FEDERAL ELECTION COMMISSION
Washington, DC 20463

SUBSTITUTION MEMORANDUM

TO: Rosemary Smith
Associate General Counsel

FROM: Office of the Commission Secretary

DATE: August 6, 2004

SUBJECT: *Ex Parte* Communication regarding
Advisory Opinion Request 2004-25

Attached herewith is an email received by the Commissioners from Mr. Steve Hoersting regarding the above-captioned matter.

cc: Commissioners
Staff Director
General Counsel
Press Office
Public Disclosure

Attachment

Jonathan Levin/FEC/US
08/04/2004 01:28 PM

To Mary Dove/FEC/US@FEC
cc Darlene Harris/FEC/US@FEC, Rosie Smith/FEC/US@FEC, Brad Deutsch/FEC/US@FEC
bcc
Subject Fw: Comments AOR 2004-25; Senator Jon Corzine

The document attached to the message below should be printed out and circulated by your office as an Ex Parte Communication.

----- Forwarded by Jonathan Levin/FEC/US on 08/04/2004 01:24 PM -----

"Hoersting, Steve" <SHoersting@nrsc.org>
08/03/2004 02:08 PM

To <lnorton@fec.gov>, <rsmith@fec.gov>, <jlevin@fec.gov> <bsmith@fec.gov>, "Ellen Weintraub" <eweintraub@fec.gov>, <dmason@fec.gov>, <sthomas@fec.gov>, <mtoner@fec.gov>, <dmcdonald@fec.gov>, <vwu@fec.gov>,
cc <AHayward@fec.gov>, <ERikhye@fec.gov>, <rharvey@fec.gov>, <lshanks@fec.gov>, <kcence@fec.gov>, <jbowman@fec.gov>, <bwoo@fec.gov>, <areel@fec.gov>, <mlaurenza@fec.gov>, <fglendenning@fec.gov>, <shays@fec.gov>
Subject Comments AOR 2004-25; Senator Jon Corzine

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2004-25 Corzine2.doc

National Republican Senatorial Committee

Stephen M. Hoersting
General Counsel

August 3, 2004

Lawrence Norton, Esq.
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Federal Election Commission
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VIA ELECTRONIC MAIL

Re: Advisory Opinion 2004-25; Senator Jon Corzine (D-NJ)

Dear Mr. Norton:

Much has been made of how "obvious" is the answer to Senator and DSCC Chairman Jon Corzine's recent Advisory Opinion request to the Federal Election Commission.[1] One Republican observer has said, "It does seem pretty clear-cut ... [f]rankly, I don't even know why they're asking."[2]

But Senator Corzine cannot spend money on politics as in the days of old, or in the same way other wealthy Americans can post-BCRA. He is in a unique position. If Senator Corzine personally spends for political activity he would be doing so based on material information gained through his role as DSCC Chairman, which would transform that spending into an excessive contribution to the DSCC in violation of BCRA's enhanced coordination prohibitions. *See* 2 U.S.C. § 441a(a)(7)(B)(ii).

Senator Corzine also cannot donate unlimited personal money to organizations that would spend it for the same purpose. Under BCRA, an individual holding Federal office may not donate funds for voter registration activity unless those funds are subject

[1] *See* Paul Kane and Amy Keller, "Corzine Eyes Spending Spree," Roll Call July 6, 2004 (Statement of James Bopp, Jr.); *see also* Robert Bauer, "Why Are Advisory Opinions Requested on the Obvious?" available at http://www.moresoftmoneyhardlaw.com/candidates/index.htm#070704.

[2] Kane and Keller, *supra* note 1.

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to the limitations of the Federal Election Campaign Act. *See* 2 U.S.C. § 441i(e)(1)(A) and (B).

So why would Senator Corzine delay his political plans to seek the advice and imprimatur of the Commission if we should all know the result? Answer: Because what once was obvious is no longer after the Supreme Court's validation of BCRA in *McConnell v. Federal Election Comm'n.*

The National Republican Senatorial Committee ("NRSC") is an unincorporated association designed, in part, to aid the election of Republican candidates to the United States Senate. The NRSC appreciates the opportunity to comment on this Advisory Opinion Request. BCRA's restrictions on soft-money spending by individuals holding Federal office apply to Senator Corzine in his personal and official capacities. These provisions are valid under the Supreme Court's *McConnell* opinion. As such, Senator Corzine may donate funds to groups that conduct voter registration activities at any time within the limits and prohibitions of the Act.

If Senator Corzine believes that the application of section 441i(e) to his requested activity would violate his rights under the First Amendment to the Constitution, or perhaps under its Fifth Amendment Equal Protection Clause, he may challenge the provision in a declaratory judgment action. If, for some reason, the Commission does not limit Senator Corzine's giving to the limits of the Act, it must set now the dollar threshold at which Senator Corzine's donations would effectively "finance" any recipient organizations within the meaning of section 441i(e)(1), and thereby plunge those recipients into the strictures of FECA.

REQUEST and SUMMARY of ARGUMENT

"Senator Corzine plans to donate his personal funds, in various amounts, some exceeding $25,000, to one or more organizations that engage in voter registration activity, as defined in 11 C.F.R. § 100.24(a)(2)." Advisory Opinion Request 2004-25, Senator and DSCC Chairman Jon Corzine (D-NJ) ("Request"). Senator Corzine seeks the Commission's opinion as to whether 2 U.S.C. § 441i(e) restricts a candidate's or Federal officeholder's donation of personal funds. Request at 1.

Section 441i(e) provides that an "individual holding Federal office ... shall not ... spend funds ... [in connection with Federal or non-Federal elections unless those funds are] subject to the limitations [and] prohibitions of the Act." *See* 2 U.S.C § 441i(e)(1)(A) and (B). It also provides that "any entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more ... individuals holding Federal office, shall not solicit, receive, direct, transfer or spend funds" in connection with Federal or non-Federal elections unless within the limits and prohibitions of the Federal Election Campaign Act of 1971, as amended. ("FECA" or "Act"). *Id.*

In this comment, the NRSC will demonstrate that each of the requirements of section 441i(e) are met by the activity proposed by the Requestor. Specifically, the NRSC will show that:

- Voter registration activity is in connection with both Federal and non-Federal elections, and that the Commission itself has reached this conclusion.

- The ban on individuals holding Federal office from directing or spending soft money is broad and general in scope. If proposed activity is in connection with an election, the ban applies everywhere it is not excluded by statute, and the Commission itself has reached this conclusion.

- The ban on individuals holding Federal office applies to *individuals* holding Federal office; to officeholders in their individual and official capacities, and that the Supreme Court reached this conclusion explicitly in *McConnell*.

The NRSC will then address possible objections to applying section 441i(e) to the activity proposed in the request:

- That while the core provision binding Senator Corzine reads "a[n] individual holding Federal office ... shall not ... spend," applying section 441i(e) to Senator Corzine's request does not raise the specter of expenditure limitations, and does not conflict with the Millionaire's Amendment. What Senator Corzine proposes is the making of donations, not spending for his own speech or re-election.

- That while the term "donate" may not actually appear in section 441i(e), the concept is captured by the term "spend," which does appear, and the Commission itself has reached this conclusion.

- That the three objections raised by the Requestor are either inapposite or recently rejected by the Supreme Court, the Commission, or both.

- That section 439a has parameters the Commission must follow, and does not permit personal donations by individuals holding Federal office in unlimited amounts to any kind of organization.

- That even if the Commission somehow permits Senator Corzine to donate his personal soft money outside the limits of the Act, at some point his donations make the recipient an entity "financed" by Senator Corzine in violation of section 441(i)(e)(1). The Commission must set this threshold before permitting the Senator to make donations.

Voter registration activity is in connection with both Federal and non-Federal elections, and the Commission itself has reached this conclusion.

Section 441i(e) applies both to spending "in connection with an election for Federal office," and "in connection with any election other than for Federal office." 2 U.S.C. § 441i(e)(1)(A) and (B). The Requestor states that "Senator Corzine plans to donate his personal funds, in various amounts ... to one or more organizations that engage in voter registration activity, as defined in 11 C.F.R. § 100.24(a)(2)." Request at 1. Voter registration activity conducted within 120 days of an election is Federal election activity, 2 U.S.C. § 431(20)(A)(i), and meets the requirement of section 441i(e)(1)(A). The Commission has held that voter registration beyond 120 days meets the requirement of section 441i(e)(1)(B). *See* Advisory Opinion 2003-12 ("STMP anticipates in engaging in voter registration ... from the beginning of its activities. [T]herefore, the Commission concludes ... that the activities of STMP ... are in connection with an election other than an election for Federal office"). After all, what is the point of registering voters if the activity is not ultimately in connection with an election?

The ban on individuals holding Federal office from directing or spending soft money is broad and general in scope. If a proposed activity is in connection with an election, the ban applies everywhere it is not excluded by statute, and the Commission itself has reached this conclusion.

Section 441i(e) places a general limitation on the activity of candidates and individuals holding Federal office. Its broad sweep is evidenced by the number of exceptions provided in the statute. There are three exceptions to the general ban for soft-money fundraising.[3] The general ban on soft-money spending applies to all candidates or individuals holding Federal office unless he or she is also a candidate for State or local office. 2 U.S.C. § 441i(e)(2). These exceptions permit candidates and individuals holding Federal office to "solicit, receive, direct, transfer, spend, or disburse funds in connection with Federal and non-Federal elections only from sources permitted under the Act and only when the combined amounts solicited and received from any particular person or entity do not exceed the amounts permitted under the Act's contribution limits and are not from prohibited sources." Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49083 (July 29, 2002). "[G]iven these many exceptions, as well as the substantial threat of corruption or its appearance posed by donations to or at the behest of federal candidates and officeholders, [§ 441i(e)] is clearly constitutional." *McConnell v. Federal Election Comm'n.*, 124 S. Ct. 619, 683 (2003).

[3] Exceptions to the soft-money fundraising ban apply when a candidate or individual holding Federal office makes general solicitations of funds for 501(c) organizations where the solicitation does not specify how the funds will be spent. 2 U.S.C. § 441i(e)(4)(A). Candidates or individuals holding Federal office may make solicitations for federal election activity if the solicitation is made only to individuals and the amount solicited does not exceed $20,000. 2 U.S.C. § 441i(e)(4)(B). Additionally, candidates or individuals holding Federal office may "attend, speak, or be a featured guest" at a state or local party fundraising event even if soft money is solicited or collected there. 2 U.S.C. § 441i(e)(3).

Many believe that section 441i(e) was written to effectively wind down the non-Federal side of leadership PACs; to prevent individuals holding Federal office from raising and spending soft money into and from leadership PACs they control. This is certainly one result. *See* Explanation and Justification, Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49088 (July 29, 2002); *see also* Leadership PACs, 68 Fed. Reg. 67,013 (Dec. 1, 2003). But the Commission is aware that section 441i(e) does much more. *See* Advisory Opinions 2003-37, Americans for a Better Country; and 2003-12, Representative Jeff Flake. The Commission has recognized that the functional limits to the scope of section 441i(e) are the exceptions to the provision noted above. In Advisory Opinion 2003-32, Superintendent Inez Tenenbaum, the Commission stated that "[i]n analyzing the application of 2 U.S.C. § 441i(e), the threshold question is whether the funds are in connection with an election . . . . If they are, then the analysis proceeds to whether the exceptions ... apply." Section 441i(e) is part of a "system of prohibitions and limitations on the ability of Federal officeholders and candidates, to raise, spend, and control soft money." *See* 148 Cong. Rec. S2139 (Daily ed. March 20, 2002) (statement of Sen. McCain).

The ban on individuals holding Federal office applies to *individuals* holding Federal office; to officeholders in their individual and official capacities. The Supreme Court reached this conclusion explicitly in *McConnell*.

Congress knows how to distinguish an officeholder in his official capacity from an officeholder in his personal capacity.[4] Section 441i(e) uses the phrase "individual holding Federal office." This phrase is not accidental. It is not Congress's quaint way of describing an "officeholder" and cannot be read to limit its proscriptions to the official acts of those who hold public office. A similar phrase, "individual as a holder of Federal office" is used in another section of the Act, section 439a, the personal use prohibitions. Section 439a both prevents officeholders from *personally* benefiting, in an individual capacity, from the spending of campaign funds and permits campaign spending by officeholders in their *official* capacity, for official purposes. 2 U.S.C. § 439a(a)(2). There is no doubt that Congress intended the phrase "individual holding Federal office" to encompass both the official and personal capacities of a Federal officeholder.

"In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). And section 439a is not the only illustrative provision in the Act. Section 441i(d) prohibits "officers" of national, State and local party committees from soliciting funds for or directing donations

[4] Congress has made clear in Federal bribery statutes that the term "'public official' means Member of Congress, Delegate, or Resident Commissioner ... or officer ... of the United States ... in any official function." 18 U.S.C. § 201(a)(1). The term "official act" means "action on any question ... which may be brought before any public official in such official's official capacity." 18 U.S.C. § 201(a)(3). Whereas the term "'person who has been selected to be a public official' means any person who has been nominated or appointed to be a public official." 18 U.S.C. § 201(a)(2). Federal statutes prohibiting the knowing concealment of assets in bankruptcy proceedings prohibit "a person ... in a personal capacity" from fraudulently concealing his property or the property of another person. 18 U.S.C. § 152(a)(7).

to Internal Revenue section 501(c) and 527 organizations. BCRA section 441i(d) uses the term "officers," and does not employ the language "individuals holding National, State or local party office." By its terms, section 441i(d) applies to the official, not personal, capacity of party committee officers. This is in accord with the Commission's recognition in the soft money rulemaking that party committee officers, "individuals, such as State party chairmen and chairwomen, who also serve as members of their national party committees, can, consistent with BCRA, wear multiple hats, and can raise non-Federal funds for their State party organizations without violating the prohibitions against non-Federal fundraising by national parties." 67 Fed. Reg. 49064, 49083 (July 29, 2002). The Supreme Court's holding aligns with the Commission's determination: "[section 441i(d)] in no way restricts solicitations by party officers acting in their *individual* capacities." *McConnell*, 124 S. Ct. at 680 (emphasis added). Likewise, section 441i(d) in no way restricts *donations* by party officers acting in their individual capacities.

Individuals holding Federal office can and do wear multiple hats in managing different organizations in the hard money world. *See* Leadership PACs: Final Rules and Transmittal of Regulations to Congress. 68 Fed. Reg. 67,013 (Dec. 1, 2003). But there are no hats available for federal officeholders in the soft-money world. Section 441i(e) precludes the wearing of soft-money hats by individuals holding federal office. The Supreme Court demonstrated this in discussing the section's solicitation prohibitions, and affirmed that BCRA reaches the individual capacity of officeholders: "Rather than place an outright ban on solicitations to tax-exempt organizations, [section 441i(e)] permits limited solicitations to tax exempt organizations[;] limited solicitations of soft money .... This allowance accommodates *individuals* who have long served as active members of nonprofit organizations in both their official and *individual* capacities." *McConnell*, 124 S. Ct. at 683 (emphasis added). Section 441i(e) limits the spending of individuals holding Federal office in their *individual* and official capacities.

Application of section 441i(e) to Senator Corzine's request does not raise the specter of expenditure limits, and does not conflict with the Millionaire's Amendment. What Senator Corzine proposes is the making of donations, not spending for his own speech or re-election.

Applying section 441i(e) to the personal spending of individuals holding Federal office raises the issue of expenditure limitations, which have long been disfavored in election law jurisprudence. *See generally, Buckley v. Valeo*, 424 U.S. 1 (1976); *Federal Election Comm'n. v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). Likewise, if a candidate or individual holding Federal office cannot spend in excess of the limitations of the Act, doesn't that render the so-called Millionaire's Amendment a dead letter? *See* 2 U.S.C. § 441a(i).

A quick look through the briefs demonstrates that no petitioner/individual holding Federal office claimed, before the three-judge panel, that section 441i(e) would prevent

him from spending personal funds in violation of the First Amendment.[5] The *McConnell* Court did not address the issue directly. Frankly, the NRSC is not certain how the question would be decided today if the Court were to consider it directly. *See Federal Election Comm'n. v. Colorado Federal Campaign Comm.*, 518 U.S. 604 (1996), JJ. Stevens, Ginsburg dissenting ("[T]he government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns"); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 402-406 (2000), J. Breyer concurring ("The Constitution permits restrictions on the speech of some in order to prevent a few from drowning out the many .... [U]nlimited spending threatens the integrity of the electoral process .... [I]t might prove possible to reinterpret aspects of *Buckley* ... making less absolute the contribution/expenditure line."); *McConnell*, 124 S. Ct. at 706, JJ. Stevens, O'Connor, Souter, Breyer, Ginsberg ("To say that Congress is without power ... to safeguard an election from the improper influence of money ... is to deny to the nation in a vital particular the power of self protection. We abide by that conviction [and] are under no illusion that BCRA will be the last congressional statement on the matter"). What the NRSC does know is that the Court did, in several places, use the words "spending" or "spend" in upholding section 441i(e) against facial challenge. *McConnell*, 124 S. Ct. at 682-83.

The *in pari materia* doctrine of statutory construction calls into question applying section 441i(e) to the individual capacity of individuals holding Federal office when read together with the Millionaire's Amendment. 2 U.S.C. § 441a(i). "Sections and acts *in pari materia* should be construed together and compared with each other." 73 Am. Jur. 2d *Statutes* § 103 (2004). But the *in pari materia* doctrine is premised on the presumption that "[s]tatutes are not to be considered as isolated fragments of law, but as ... parts of a great, connected, homogeneous system." *Id.* The Millionaire's Amendment, however, was just that: a last minute amendment to a statute passed under unusual circumstances. Any attempt to make a homogenous system out of the many and varied parts of BCRA was made only more difficult by adoption of the Millionaire's Amendment. And BCRA did not undergo the harmonizing process of a conference committee.[6] The "critical question [in applying the doctrine of *in pari materia*] concerns

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[5] Complaint for Representative Thompson and Representative Hilliard, McConnell v. FEC, 251 F. Supp. 2d 919 (D.C. Cir. 2003)(1:02CV00881) available at http://www.law.stanford.edu/library/campaignfinance/thompson/thompson-v-fec.pdf; Brief for Senator McConnell, McConnell v. FEC, 251 F. Supp. 2d 919 (D.C. Cir. 2003)(No. 02-0582) available at http://www.law.stanford.edu/library/campaignfinance/mcconnell/SFXA3.pdf; Brief for Congressman Ron Paul, et al., McConnell v. FEC, 251 F. Supp. 2d 919 (D.C. Cir. 2003) available at http://www.law.stanford.edu/library/campaignfinance/paul/paul.11.6.pdf.

[6] *See* 148 Cong. Rec. S1995 (Daily ed. March 18, 2002) statement of Sen. Dodd. ("I believe the risk of delay far outweighs the potential for legislative improvements. Instead of becoming law, the Shays-Meehan bill ... would be a candidate for a Senate-House conference or additional House debate. Either of these scenarios would kill any real chance to enact campaign finance reform in the 107th Congress."); *see also* Statement of Senator Pete Domenici, March 20, 2002, Cong. Rec. S2153 (R-NM) ("Normally, the Senate would have the opportunity to make the small changes that most would agree would make this legislation much more effective. I am disappointed that the most adamant Senate proponents of this legislation bunkered down to prevent any improvements").

how reasonable it is to assume the legislators and members of the public know the provisions of other acts ... when they consider the meaning of the act to be construed." 2A Sutherland Statutory Construction 51.01, at 450 (4th ed. 1973). NRSC Counsel can assure the Commission that virtually no one in the legislature or public knows the provisions of the Millionaire's Amendment.

Moreover, the Millionaire's Amendment was not before the Supreme Court when it made a holistic review of BCRA. The Supreme Court has not had an opportunity to reconcile the Millionaire's Amendment with the rest of BCRA. Indeed, no court has had an opportunity to reconcile the Millionaire's Amendment with the rest of BCRA. Section 441i(e) is not the only provision that would be called into question when compared to the Millionaire's Amendment. Because the Millionaire's Amendment increases contribution limits to qualifying candidates, perhaps its consideration with BCRA would lead a Court to invalidate the $2000 contribution limit to candidates, as being directly contradictory to Congress's assertion that $12,000 contributions are not corrupting. Will the Commission read the Millionaire's Amendment in light of the *in pari materia* doctrine and its knowledge of "corruption" jurisprudence to suspend enforcement of the Act's contribution limits in section 441a(a)?

But the Commission need not enter such murky waters. Senator Corzine is not asking the Commission if he may spend money on his own behalf. He is asking if he may give his money to others. Senator Corzine also is not up for re-election this cycle, and is not asking to spend money for his own election.[7]

Because Senator Corzine is not asking to spend money for his own speech or to spend personal funds to further his re-election, the Commission can keep faith with the unambiguous language of section 441i(e) and its facial validation by the *McConnell* Court, without reaching or treading upon more difficult jurisprudential issues. What Senator Corzine is really trying to do is donate money to others. There is no need for the Commission to say here how Senator Corzine's request may affect the Millionaire's Amendment. "So long as there is no 'positive repugnancy' between two laws, a court must give effect to both. While courts should disfavor interpretations of statutes that render language superfluous, in this case that canon does not apply." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992) (citations omitted). What the Commission knows from the Court is that section 441i(e) applies to the individual capacity of an officeholder, *McConnell, supra*, 124 S. Ct. at 683, and is facially valid. *Id.*

[7] The Millionaire's Amendment becomes operative no sooner than June 30 of the year preceding the year in which a general election is held. 2 U.S.C. § 441a(i)(1)(E)(ii)(I). For Senator Corzine, this is no sooner than June 30, 2005.

While the term "donate" may not actually appear in section 441i(e), the concept is captured by the term "spend," which does appear, and the Commission itself has reached this conclusion.

The definitions of "expenditure" at section 431(9)(i) and "contribution" at section 431(8)(i) are identical.[8] A "political committee" is defined as a group of persons that "receives contributions" or "makes expenditures" in excess of $1000 in a calendar year. 2 U.S.C. § 431(4). The words "makes contributions" are not included in the definition of political committee. Yet no one at the Commission believes that a group of persons that pools funds to make contributions does not become a political committee once the contributions exceed $1000. Why? Because the term "makes expenditures" subsumes the making of a contribution. Likewise, the term "spend" any funds subsumes the concept "donate" any funds.

"Spend is the general word." The Random House College Dictionary, 1264 (rev. ed. 1980). And the Commission uses the term "spend" as generally as any it employs. *See* 67 Fed. Reg. 49064, 49089 (July 29, 2002) ("[T]he plain language of BCRA ... indicates that the ban on national party raising and spending of non-Federal funds was intended to be broad"). Indeed, the regulations at 11 C.F.R. § 300.32(b)(2) state that a "local committee of a political party may spend Levin funds [for] any use that is lawful under the laws of the State in which the committee is organized." Donations are lawful under the laws of many States in which local committees are organized. Spending subsumes the act of donating.[9]

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[8] The U.S. Supreme Court in *Buckley* refers to the definitions as "parallel provisions." *Buckley v. Valeo*, 424 U.S. 1, 77 (1976).

[9] The word "donate" does not actually appear in section 441i(e). Its variation does appear in other provisions, however, most notably the party committee soft money ban of section 441i(a), and the party committee non-profit donation ban of section 441i(d). There is a presumption in statutory construction that the use of different language indicates a legislative intention to mean different things. *E.E.O.C. v. Gilbarco, Inc.*, 615 F.2d 985, 999 (4th Cir. 1980). This applies no less in BCRA. But the inclusion of the terms "donation" in 441i(a), "donations" in 441i(d), and their absence in 441i(e) does not mean that Senator Corzine may give funds for voter registration without limitation.

It is useful to review BCRA's treatment of the terms "donation" and "donations" in sections 441i(a) and 441i(d), respectively. Section 441i(d) states that a national party committee "shall not solicit any funds for, or make or direct any donations to" 501(c) and 527 organizations. Because the national party soft money ban prohibits donations with soft dollars, section 441i(d) goes the extra step to prohibit hard-money donations to non-profit organizations. This is the reason it was invalidated by the Supreme Court in *McConnell*. Section 441i(d) is not a useful analog to the candidate spending limitation in section 441i(e). The party committee analog to the candidate spending limitation, if there is one, is section 441i(a).

Section 441i(a) lays out two general ideas: what a national party may *get from* others and what a national party may *give to* others. The plain language states that a national party committee "may not solicit, receive, or direct to another person a contribution, donation or transfer of funds or any other thing of value [on the one hand], *or* spend any funds [on the other]" not subject to the limits of the Act. 2 U.S.C. § 441i(a). It means, on the one hand, that the national party may not *solicit* something *from* a donor outside the limits of the Act; may not *receive* something *from* a donor outside the limits of the Act; and may not cajole *from* a donor to a third entity something of value outside the limits of the Act. But it also means, on the other hand, that a national party may not, itself, give something of value *to* a third entity outside the

BCRA's prohibition on candidates or individuals holding Federal office from spending non-Federal funds in connection with elections, includes the making of non-Federal donations in connection with elections. The Commission itself has reached this conclusion in Advisory Opinion 2003-23, where it said that a candidate "*donating* funds to organizations that conduct Federal election activity constitutes *spending* in connection with elections for Federal office". (Emphasis added). Senator Corzine's donations to groups engaging in voter registration activity are captured by the spending limitations of section 441i(e).

The three objections raised by the Requestor are either inapposite or recently rejected by the Supreme Court, the Commission, or both.

The Requestor says several times that the "Supreme Court has characterized these prohibitions as 'restrictions on solicitations.'" Request at 2. But the Requestor refers to the Court's pronouncements with regard to BCRA sections 441i(a) and 441i(d), which apply to officers of national party committees, not individuals holding federal office.[10] Whatever are Senator Corzine's obligations under section 441i(d) as an officer of the DSCC, he is also an individual holding Federal office and bound by the spending limitations of section 441i(e).

The Requestor also says that when restrictions "went beyond the 'marginal' and when they went beyond the goal of preventing corruption or its appearance, the Court felt compelled to curtail them." Request at 3. Again, the Requestor is referring to the Court's discussion of section 441i(d), which is not directly relevant here.

But the Court's discussion of section 441i(d) is instructive. Section 441i(d) provides that officers of national party committees "shall not solicit any funds for, or make or direct any donations to" 501(c) and 527 organizations. The national party soft money ban of section 441i(a) already ensures that national parties and their officers do not traffic in soft money. Therefore, section 441i(d) was to ensure that national party committees do not donate to charities with even hard money. The government defended section 441i(d)'s donation restriction as an anti-circumvention measure. *McConnell*, 124 S. Ct. at 680. The Court's response was interesting. It said, "[w]e agree insofar as it prohibits the donations of soft money. [But w]e have found no evidence that Congress

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limits of the Act. The term "donation" appears in the first half of the prohibition; the receipt-side of the prohibition. It does not appear in the second half. The term "donate" does not appear on the giving side of the national party soft money ban. However, no one would say that a national party committee may donate funds to another entity in excess of the Act's limitations.

The absence of the term "donate" in section 441i(e) is not fatal.

[10] Requestor cites *McConnell* pp. 655 and 668. *See* Request at 3. The quote at page 665 merely restates the Court's long held contribution jurisprudence: "In these cases we have recognized that contribution limits, unlike limits on expenditures, 'entai[l] only a marginal restriction upon the contributor's ability to engage in free communication.'" The quote at page 668 are made within the context of discussing the national party soft money ban, section 441i(a). The quotes referenced by the Requestor are not found in the Court's separate discussion of section 441i(e), which occurs at pp. 682-683.

was concerned about, much less that it intended to prohibit donations of money already fully regulated by FECA." *McConnell*, 124 S. Ct. at 680-683. By contrast, Senator Corzine seeks to make donations of soft money. He is not content to make donations of money fully regulated by FECA.

Finally, the Requestor states that the "purpose of BCRA's core soft money restrictions was 'to prevent the actual and apparent corruption of federal candidates and officeholders' that resulted from donations made by *others*. *McConnell v. Federal Election Comm'n*, 124 S. Ct. 619, 660 (2003). It was not to curtail the giving of the covered persons *themselves*." Request at 2 (emphasis in original).

Yet, the Commission has curtailed the giving of covered persons themselves. In Advisory Opinion 2004-1, the Commission held that payments by one federal candidate made in cooperation with another federal candidate create an impermissible contribution under section 441a(a)(7)(B)(i) and 11 C.F.R. Part 109. This despite some contrary language in BCRA section 214(C). *See* BCRA, Public Law 107-155, 116 Stat. 94 (Mar. 27, 2002). The Commission made its determination by adhering to an errant word ("that") in the payment prong of the Commission's coordination regulations. 11 C.F.R. 109.21(a)(1). ("A communication is coordinated with a candidate ... when the communication ... is paid for by a person other than *that* candidate [and satisfies one of several content and conduct standards]"). In commenting on Advisory Opinion Request 2004-1, the NRSC made much the same argument the Requestor is making now: Federal candidates and officeholders do not corrupt themselves or each other. Specifically, the NRSC argued that there is nothing in the Act's jurisprudential history that recognizes corruption in the cooperative spending of the campaign accounts of federal candidates of the same political party. Comments of National Republican Senatorial Committee, Advisory Opinion 2004-1, General Counsel's Blue Draft.[11] The NRSC did not carry the day, however -- and this was where only hard money was at issue. Even the NRSC then acknowledged that a federal candidate can be corrupted by the personal, soft-dollar spending of another individual holding Federal office. *Id.*

The Commission and the Requestor may like to distinguish Advisory Opinion 2004-1 from this request on the absence here of any coordination. The Commission may believe that coordinated activity, by its nature, acutely conveys corruption and is justifiably prohibited even when found between federal candidate committees of the same political party, but that the corruptive influence of donations for independent activity is more novel and implausible than that posed by contributions to candidates. As stated by the Requestor, "[w]hen a candidate or Federal officeholder gives away his or her own money, it is hard to see how that would be considered 'a means of buying influence and access with Federal officeholders and candidates.'" Request at 3. But this is precisely the rationale recently rejected by the Supreme Court in *Leake v. North Carolina Right to Life, Inc.*, 124 S. Ct. 2065 (2004).

[11] Available at http://www.fec.gov/aos/issued/aor2004-01com4.pdf.

In *Leake*, the North Carolina Right to Life ("NCRL"), a non-profit organization, created an internal political action committee. The committee's sole purpose was to make independent expenditures and would not make monetary or in-kind contributions of any kind.[12] *North Carolina Right to Life, Inc. v. Leake*, 344 F.3d 418 (4th Cir. 2003). NCRL challenged North Carolina's $4000 contribution limit to independent expenditure political action committees on the ground that such contributions do not present the risk of *quid pro quo* corruption or its appearance. *Id.* at 422. The Fourth Circuit upheld the challenge, stating the very argument the Requestor now seems to be making. The Fourth Circuit said:

> In contrast, contributions to a committee that makes only independent expenditures poses no such threat. Because the corruptive influence of contributions for independent expenditures is more novel and implausible than that posed by contributions to candidates, convincing evidence of corruption is required. *Colorado Republican*, 518 U.S. at 618. The State, however, failed to proffer sufficiently convincing evidence which demonstrates that there is a danger of corruption due to the presence of unchecked contributions to IEPACs. We agree with the District Court that the $4,000.00 limitation on contributions to IEPACs is substantially overbroad and unconstitutional.

North Carolina Right to Life v. Leake, 344 F.3d 418 (4th Cir. 2003). In considering the Fourth Circuit opinion, the Supreme Court granted certiorari, vacated the judgment in its entirety, and remanded the case to the Fourth Circuit for further consideration in light of *McConnell v. Federal Election Comm'n*. *See Leake v. North Carolina Right to Life*, 124 S. Ct. 2065 (2004).

Section 441i(e) is a donation limit for individuals holding Federal office, no less than any other contribution or donation limit under State or Federal law. Despite Requestor's assertions about the tenuous nature of the influence that can be gained by donating personal funds to organizations that do not coordinate with candidates, the fact remains that such limits in 441i(e) are presumptively valid after the Supreme Court's opinions in *McConnell* and *Leake*. If the Commission was unwilling to rationalize the term "that" in the first prong of its coordination regulations -- where nothing in BCRA, jurisprudence or even its Explanation and Justification required fealty to that unfortunate turn of phrase -- it is difficult to see how the Commission can rationalize the term "spend" appearing in a statute, where all that the Commission knows of its pedigree is that it was facially validated by the Supreme Court, and that a Fourth Circuit opinion casting doubt upon the very rationale for applying the provision to Senator Corzine's request was reversed and remanded only three months ago.

In its *McConnell* opinion, a majority of the Supreme Court no fewer than five times invited aggrieved persons to file as-applied challenges to various provisions of BCRA. 124 S. Ct. 619, 668 n.52, 669, 677, 717 and 718. If Senator Corzine believes that the application of section 441i(e) to his requested activity would violate his rights

[12] A coordinated communication is one form of in-kind contribution. *See* 2 U.S.C. § 441a(a)(7)(B)

under the First Amendment to the Constitution, or perhaps under the Fifth Amendment's Equal Protection clause, he may challenge the provision in a declaratory judgment action. But the Commission has "exclusive jurisdiction with respect to the civil enforcement" of the Act. 2 U.S.C. § 437c(b)(1). If the Commission finds itself guessing about the meaning of the Court's remand in *Leake*, its duty is to enforce the statute. "[I]n interpreting a statute [the Commission] should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992)(citations omitted). Section 441i(e) is unambiguous. And nothing in the recent signaling from the Supreme Court can lead the Commission to any other result.

The truth is the Commission has in past opinions already decided key issues lurking in Senator Corzine's request. In Advisory Opinion 2003-32, Senate candidate Inez Tenenbaum, a former State officeholder, asked if she may donate funds from her State campaign account to several organizations within and outside South Carolina. The Commission held that Ms. Tenenbaum "may not donate the funds in her State campaign account to charitable organizations that ... have Federal election activity as their principal purpose."[13]

As the Commission has noted,

> [I]n discussing BCRA's restrictions on the solicitations and spending of non-Federal funds by Federal candidates and officeholders, the co-sponsors stated that these provisions were part of a "system of prohibitions and limitations on the ability of Federal officeholders and candidates, to raise, spend, and control soft money" in order "to stop the use of soft money as a means of buying influence and access with Federal officeholders and candidates." *See* 148 Cong. Rec. S2139 (Daily ed. March 20, 2002) statement of Sen. McCain).

67 Fed. Reg. 49064, 49107 (July 29, 2002). Senator Corzine is not in cycle. Between now and November 2, there are fewer than the 120 days required to make voter registration Federal election activity. Can it be doubted that he is spending to try and influence the election of other Federal candidates?

Section 439a has parameters the Commission must follow and does not permit personal donations by individuals holding Federal office in unlimited amounts to any kind of organization.

The NRSC believes that Senator Corzine's proposed activity fits squarely within the provisions of section 441i(e). Indeed, "Senator Corzine seeks the Commission's opinion as to whether section 441i(e) restricts a candidate's or Federal officeholder's

[13] The Commission could not agree whether Ms. Tenenbaum may donate such non-Federal funds to a charitable organization that conducts election activity but whose principal purpose is not Federal election activity. Advisory Opinion 2003-32.

donation of personal funds." Request at 1. But the Commission may take it upon itself to apply other provisions of the Act to the question posed in the Request. One such provision may be section 439a.

Section 439a provides that a "contribution accepted by a candidate, and any other donation received by an individual as support for activities of the individual as a holder of Federal office, may be used by the candidate or individual" for four purposes and four purposes only: 1) for expenditures in connection with the campaign for Federal office of the candidate or individual; 2) for expenses incurred in connection with the duties of the individual as a holder of Federal office; 3) for contributions to a charitable organization described in section 170(c) of the Internal Revenue Code of 1986; or 4) for transfers without limitation, to a national, State, or local committee of a political party. *See* 2 U.S.C. § 439a(a)(1)-(4).

The Commission has long held that "a candidate and the candidate's committee have wide discretion in making expenditures to influence the candidate's election." Advisory Opinions 2000-40, 2000-37, and 2000-12. But there are limits to this maxim found both within the other sections of the Act and the other provisions of section 439a itself. First, the funds must actually be campaign funds. They must be placed in the campaign account by Senator Corzine so that they may be reported; reporting both the receipt of the personal funds into the campaign account and the eventual disbursement. *See* 2 U.S.C. § 432(c)(5). Second, they must be spent in light of the other provisions of the Act.

The first permissible use -- for expenditures in connection with the campaign for Federal office -- cannot be used to nullify the others. The Commission cannot permit a candidate to say that, to further his campaign, he really needs to transfer hundreds of thousands of dollars to help a fellow Federal candidate get elected. He may not use campaign funds to support more than one candidate -- which means contribute more than $1000 per election to another candidate -- and have his committee remain an authorized committee. 2 U.S.C § 432(e)(3)(A) & (B). He may not transfer unlimited dollars to another political committee, including a leadership PAC, for that would obliterate subsection (a)(4), which permits transfers without limitation to national, State or local party committees, but not other political committees.[14] Likewise, the Commission may not permit an individual holding Federal office to donate unlimited funds to a 501(c)(4), 501(c)(5), or 527 organization on the premise that the individual may determine that such donations are the most effective way to further his campaign. To permit such donations would obliterate the restriction in subsection (a)(3), contributions to charitable organizations described in section 170(c) of the Internal Revenue Act.

Section 170(c) defines charitable contributions as monies given to organizations that would qualify for tax exempt status under Internal Revenue section 501(c)(3). It includes only those organizations which are "not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not

[14] Other political committees may receive contributions from Federal campaign accounts subject to the contribution limits of section 441a(a).

participate in, or intervene in ... any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. §170(c)(2). It is possible the Commission might permit Senator Corzine to give personal funds to his campaign account so that the campaign might give them to a 501(c)(3) organization that engages in purely non-partisan voter registration activity. The NRSC notes that Senator Corzine did not ask the Commission if he may give personal funds to his campaign account to, in-turn, give them to 501(c)(3) organizations that engage in purely non-partisan voter registration activity. If the Commission approves this it must follow section 439a. Senator Corzine would have to actually place the funds in his campaign account. And the only possible recipients of those funds would be 501(c)(3) charitable organizations that engage in purely non-partisan voter registration activity.

But the Commission must still square this approach with section 441i(e). Voter registration activity conducted within the remaining 89 days before the November 2 election is "Federal election activity" captured under the prohibitions in section 441i(e). With regard to amounts used for activity beyond November, the Commission has already stated that voter registration activity during that time period is in connection with non-Federal elections. *See* Advisory Opinion 2003-12. ("STMP anticipates engaging in voter registration from the beginning of its activities .... [T]herefore, the Commission concludes that the activities of STMP are in connection with an election *other than ... for Federal office*")(emphasis added). Section 441i(e)(1)(B) says that individuals holding Federal office may not donate funds for activity in connection with non-Federal elections in excess of the amounts permitted in sections 441a(a)(1), (a)(2) and (a)(3). The statute does not say the amounts are subject to the provisions of section 439a(a)(3). This means Senator Corzine may donate no more than $5000 to each recipient per calendar year.[15]

At some point, Senator Corzine's donation of personal funds makes the recipient an "entity ... financed" by Senator Corzine in violation of section 441i(e). The Commission must set this threshold before permitting the Senator to make donations.

The phrase "established, financed, maintained or controlled is an inclusive disjunctive. It is true "when either or both of its constituent propositions are true." Merriam-Webster's Collegiate Dictionary (11th ed. 2004).[16] At some point, Senator Corzine's donations alone would render the organization in the control of Senator Corzine, and subject to Federal contribution limits. The Commission has recognized as much in Advisory Opinion 2003-12. ("Having concluded that Representative Flake established STMP, it is not necessary to determine whether he will finance, maintain, or

[15] Sections 439a and 441i(e) can be reconciled by dividing them among entities that engage in activity in connection with either Federal or non-Federal elections. If the charitable organization does not engage in activity in connection with Federal or non-Federal elections, individuals holding Federal office may give campaign funds without limitation under section 439a(a)(3). Those charitable entities that do engage in activity in connection with Federal or non-Federal elections, including non-partisan voter registration activity, are captured under section 441i(e) and those limits apply.

[16] Available at http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=inclusive+disjunction.

control STMP. ... [T]he Commission concludes that STMP is an entity 'established, financed, maintained or controlled' by Representative Flake.'")

While a 501(c) organization will not be treated as an entity 'established, financed, maintained or controlled' solely because the covered individual attends fundraising events, and/or participates in fundraising, "[a] different result may occur if the covered individual is the source of a such a [sic] significant amount of funds for the 501(c) organization that the covered individual is effectively financing the organization." *See* Advisory Opinion 2003-12, n.17.

The Commission has held that entities controlled by individuals holding Federal office "may raise up to a total of $5000 per calendar year from any particular permissible source." Advisory Opinion 2003-12. There is no *de minimis* exception to determining when an organization is established, financed, maintained or controlled by a covered individual, 67 Fed. Reg. 49064, 49084 (July 29, 2002), and the Commission has signaled that the solicitation limitations in section 441i(e)(4)(B) are not a guide as to when control occurs.[17] In other words, the Commission has said that it will not be influenced by the charitable solicitation amounts listed in 441i(e)(4)(B) and allow individuals to donate up to $20,000 before the Commission even begins to consider whether an entity is directly or indirectly financed by an individual holding Federal office.

In defending section 441i(d) in the Supreme Court, the government asserted that the restriction on national party committees making hard money donations to charitable organizations is "necessary to prevent parties from leveraging their hard money to gain control over a tax-exempt group's soft money." *McConnell*, 124 S.Ct. at 681. The Court was skeptical of the government's argument, but assured the government that "any legitimate concerns over capture are diminished by the fact that the restrictions set forth in [441i(a) and (b)] apply not only to party committees, but to entities under their control." *Id.*

The Request states that Senator Corzine "will donate to organizations that he has not directly or indirectly established, financed, maintained or controlled." Request at 1. But the Requestor cannot assert the very question the Commission is asked to answer. If the Commission does not limit Senator Corzine's personal donations for voter registration activity in conformity with the provisions of 2 U.S.C. § 441i(e), and the limits of section 441a(a), -- which it should -- it must still determine the dollar threshold upon which Senator Corzine would effectively finance the recipient organization, *before* permitting him to donate. It is no good telling Senator Corzine he may give without telling him the point at which he transforms the recipient entities into veritable political committees.

[17] *See* Advisory Opinion 2003-32, Superintendent Inez Tenenbaum ("Your request proposes that the donations to section 501(c)(3) organizations that conduct election activity ... as their principal purpose should be nonetheless permitted by the exception at section 441i(e)(4)(B). This section, however, applies only to solicitations and does not extend to donations. Therefore, [requestor's] State campaign account may not donate its excess funds to section 501(c)(3) organizations that conduct election activity ... as their principal purpose because none of the exceptions in 2 U.S.C. 441i(e) apply").

Conclusion

"In this day and age, it is widely assumed that views on these kinds of issues merely serve the personal political agendas of those holding them."[18] These comments, however, are not a policy prescription from the NRSC; far from it. Rather they are a good faith assessment of where the law actually is, and how much has changed in the eight months since *McConnell*.

The NRSC appreciates the opportunity to comment on this advisory opinion request.

Respectfully submitted,

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[18] Robert F. Bauer, "Election Law and the Question of Distinctions," available at http://www.moresoftmoneyharlaw.com/other/index.htm#072604.