

August 27, 2010

By Electronic Mail

Christopher Hughey, Esq.
Acting General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2010-20 (NDPAC)

Dear Mr. Hughey:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to AOR 2010-20, an advisory opinion request submitted on behalf of National Defense PAC (NDPAC), a federal non-connected multicandidate political committee¹ that seeks the Commission's opinion as to whether it may lawfully:

- a. "accept[] unlimited contributions . . . for the express purpose of making independent expenditures (IEs), including paying any or all of its own administrative & operating expenses," and
- b. "accept[] contributions . . . subject to the limits at 2 USC §§441a(a)(1)(C) and (2)(C), to expend as campaign contributions to candidates, pursuant to 2 USC §441a(a)(2)[.]"

AOR 2010-20 at 1.

These questions were answered by the U.S. Supreme Court in *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) (*CalMed*). A federal non-connected multicandidate political committee that makes contributions to candidates, *e.g.*, NDPAC, is subject to the \$5,000 contribution limit with respect to all of the funds it receives, including those used to pay for administrative expenses, notwithstanding the fact that such a committee also makes independent expenditures. And such a committee cannot accept corporate contributions for any purpose, including payment of its administrative costs.

Though recent court decisions, including those cited by NDPAC—*Citizens United v. FEC*, 130 S. Ct. 876 (2010) and *SpeechNow v. FEC*, 599 F.3d 686 (D.C. Cir. 2010)—have invalidated provisions of federal campaign finance law unrelated to multicandidate political committees, no court has disturbed the holding in *CalMed*. *CalMed* thus remains the applicable

¹ Although NDPAC does not explicitly identify itself as a "multicandidate political committee," it does state its intention to make campaign contributions to candidates pursuant to 2 USC § 441a(a)(2), the section of the Federal Election Campaign Act (FECA) governing political contributions by multicandidate political committees.

law here, and requires the Commission to advise NDPAC that it must continue to abide by the \$5,000 limit established by 2 U.S.C. § 441a(a)(1)(C), as well as the ban on contributions from corporations and labor organizations to federal political committees established by 2 U.S.C. § 441b. Oddly, NDPAC fails to so much as mention *CalMed*, let alone attempt to distinguish the legal questions NDPAC raises from those answered by the Court in *CalMed*.

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 declaring key portions of the Act unconstitutional. Federal law is clear here, as is a directly applicable Supreme Court precedent, and the Commission has no authority to ignore the law or to declare it unconstitutional.

1. The Supreme Court held in *CalMed* that FECA’s \$5,000 contribution limit is constitutional as applied to non-connected political committees that make contributions to candidates, notwithstanding the fact that such committees are also free to make independent expenditures.

In *CalMed*, the California Medical Political Action Committee (CALPAC), a registered “political committee with the Federal Election Commission . . . subject to the provisions of the Federal Election Campaign Act relating to multicandidate political committees[.]” challenged the constitutionality of the \$5,000 contribution limit established by 2 U.S.C. § 441a(a)(1)(C)—the contribution limit at issue in this AOR. *See CalMed*, 453 U.S. at 185-86.

The Supreme Court rejected CALPAC’s challenge, with a four-Justice plurality opinion (Marshall, Brennan, White, Stevens, JJ.) and a concurring opinion (Blackmun, J.) supporting the majority holding that contributions to multicandidate political committees, which by definition make contributions to candidates, may constitutionally be subject to the \$5,000 limit of 2 U.S.C. § 441a(a)(1)(C). Justice Blackmun reasoned:

By definition, a multicandidate political committee like CALPAC makes contributions to five or more candidates for federal office. § 441a(a)(4). Multicandidate political committees are therefore essentially conduits for contributions to candidates, and as such they pose a perceived threat of actual or potential corruption. In contrast, contributions to a committee that makes only independent expenditures pose no such threat.

CalMed, 453 U.S. at 203 (Blackmun, J., concurring in part and concurring in the judgment) (emphasis added).

Justice Blackmun concluded by explaining his view that “contributions to political committees can be limited only if those contributions implicate the governmental interest in preventing actual or potential corruption, and if the limitation is no broader than necessary to achieve that interest.” *Id.* “Because this narrow test is satisfied here”—with respect to a multicandidate political committee—Justice Blackmun concurred in the result reached by the four-Justice plurality upholding the \$5,000 contribution limit. *Id.* at 203-04.

Similarly, the four-Justice plurality found “unpersuasive” CALPAC’s argument that “because the contributions here flow to a political committee, rather than to a candidate, the danger of actual or apparent corruption of the political process recognized by [the] Court in *Buckley* as a sufficient justification for contribution restrictions is not present in this case.” *CalMed*, 453 U.S. at 195. The plurality explained that it disagreed “with appellants’ claim that the contribution restriction challenged here does not further the governmental interest in preventing the actual or apparent corruption of the political process. Congress enacted § 441a(a)(1)(C) in part to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*.” *Id.* at 197-98.

Furthermore, the plurality considered and explicitly rejected an argument repeated here by NDPAC—that it should be permitted to raise funds to pay its administrative expenses without regard to the \$5,000 contribution limit and the ban on corporation contributions:

[C]ontributions for administrative support clearly fall within the sorts of donations limited by § 441a(a)(1)(C). Appellants contend, however, that because these contributions are earmarked for administrative support, they lack any potential for corrupting the political process. We disagree. If unlimited contributions for administrative support are permissible, individuals and groups like CMA could completely dominate the operations and contribution policies of independent political committees such as CALPAC. Moreover, if an individual or association was permitted to fund the entire operation of a political committee, all moneys solicited by that committee could be converted into contributions, the use of which might well be dictated by the committee's main supporter. In this manner, political committees would be able to influence the electoral process to an extent disproportionate to their public support and far greater than the individual or group that finances the committee’s operations would be able to do acting alone. In so doing, they could corrupt the political process in a manner that Congress, through its contribution restrictions, has sought to prohibit. We therefore conclude that § 441a(a)(1)(C) applies equally to all forms of contributions specified in § 431(8)(A), and assess appellants’ constitutional claims from that perspective.

Id. at 199 n.19.

Finally, the Court rejected CALPAC’s argument that the \$5,000 contribution limit violates the equal protection component of the Fifth Amendment because “corporations and labor unions may pay for the establishment, administration, and solicitation expenses of a ‘separate segregated fund to be utilized for political purposes.’” *Id.* at 200. CALPAC asserted “that a corporation’s or a union’s contribution to its segregated political fund is directly analogous to an unincorporated association’s contributions to a multicandidate political committee . . . [and] because contributions are unlimited in the former situation, they cannot be limited in the latter without violating equal protection.” *Id.*

In rejecting this argument, the Court’s plurality explained: “Appellants’ claim of unfair treatment ignores the plain fact that the statute as a whole imposes far *fewer* restrictions on individuals and unincorporated associations than it does on corporations and unions.” *Id.* (emphasis in original). Whereas “individuals and unincorporated associations may contribute to

candidates, to candidates' committees, to national party committees, and to all other political committees while corporations and unions are absolutely barred from making any such contributions." *Id.* at 201. "In addition, multicandidate political committees are generally unrestricted in the manner and scope of their solicitations; the segregated funds that unions and corporations may establish pursuant to § 441b(b)(2)(C) are carefully limited in this regard." *Id.*

"Accordingly," the *CalMed* plurality concluded, "the \$5,000 limitation on the amount that persons may contribute to multicandidate political committees violates neither the First nor the Fifth Amendment." *Id.*

2. The Supreme Court in *McConnell* reaffirmed the holding in *CalMed*, and neither *Citizens United* nor *SpeechNow* undermines *CalMed*.

More than two decades after its *CalMed* decision, the Supreme Court reaffirmed its *CalMed* holding in *McConnell v. FEC*, 540 U.S. 93 (2003). The majority in *McConnell* explained that the *CalMed* Court had "upheld FECA's \$5,000 limit on contributions to multicandidate political committees." 540 U.S. at 152 n. 48. The Court elaborated:

It is no answer to say that such limits were justified as a means of preventing individuals from using parties and political committees as pass-throughs to circumvent FECA's \$1,000 limit on individual contributions to candidates. Given FECA's definition of "contribution," the \$5,000 and \$25,000 limits restricted not only the source and amount of funds available to parties and political committees to make candidate contributions, but also the source and amount of funds available to engage in express advocacy and numerous other noncoordinated expenditures. If indeed the First Amendment prohibited Congress from regulating contributions to fund the latter, the otherwise-easy-to-remedy exploitation of parties as pass-throughs (*e.g.*, a strict limit on donations that could be used to fund candidate contributions) would have provided insufficient justification for such overbroad legislation.

Id.

To be certain, Justice Blackmun did state in dicta in his *CalMed* opinion that his "analysis suggests that a different result would follow if § 441a(a)(1)(C) were applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates." *CalMed*, 453 U.S. at 203 (emphasis added). And the *CalMed* plurality found it unnecessary to consider such a "hypothetical application of the Act," explaining:

The case before us involves the constitutionality of § 441a(a)(1)(C) as it applies to contributions to multicandidate political committees. Under the statute, these committees are distinct legal entities that annually receive contributions from over 50 persons and make contributions to 5 or more candidates for federal office. Contributions to such committees are therefore distinguishable from expenditures made jointly by groups of individuals in order to express common political views.

Id. at 197 n.17 (internal citation omitted).

Indeed, a different result did follow when the D.C. Circuit in *SpeechNow* considered the application of § 441a(a)(1)(C) to contributions to a political committee established for the purpose of making only independent expenditures. *See SpeechNow*, 599 F.3d at 689 (“*SpeechNow* further intends to operate exclusively through ‘independent expenditures.’”)

Whereas the Supreme Court in *CalMed* found that contributions to multicandidate political committees “pose a perceived threat of actual or potential corruption” sufficient to justify the \$5,000 contribution limit, *CalMed*, 453 U.S. at 203 (Blackmun, J., concurring in part and concurring in the judgment), the D.C. Circuit in *SpeechNow* applied the reasoning of *Citizens United* and concluded “that the government has no anti-corruption interest in limiting contributions to an independent expenditure group such as *SpeechNow*.” *SpeechNow*, 599 F.3d at 695 (emphasis added).

However, neither the Supreme Court in *Citizens United* nor the D.C. Circuit in *SpeechNow* disturbed the holding of *CalMed*, reaffirmed in *McConnell*, that contributions to multicandidate political committees—*i.e.*, committees that make contributions to candidates and other committees—may constitutionally be subject to FECA’s \$5,000 limit notwithstanding the fact that such committees also make independent expenditures. At issue in both *Citizens United* and *SpeechNow* was the funding of independent expenditures by entities engaged exclusively in making independent expenditures, not contributions to candidates. Thus, those cases do not apply to NDPAC, which intends to make both contributions and independent expenditures.

For the same reason, the Commission’s recent advisory opinions 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten) do not apply to NDPAC. Both Club for Growth and Commonsense Ten sought the Commission’s opinion regarding activities of new independent expenditure-only political committees—not activities of a decade-old multicandidate political committee like NDPAC. *See* AO 2010-09 at 1 (“We are responding to your advisory opinion request on behalf of Club for Growth . . . concerning the application of [FECA] and Commission regulations to its plans to establish, administer, and pay the solicitation costs of a new independent expenditure-only political committee”); *see also* AO 2010-11 (“The Committee . . . registered with the Commission on June 11, 2010, and . . . intends to make only independent expenditures.”).

And though the Commission, without clear legal authority, decided in AO 2010-11 to permit the Commonsense Ten independent expenditure-only political committee to solicit and accept contributions from corporations and labor organizations despite the § 441b ban on contributions by such entities to federal political committees, the basis of the Commission’s opinion was—again—the fact that Commonsense Ten is an independent expenditure-only committee. For this reason, the Commission’s decision in AO 2010-11 not to enforce § 441b to an independent expenditure-only committee has no applicability to NDPAC.

3. NDPAC is a multicandidate political committee indistinguishable from CALPAC and is consequently subject to the \$5,000 contribution limit upheld in *CalMed*.

Just like CALPAC—and unlike *SpeechNow*—NDPAC was established as a multicandidate political committee to make contributions to federal candidates and it has been making such contributions for nearly a decade, if not longer.² NDPAC was not “established for the purpose of making independent expenditures,” *CalMed*, 453 U.S. at 203, and states plainly in AOR 2010-20 that it intends to continue making contributions to candidates. NDPAC may not, therefore, avail itself of the *SpeechNow* decision.

Furthermore, NDPAC is not a separate segregated fund (SSF) connected to a corporation or labor organization and, therefore, may not avail itself of FECA provisions permitting corporations and labor organizations to pay the administrative expenses of a connected SSF. As the Court explained in *CalMed*, rejecting the equal protection argument made there, the “claim of unfair treatment ignores the plain fact that the statute as a whole imposes far *fewer* restrictions on individuals and unincorporated associations than it does on corporations and unions.” *Id.* (emphasis in original). For example, multicandidate political committees like NDPAC are generally unrestricted in the manner and scope of their solicitations, while SSFs that unions and corporations may establish may only solicit contributions from their restricted class. *See* 2 U.S.C. § 441b(b)(4).

The NDPAC wants to have its cake and eat it too. On the one hand, like an SSF, it wants to pay its administrative costs with unlimited corporate contributions; while on the other hand, unlike an SSF, it wants to solicit contributions beyond a “restricted class.” However, NDPAC chose its fate many years ago by establishing itself as a multicandidate committee. And the Supreme Court has upheld the \$5,000 contribution limit applicable to such committees. The Commission must thus reject NDPAC’s suggestion that it ignore that limit.

For the above stated reasons, we urge the Commission to advise NDPAC that as a registered multicandidate political committee it is prohibited by 2 U.S.C. §§ 441a(a)(1)(C) and 441b from accepting contributions in excess of \$5,000, and from accepting any corporation or labor organization contributions, regardless of the purpose for which the funds are used.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Fred Wertheimer

Fred Wertheimer
Democracy 21

/s/ J. Gerald Hebert

J. Gerald Hebert
Paul S. Ryan
Campaign Legal Center

² The FEC’s website documents contributions by NDPAC to federal candidates back to October 31, 2000. *See* http://query.nictusa.com/cgi-bin/com_supopp/C00359992/.

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

Counsel to Democracy 21

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

Counsel to the Campaign Legal Center

Copy to: Commission Secretary