

AGENDA DOCUMENT NO. 11-67



FEDERAL ELECTION COMMISSION
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AGENDA ITEM

MEMORANDUM

TO: The Commission

For Meeting of 12-1-11

FROM: Anthony Herman
General Counsel

AH

Rosemary C. Smith *AKK for RCS*
Associate General Counsel

Robert M. Knop *JSW for RMR*
Assistant General Counsel

David Adkins *DA*
Attorney

Neven Stipanovic *NES*
Attorney

Subject: Draft AO 2011-21 (Constitutional Conservatives Fund PAC)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the Open Session agenda for December 1, 2011.

Attachment

1 ADVISORY OPINION 2011-21

2
3 Dan Backer, Esq.
4 DB Capitol Strategies PLLC
5 209 Pennsylvania Avenue, SE
6 Suite 2109
7 Washington, DC 20003

DRAFT

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9
10 Dear Mr. Backer:

11 We are responding to your advisory opinion request on behalf of the
12 Constitutional Conservatives Fund PAC (the “Committee”), concerning the application of
13 the Federal Election Campaign Act of 1971, as amended (the “FECA” or “Act”), and
14 Commission regulations to the Committee’s plans to receive unlimited contributions from
15 individuals, corporations, and labor organizations for the purpose of financing
16 independent expenditures.

17 The Commission concludes that all funds the Committee receives in connection
18 with an election for Federal office must be subject to the Act’s limitations, prohibitions,
19 and reporting requirements. Therefore, the Committee may neither receive unlimited
20 contributions from individuals nor receive any contributions from corporations and labor
21 organizations for the purpose of financing independent expenditures.

22 ***Background***

23 The facts presented in this advisory opinion are based on your letter received on
24 October 18, 2011, your phone call with Commission attorneys on October 20, your email
25 received on October 23, and public disclosure reports filed by the Committee with the
26 Commission.

1 The Committee is a leadership PAC sponsored by and established, financed,
2 maintained, or controlled by Senator Michael Lee of Utah. The Committee is “dedicated
3 to identifying and supporting conservative candidates who are committed to the cause of
4 restoring constitutionally limited government and who understand that the federal
5 government has become too big, too expensive, and too intrusive as Congress has ignored
6 important constitutional limitations on its own power.” Request at 2. It is affiliated with
7 Lead Encourage Elect PAC (a/k/a “LEE PAC”), another leadership PAC sponsored by
8 Senator Lee.

9 The Committee currently maintains a single Federal account into which it
10 receives contributions that are subject to the limitations, prohibitions, and reporting
11 requirements of the Act (“current account”). The Committee plans to establish a separate
12 Federal account – a “non-contribution account” – into which it would receive unlimited
13 contributions from individuals, corporations, and labor organizations (“separate
14 account”).¹ The Committee plans to use its current account to make direct contributions
15 to candidates’ authorized committees and to use its separate account to finance
16 independent expenditures.

17 Independent expenditures financed from the Committee’s proposed separate
18 account would expressly advocate for the election or defeat of Federal candidates other
19 than Senator Lee. These independent expenditures would not be coordinated
20 communications, as defined at 11 CFR 109.21, and candidates that benefit from these
21 independent expenditures would not be involved in fundraising for the Committee’s
22 separate account.

¹ The Committee would not receive funds from foreign nationals, Federal contractors, or national banks or corporations organized by any law of Congress.

Question Presented

May the Committee receive unlimited contributions from individuals, corporations, and labor organizations for the purpose of financing independent expenditures?

Legal Analysis and Conclusions

No, the Committee may neither receive unlimited contributions from individuals nor receive any contributions from corporations and labor organizations for the purpose of financing independent expenditures because section 441i(e)(1)(A) prohibits the Committee from doing so.

As amended by the Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. No. 107-155, 116 Stat. 61 (2002), the FECA provides that, “unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act,” Federal candidates and officeholders, their agents, and entities directly or indirectly established, financed, maintained, or controlled by, or acting on their behalf (collectively, “covered persons”), may not “solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office.” 2 U.S.C. 441i(e)(1)(A); *see also* 11 CFR 300.61.

In *McConnell v. FEC*, the Supreme Court upheld this provision:

No party seriously questions the constitutionality of [441i(e)’s] general ban on donations of soft money made directly to federal candidates and officeholders, their agents, or entities established or controlled by them. Even on the narrowest reading of *Buckley*, a regulation restricting donations to a federal candidate, *regardless of the ends to which those funds are ultimately put*, qualifies as a contribution limit subject to less rigorous scrutiny. Such donations have only marginal speech and associational value, but at the same time pose a substantial threat of corruption. By severing the most direct link between the soft-money donor and the federal candidate, [section 441i(e)’s] ban on donations of

1 *soft money is closely drawn to prevent the corruption or the appearance of*
2 *corruption of federal candidates and officeholders.*
3

4 540 U.S. 93, 182 (2003) (emphasis added); *see Buckley v. Valeo*, 424 U.S. 1, 26-27
5 (1976) (finding that the Act’s limitations on contributions to candidates are a
6 constitutionally permissible method of preventing corruption and its appearance).

7 Neither section 441i(e) nor the Supreme Court’s reasoning in *McConnell*
8 upholding and interpreting this provision has been disturbed by more recent court
9 decisions such as *Citizens United v. FEC*, 558 U.S. ___, 130 S. Ct. 876, 913 (2010)
10 (holding that corporations may make independent expenditures and electioneering
11 communications using general treasury funds, but also reaffirming that contribution
12 limits are an accepted means to prevent *quid pro quo* corruption and its appearance);
13 *EMILY’s List v. FEC*, 581 F.3d 1, 12 (D.C. Cir. 2009) (holding that political committees
14 and other non-profit groups may finance certain independent political activity with funds
15 outside the limitations and certain prohibitions of the Act); *SpeechNow.org v. FEC*, 599
16 F.3d 686, 696 (D.C. Cir. 2010) (*en banc*) (holding that an independent expenditure-only
17 political committee may receive unlimited contributions from individuals); *Carey v. FEC*,
18 Civ. No. 11-259-RMC (D.D.C. 2011) (a nonconnected political committee that makes
19 direct contributions to candidates may receive unlimited funds into a separate bank
20 account for the purpose of financing independent expenditures).

21 The Commission recently concluded that section 441i(e) “remains valid” and
22 continues to govern the activity of covered persons when they solicit, receive, direct,
23 transfer, or spend funds in connection with an election for Federal office. Advisory
24 Opinion 2011-12 (Majority PAC and House Majority PAC). There, the Commission

1 concluded that, consistent with section 441i(e), a Federal candidate or officeholder could
2 not solicit unlimited individual, corporate, and labor organization contributions on behalf
3 of an independent expenditure-only political committee because those funds would not be
4 subject to the limitations and prohibitions of the Act. *Id.*

5 The Committee here states that it is a leadership PAC. By definition, a leadership
6 PAC is “directly or indirectly established, financed, maintained, or controlled” by a
7 candidate for Federal office, or a Federal officeholder.² Therefore, the Committee must
8 comply with section 441i(e) of the Act, and the funds that the Committee receives in
9 connection with an election for Federal office must be subject to the limitations,
10 prohibitions, and reporting requirements of the Act. *See* 2 U.S.C. 441i(e)(1)(A);
11 11 CFR 300.61. As such, it may not receive unlimited funds from individuals or any
12 funds from corporations or labor organizations, because such funds would not be subject
13 to the limitations and prohibitions of the Act.

14 The fact that the Committee would use the funds solely to finance independent
15 expenditures supporting or opposing the election of Federal candidates and officeholders
16 other than Senator Lee does not alter this conclusion. *See, e.g.,* Prohibited and Excessive
17 Contributions: Non-Federal Funds or Soft Money; Final Rule,” 67 Fed. Reg. 49064,
18 49106 (July 29, 2002) (rejecting an interpretation of section 441i(e)(1)(A) as covering
19 only funds “that would eventually benefit the candidate’s own campaign”). Nor is it
20 relevant that the Committee would deposit the funds into a separate Federal account. *Cf.*
21 *Carey*, Civ. No. 11-259-RMC at 4 (affirming the “two-account” approach only for those
22 political committees that are “*wholly separate from federal candidates or parties*,” and

² 11 C.F.R. 100.5(e)(6).

1 therefore do not implicate the “governmental interest in protecting *quid pro quo*
2 corruption”) (emphasis added).

3 Accordingly, the Committee may receive funds in connection with an election for
4 Federal office from individuals only in amounts not exceeding \$5,000 per contributor.
5 And the Committee may not receive any funds in connection with an election for Federal
6 office from corporations or labor organizations.

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

1 directly from the Commission's Advisory Opinion searchable database at
2 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

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Cynthia L. Bauerly

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Chair

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Federal Election Commission