Perkins Coie

BY FACSIMILE

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607 Fourteenth Street N.W.
Washington, D.C. 20005-2011
PHONE: 202.628.6600
FAX: 202.434.1690
www.perkinscoie.com

Ms. Mary Dove
Secretary
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Draft Advisory Opinion 2005-10

Dear Ms. Dove:

On behalf of Requestors, the Honorable Howard Berman and the Honorable John Doolittle, we write to comment on Draft Advisory Opinion 2005-10. Requestors respectfully urge the Commission to amend the draft opinion and permit the conduct they have proposed.

This request arose from an unusual situation: it involves the proclamation by a state governor of a special, off-year election to pass a series of referenda on issues critical to the state. The vast majority of states do not consider statewide ballot referenda in the off-year – if at all. Yet California, in unprecedented circumstances, is now poised to consider an array of initiatives on topics of intense public concern, such as abortion, redistricting, and union political activity. No federal candidate will share the ballot with these initiatives. Federal officeholders like Requestors have intense interests in these issues, not to mention obligations to their constituents to influence their resolution, and they seek to participate on the same terms as others. The question of their own re-election will not come before the voters in the special election, and indeed will not reach the voters until next year.

The draft opinion addresses this unusual situation in a seemingly conventional way. It presumes that the ballot questions present an election like any other; that the same limits on federal officeholder fundraising should apply, as in any other; and that Advisory Opinion 2003-12 should control this situation, as it would any other.

Yet each of these presumptions is misguided. As the draft acknowledges, the statute does not command the Commission to apply the restrictions of 2 U.S.C. § 441i(e)(1)(B) to fundraising on behalf of ballot initiative committees. "[T]he Act's general definition of 'election. ... [does] not resolve the question, because the interpretation of the scope of section 441i(e)(1)(B) should not depend on one word in isolation." Draft at 4 (citing Advisory Opinion 2003-12 and 2 U.S.C. 431(1)(A)) (quotation marks omitted). As with fundraising for legal expense trusts, "[t]here is no indication in the legislative history of

BCRA that Congress intended [BCRA] to change an area that is both well-familiar to members of Congress and subject of longstanding interpretation ... " Advisory Opinion 2003-15. *Cf.* Draft at 5 n.4 (listing advisory opinions that found ballot initiatives not to be in connection with an election).

To conclude that fundraising for all ballot initiatives, at all points in the election cycle, are subject to 441i(e)(1)(B) limits, the draft relies on the anticorruption rationale that led the Supreme Court to uphold BCRA in *McConnell v. FEC*, 540 U.S. 93 (2003). See Draft at 4 n.3. Yet while the draft implies that the purpose of the 441i(e)(1)(B) restrictions is to sever wholly the connection between federal officeholders and large sums of money, this overstates the case.

One can discern this clearly by looking to the draft's quote from *McConnell*, and picking up where the draft left off: "Without some restriction on solicitations, federal candidates and officeholders could easily avoid FECA's contribution limits by soliciting funds from large donors and restricted sources **to like-minded organizations engaging in federal election activities.**" 540 U.S. at 182-83 (emphasis added).

The purpose of section 441i(e) was not simply to keep officeholders from raising soft money; as the Court pointed out, the statute "admits of a number of exceptions." 540 U.S. at 181. Rather, the purpose was to keep officeholders from circumventing FECA limits and restrictions by raising soft money for others to spend in their elections, for their electoral benefit – a purpose not served in an unprecedented, off-year special election, in which the soliciting officeholders are not themselves on the ballot.

Finally – and critically – the draft relies on Advisory Opinion 2003-12. Yet the draft's treatment of this complex, fact-specific opinion is lacking in several ways. First, Advisory Opinion 2003-12 involved the exact opposite of the situation presented here. It involved the request of an officeholder and candidate who sought to raise unlimited, unrestricted funds for an initiative committee that he would control, and that would pay for federal election activity before his voters in an election in which he would be on the ballot. That situation was a far cry from the one presented here, in which officeholders with no connection to the committees would raise funds in an election that would be concluded a year before their own.

Second, the distinction that the Commission drew between pre- and post-qualification activities in Advisory Opinion 2003-12 does not control the outcome of this request. That distinction was not necessary to decide Advisory Opinion 2003-12; it was Congressman Flake's establishment and control of the committee that rendered his

fundraising activities "in connection with an election other than an election for Federal office," regardless of when those activities occurred. Moreover, that distinction is inapposite here, where the initiatives are to be voted on a year before the federal general election; and where the proposed activities will not involve any "amounts of federal election activity." Advisory Opinion 2003-12.

Thus, the draft is the product of an ambiguous statute, a selectively narrow reading of *McConnell*, and total reliance on the dicta of a materially distinguishable advisory opinion.

From such origins, unpredictable consequences can only be expected. Indeed, they become apparent on close examination. Thus:

- The draft says that a federal candidate may only solicit donations of up to $5,000 per calendar year for the post-qualification activities of a ballot initiative to be voted on in the off-year. *See* Draft at 6. Yet that same candidate may solicit nonfederal donations of up to $10,000 per calendar year for his own state party on the eve of his own election. *See* Advisory Opinion 2005-2.

- The draft says that a federal candidate is forbidden to raise funds outside federal limits or restrictions for the post-qualification activities of an initiative on the November 2005 ballot, when no federal election activity is occurring. *See* Draft at 6. Yet that same candidate may raise unlimited corporate funds in 2006, while federal election activity is occurring, for the pre-qualification activities of an initiative that will accompany him or her on the November 2006 ballot. *See* Advisory Opinion 2003-12.

- The draft says that federal officeholders must stay within federal limits and federal restrictions while raising funds in connection with an initiative that would change the way their congressional districts are drawn. *See* Draft at 6. Yet those same officeholders may raise funds outside federal limits and federal restrictions to defray litigation costs associated with their own ballot access. *See* Advisory Opinion 2003-15.

- The draft says that a Member's fundraising for a ballot initiative committee run by him and sponsoring public communications featuring him before his electorate is treated no differently than his fundraising for an initiative committee that is unconnected to him, and that pays for no public communications featuring him. *See* Advisory Opinion 2003-12; *see also* Draft at 5-6.

These anomalies are not the product of a flawed Congressional design. They are the product of a flawed draft advisory opinion. Congress knew what it was doing when it passed section 441i(e) – it wanted to keep candidates and officeholders from evading the FECA "by soliciting funds from large donors and restricted sources to like-minded organizations engaging in federal election activities." 540 U.S. at 182-83. It intended to accommodate "the individual speech and associational rights of federal candidates and officeholders." *Id.* at 183.

Congress did not intend to see those same rights sacrificed at the altar of formalism. Here, the threat to those rights is especially acute. State political figures can take advantage of judicial rules protecting initiative committee activity to promote their own agenda, while federal political figures are placed at a competitive disadvantage by federal rules that purport to withhold such protection. The cost of accommodating the federal officeholders' rights is especially low; there is no risk of circumvention, no likelihood of federal election activity, and no probability of an effect on any federal election.

For these reasons, the Commission should amend Draft Advisory Opinion 2005-10, and permit Requestors' proposed conduct.

Very truly yours,

Judith L. Corley
Brian G. Svoboda
Counsel to Requestors

cc (by electronic mail): Chairman Scott Thomas
Vice Chairman Michael Toner
Commissioner David Mason
Commissioner Danny McDonald
Commissioner Brad Smith
Commissioner Ellen Weintraub

cc (by facsimile): Lawrence Norton, Esq.
Rosemary Smith, Esq.