

August 2, 2013

**By Electronic Mail**

Lisa J. Stevenson  
Deputy General Counsel, Law  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

**Re: Comments on Advisory Opinion Request 2013-10 (DSCC, DCCC, NRCC, NRSC)**

Dear Ms. Stevenson:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to Advisory Opinion Request 2013-10, a request submitted on behalf of the Democratic Senatorial Campaign Committee (“DSCC”), Democratic Congressional Campaign Committee (“DCCC”), the National Republican Congressional Committee (“NRCC”), and the National Republican Senatorial Committee (“NRSC”) (collectively, the “Committees”), seeking “confirmation that they may defray office building expenses using funds from the same segregated Federal accounts from which they can pay for recounts, legal defense, and other disbursements” pursuant to prior advisory opinions issued by the Commission. AOR 2013-10 at 1 (citing AO 2009-04 and AO 2011-03).

We object in the strongest possible terms to the series of nonsensical advisory opinions, based on nonsensical regulations, concluding that federal candidates and party committees may set up segregated accounts, subject to separate contribution limits, to pay for recounts (AO 2006-24 and AO 2009-04) and an expanding list of other activities—*e.g.*, pre-election legal and administrative expenses to prepare for possible recounts (AO 2010-14), recounts in some unspecified future election (AO 2010-18) and, most recently, party legal defense expenses in litigation wholly unrelated to recounts and elections contests (AO 2011-03).

Years ago, the Commission, by regulation, incorrectly exempted funds raised and spent “with respect to a recount . . . or election contest” from treatment as “contributions” and “expenditures” through promulgation of 11 C.F.R. §§ 100.91 and 100.151. The Commission then based the series of above-described “recount fund” advisory opinions on these ill-conceived regulations. As bad as they were, the problem was at least contained to the sphere of recount related activities.

But now, the Commission is being asked to wholly abandon the fig leaf that such “recount funds” are to be used for recounts and to allow the Committees to set up general purpose slush funds using money that is in excess of a donor’s contribution limit to pay for “office building expenses,” which of course have nothing at all to do with recounts. The plain language of the recount regulations at 11 C.F.R. §§ 100.91 and 100.151, and the advisory

opinions relying on them, simply cannot be read to exempt funds raised and spent for office building expenses from the definitions of “contribution” and “expenditure.” Thus, what the current advisory opinion request seeks is wholly without basis in law.

There is an eerily familiar proposition here, reminiscent of the Commission’s AO 1979-17, which, as explained in *McConnell v. FEC*, 251 F. Supp. 2d 176, 196 (D.D.C. 2003), gave birth to the national party soft money system that was eventually outlawed by the Bipartisan Campaign Reform Act of 2002 (BCRA). In AO 1979-17, the Commission for the first time permitted national party committees to set up segregated accounts for funds exempted by statute from the definition of “contribution,” including funds for “construction or purchase of any office facility.” AO 1979-17 at 5. Over the ensuing years, the Commission permitted these party soft money accounts to be used to pay more and more party expenses—until Congress shut the whole soft money system down through passage of BCRA, which, among other things, repealed the “office facility” exemption from the definition of “contribution.”

The fact that in the course of dismantling the soft money system, Congress in 2002 explicitly repealed the “office facility” exemption from the definition of “contribution” further illustrates the audaciousness of the Committees’ request here that the Commission recreate a functionally identical “office facility” exemption through this advisory opinion.

In the words of Chief Justice Roberts, “enough is enough.” *Fed. Election Comm’n v. Wis. Right to Life*, 551 U.S. 449, 478 (2007). The Commission’s regulations that exclude from the definitions of “contribution” and “expenditure” money raised and spent by candidates and parties to pay for recounts and elections contests make no sense, to begin with. *See* 11 C.F.R. §§ 100.91 and 100.151. The Commission’s numerous advisory opinions based on these regulations—standing for the proposition that funds raised and spent for recounts, election contests, and a growing list of other purposes, are “in connection with” elections but are not “for the purpose of influencing” elections—likewise make no sense.

The effect of these prior rulings is that the Commission has severely undermined the statutory contribution limits at 2 U.S.C. § 441a(a)(1)—by allowing donors to evade the limits by effectively doubling them, giving once to the candidate or party committee, and then again to the candidate’s or party committee’s “recount fund.” If the Commission now generalizes this means of evading the contribution limits by essentially opening up such slush funds for general purpose use, the effect will be plain: an exception created by the Commission from whole cloth will swallow the rule. With no basis in law, the Commission will have sanctioned the creation of a new soft money system.

We urge the Commission to do no further harm in this proceeding. The Commission should not allow the Committees to pay for office building expenses using their segregated slush funds approved for entirely other purposes in prior advisory opinions. We further urge the Commission to conduct a separate rulemaking proceeding to reconsider the flawed premise that funds raised by candidates and national party committees for recounts, election contests, legal defense and other purposes are not “for the purpose of influencing” federal elections. Properly construed, the law requires funds raised and spent by federal candidate and national party committees for recounts and all other activities to be both “contributions” and “expenditures”

subject to a single contribution limit under 2 U.S.C. § 441a(a)(1), as well as the aggregate contribution limits established by 2 U.S.C. § 441a(a)(3).

### 1. “Recount” Funds—Not Just For Recounts Anymore

There is a long history to this present attempt by the Committees to undermine federal contribution limits, which sets the context for this AOR. On three prior occasions, all following the enactment of BCRA, party committees submitted advisory opinion requests seeking permission to raise and spend unlimited soft money for recount purposes in federal elections.<sup>1</sup> On the first two occasions, the Commission’s general counsel recommended that the Commission adopt an opinion that BCRA now requires party committees (and their federal candidates and officeholders) to raise and spend only hard money (*i.e.*, federally permissible funds) for recount purposes.<sup>2</sup> But following the release of these recommendations, and on the eve of the Commission’s votes, the advisory opinion requests were withdrawn by the party committees at the last minute, thereby preempting the Commission’s vote—which likely would have been adverse to the parties’ position.

On the third occasion, the Commission (without a recommendation from the general counsel) approved AO 2006-24, making clear that “because election recount activities are in connection with a Federal election, any recount fund established by either a Federal candidate or the State Party must comply with the amount limitations, source prohibitions, and reporting requirements of the Act.” AO 2006-24 at 2. But the advisory opinion permitted a candidate and a state party to each establish separate recount funds, subject to contribution limits that are separate from the limits applicable to their principal committees.

On each of these three occasions, the Campaign Legal Center and Democracy 21 filed comments with the Commission not only urging the Commission to reject the parties’ requests for permission to use soft money to pay for recount activities, but also urging the Commission to reconsider its nonsensical position that recount activities are “in connection with” elections, but not “for the purpose of influencing” elections.<sup>3</sup>

Given the Commission’s statement of law in AO 2006-24—that federal election recount activities are “in connection with” a federal election and therefore that only hard money may be used to pay for such activities, but that such activities could be paid for out of a separate account, subject to a separate contribution limit—the Commission was then asked in AOR 2009-04 by the

---

<sup>1</sup> See AOR 2006-24 (DSCC, NRSC and Republican State Comm. of Pennsylvania) (Aug. 7, 2006); AOR 2004-38 (NRSC) (Oct. 13, 2004); AOR 2002-13 (DSCC, DCCC, NRSC, NRCC) (Oct. 30, 2002).

<sup>2</sup> See Draft AO 2004-38; Agenda Doc. 04-99 (Draft A) (Oct. 26, 2004); Draft AO 2002-13; Agenda Doc. 02-79 (Draft A) (Nov. 12, 2002).

<sup>3</sup> See Comments of the Campaign and Media Legal Center on AOR 2002-13 (Nov. 8, 2002) at 2-3; Comments of Democracy 21 and Common Cause on AOR 2002-13 (Nov. 8, 2002) at 1-2; Comments of Democracy 21, the Campaign Legal Center and the Center for Responsive Politics on AOR 2004-38 (Oct. 25, 2004) at 5-6; Comments of Democracy 21 and the Campaign Legal Center on AOR 2006-24 (April 24, 2006) at 7-8.

Franken Committee whether it was permitted to establish an “election contest” fund “separate from the Committee’s existing recount fund” and subject to its own contribution limit, *i.e.*, a third contribution limit. AOR 2009-04 at 3. The Commission was also asked in AOR 2009-04 whether the DSCC, “like state parties and federal candidates, may rely on Advisory Opinion 2006-24, [to] establish a recount fund.” AOR 2009-04 at 2.

Once again, the Campaign Legal Center and Democracy 21 filed comments with the Commission, not only urging the Commission to deny the Franken Committee’s request for permission to set up an election contest fund separate from its recount fund, but also once again urging the Commission to reconsider its position that recount activities are “in connection with” elections, but not “for the purpose of influencing” elections.<sup>4</sup>

In AO 2009-04, the Commission extended the use of recount funds to a national party committee, the DSCC, but was unable to muster four votes to approve a response with regard to whether the Franken Committee was permitted to set up an election contest fund separate from its recount fund, and subject to a separate contribution limit. AO 2009-04 at 1.

On three occasions since AO 2009-04, the Commission has further expanded the use of recount funds. In AO 2010-04, the Commission opined that the DSCC was permitted to spend recount funds before the general election “to pay for the services of attorneys and staff who will prepare for the post-election period” in “States where recounts are most likely” or “may occur”—*i.e.*, to spend recount funds for as-yet-nonexistent recounts. AO 2010-14 at 1-2. In AO 2010-18, the Commission opined that the Minnesota Democratic-Farmer-Labor Party was permitted to retain funds raised but not spent for a 2008 recount, and to use the funds to pay for unspecified future recounts. AO 2010-18 at 1.

Most recently, in AO 2011-03, the Commission without explanation completely jettisoned the requirement that recount and election contest funds be used in a manner somehow connected to actual or possible future recounts or election contests—permitting the DSCC, DCCC, RNC, NRSC, and NRCC to use such funds to pay legal defense expenses in litigation wholly unrelated to recounts or election contests. The Commission offered no explanation for this untethering of “recount funds” from recounts. Instead, the opinion simply states: “Under the circumstances presented by this request, the Commission concludes that the National Party Committees may use donations to their respective recount funds to defray expenses for defending against the Janvey Litigation.” AO 2011-03 at 4. The plain language of the recount regulations at 11 C.F.R. §§ 100.91 and 100.151 has no application to legal defense expenses. AO 2011-03 was wrongly decided, and the fact that the Commission was unable to muster any plausible rationale for its conclusion is the best evidence of the error.

In a concurring statement in AO 2011-03, without any hint of irony and without an explanation of her legal basis for voting for AO 2011-03, Chair Weintraub warned that “the

---

<sup>4</sup> See Comments of the Campaign Legal Center and Democracy 21 on Alternative Draft AOs 2009-04 (Mar. 18, 2009) at 9-10.

Commission must exercise care to limit the uses of recount funds, to avoid their becoming a vehicle for an effective doubling of the party contribution limits.”<sup>5</sup>

Simply put, what Chair Weintraub warned about has already happened. These segregated funds have become a vehicle for an effective doubling of the party contribution limits—and the Commission is being asked in this AOR to further exacerbate the problem.

## **2. The Commission’s Recount Regulations Have Given Birth to a New Soft Money System.**

In 1977, the Commission promulgated a regulation stating that a “gift, subscription, loan, advance, or deposit of money or anything of value made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election, is not a contribution” except that the prohibition on contributions and expenditures by foreign nationals “in connection with an election, and the prohibition on contributions and expenditures by corporations and labor unions “in connection with” a federal election apply. 11 C.F.R. § 100.91 (citing 11 C.F.R. § 110.20 (foreign nationals) and Part 114 (corporations and labor unions)). The Commission has promulgated a corollary exemption from the definition of “expenditure” at 11 C.F.R. § 100.151.

The Commission’s only explanation and justification for its regulation exempting recount funds from the definition of “contribution” is the following conclusory statement: “Also excluded from the definition of contribution is a donation to cover costs of recounts and election contests, since, though they are related to elections, are not Federal elections as defined by the Act.” *See* Explanation and Justification of the Disclosure Regulations, H.R. Doc. No. 95-44, at 40 (1977).

Because “contribution” is defined as money given “for the purpose of influencing” an election, 2 U.S.C. § 431(8)(A)(i), the recount regulations thus stand for the logically incoherent proposition that while money given for a recount or election contest is not “for the purpose of influencing” a federal election, it is nevertheless money that is raised and spent “in connection with” a federal election.

The Commission’s recount regulations are incorrect. Recount funds are, and always should have been treated as, “for the purpose of influencing” a federal election. Funds raised and spent by federal candidate and party committees for recount purposes—and, indeed, for any purposes—should be “contributions” and “expenditures” under 2 U.S.C. § 431, subject to a single contribution limit under Section 441a(a)(1) and to the aggregate limits established by Section 441a(a)(3). Candidates and party committees should not be permitted to establish separate funds, subject to separate limits, to be used to pay for recounts, election contests, legal defense expenses and, under the present AOR, office building expenses.

The Commission’s position to the contrary simply makes no sense. Indeed, with respect to recounts—the root justification for the now-ever-expanding-purpose slush funds—it is difficult to conceive of funds that are more directly “for the purpose of influencing” an election

---

<sup>5</sup> Advisory Opinion 2011-03, Concurring Statement, Commissioner Ellen L. Weintraub (Apr. 11, 2011).

than those funds spent to determine the actual winner of the election. A recount is an integral part of the election process itself.<sup>6</sup>

As for the Commission's explanation and justification of its recount rules, it is of course correct that a recount is not, in itself, an "election" as defined in 2 U.S.C. § 431(1). But many of the things candidates and parties raise money to pay for are not "elections," yet the funds raised to pay such expenses have long been deemed "contributions" because the *raison d'être* of candidate and party committees is to influence—and win—elections. Just as a "recount" is not, in itself, an election, neither is a television advertisement, or a campaign rally, or a get-out-the-vote drive. Each of these activities is part of the candidate's efforts to influence the outcome of the "election." Precisely the same is true of a recount. The activities paid for by a candidate or party with regard to a recount are "for the purpose of influencing" the outcome of an "election," in this case, a general election as defined in Section 431(1)(A).

The Commission is now well down a slippery slope in its attempt to distinguish between things that candidate and party committees do to "influence elections" and other activities that allegedly do not influence elections. The Commission concluded in AO 2011-03, for example, that funds raised and spent by national party committees to pay certain legal expenses were not for the purpose of influencing an election. What if a candidate or party hires an attorney to provide legal oversight to the process of casting and counting ballots on Election Day? Such expenses have long been considered "expenditures" under federal law. Where is the legal line, post-AO 2011-03, between legal expenses for the purpose of influencing elections and legal expenses for other purposes?

What about other administrative expenses? Are payments to committee staff "for the purpose of influencing" elections? Maybe not! Party committee staff, after all, do work "in connection with" elections, but they are not elections themselves. Are fundraising expenses "for the purpose of influencing" elections? Who knows? Under the Commission's curious parsing, fundraising is not itself an "election," although it is "in connection with" an election. What about television ads paid for by a candidate, featuring that candidate, but not containing express candidate advocacy? Are those "for the purpose of influencing" elections or maybe just "in connection with" elections? And what about candidate and party office expenses?

The Committees argue in AOR 2013-10 that because the Committees do not use their office building "for the purpose of influencing the election of any particular candidate for office in any particular Federal election," they should not be required to pay office building expenses from their principal committee accounts and, instead, should be permitted to pay for such expenses out of a slush fund of money raised under separate contribution limits. AOR 2013-10 at 1 (emphasis added).

---

<sup>6</sup> The recount process is typically characterized by candidates, their representatives, and party operatives each attempting to ensure a complete count of all "valid" votes, to ensure that "invalid" votes are not counted, and to ensure that the final tally of votes is free from error. Candidates and parties undertake recount activities for the specific purpose of ensuring that the candidate's lead will be protected, or their opponent's lead will be eroded, during the recount process.

As the district court explained in *McConnell*, the national party soft money system outlawed by BCRA was born out of the Commission’s AO 1979-17, in which the Commission for the first time permitted a national party committee, the RNC, to set up a segregated account for funds exempted by statute from the definition of “contribution,” including funds for “construction or purchase of any office facility not acquired to influence the election of any candidate in any particular election for Federal office.” AO 1979-17 at 5 (internal quotation marks omitted) (emphasis added); *McConnell*, 251 F. Supp. 2d at 196.

The history here is very pertinent. What may have appeared at the time to be an insignificant exception to the contribution limits grew into the loophole that swallowed the rule. Recounting in painstaking detail how the national party soft money loophole that was opened by AO 1979-17 and the statutory “office facility” exemption then grew and grew, the district court in *McConnell* explained that by the 2000 election cycle, the national parties spent \$498 million of nonfederal funds—42% of their total spending. 251 F. Supp. 2d at 200-01.

BCRA outlawed this allowance for national parties to maintain a separate account to pay for office facility expenses and other expenses not incurred to influence the election of a specific candidate in a particular election. The Commission explained in its Explanation and Justification for its post-BCRA soft money rules:

BCRA repealed 2 U.S.C. 431(8)(B)(viii), which had exempted from the definition of contribution any donation of money or anything of value, or loan, to a national or State party committee that is specifically designated to “defray any cost for construction or purchase of any office facility not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office.”

*Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, Final Rule and Explanation and Justification, 67 Fed. Reg. 49064, 49100 (July 29, 2002).

Yet notwithstanding the fact that Congress in BCRA specifically repealed the statutory “office facility” exemption to the definition of “contribution,” the Committees are attempting to re-establish the same exemption through the back door—by means of an advisory opinion that seeks permission to use “recount funds,” subject to separate contribution limits, to pay for building expenses. The Commission is poised to permit through an advisory opinion the precise activity explicitly outlawed by Congress and, in the process, to recreate the soft money system all over again.

The Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003), likewise recognized the Commission’s central role in creating the soft money system outlawed by BCRA. The Court explained:

Shortly after *Buckley* was decided, questions arose concerning the treatment of contributions intended to influence both federal and state elections. Although a literal reading of FECA’s definition of “contribution” would have required such activities to be funded with hard money, the FEC ruled that political parties could

fund mixed-purpose activities—including get-out-the-vote drives and generic party advertising—in part with soft money. In 1995 the FEC concluded that the parties could also use soft money to defray the costs of “legislative advocacy media advertisements,” even if the ads mentioned the name of a federal candidate, so long as they did not expressly advocate the candidate's election or defeat.

As the permissible uses of soft money expanded, the amount of soft money raised and spent by the national political parties increased exponentially. Of the two major parties’ total spending, soft money accounted for 5% (\$21.6 million) in 1984, 11% (\$45 million) in 1988, 16% (\$80 million) in 1992, 30% (\$272 million) in 1996, and 42% (\$498 million) in 2000.

540 U.S. at 123-24 (footnotes omitted) (citation omitted) (emphasis added).

History has taught us that as the permissible uses of recount slush funds expand, the amount of money candidates and parties will raise for such slush funds will increase exponentially. Just as the *McConnell* Court recognized that the “solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA’s” contribution limits, 540 U.S. at 126, so too has the Commission’s allowance of recount slush funds enabled parties and candidates to circumvent FECA’s contribution limits.

### 3. Conclusion

As we have repeatedly argued before the Commission,<sup>7</sup> the Commission’s recount regulations erroneously take the position that recount activities are not “for the purpose of influencing” a federal election, even though they are “in connection with” an election. This interpretation defies common sense and has given rise to a new means for wealthy donors to evade contribution limits. But even the existing recount regulations, as flawed as they are, cannot be read to exempt office building expenses from the definition of “contribution”; the plain language of the recount regulations has no application to office building expenses.

Accordingly, the Commission should deny the Committees’ request for permission to use their segregated recount slush funds to pay for office building expenses. The Commission should also initiate a rulemaking proceeding to reconsider its recount regulations in recognition of the fact that all funds raised and spent by federal candidate and party committees are for the purpose of influencing elections and, consequently, should be subject to a single contribution limit under 2 U.S.C. § 441a(a)(1), as well as the aggregate limits established by 2 U.S.C. § 441a(a)(3).

We appreciate the opportunity to comment on this matter.

---

<sup>7</sup> See Comments of the Campaign and Media Legal Center on AOR 2002-13 (Nov. 8, 2002) at 2-3; Comments of Democracy 21 and Common Cause on AOR 2002-13 (Nov. 8, 2002) at 1-2; Comments of Democracy 21, the Campaign Legal Center and the Center for Responsive Politics on AOR 2004-38 (Oct. 25, 2004) at 5-6; Comments of Democracy 21 and the Campaign Legal Center on AOR 2006-24 (April 24, 2006) at 7-8.

Sincerely,

*/s/ J. Gerald Hebert*

*/s/ Fred Wertheimer*

J. Gerald Hebert  
Paul S. Ryan  
Campaign Legal Center

Fred Wertheimer  
Democracy 21

Paul S. Ryan  
The Campaign Legal Center  
215 E Street NE  
Washington, DC 20002

Counsel to the Campaign Legal Center

Donald J. Simon  
Sonosky, Chambers, Sachse  
Endreson & Perry LLP  
1425 K Street NW—Suite 600  
Washington, DC 20005

Counsel to Democracy 21

Copy to: Ms. Shawn Woodhead Werth, Secretary & Clerk of the Commission  
Mr. Adav Noti, Acting Associate General Counsel, Policy  
Ms. Amy L. Rothstein, Assistant General Counsel  
Mr. Robert M. Knop, Assistant General Counsel