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January 5, 2011

AOR 2011-01

RECEIVED
FEDERAL ELECTION
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2011 JAN -6 AM 11:40
OFFICE OF GENERAL
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BY HAND DELIVERY

Christopher Hughey
Acting General Counsel
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request

Dear Mr. Hughey:

Pursuant to 2 U.S.C. § 437f, we seek an advisory opinion on behalf of Robin Carnahan for Senate (the "Committee"). The Committee seeks confirmation that a separate legal defense fund (the "Fund") may be established – by one or more individuals, none of whom would be Federal candidates or Federal officeholders – to defray the Committee's costs of defending against a copyright infringement and misappropriation lawsuit filed against the Committee by Fox News Network, LLC and Fox News Sunday host, Chris Wallace (the "Plaintiffs"). In addition, the Committee seeks confirmation that the funds used to defray the Committee's costs do not have to comply with the prohibitions, limitations, and reporting requirements of the Federal Election Campaign Act of 1971, as amended (the "Act").

FACTUAL DISCUSSION

On September 15, 2010, the Plaintiffs filed a complaint against the Committee in United States District Court for the Western Division of Missouri. The complaint alleges that an advertisement aired by the Committee on television and the Internet – which featured footage of a 2006 Fox News interview between host Chris Wallace and Senate candidate Roy Blunt – (i) infringes Fox News' copyright, (ii) invades Mr. Wallace's right of privacy and misappropriates his likeness, and (iii) invades Mr. Wallace's right of publicity and misappropriates his identity or persona. The Committee filed a motion to dismiss on October 8, 2010. The motion is still pending. The Fox News Network is a major media corporation and has almost unlimited corporate funds at its disposal to prosecute the litigation against the Committee. The legal fees for defending against

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the Fox News lawsuit have already exceeded \$85,000 and will continue to accumulate.

The Committee wishes to know whether a separate legal defense fund may be established to defray the Committee's costs of defending the lawsuit. Pursuant to Advisory Opinions 2003-15 (Majette) and 1996-39 (Heintz for Congress), the Fund would be *entirely* separate and independent from the Committee, and would not be administered by the Committee. Solicitations would be made in person or in writing, and would be accompanied by a letter stating the purpose of the Fund and noting that no donations to the Fund would be used for the purpose of influencing any Federal election. Solicitations to the Fund would be conducted separately from any solicitations on behalf of the Committee or any other Federal committee. None of the individuals involved in establishing, administering, or operating the Fund would be Federal candidates or Federal officeholders. If permitted to do so by the Commission, the Fund would accept unlimited donations from individuals, political committees, corporations, and labor unions, and use those donations to defray the Committee's costs of defending against the lawsuit. The Fund would terminate upon cessation of the litigation and the full payment of all costs associated with the litigation. Any excess funds would be refunded to donors or donated to a 501(c)(3) charity that does not engage in any election-influencing activities.

In light of these facts, the Committee asks the following questions:

1. May a separate legal defense fund be established to defray the Committee's costs of defending against the Fox News lawsuit?
2. If so, may the Fund accept unlimited donations from individuals, political committees, corporations, and labor unions, and use those funds to defray the Committee's costs of defending against the Fox News lawsuit?
3. If the Fund may not accept unlimited donations from individuals, political committees, corporations, and labor unions, which types of funds may it accept and use to defray the Committee's costs of defending against the Fox News lawsuit?

LEGAL ANALYSIS

In a series of Advisory Opinions beginning in 1979, and running uninterrupted until passage of the Bipartisan Campaign Reform Act ("BCRA") in 2002, the Commission determined that donations to and disbursements from a legal defense fund are *not* "contributions" or "expenditures" under the Act, provided that the subject matter of the lawsuit did not involve compliance with the Act. *See, e.g.* Advisory Opinion 2003-15 (Majette) ("In each of these advisory opinions, the Commission concluded that to the extent the legal expenses were used exclusively for the purposes of defraying legal costs, donations to and disbursements from the fund would not constitute contributions or expenditures.").

In Advisory Opinion 1981-13 (Moss), for example, the Commission considered whether a former Senate candidate could establish a legal defense fund to defend against a defamation lawsuit arising out of statements that he made at a press conference, and whether that fund could accept "any contribution given by any individual or corporation ... [not] subject to the limitations or prohibitions of the Act." Advisory Opinion 1981-13. The Commission concluded that "because the fundraising activity for Mr. Moss is exclusively connected with, and strictly for the purpose of, paying the costs of his legal defense, such activity is outside the purview of the Act, and nothing in the Act or the Commission's regulations would limit or prohibit the fund from receiving donations from [otherwise prohibited] sources ... or require[] [the fund] to register or file disclosure reports under the Act or Commission regulations." *Id.*

Likewise, in Advisory Opinion 1981-16 (Carter-Mondale Presidential Committee), the requestors asked whether a "Special Fund" could be established to pay for two types of expenses that the presidential committee had incurred during the course of the campaign: (i) litigation related to compliance with the Act and (ii) commercial litigation involving Committee contracts and other similar liabilities. The Commission concluded that donations to the Fund for the *second* type of the litigation would not be treated as "contributions" or "expenditures" under the Act, but donations to the Fund for the *first* type of litigation would be treated as "contributions" and "expenditures." Consequently, the Commission allowed the Special Fund to accept donations from individuals in excess of the contribution limits to pay for the costs of defending the commercial litigation suits.¹

In this series of pre-BCRA opinions, the Commission set forth a clear set of rules governing legal defense funds:

1. ***Donations to the fund are not subject to the prohibitions, limitations, and reporting requirements of the Act.*** Consequently, legal defense funds may accept unlimited individual and corporate donations. *See* Advisory Opinion 1983-30 (Joyner) ("[N]either the source nor the amount of donations to the fund would be limited under the Act or Commission regulations. Nor would the Act or regulations require any reporting or receipts or payments of the fund."). *See also* Advisory Opinions 1979-37 (Flood) (allowing for acceptance of corporate and union donations to legal fund); 1981-13 (allowing for acceptance of corporate donations to legal fund); 1981-16 (allowing for acceptance of individual donations to legal fund in excess of contribution limits); 1982-14 (Michigan Republican State Committee) (allowing for acceptance of corporate donations to legal fund); 1982-35 (Hopfman) (allowing for acceptance of individual donations to legal fund in excess of contribution limits); 1983-21 (Studds) (allowing for

¹ The Carter-Mondale Committee's request did not ask whether the Fund could accept corporate donations; it also voluntarily agreed to limit all donations to \$5,000.

acceptance of corporate donations and individual donations in excess of contribution limits to legal fund); 1983-30 (allowing for acceptance of corporate donations and individual donations in excess of contribution limits to legal fund); 1983-37 (Massachusetts Democratic State Committee) (allowing for acceptance of corporate donations and individual donations in excess of contribution limits to legal fund); 1996-39 (Heintz for Congress) (allowing for acceptance of corporate donations to legal fund).

2. ***Donations must be raised and spent by a separate entity.*** In Advisory Opinion 1990-23 (Frost), the Commission rejected a request from then-Congressman Frost to allow his principal campaign committee to operate a soft money account dedicated to monitoring the redistricting process. The Commission emphasized, however, that "[n]othing in this opinion should be construed to prohibit Mr. Frost from setting up a fund or entity, independent of the Frost Committee, for the purposes of paying expenses related to redistricting or reapportionment." *Id.* In Advisory Opinion 1996-39, the Commission again emphasized that a "Committee itself may not establish the account or conduct the fundraising, but a separate entity may do so." *Id.*
3. ***The subject matter of the litigation may not involve compliance with the Act.*** In Advisory Opinion 1981-16, the Commission clarified that donations to pay for defensive litigation related to compliance with the Act would be treated as "contributions" and "expenditures". In the same opinion, however, the Commission stated clearly that donations to pay for defensive litigation related to commercial litigation arising out of contracts entered into by the committee would *not* be treated as "contributions" or "expenditures" under the Act. *See also* Advisory Opinion 1993-15 (The Tsongas Committee) ("In past opinions, the Commission concluded that the costs of legal representation with respect to post-election audit and compliance matters relating to that election emanate from activities clearly within the scope of the Act The Commission has also determined that donations and disbursements made for the purpose of defending a Federal officeholder with respect to activities unrelated to compliance with the Act were not contributions or expenditures.").
4. ***It does not matter whether the party named in the litigation is a candidate or a political committee.*** The "establishment of a legal expense fund for the purpose of defraying the cost of private litigation between political committees and third parties ... falls outside the scope of the Act and Commission regulations." Advisory Opinion 1982-35. Consequently, the Commission has approved requests regardless of whether the party named in the litigation is a candidate or his or her political committee. *See* Advisory Opinions 1981-13 and 1983-30 (granting request where candidate would be party to the litigation); Advisory Opinions 1981-16 and 1983-37 (granting request where political committee would be party to the litigation).

As part of BCRA, Congress made it illegal for a Federal candidate or an entity "established, financed, maintained, or controlled" by a Federal candidate to "solicit, receive, direct, transfer, spend, or disburse funds in connection with an election for Federal office ... unless the amounts consist of Federal funds that are subject to the limitations, prohibitions, and reporting requirements of the Act." 2 U.S.C. 441i(e)(1)(A); 11 C.F.R. § 300.61. Because of this new provision, there was initially some debate as to whether these advisory opinions still constituted good law. *See* Comments on Advisory Opinion Request 2003-15 by Campaign Legal Center (May 12 and August 13, 2003) (arguing that pro-BCRA advisory opinions dealing with legal defense funds no longer constituted good law).

In Advisory Opinion 2003-15, however, the Commission answered that question in the affirmative, concluding that BCRA did not change the law with respect to legal defense funds. *See* Advisory Opinion 2003-15 ("The Commission concludes that 2 U.S.C. § 441i(e)(1)(A) does not change this result. There is no indication in the legislative history of BCRA that Congress intended section 441i(e)(1)(A) to change an area that is both well-familiar to members of Congress and subject of longstanding interpretation through statements of Congressional policy and Commission advisory opinions."). The *Majette* AO involved a lawsuit challenging the constitutionality of the 2002 primary election for the U.S. House in Georgia. Despite the clear nexus to a specific election, the Commission concluded that the lawsuit was not "in connection with an election for Federal office." *See* Advisory Opinion 2010-3, n. 3 (National Democratic Redistricting Trust) ("[N]ot all activities that may have some indirect effect on elections are encompassed by the 'in connection with' standard of BCRA."). Because then-Congresswoman *Majette's* proposed legal defense fund satisfied the conditions set forth in the pre-BCRA advisory opinions, the Commission permitted it to accept donations that did not comply with the limitations or prohibitions of the Act. *See* Advisory Opinion 2003-15, n. 3 (acknowledging "longstanding policy" of finding that "the limits and prohibitions of the Act do not apply to monies given to a candidate's legal defense fund.").

These precedents suggest that a legal defense fund may be established to defray the Committee's cost of defending against the Fox News lawsuit. These precedents also establish that the Fund may accept unlimited donations from individuals, political committees, corporations, and labor unions and use those funds to defray the Committee's costs of defending against the lawsuit. The proposed course of action is entirely consistent with the long line of pre-BCRA opinions, which were subsequently ratified in the *Majette* AO.

- First, donations to the Fund will be raised and spent by a legally separate entity, which will abide by the safeguards set forth in the "Factual Discussion." These safeguards are consistent with those approved in Advisory Opinions 1996-39 and 2003-15.
- Second, the subject matter of the lawsuit – whether the Committee violated Federal copyright law or Missouri tort law – is entirely unrelated to compliance with the Act.

The Fox News complaint does not allege that the Committee violated the Act or Commission regulations. *Cf.* Advisory Opinion 1993-15 (treating donations to legal defense fund as "contributions" and "expenditures" because DOJ indictment referred to violations of Act).

- Third, it is immaterial that Fox News and Chris Wallace named the Committee, rather than the candidate, as the defendant in the lawsuit. As the Commission has explicitly acknowledged, "the establishment of a legal expense fund for the purpose of defraying the cost of private litigation between political committees and third parties ... falls outside the scope of the Act and Commission regulations." Advisory Opinion 1982-35.
- Finally, this lawsuit is *not* "in connection with an election for Federal office." The Majette AO establishes a presumption that legal defense funds that do not have a purpose of "influencing an election" are also "not in connection with" an election. This presumption is bolstered by the fact that the corporate contribution ban at 2 U.S.C. § 441b employs the same "in connection with" standard as 2 U.S.C. § 441i(e)(1)(A). Because the Commission has traditionally allowed legal defense funds to accept corporate donations, donations to those funds are not "in connection with" an election under 2 U.S.C. § 441i or § 441i(e)(1)(A). *See* Advisory Opinion 2003-15 ("Because this lawsuit is not 'in connection with' a Federal election for purposes of section 441b, it should not be considered 'in connection with' a Federal election for purposes of 2 U.S.C. § 441i(e)(1)(A).")²

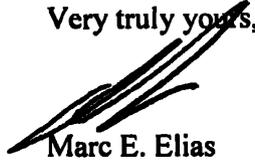
In "this situation the Committee has no choice but to defend itself or admit the violations alleged by the plaintiff[s]." Advisory Opinion 1980-4 (Carter-Mondale Presidential Committee). Consequently, the Commission should allow for the establishment of a legal defense fund to defray the Committee's cost of defending against the Fox News lawsuit. The Commission should also permit the Fund to accept unlimited donations from individuals, political committees, corporations, and labor unions and to use those funds to defray the Committee's costs of defending against the lawsuit.

If you have any questions or need additional information, please do hesitate to contact us.

² Furthermore, one of the advisory opinions cited in the Majette AO – Advisory Opinion 1981-13 – involved a situation directly analogous to the one here: a state tort action arising out of campaign activity.

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Very truly yours,

A handwritten signature in black ink, appearing to be a stylized name, possibly "Marc E. Elias", written over the typed name.

Marc E. Elias
Ezra W. Reese
Jonathan S. Berkon