FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Rosemary Smith
Associate General Counsel

FROM: Office of the Commission Secretary

DATE: August 12, 2004

SUBJECT: *Ex Parte* Communication regarding
Proposed Advisory Opinion 2004-25
(Senator Jon Corzine)

Attached herewith is an email received by the Commissioners from Steve Hoersting, General Counsel, National Republican Senatorial Committee, and Donald F. McGahan, General Counsel, National Republican Congressional Committee, regarding the above-captioned matter.

cc: Commissioners
Staff Director
General Counsel
Press Office
Public Disclosure

Attachment

National Republican Congressional Committee

Donald F. McGahn II
General Counsel

August 11, 2004

The Honorable Bradley A. Smith
Chairman
Federal Election Commission
999 E Street N.W.
Washington, DC 20463

VIA ELECTRONIC MAIL

RE: Draft Advisory Opinion 2004-25: Senator Jon Corzine (D-NJ)

Dear Chairman Smith:

By and through the undersigned counsels, both the National Republican Congressional Committee and the National Republican Senatorial Committee submit these comments on the General Counsel's draft advisory opinion ("Blue Draft") in the above-referenced matter.

We ask that the Commission reject the Blue Draft, because it misreads the Bipartisan Campaign Reform Act ("BCRA"), and would allow Senator (and Chairman of the Democratic Senatorial Campaign Committee) Jon Corzine to spend unlimited personal soft dollars on Federal election activity. One of the main purposes of BCRA was to take individuals holding or seeking Federal office out of the so-called soft money business. The Blue Draft does the opposite.

I. ANALYSIS

A. Officers or Agents Acting On Behalf of a National Committee.

The Blue Draft misses the critical distinction between a national party officer and a Federal officeholder/candidate with respect to the ability to act in an individual capacity. The Blue Draft correctly observes that the restrictions on national party raising and spending of soft money do not apply to party officers in their individual capacities. Blue Draft at 3. This ability

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to wear "two hats" is consistent with the language of BCRA, as recognized by the Supreme Court.[1] See McConnell v. Federal Election Commission, 124 S. Ct. 619, 658 (2003) ("§ 323(d) places no ... restrictions on solicitations by party officers acting in their individual capacities"). As the Blue Draft correctly concludes, "the plain language of both the Act and the Commission's regulations specifically limit application of these restrictions to national party committee officers and agents only when such individuals are *acting on behalf of the national party committee.*" Blue Draft at 2 (emphasis in original).

B. Federal Candidates or Individuals Holding Federal Office.

However, the same is *not* true of Federal officeholders and candidates, a point the Blue Draft misses. Unlike the provisions concerning national party officers,[2] BCRA explicitly addresses Federal officeholders and candidates in their individual capacities:

> (1) *In general.* A candidate, *individual* holding Federal office, agent of a candidate or an *individual* holding Federal office . . . shall not –
>
> > (A) solicit, receive, direct, transfer or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act; or
> >
> > (B) solicit, receive, direct, transfer, or spend funds in connection with any election other than an election for Federal office or disburse funds in connection with such an election unless the funds –
> >
> > > (i) are not in excess of the amounts permitted with respect to contributions to candidates and political committees . . . .

2 U.S.C. § 441i(e)(1) (emphasis added).

Thus, the Blue Draft does not go far enough when it states that "the Act and Commission regulations do not contain any language that explicitly limits application of the restrictions on a Federal candidate or officeholder only to when such an individual is acting in his or her official capacity." Blue Draft at 4. Although true that there is no such language of limitation, the Act explicitly includes language applying the so-called soft money ban to "individual[s] holding Federal office." This is in stark contrast to the language concerning party officers and agents,

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[1] The Court also recognized the ability of national party officers to plan and advise State and local party committees or candidates about the expenditure of non-federal funds. See McConnell, 124 S. Ct. 619 at 670 ("Nothing on the face of §323(a) prohibits national party officers, whether acting in their official of individual capacities, from sitting down with state and local party committees to plan and advise how to raise and spend soft money").

[2] The pertinent section of the Act references "any officer or agent acting on behalf of such a national committee." 2 U.S.C. § 441i(a)(2). As the Blue Draft notes, this means the officer must be acting in his or her capacity as an officer.

who, as the Blue Draft acknowledges, must be acting on behalf of the party committee to trigger the prohibition.[3]

Ignoring the difference in statutory language, the Blue Draft creates its own concept of a Federal officeholder's individual capacity. Using every linguistic trick in its arsenal – from twisting a lack of legislative history into some sort of affirmative intent on page 4, lines 21-23, to the irrelevant discussion about whether or not Senator Corzine could corrupt himself on page 6, lines 4-7 – the Blue Draft makes the absurd statement that "Senator Corzine may donate his personal funds in amounts exceeding the Act's limits to organizations that engage in voter registration activity, irrespective of his status as a Federal candidate or officeholder." Blue Draft at 6, ln. 7-10.

How can this be? The Act by its own language prohibits "an individual holding Federal office" – in this case Senator Corzine – from spending funds beyond the limits of the Act. To say otherwise (as does the Blue Draft) is to completely ignore the language of BCRA itself. The Blue Draft's various policy musings about whether or not "the underlying purposes of the Act"[4] are furthered or thwarted do not overcome the language of the Act itself. The fact remains that the Act refers to "an individual holding Federal office." It does not simply say "Federal officeholder," let alone make any reference to a "Federal officeholder in his official capacity" or the like (unlike the provision regarding "officer or agent acting on behalf of such a national committee").

C. Congress Has Already Struck the Balance, and the Supreme Court has Agreed.

If Congress wanted to draw the distinction that has been concocted by the Blue Draft, it could have said so, clearly and unambiguously.[5] After all, Congress did allow for individuals who hold Federal office to solicit funds beyond the limits and prohibitions of the Act in the case of 501(c) entities, and, for those individuals who are candidates to State or local office, to spend without limitation. *See* 2 U.S.C. § 441i(e). Thus, despite the Blue Drafts musings of the purposes of BCRA, Congress has already struck the balance with respect to what individuals who hold Federal office can and cannot do. As the Supreme Court observed in McConnell:

> Section [441i](e) addresses these [anti-circumvention] concerns while accommodating the *individual* speech and associational rights of federal candidates and officeholders. Rather than place an outright ban on solicitations to tax-exempt organizations, [the section] permits limited solicitations of soft money. . . . This allowance accommodates

[3] This reflects reality. Party committees are entities, and can only act through agents acting on behalf of the entity. Federal officeholders, however, are not entities, and thus the Act does not recognize the same two-hat theory.

[4] Of course, given that the Blue Draft claims a lack of legislative history, it is hard to take seriously any claim regarding the "purpose" of the Act.

[5] Congress has drawn this distinction in other contexts, whether in the context of the personal use of campaign funds, see 2 U.S.C. § 439a, or the legion of examples found in the Senate and House Ethics Rules regarding acting within one's official capacity. Congress drew no such distinction in section 441i(e), and it is not the job of the Commission to second-guess that decision.

individuals who have long served as active members of non-profit organizations in both their official and *individual* capacities.

McConnell, 124 S.Ct. at 683 (emphasis added).

Remarkably, the Blue Draft completely ignores this section of the Act and this portion of McConnell. Yet, the Blue Draft goes to great lengths to cull every quote it can muster to support the idea that party officers may permissibly act in their personal capacities. See Blue Draft at 3, ln. 1-4. The Blue Draft cannot have it both ways. It cannot invoke BCRA and McConnell to arrive at the conclusion that party officers can act in their individual capacities, yet ignore BCRA and McConnell with respect to federal officeholders, simply because such reliance is inconvenient.[6] Such outcome-determinative reasoning, and selective reference to the Act and Supreme Court case law, has no place in a Commission Advisory Opinion.

D. Corruption or the Appearance Thereof.

As a policy matter, the Blue Draft ties itself in knots in trying to prove that because Senator Corzine is not soliciting or receiving funds from others, the anti-corruption or appearance thereof rationale does not apply. But once again, the Blue Draft misses the point – the issue is not whether or not Corzine is corrupted, but whether or not his soft money spending to benefit others creates an appearance of corruption. Both Congress and the Commission have already answered this question in the affirmative. For example, a Senator's reelection campaign may only contribute $1,000 per election to another Senate campaign. Similarly, the Commission in Advisory Opinion 2004-01 ruled that candidate to candidate coordination is legally significant, and thus subjects such activity to the applicable limits. Moreover, simply because Senator Corzine's spending is for things supposedly "independent" of other campaigns does not change the result. After all, the Supreme Court recently reversed and remanded a Fourth Circuit decision holding that contribution limits to organizations engaged in independent activity are unconstitutional. Leake v. North Carolina Right to Life, Inc., 124 S.Ct. 2065 (2004).

[6] In saying the Supreme Court has "acknowledged" that the national party restrictions -- on both soliciting and spending of soft money -- "do not apply to [party] officers acting in 'their individual capacities,'" the Blue Draft pinpoint cites several portions of the Opinion. Each portion cites the Court's discussion of solicitation restrictions, not spending restrictions. See Blue Draft at 3, ln. 1-4, citing McConnell at 658 ("§ 323(d) places no ... restrictions on *solicitations* by party officers acting in their individual capacities."); *id.* at 668 ("Officers of national parties are free to *solicit* soft money in their individual capacities."); and *id.* at 679 [sic] 680 ("§ 323(d) in no way restricts *solicitations* by party officers acting in their individual capacities"). From these portions of the Opinion, the Blue Draft concludes that the party officer restrictions on *spending* also do not apply to the personal capacity of party officers. This is a correct interpretation. But the Blue Draft does not use this interpretative method to extend the officeholder spending ban to the individual capacity of Federal officeholders, even though the Court plainly says the officeholder restrictions reach the individual capacity of officeholder solicitations at p. 683 of McConnell. The Blue Draft is inconsistent in its approach.

II. CONCLUSION

In conclusion, the National Republican Congressional Committee and the National Republican Senatorial Committee appreciate the opportunity to comment on this draft advisory opinion, and ask that the Commission reject it.

Respectfully submitted,

/s/ Don McGahn

Donald F. McGahn II

/s/ Steve Hoersting

Stephen M. Hoersting

cc: The Honorable Ellen L. Weintraub
The Honorable David M. Mason
The Honorable Danny L. McDonald
The Honorable Scott E. Thomas
The Honorable Michael E. Toner
Lawrence Norton, General Counsel