



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

ADVISORY OPINION 2011-03

CONCURRING STATEMENT COMMISSIONER ELLEN L. WEINTRAUB

On April 7, 2011, the Commission voted to adopt an Advisory Opinion concluding that certain national party committees could use their recount funds to defend against a lawsuit seeking the return of funds, predominantly “soft money” non-Federal donations, under Texas state law.¹ The Request presented the Commission with an extraordinary set of circumstances, one not contemplated by our existing legal framework. Accordingly, I supported the Advisory Opinion, which is limited to the anomalous circumstances of the Request.

Under the Bipartisan Campaign Reform Act of 2002 (“BCRA”),² national party committees are prohibited from soliciting, receiving, directing, or spending any funds other than those “subject to the limitations, prohibitions, and reporting requirements” of the Federal Election Campaign Act of 1971. 2 U.S.C. § 441i(a)(1); 11 CFR § 300.10(a). Put simply, national party committees must pay for all their outlays and expenses – even those that are not related to Federal elections – using Federal contributions, colloquially known as “hard money.”

In 2009, the Commission voted 5-0 to recognize a very limited exception to this general rule in the case of recounts (I was recused from the matter, and did not vote). Specifically, in Advisory Opinion 2009-04, the Commission allowed national party committees to establish separate funds to pay expenses relating to recount contests. Importantly, recount funds are not mechanisms for raising unlimited “soft money” donations of the sort Congress sought to prohibit with BCRA. Rather, recount funds are subject to the same source prohibitions and reporting requirements that apply to national party committees’ general funds. Recount funds are also subject to the same monetary limit as other contributions. This limit is applied separately, however, to national party committees’ recount funds and their general funds. *See* 2 U.S.C. § 441a(a). Therefore, the Commission must exercise care to limit the uses of recount funds, to avoid their becoming a vehicle for an effective doubling of the party contribution limits.

Because of their unique characteristics, recount contests have long been afforded special treatment under our precedents. *See, e.g.*, Advisory Opinion 1978-92 (superseded in part). That some recounts will occur can be predicted as a general matter, but it is impossible to forecast with any degree of accuracy when and where they will be required. By definition, they occur after an election has concluded, at which point the candidates will have exhausted most of their resources. As a result, the Commission has considered recounts to be similar to runoff elections,

¹ Advisory Opinion 2011-03 (DSCC, RNC, NRCC, DCCC, and NRSC).

² Pub. L. No. 107-155, 116 Stat. 81 (2002).

which trigger a contribution limit separate from the normal contribution limit. *See* Advisory Opinion 2006-24 (NRSC/DSCC).

In permitting recount funds, in sum, the Commission struck a balance between preserving the “hard money” framework established by Congress and allowing the national party committees the flexibility to deal with an atypical and unpredictable occurrence. Advisory Opinion 2011-03 strikes the same balance.

Significantly, the litigation that is the subject of this request is *sui generis*. The lawsuit at issue concerns the proceeds of an alleged Ponzi scheme, which the national party committees presumably had no reason to expect. As explained in the Opinion, moreover, the lawsuit initiated by Mr. Ralph Janvey “seeks the disgorgement of [soft money] funds that the National Party Committees have been prohibited from raising and spending for almost a decade.” Advisory Opinion 2011-03 at 2.

It is unlikely that Congress would have anticipated that, nine years after the passage of BCRA, national party committees would be subject to a suit seeking the return of funds donated to accounts that long ago ceased to exist. Indeed, Congress established a detailed scheme in BCRA for the retirement of “soft money” accounts. Specifically, BCRA permitted national party committees to spend non-Federal funds on certain activities traceable to elections held prior to November 6, 2002. *See* BCRA § 402(b)(2), 116 Stat. at 113; *see also* 11 CFR § 300.12(a). Any remaining funds had to be returned to contributors or disgorged to the United States Treasury no later than March 31, 2003. 11 CFR § 300.12(c); *see also* Explanation and Justification for Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49064, 49091 (July 29, 2002).

In accordance with these provisions, the national party committees long ago retired their soft money accounts. This suit thus presents the national party committees with a unique and unforeseeable situation.

Like any Advisory Opinion, this one concerns a “specific transaction or activity” by the requestors and may only be relied on by the requestors and “any person involved in any specific transaction or activity which is indistinguishable in all its material aspects” from the one described in the request. *See* 2 U.S.C. § 437f(a)(1), (c)(1). The circumstances presented here – a lawsuit seeking the return of “soft money” donations that were the proceeds of an alleged Ponzi scheme – will reoccur rarely, if at all. Moreover, this Opinion allows the national party committees to defend against this suit using recount funds – which remain subject to Federal limits, prohibitions and reporting requirements – rather than unlimited or unreported “soft money” funds. In doing so, the Opinion applies only to the circumstances presented, and does not create a broader exception for funding other legal expenses or other activity.

For these reasons, I voted to adopt Advisory Opinion 2011-03.

4/11/11
Date

Ellen L. Weintraub
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Commissioner