redistricting efforts during the next two years, we anticipate that we will be asked to make soft money contributions to these efforts. Redistricting is a key once-a-decade effort that both parties have very high on their priority list. Given the priority of the redistricting efforts, relatively small soft money contributions in this area could result in disproportionate benefit.

*Id.* (quoting memorandum).

Finally, the Commission notes in its brief that the RNC admitted in its lawsuit that “redistricting ‘involves congressional districts,’” and conceded that “the purpose of its redistricting activities is to divide federal and state legislative districts ‘into a proper format that hopefully would be . . . more of a benefit to [the RNC] than the opposition party.’” *Id.*

In other words, in order to defend the application of section 441i(a) to funds raised and spent for redistricting activities, the Commission necessarily (and correctly) takes the position that such redistricting activities “affect federal elections.” There is no basis to distinguish for these purposes between section 441i(a) and 441i(e). If the Commission’s litigating posture in the *RNC* case is correct, then the Commission must conclude here that solicitations by federal candidates and officeholders for funds related to redistricting activities fall within the proscriptions of section 441i(e). To decide otherwise in this proceeding would be inconsistent with, and severely undermine, the Commission’s current position in court.

In short, it would be incoherent for the Commission to contend in court that redistricting activities “affect federal elections” but to conclude here that redistricting activities are not “in connection with” an election.

Indeed, it is ironic that this AOR is filed by a Trust associated with the Democratic Party, since the DNC itself in the same litigation also argues that redistricting activities are very much “in connection with” elections. In its court papers, the DNC approvingly quotes Judge Kollar-Kotelly’s finding that redistricting activities “have an effect on federal elections”:

Similarly, Plaintiffs provide no new, concrete facts with respect to their proposed “Redistricting Account”—and this too was decided by *McConnell*. In that case, the RNC introduced evidence that it used soft money “to support redistricting efforts, including redistricting litigation.” *McConnell*, 251 F. Supp. 2d at 338 (opinion of Henderson, J.); *id.* at 462 (opinion of Kollar-Kotelly, J.); *id.* at 831-32 (opinion of Leon, J.). In response, Judge Kollar-Kotelly concluded that state redistricting efforts have an effect on federal elections. *See id.* at 468, 687. Before the Supreme Court, Plaintiffs took issue with Judge Kollar-Kotelly’s conclusion, and asked the court to strike down 441i(a) as it restricted receipt of soft money in relation to redistricting activities. The Court declined to do so.

In the instant challenge, Plaintiffs merely reassert that they plan to create an account to support political activity, analysis, and litigation related to redistricting. But they have failed to introduce any concrete, discrete facts to support an as-applied challenge or to differentiate their claim from the one decided in *McConnell*. Indeed, their legal analysis as to why 441i(a) is unconstitutional as applied to their Redistricting Account does not contain a single citation to the factual record.

Brief for DNC in Opposition to Plaintiffs’ Motion for Summary Judgment at 12, *RNC v. FEC* (No. 08-1953) (D.D.C. Mar. 9, 2009) (emphasis added) (internal citations omitted).

Thus, the DNC concludes, “In short, [the RNC’s] basic argument—that the Constitution does not allow Congress to regulate national party fundraising for state candidate contributions, redistricting, issue advocacy, litigation and headquarters expenses—is not remotely the law.” DNC Br. at 3.

The DNC’s correct statement of constitutional law likewise applies to Congress’ regulation of federal officeholder fundraising for redistricting.

### **Conclusion**

The Commission correctly asserts in *RNC* that redistricting is the most important legislative activity in the electoral lives of U.S. House members. Brief for Defendant FEC, *supra* at 46.

The “most important” activity in the “electoral lives” of Members of Congress is plainly “in connection with” elections. Consequently, Members of Congress are prohibited by section 441i(e) from soliciting funds for the Trust outside of federal law amount limits and source prohibitions.

We appreciate the opportunity to comment on this matter.

Sincerely,

*/s/ Fred Wertheimer*

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