FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

CONCURRENCE IN ADVISORY OPINION 2003-03

Vice Chairman Smith, and Commissioners Mason and Toner

This Advisory Opinion presented the Commission with its first significant opportunity to apply the Bipartisan Campaign Reform Act's (BCRA) solicitation restrictions to specific fact situations. The Commission determined in this Opinion that under BCRA federal officeholders and candidates may attend state and local candidate fundraising events in which funds outside the federal limits are raised. The Commission also ruled that federal candidates and officeholders may speak and be featured guests at such events provided, if federally impermissible funds are raised, that appropriate disclaimers are given. The Commission also made clear that federal candidates and officeholders may legally participate in any and all event activities.

We strongly support these unanimous Commission rulings and believe that today's Opinion will go a long way toward clarifying what covered persons (such as federal officeholders and candidates) can and cannot do under BCRA. We write separately here to explain why we support the Commission's rulings, to identify a few issues on which there remains disagreement, and to outline the scope and application of the Opinion.[1]

As a start, we understand that the Commission must interpret the Act and its Regulations to comport with the constitutional liberties of affected individuals and groups. A solicitation ban, prohibiting speech on the basis of its content, burdens both speech and association freedoms at the core of the First Amendment, and must be narrowly tailored to serve a compelling state interest. *Republican Party of Minnesota v. White*, 122 S.Ct. 2528, 2534 (2002); *Village of Schaumburg v. Citizens for a Better Environment*, 100 S.Ct. 826, 833 (1980). That the covered persons at issue are public officials is also important: "The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Republican Party of Minnesota*, 122 S.Ct. at 2538 (quoting *Wood v. Georgia*, 370 U.S. 375, 395 (1962)).

Prohibitions on speech must also be clear. This Commission cannot set standards – exposing respondents to potential criminal sanctions – based upon a listener's perception, intuition or inference that a covered person's statements amount in some way to a solicitation. Liability cannot rest upon the "varied understanding" of members of an audience. "In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to

[1] We supported an alternative draft offered by Commissioner Smith and continue to believe that the interpretation of the law in that draft is a better approach. Nevertheless, understanding the importance of providing binding advice to the regulated community, we came to a bipartisan majority on most of the issues raised.

hedge and trim." *Buckley v. Valeo*, 424 U.S. 1, 43 (quoting *Thomas v. Collins* (1945) 323 U.S. 516, 535 (1945)).

The Commission correctly ruled in the Opinion that, under BCRA, covered persons may express their political support for a state or local candidate at state and local candidate fundraising events. For example, a federal officeholder under BCRA is free to declare "I hope you will re-elect Delegate Bill Janis this fall" or, "I hope we can count on your vote in November." Such political expressions of support are not solicitations and are in no way restricted by BCRA.

The Commission also correctly ruled that, under BCRA, covered persons are free to solicit federally permissible funds for state and local candidates. The Commission provided safe harbor disclaimer language for covered persons who intend to solicit only federally permissible funds. Solicitors are not required to use that language. However, if the safe harbor language is used, it will serve to insulate the covered person from liability.

The Requestors sought advice on whether general solicitations that mention no dollar amount would be lawful under BCRA. Our preferred view would be to presume that covered persons who make unqualified solicitations intend to comply with the law, while prohibiting overt solicitations of impermissible funds. Otherwise, we believed the Commission is essentially assuming that a solicitor who makes no mention of a specific amount meant to violate the solicitation restrictions. The Opinion as released instead requires that general solicitations contain disclaimers that recite the federal restrictions. For written solicitations that contain a "general pitch" (which, under Virginia law could be a solicitation for any amount from any source) a disclaimer such as that provided in 1.c of the Opinion should be included.

The more difficult situation, both from the perspective of the solicitor and from our perspective as enforcers of this law, is an oral solicitation at an event. Here, a covered person such as Rep. Cantor, making general statements to elicit financial support, now shall only so speak if a disclaimer is provided informing attendees that he may only ask for donations that meet the amount and source limitations of federal law. The Commission has provided clear and concise language, and including this requirement satisfied our colleagues that BCRA's solicitation limits were being properly interpreted.

We observe that the disclaimer can be communicated in a variety of ways – for instance displayed at an event, offered on response devices, or announced by the federal official during his public comments. The disclaimer will be adequate using one of these methods – officeholders or event organizers need not do them all. For the speaker's part, one publicly announced disclaimer such as "I am only asking for up to $2,000 from individuals. I am not asking for corporate or labor funds, or funds from minors" is enough.

Written disclaimers at these events should be "clear and conspicuous," a concept that exists in another context in our regulations at 11 CFR 110.11(c)(1). That is, a disclaimer should not be difficult to read or hear, or its placement easily overlooked. We hasten to add, however, that the specific requirements of 110.11(c)(2)-(4) should not be understood to apply, and a failure

to abide by these specific requirements will not by itself be deemed a violation of the Act. We also note that a rote recitation of a disclaimer shall not shield a covered person if that solicitor then encourages potential donors to disregard the limits.

Under the Commission's Opinion, a covered person, such as Rep. Cantor, may participate in other ways at state and local political events, including fundraisers. He may, for example, speak individually with attendees, he may have his photo taken with guests, and he may greet people in a reception line. The Commission will not require that general statements he makes during these private one-on-one encounters contain disclaimers. The general event-level disclaimer discussed in the previous paragraph will suffice.

One other difficult issue involves the use of a covered person's name by a state or local candidate, raised by the Requestor in question 5. We understand that covered persons such as Rep. Cantor often show support for state and local candidates by, for instance, serving as an "Honorary Chair" of a campaign, appearing as an endorser on a list, or taking a publicity photo with the candidate for the campaign's use in its materials. Our preferred approach to these issues, and the one contained in the alternative draft we supported, would be to find that the use for subsequent solicitations of general letterhead that lists a covered person as, for instance, "Honorary Chair," would not impute the content of the solicitation to the covered person. We would rule the same as to the use of a covered person's brochure photo or a list of endorsers including his name in a solicitation. However, using a covered person's name on a specifically fundraising-related piece – such as an invitation host committee for a fundraising event – would require a disclaimer if the solicitation sought donations of impermissible funds.

In the final Opinion released by the Commission, the result is not so definitive. The Commission voted 6-0 that covered persons may be listed as an "Honorary Chair" on letterhead, so long as the letterhead is not used for solicitations of funds beyond those legal under federal law. It also concluded that if the covered person's name appeared in a specific fundraising context for an event that solicited impermissible funds, those materials would require a disclaimer. The Commission could not agree whether the covered person's name could appear on campaign letterhead as Honorary Chair when that letterhead is used for a solicitation, without the campaign also remembering to include the federal disclaimer.

We could not support imputing the solicitation to the covered person, merely because his name appears as one of many on general letterhead. We believe this creates such uncertainty for that person that they will be discouraged from publicly participating in state and local campaigns, or even in other kinds of groups. We also could not support a precedent that might imply that, merely by having a covered person as one of many people involved in an organization, the otherwise nonfederal election activities of that organization could be subject to federal limits and restrictions. This potential extension of the Commission's authority has implications in a number of other contexts. We could not agree to an interpretation of the law of such breadth, and it was not adopted. We hope the Commission will have the opportunity at a later date to revisit these issues and resolve them definitively.

Even so, we believe that this Opinion has provided critical practical guidance to federal officeholders and candidates so that they can order their affairs without undue fear of liability under BCRA. We are pleased that the Commission was able to act unanimously on these important issues. As we are presented with additional requests asking the Commission to apply BCRA to new situations, we look forward to working productively with our colleagues to clarify the new law.

Dated: April 29, 2003

Bradley A. Smith, Vice Chairman

Michael E. Toner, Commissioner

David M. Mason, Commissioner