

July 8, 2013

**By Electronic Mail**

Lisa J. Stevenson  
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Federal Election Commission  
999 E Street NW  
Washington, DC 20463

**Re: Comments on Advisory Opinion Request 2013-4 (Democratic  
Governors Association and Jobs and Opportunity)**

Dear Ms. Stevenson:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 with regard to Advisory Opinion Request (AOR) 2013-4, a request submitted on behalf of the Democratic Governors Association (“DGA”) and Jobs and Opportunity (“J&O”) asking the Commission whether they are permitted to “spend nonfederal funds on voter registration, get-out-the-vote (“GOTV”) activities, voter identification, and generic campaign activity.” *See* AOR 2013-4 at 1.

The answer to this question is simple, and compelled by the plain language of the statute. There is no dispute that DGA is an “association . . . of individuals holding State . . . office.” Nor is there any dispute that 2 U.S.C. § 441i(b)(1) states that any such “association” must pay for all “federal election activity” (“FEA”), including the above-listed activities, with federal funds. That is the end of the matter insofar as the DGA is concerned. With regard to J&O, it is nothing more than a creation and agent of DGA, under the complete control of DGA. As such, it is likewise required to pay for all FEA with federal funds.

As explained below, although DGA and J&O here explicitly seek permission only to fund voter registration, GOTV activities, voter identification, and generic campaign activity with nonfederal funds, any Commission opinion declaring that DGA is not an association of state officeholders for the purposes of Section 441i(b)(1) would enable DGA and J&O to pay for another type of FEA with nonfederal funds—public communications that clearly refer to federal candidates and that promote, attack, support or oppose those candidates.

Just as the U.S. District Court for the District of Columbia in *Shays v. FEC*, 337 F. Supp. 2d 28, 102-04 (D.D.C. 2004), held that the Commission lacks the authority to create, by regulation, an exemption from the FEA soft money restrictions for associations of state candidates and officeholders, so too does the Commission lack the authority to create the exemption requested in this AOR. The exemption from Section 441i(b)(1) sought in AOR 2013-4 is contrary to law, would invite massive circumvention of the law, and must be denied.

**I. BCRA’s “Federal Election Activity” Funding Restrictions, Upheld by *McConnell*, Are Critical to Preventing Circumvention of BCRA’s Soft Money Ban.**

The Federal Election Campaign Act (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), requires any state, district or local political party committee, any entity established, financed, maintained or controlled by such party committee, or any “association or similar group of candidates for State or local office or of individuals holding State or local office” that disburses funds for FEA to make such disbursements using “funds subject to the limitations, prohibitions, and reporting requirements” of the Act. 2 U.S.C. § 441i(b)(1) (emphasis added).

The Act defines FEA to include four types of activities:

1. Voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;
2. Voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for federal office appears on the ballot;
3. A public communication that refers to a clearly identified candidate for federal office (regardless of whether a candidate for state or local office is also mentioned) and that promotes, attacks, supports or opposes (“PASO”) a candidate for federal office; and
4. Services provided during any month by an employee of a state, district or local party committee who spends more than 25 percent of that individual’s compensated time on activities in connection with a federal election.

2 U.S.C. § 431(20)(A).

In crafting BCRA’s definition of FEA, Congress took pains to be detailed and comprehensive. Not only is the statutory definition unusually precise, but Congress went a step further and specified what activity was “excluded” from the definition.<sup>1</sup> In short, Congress did not leave any room for this important term to be restricted in its scope by administrative interpretation. *See Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (statute’s “mention of one thing implies the exclusion of another thing” (internal quotation marks and citations omitted)).

Congress’s overriding purpose in enacting the soft money restrictions applicable to state and local parties, and associations of state and local candidates and officeholders, was to avoid

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<sup>1</sup> The activities Congress exempted from the definition of “Federal election activity” are: (1) public communications that do not constitute voter registration, voter identification, GOTV, or generic campaign activity and refer solely to nonfederal candidates; (2) contributions to nonfederal candidates that are not earmarked for Federal election activity; (3) state and local political conventions; and (4) the cost of grassroots campaign materials, such as bumper stickers, that refer only to nonfederal candidates. 2 U.S.C. § 431(20)(B).

circumvention of BCRA's soft money prohibition applicable to federal candidates, officeholders and party committees. One of BCRA's principal sponsors said that in closing the soft money loophole, Congress took "a balanced approach which addresses the very real danger that Federal contribution limits could be evaded by diverting funds to State and local parties," while "not attempt[ing] to regulate State and local party spending where this danger is not present, and where State and local parties engage in purely non-Federal activities." 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (emphasis added). Congress carefully crafted the contours of the definition of FEA to cover only those activities that "in the judgment of Congress . . . clearly affect Federal elections" and left unregulated "activities that affect purely non-Federal elections." 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

BCRA's state and local soft money restrictions, codified at 2 U.S.C. § 441i(b)(1), were challenged and upheld by the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003), as a permissible means of preventing "wholesale evasion" of the national party soft money ban. *Id.* at 161. The Court noted:

Congress also made a prediction. Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation, Congress knew that soft-money donors would react to [the national party soft money ban] by scrambling to find another way to purchase influence. It was "neither novel nor implausible" for Congress to conclude that political parties would react to [the national party soft money ban] by directing soft-money contributors to the state committees . . . .

*Id.* at 166 (internal citation omitted) (quoting *Nixon v. Shrink*, 528 U.S. 377, 391 (2000)).

The *McConnell* Court concluded that "[p]reventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest." *McConnell*, 540 U.S. at 165-66. Though the *McConnell* Court was explicitly discussing state party committees in this passage, Congress included in the same section of BCRA the restrictions on associations of state candidates or officeholders.

Just as "it was neither novel nor implausible for Congress to conclude that political parties would react to [the national party soft money ban] by directing soft-money contributors to the state committees[.]" *id.* at 166, nor was it novel or implausible for Congress to conclude that parties would react to the soft money ban by directing soft money contributors to associations of state candidates or officeholders.

The *McConnell* Court went on to explicitly discuss BCRA's definition of FEA, recognizing that though Section 441i(b) "captures some activities that affect state campaigns for nonfederal offices," it is nevertheless constitutional because it "clearly capture[s] activity that benefits federal candidates." *Id.* at 166-67. The Court found that "federal candidates reap substantial rewards from any efforts that increase the number of like-minded registered voters who actually go to the polls." *Id.* at 167-68 (emphasis added). The Court concluded:

Because voter registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption. Section [441i(b)] is a reasonable response to that risk. . . . The prohibition on the use of soft money in connection with these activities is therefore closely drawn to meet the sufficiently important governmental interests of avoiding corruption and its appearance.

*Id.* at 168-69.

Similarly, the Court recognized that “[p]ublic communications’ that promote or attack a candidate for federal office—the third category of ‘Federal election activity,’—also undoubtedly have a dramatic effect on federal elections.” *Id.* at 169 (internal citation omitted). The Court explained that “[s]uch ads were a prime motivating force behind BCRA’s passage.” *Id.*

[A]ny public communication that promotes or attacks a clearly identified federal candidate directly affects the election in which he is participating. The record on this score could scarcely be more abundant. Given the overwhelming tendency of public communications, as carefully defined in [Section 431(20)(A)(iii)], to benefit directly federal candidates, we hold that application of [Section 441i(b)] contribution caps to such communications is also closely drawn to the anticorruption interest it is intended to address.

*Id.* at 170.

In short, Congress recognized that BCRA’s core soft money prohibition applicable to federal candidates, officeholders and party committees would be easily evaded without Section 441i(b)’s FEA restrictions on state parties and associations of state candidates and officeholders. The *McConnell* Court upheld Section 441i(b) as means of preventing wholesale evasion of the federal soft money prohibition—a “closely-drawn means of countering both corruption and the appearance of corruption.” *Id.* at 167.

## **II. DGA Is an Association of Individuals Holding State Office and Thus Is Required to Pay for Federal Election Activity with Federal Funds.**

DGA incorrectly states that its request “presents an important question of first impression for the Commission: *which associations or groups are subject to restrictions on registering, identifying, and turning out voters?*” AOR 2013-4 at 3 (emphasis in original). The answer to DGA’s question is in the plain language of Section 441i(b)(1): “[A]ssociation[s] or similar group[s] of candidates for State or local office or of individuals holding State or local office” are subject to the funding restrictions on their FEA. 2 U.S.C. § 441i(b)(1). Homeowners associations are not subject to the restrictions; trade associations are not subject to the restrictions; bar associations are not subject to the restrictions. Associations of state or local candidates or officeholders are subject to BCRA’s FEA restrictions.

DGA's name and self-description make clear that it is an association of individuals holding state office. "DGA's membership consists of the nation's incumbent Democratic governors." AOR 2013-4 at 1. Indeed, under DGA's bylaws, no person other than an incumbent governor is permitted to be a member. *Id.* As such, DGA is clearly covered by the plain language of Section 441i(b)(1) and is required by statute to use "funds subject to the limitations, prohibitions, and reporting requirements" of FECA to pay for all FEA it engages in. There is no other possible reasonable interpretation of the law. If DGA does not constitute an "association . . . of individuals holding State or local office" under Section 441i(b)(1), it is difficult to fathom what association would be covered by the law.

Ignoring the fact that the statute clearly applies to "associations . . . of individuals holding State or local office," and ignoring the fact that the *McConnell* Court upheld Section 441i(b) against constitutional challenge, DGA argues that, "[i]n light of serious constitutional questions that the FEA restrictions raise and the congressional silence on which associations or groups are covered," the Commission should rewrite the statute so as to "exclude *interstate* associations like the DGA[.]" AOR 2013-4 at 3 (emphasis in original).

Advisory opinions are for the purpose of addressing questions "concerning the application of the [Federal Election Campaign] Act," 11 C.F.R. § 112.1(a), not for rewriting provisions of the Act, nor for declaring portions of the Act unconstitutional. Federal law is clear here and the Commission has no authority to declare the statute unconstitutional insofar as it imposes a federal funds requirement on an *interstate* association of state officeholders, which is what the DGA is requesting the Commission do here.

Even if the Supreme Court had not already upheld the constitutionality of this statute, which it has, it is well-settled law that "adjudication of the constitutionality of congressional enactments [is] beyond the jurisdiction of administrative agencies." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (quoting *Johnson v. Robison*, 415 U.S. 361, 367-68 (1974)); see also *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975). As the Court of Appeals for the D.C. Circuit said in *Branch v. FCC*, 824 F.2d 37 (D.C. Cir. 1987), an "agency may be influenced by constitutional considerations in the way it interprets . . . statutes [but] it does not have jurisdiction to declare statutes unconstitutional." *Id.* at 47. The request made here to do so is particularly remarkable given that the Supreme Court in *McConnell* directly addressed and specifically upheld Section 441i(b)(1).

DGA's request here is also remarkable given that the U.S. District Court for the District of Columbia in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), considered and struck down just such a Commission-created exemption from the FEA soft money restrictions for associations of state candidates and officeholders. In *Shays*, the court considered a challenge by BCRA's principal Congressional sponsors to a Commission regulation excluding from the definition of GOTV, for the purposes of BCRA's FEA soft money prohibition, communications "by an association or similar group of candidates for State or local office or of individuals holding State or local office if such communication refers only to one or more State or local candidates." *Id.* at 102.

Plaintiffs in *Shays* argued that “Congress provided the Commission with no authority to adopt such an exemption—and the exemption is, in fact, in direct contravention of legislative intent.” *Id.* The court noted approvingly plaintiffs argument that the challenged exemption would “invite just the sort of circumvention that BCRA sought to prevent, because [p]arties and candidates can easily conduct GOTV ... activities through associations of state or local candidates (such as the Democratic or Republican Governors Association [“RGA”]), avoid mention of federal candidates on the ballot, and mobilize voters to the polls.” *Id.* (internal quotation marks omitted) (emphasis added).

The *Shays* court agreed that “nothing on the face of the statute suggests that an exemption may be drawn.” *Id.* at 103. The court explained that the Commission had included this exemption “because it [found] it implausible that Congress intended to federalize State and local election activity to such an extent without any mention of the issue during the floor debate for BCRA.” *Id.* at 103-04. The *Shays* court explicitly rejected the Commission’s justification for the exemption—*i.e.*, that “Congress could not have meant what it actually said.” *Id.* at 104.

Despite the *Shays* court’s rejection of the Commission’s justification for the old exemption, DGA in its AOR here brazenly quotes the Commission justification explicitly rejected by the district court, urging the Commission to once again employ this impermissible justification for a new exemption, this time to be created by advisory opinion instead of by regulation. AOR 2013-4 at 5 (“As the Commission itself noted in 2002, it is ‘implausible that Congress intended to federalize State and local election activity . . . .’”).

The *Shays* court concluded that “Congress has spoken directly on this question, and that the Commission’s exemption for ‘association[s] or similar group[s] of candidates for State or local office or of individuals holding State or local office’ runs contrary to Congress’s clearly expressed intent and cannot stand.” 337 F. Supp. 2d at 104.

Just as the *Shays* court recognized that an exception from the soft money prohibition for certain FEA activities by DGA, RGA and other associations of state or local candidates would invite just the sort of circumvention that BCRA sought to prevent, so too must the Commission recognize here that the blanket exemption from BCRA’s FEA soft money prohibition that the DGA requests would similarly invite and allow massive circumvention of BCRA.

Importantly, though DGA mentions only its desire to spend nonfederal funds on voter registration, GOTV activities, voter identification, and generic campaign activity, a Commission opinion advising DGA that it does not constitute an “association of individuals holding state office” for the purposes of Section 441i(b)(1) would necessarily also enable DGA and other similar associations of candidates or officeholders (*e.g.*, the RGA) to use nonfederal funds to pay for public communications that PASO federal candidates—so-called Type III FEA. *See* 2 U.S.C. § 431(20)(A)(iii). As the Supreme Court recognized in *McConnell*, such ads “undoubtedly have a dramatic effect on federal elections” and “were a prime motivating force behind BCRA’s passage.” 540 U.S. at 169.

The FEA exemption DGA seeks here runs contrary to the plain language of the statute and Congress’s clearly expressed intent. The Commission has no authority to issue such an

exemption and accordingly must deny DGA's request. The Commission must advise DGA that it is an association of individuals holding state office and thus is required to pay for FEA with federal funds.

### **III. J&O Is the Agent of DGA, an Association of Individuals Holding State Office, and Thus Is Required to Pay for Federal Election Activity with Federal Funds.**

J&O is a political organization “soon to be established by DGA.” AOR 2013-4 at 1. “The group of persons that will decide how J&O spends its money will include DGA officers and other DGA employees.” *Id.* at 8 (attached email from Mr. Jonathan Berkon to Ms. Amy Rothstein (June 25, 2013)). Though DGA's members—which consist entirely of state officeholders—“will generally not play a role in deciding how J&O's funds will be spent,” DGA does not deny that its members may be among the group of persons that will decide how J&O spends its money. *Id.* “[I]t is possible that DGA will provide funds to J&O.” *Id.* In response to a question from the Commission regarding whether DGA has the “authority to hire, fire, or otherwise control J&O's officers or other decision makers,” DGA did not respond directly, instead stating that “J&O's two members are officers of the DGA.” *Id.* Given that DGA's members have the authority to hire, fire, or otherwise control DGA's officers, DGA's members will have the authority to hire, fire, or otherwise control J&O's officers and decision makers. DGA further stated that “DGA employees are likely to play a role in the day-to-day operations of J&O.” *Id.* Though DGA members “will generally not play a role in the day-to-day operations of J&O,” DGA did not deny that its members may be involved in day-to-day operations of J&O. *Id.* (emphasis added).

These facts clearly establish that J&O is the agent of DGA—created by DGA and under the complete control of DGA. Like DGA, J&O must also be required to pay for FEA with federal funds. Any other result will invite massive circumvention of BCRA's soft money prohibition.

The Commission's regulations define “agent” to mean “any person who has actual authority, either express or implied, to engage” in activities on behalf of a principal. *See* 11 C.F.R. §§ 109.3 and 300.2(b). Under this legal standard, J&O is clearly the agent of DGA, with express actual authority to act on behalf of DGA.

Similarly, under common law, “agency” is defined as the “fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.” Restatement (Third) of Agency § 1.01 (2006). DGA, through its very creation of J&O with two DGA officers as J&O's sole members, assents to J&O that J&O shall act on DGA's behalf, subject to DGA's control. J&O, by coming into existence under the complete control of DGA, consents to act on DGA's behalf.

“Agency” is a bedrock principle of law upon which the Commission has long relied in its enforcement of FECA. For example, in MUR 6168, the Commission recently employed the principle of “agency” to enforce the prohibition on contributions in connection with any election by national banks and corporations organized by authority of any law of Congress—

notwithstanding the fact that the statute makes no explicit reference to “agents” being subject to the prohibition. *See* 2 U.S.C. § 441b(a); *see also* MUR 6168, Conciliation Agreement (May 5, 2009). In MUR 6168, a federally-chartered savings association, Park Federal Savings Bank, was deemed by the Commission to have violated Section 441b(a) when its state-chartered wholly owned subsidiary, GPS Corporation, made contributions to state and local political committees. MUR 6168, Conciliation Agreement (May 5, 2009) at 2-3. Citing Advisory Opinion 1980-7, the Commission explained that a state-chartered subsidiary of a federally-chartered savings association “could not make political contributions if the subsidiary and the parent could be characterized as one entity.” *Id.* at 2. “[W]here circumstances are such that one corporation is merely an agent, instrumentality, or alter ego of another corporation, the notion of separate corporate existence of parent and subsidiary will not be recognized.” *Id.* at 3 (citing AO 1980-7).

The Commission in MUR 6168 explained that “[c]ourts will disregard the fiction of a separate legal entity when there is such domination of finances, policy, and practices by the parent that the subsidiary has no separate existence of its own and is merely a business conduit for its principal.” *Id.* *See also* MUR 5628 (AMEC), First General Counsel’s Report at 12-13 (declining to hold parent liable where subsidiary maintained an independent management team and operated with relative autonomy from parent); AO 1998-11 (Patriot Holdings) (concluding that subsidiaries were not the agents of the parent entity where the parent did not pay the salaries or expenses of the subsidiaries).

The Commission here should disregard the fiction that J&O is a separate legal entity, given DGA’s domination of J&O’s finances, policy, and practices. J&O will have no separate existence of its own; it will merely be a conduit for the DGA’s activities. DGA and J&O will share a management team and other staff, with DGA employees running the day-to-day operations of J&O.

Exempting J&O—a mere agent, instrumentality, and alter ego of DGA—from BCRA’s FEA soft money prohibition, will invite massive circumvention of BCRA’s soft money prohibition through the simple expedient of setting up a shell entity under the complete control of the covered entity. The Commission should advise J&O that, as an agent of DGA, it is an association of individuals holding state office and thus is required to pay for FEA with federal funds.

### **Conclusion**

The Commission has no choice in this matter but to opine that DGA—an association of state officeholders—is subject to the FEA soft money prohibition of Section 441i(b)(1). The Commission cannot rewrite Section 441i(b)(1) to exclude interstate associations of candidates or officeholders, nor can the Commission decide the law is unconstitutional. Indeed, the Commission’s obligation is to defend the constitutionality of campaign finance laws enacted by Congress. The Commission should opine that J&O, an agent of DGA, is likewise an association of individuals holding state office and thus is required to pay for FEA with federal funds. If the Commission advises DGA or J&O otherwise, the Commission will have opened the door not only to the use of nonfederal funds to pay for voter registration, GOTV activities, voter



identification, and generic campaign activity—but also to pay for ads that clearly identify and PASO federal candidates—and in doing so will have severely and impermissibly undermined BCRA.

We appreciate the opportunity to submit these comments.

Sincerely,

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