April 21, 2003

VIA FAX AND MAIL

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Federal Election Commission
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Comments on AOR 2003-12

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Re: Advisory Opinion Request 2003-12

Dear Mr. Norton:

I am writing on behalf of the Campaign Legal Center to provide comments on Advisory Opinion Request (AOR) 2003-12, submitted on behalf of U.S. Representative Jeff Flake (R-AZ) and the Stop Taxpayer Money for Politicians Committee ("the Committee"). The Campaign Legal Center is a non-profit, non-partisan organization established to represent the public interest in strong enforcement of the nation's campaign finance laws. Through its legal staff, the organization participates in the administrative and legal proceedings in which campaign finance and campaign-related media laws are interpreted and enforced.

Introduction

This Advisory Opinion Request inquires as to the applicability of Federal campaign finance law, as recently amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), to the contemplated activities of a ballot measure committee that has been, and hopes to continue to be, closely affiliated with a Federal officeholder and candidate. Along these lines, it asks whether a Federal officeholder and candidate may chart the course for, and otherwise enable, a ballot measure committee to engage in extensive voter mobilization activities and Federal candidate-specific communications undertaken simultaneously with Federal election campaigns in which the officeholder is a candidate.

In general, Federal campaign finance law has not regulated, and does not now regulate, the activities of ballot measure committees. However, where a ballot measure committee is deeply entangled with a Federal candidate and intends to engage in voter mobilization activities aimed at turnout at the polls for precisely the date Federal candidates stand for election, or to finance public communications promoting or attacking Federal candidates, the funding source prohibitions, contribution limits, and disclosure requirements of the

Federal Election Campaign Act of 1971 (as amended by BCRA) are properly triggered. The same stands for when ballot measure committees independently intervene in Federal election campaigns. Both scenarios raise precisely the concerns that Congress sought to alleviate in enacting campaign finance restraints in the wake of instances of scandal over the past 100 years: the actual or apparent corruption of the Federal political process.

Indeed, it must be acknowledged that ballot initiative campaigns have become increasingly expensive propositions. According to statistics from Ballotfunding.org concerning money and ballot measures in the 2002 elections:

- ballot committees in the 24 states with citizen-initiated ballot measures received over $171 million in donations;
- 29 proponent ballot campaigns attracted contributions in excess of one million dollars; and
- an Arizona proposition (a tribal gaming measure) raised nearly $21 million.

Ballotfunding.org (A Project of the Ballot Initiative Strategy Center Foundation), "A Buyer's Guide to Ballot Measures," March 2003, http://www.ballotfunding.org/Buyer's Guide to Ballot Measure Funding 2002.pdf. Well-known journalist David Broder (an expert on the ballot initiative process) has suggested that, in the 1998 election cycle, at least $250 million was spent on initiatives at the state level. "Do Ballot Initiatives Undermine Democracy," Policy Forum discussed in *Cato Policy Report*, July/August 2000, p. 6. In fact, Ballofunding.org puts the 1998 figure closer to $400 million. Press Release, "Despite Federal Campaign Finance Reform, Ballot Measure Donors Remain Elusive," Ballotfunding.org (A Project of the Ballot Initiative Strategy Center Foundation), Jul. 18, 2002, http://www.ballot.org/blindspot/. This funding often comes in the form of large donations from corporations, unions, and wealthy individuals (many of whom have business before Federal and/or state legislatures). *See* M.A. Engle, "Direct Democracy's Big Price Tag: Stratospheric Spending on State Ballot Measures," *Capital Eye*, Vol. VII. No. 3, Fall 2000, http://www.opensecrets.org/newsletter/ce73/index.asp; Marian Currender, "Losing the Initiative," *Capital Eye*, Vol. V, No. 5, Sept. 15, 1998, http://www.opensecrets.org/newsletter/ce55/02states.htm

Moreover, the presence of initiatives on the ballot in Federal election years stands to increase voter turnout rates in both mid-term and presidential elections. As noted in a political science article:

> [H]igher voter turnout in initiative states in presidential and mid-term elections should not come as a surprise. Ballot initiatives dominate media headlines, shape candidate elections, and even national party politics. Some of the most salient and emotional policy questions . . . are decided by voters in initiative contests. In some states, the salience of ballot

> initiatives among voters has even eclipsed that of candidates running for office . . .

Caroline J. Tolbert, John A. Grummel & Daniel A. Smith, "The Effects of Ballot Initiatives on Voter Turnout in the American States," *American Politics Research*, Vol. 29 No. 6, November 2001, 643, http://www.ballot.org/resources/Ballot_Initiatives_&_Voter_Turnout.pdf.

In light of the connection to turnout in Federal elections, domination of ballot initiative committees by Federal candidates raises the specter of a blurring of the line between the political campaign and initiative processes. This concern becomes particularly pronounced when a prominent component of an initiative campaign is to finance public communications promoting or attacking Federal candidates. And it extends to circumstances involving sporadic coordination between Federal candidates and ballot initiative committees on certain voter mobilization and political advertising, as well as independent spending by ballot initiative committees on Federal candidate-specific television and radio advertisements aired before the mentioned candidates' electorates, closely proximate to their elections. Given the aggregate sums of money and large donations involved in today's initiative campaigns, all these scenarios present the risk of actual or apparent corruption with which Federal campaign finance law has long concerned itself – manifested not only in the contribution limits of 2 U.S.C. 441a but also the spending prohibitions of 2 U.S.C. 441b.

The idea that candidate entanglement with ballot initiative committees, or certain forms of featuring candidates in ballot initiative efforts, blurs the lines between ballot initiatives and candidate campaigns (and presents an avenue for potential evasion of campaign finance contribution limits and funding source prohibitions) is widely recognized. Ballotfunding.org noted this potential, writing in late 2002:

> Legislatures and state disclosure agencies may be forced to confront [questions about "candidates . . . beginning to run for office in coordination with 'yes' or 'no' campaigns"] as more and candidates turn to ballot measure to ignite their campaigns, attract independent and disaffected voters, and some believe, circumvent state candidate campaign finance limits. Since no state limits contributions to initiative campaigns, donors who have given the most allowance amount under state campaign finance law could funnel additional money to a ballot measure that compliments the candidate of their choice . . . **What remains to be seen is, will candidates begin to run with or against ballot measure committees in an even more coordinated way including appearing in television and print advertisements for or against particular ballot measure committees?**

Ballotfunding.org (A Project of the Ballot Initiative Strategy Center Foundation), "Money and Ballot Measures in the 2002 Election," Nov. 2002, *available at* http://www.ballotfunding.org/MoneyandBallotMeasures.pdf. The political science article

cited earlier likewise stated, "[B]allot measure proponents and opponents likely will continue to fuse their campaigns with the presidential, U.S. Senate, and gubernatorial candidates, and vice versa." Tolbert, Grummel & Smith, "The Effects of Ballot Initiatives on Voter Turnout in the American States," 644. Most importantly, the Commission itself – in rejecting a *per se* exemption for communications relating to ballot initiatives from its "electioneering communications" rules – argued, "As ballot initiatives or referenda become increasingly linked with the public officials who support or oppose them, communications can use the initiative or referenda as a proxy for the candidate, and in promoting or opposing the initiative or referendum, can promote or oppose the candidate." Electioneering Communications, 67 Fed. Reg. 65,190, 65,202 (Oct. 23, 2002).

The Commission should not undertake an about-face in its perspective now. BCRA protects the integrity of the contribution limits and funding source prohibitions in Federal campaign finance law and guards against the exploitation of ballot measure committees by Federal candidates to pursue Federal campaign purposes with soft money, by:

- requiring entities "directly or indirectly established, financed, maintained or controlled or acting on behalf of" Federal candidates to use Federally permissible funds to finance activities in connection with elections, including "Federal election activity" (as defined in BCRA) (2 U.S.C. 441i(e)(1));

- requiring the FEC to promulgate coordination regulations that fully account for the statutory coordination standard, real-world campaign finance practices, and potential avenues for evasion of contribution limits and funding source prohibitions (though the FEC's coordination rule issued in response to this mandate falls short in implementing this statutory command);

- prohibiting Federal candidates and officeholders from raising soft money in connection with elections (2 U.S.C. 441i(e)); and

- preventing corporate or labor funds from being used to finance "electioneering communications" (as defined in BCRA) (2 U.S.C. 441b(a), (b)(2), (c)).

We urge the Commission to implement the BCRA soft money restraints to their full extent with respect to the facts presented by this Advisory Opinion request. This would not quash ballot measure committees, or prevent Federal candidates from speaking publicly and strongly in favor of or against ballot initiatives. Rather, it would be a measured and appropriate response to the very real threat that, in certain circumstances, ballot measure committees could be exploited or used to undermine vital safeguards against corruption and the appearance of corruption of the Federal political process.

The application of these requirements in contexts involving ballot measure committees is thoroughly constitutional. The U.S. Supreme Court's jurisprudence striking down limits on contributions to ballot measure committees and otherwise affording their activities some measure of immunity from regulation did not involve circumstances where there

was a tie to candidate elections or a threat of actual or apparent corruption of elected representatives. Indeed, in these decisions, the Court emphasized Congress's ability to address those problems. See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n. 26 (1978) ("The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts . . . The importance of the governmental interest in preventing this occurrence has never been doubted."); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 354-56 (1995) ("Our reference in the Bellotti footnote to the 'prophylactic effect' of disclosure requirements . . . had no reference to the kind of *independent activity* pursued by Mrs. McIntyre. Required disclosure about the level of financial support a candidate has received from various sources are supported by an interest in avoiding the appearance of corruption that has no application to this case . . . In candidate elections, the Government can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures.") (emphasis added).

In fact, even prior to the enactment of BCRA, the FEC had recognized that, in certain circumstances, the activities of ballot measure committees *are* a legitimate matter for its concern, and a potential trigger for the application of Federal campaign finance law. Specifically, the Commission proceeded against the California Democratic Party for attempting to shirk Federal campaign finance law's political party allocation requirements by transferring soft money to a ballot measure committee to fund voter mobilization activities that would impact turnout in the 1992 general elections. The U.S. District Court for the Eastern District of California upheld the FEC's enforcement action, noting that "While political parties have protected association rights under the First Amendment . . . [t]he Supreme Court has made clear that association rights 'may be overborne by the interests Congress has sought to protect in enacting § 441b.'" *FEC v. California Democratic Party*, 13 F.Supp.2d. 1031, 1036 (1998).

Analysis

1. The Stop Taxpayer Money for Politicians Committee is "Directly or Indirectly Established, Financed, Maintained or Controlled By or Acting on Behalf of" Congressman Flake And Thus Subject to 2 U.S.C. 441i(e)(1) In Its Own Right

a. 2 U.S.C. 441i(e)(1)

BCRA prohibits Federal candidates and officeholders from soliciting, receiving, directing, transferring, spending, or disbursing funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are Federal funds 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.

Moreover, it prohibits Federal candidates and officeholders from soliciting, receiving, directing, transferring, spending or disbursing funds in connection with any non-Federal

election, unless the funds comply with Federal source prohibitions and amount limitations. 2 U.S.C. 441i(e)(1)(B); 11 C.F.R. 300.62.

However, these prohibitions are not only applicable to Federal officeholders and candidates. They are also independently applicable to:

- any agent acting on behalf of a Federal candidate or officeholder (2 U.S.C. 441i(e)(1); 11 C.F.R. 300.60(c)); and

- entities that are "directly or indirectly established, financed, maintained or controlled by or acting on behalf of" one or more Federal candidates or officeholders (2 U.S.C. 441i(e)(1); 11 C.F.R. 300.60(d)).

b. The Stop Taxpayer Money for Politicians Committee Falls Under 2 U.S.C. 441i(e)(1)

The Stop Taxpayer Money for Politicians Committee is itself fully subject to the soft money prohibitions of 2 U.S.C. 441i(e)(1)(A)&(B) because it is "directly or indirectly established, financed, maintained or controlled by or acting on behalf of" Congressman Flake.

i. Congressman Flake "Directly . . . . Established" the Stop Taxpayer Money for Politicians Committee

Congressman Flake "directly . . . established" the Stop Taxpayer Money for Politicians Committee. According to March 24, 2003 correspondence from Congressman Flake's counsel in this matter to the FEC, "Representative Flake is among the individuals who formed the Committee, he acted as its chairman, and he signed the filing with the Arizona Secretary of State's office that formed the Committee." In April 7, 2003 correspondence to the FEC, this attorney provided the following response to the Commission's question as to "[w]ho established the Committee?": "The Committee's original officers were Jeff Flake (Chairman) and Roy Miller (Treasurer)." Likewise, in the same letter, the attorney acknowledged that Congressman Flake "was affiliated with the Committee."

The Committee must accordingly be considered "established" by Congressman Flake for purposes of 2 U.S.C. 441i(e)(1) and thus fully subject in its own right to the soft money prohibitions of 2 U.S.C. 441i(e)(1)(A) and (B).

Congressman Flake's claim to have resigned from and terminated his affiliation with the Committee on March 21, 2003 – two months after the Committee's creation and subsequent to the initial submission of this Advisory Opinion Request (indeed, occurring only after the Commission began to inquire in its correspondence with his attorney in this matter as to the role Congressman Flake played in the formation of the Committee)– cannot undo the fact that he "established" the organization and its resulting coverage under 2 U.S.C. 441i(e)(1). Indeed, even in April 7, 2003 correspondence to the FEC

following Congressman's Flake alleged termination of ties with the Committee, it was acknowledged that the Congressman had established the Committee.

Moreover, the regulatory "grandfather clause" at 11 C.F.R. 300.2(m)(3), preventing the Commission from considering the circumstances of an entity's establishment (in determining whether it is "directly or indirectly established, financed, maintained or controlled" by certain principals), does not apply here. This regulation shields only conduct occurring prior to November 6, 2002. In this instance, according to April 7, 2003 correspondence from Congressman Flake's counsel, the "Stop Taxpayer Money for Politicians Committee" was established on January 17, 2003 – subsequent to November 6, 2002.

Moreover, the Commission's regulation at 11 C.F.R. 300.2(c)(4)(ii), permitting an entity to receive an Advisory Opinion from the Commission indicating that its relationship with a sponsor who concededly "established" it is severed, does not apply here. By its express terms, this regulation requires the entity to demonstrate "that all material connections between the sponsor and the entity have been severed *for two years*" (emphasis added). That clearly is not the case here, where the alleged severance of ties has been in effect for barely one month. By inference, an entity such as this one with an alleged severance period of approximately one month (and where the severance occurred half-way through preliminary discussions with Commission staff about the Advisory Opinion request) is presumptively still "established" by the sponsor under 11 C.F.R. 300.2(c).

The Commission should not accept any argument that an entity "established" by a Federal officeholder could somehow avoid being considered "directly or indirectly established, financed, maintained or controlled" by a sponsor under BCRA immediately upon the sponsor's alleged termination of ties with the entity. Such an approach would permit Federal officeholders and candidates to form and actively plot strategy for organizations to pursue desired election-related activities and objectives using soft money – so long as, once the organization was established and set in its course, the officeholder allegedly "backed away." This result would contradict the statute and one of its critical objectives: to prevent the actuality and appearance of undue influence arising from Federal officeholder entanglement in election activities involving unlimited donations.

ii. Congressman Flake Seeks To Maintain and Control the Stop Taxpayer Money for Politicians Committee

In the event that the Commission does not consider the Stop Taxpayer Money for Politicians Committee to have been "directly or indirectly established, financed, maintained or controlled by or acting on behalf of " Congressman Flake for purpose of 2 U.S.C. 441i(e)(1) on account of the relationship between the two thus far, it should nonetheless reach this conclusion (as well as the conclusion that the Committee is the Congressman's "agent") based on the degree of intended involvement with the Committee by Congressman Flake.

Indeed, according to correspondence with the Commission dated March 24, 2003, Congressman Flake desires to "be involved in all aspects of the Committee, including its governance." Specifically, he seeks to "direct and participate in the governance of the Committee, as well as formulating its strategy and tactics for the ballot referendum." The Congressman's involvement with the Committee would, among other things, entail "bring[ing] [his] expertise to bear on all the Committee's public communications." Likewise, on April 7, 2003, Congressman Flake's attorney indicated that "Rep. Flake and/or agents of his authorized committee wish to provide significant support to the Committee." In short, as indicated in the initial March 3, 2003 correspondence requesting this Advisory Opinion, the only contemplated bounds on the Congressman's involvement would be to extent it is not permitted by law ("He plans to assist the Committee in its efforts to the extent permitted by law"). This degree of involvement certainly amounts to direct or indirect control and/or maintenance of the Committee by the Congressman and in its own right (as well as in combination with the Congressman's role in having "established" the Committee) would thus trigger the application of 2 U.S.C. 441i(e)(1)(A) and (B) to the Committee.

Such a finding of direct or indirect maintenance and/or control of the Committee by Congressman Flake is further confirmed by the fact that his agents and present and former employees of his authorized committee and congressional office would also be significantly involved in the decision-making and/or operations of the Stop Taxpayer Money for Politicians Committee. Moreover, according to March 24, 2003 correspondence from Congressman Flake's attorney to the FEC, the Committee would hire individuals who serve as consultants to the Congressman's authorized committee in the current election cycle, as well as individuals who served as consultants to his authorized committee in previous election cycles.

We note that the contemplated control and maintenance of the Committee by Congressman Flake involves the presence of numerous factors that the Commission has indicated would be relevant to its affiliation analysis under BCRA. These factors include:

- whether a sponsor, directly or through its agent, has the authority to direct or participate in the governance of an entity through formal or informal practices or procedures (*see* 11 C.F.R. 300.2(c)(2)(ii));

- whether a sponsor, directly or through its agent, has the authority to hire, appoint, demote, or otherwise control the officers, or other decision-making employees or members of the entity (*see* 11 C.F.R. 300.2(c)(2)(iii));

- whether a sponsor has common or overlapping employees that indicates an ongoing relationship between the sponsor and the entity (*see* 11 C.F.R. 300.2(c)(2)(v));

- whether a sponsor has any members, officers, or employees who were members, officers, or employees of the entity that indicates an ongoing

relationship between the sponsors and the entity (*see* 11 C.F.R. 300.2(c)(2)(vi)); and

- whether the sponsor and the entity have similar patterns of receipts or disbursements that indicate a formal or ongoing relationship between the sponsor and the entity (*see* 11 C.F.R. 300.2(c)(2)(x)).

We also note that Congressman Flake appears interested in raising funds for the Committee. The Advisory Opinion Request inquires in numerous instances whether, under what conditions, and to what extent he may raise funds for the organization. Moreover, the original March 3, 2003 correspondence from Congressman Flake's counsel cites plans for an "aggressive program to raise the funds permitted by Arizona law" to fund voter mobilization activities and a broad-based advertising campaign. To the extent Congressman Flake is permitted to and does raise funds in a significant amount, or on an ongoing basis, for the Committee, he will have "financed" the organization – triggering the application of the soft money restrictions of 2 U.S.C. 441i(e)(1)(A) and (B) to the entity. At the very least, in combination with Congressman Flake's having "established" the Committee, such significant or ongoing fundraising on its behalf should result in its being considered "directly or indirectly established, financed, maintained or controlled" by a Federal officeholder. Notably, one of the factors specified in the Commission's regulations for affiliation analysis under BCRA is "Whether a sponsor, directly or through its agent, causes or arranges for funds in a significant amount or on an ongoing basis to be provided to the entity." 11 C.F.R. 300.2(c)(2)(viii).

c. Application of 2 U.S.C. 441i(e)(1)(A) and (B) to the Stop Taxpayer Money for Politicians Committee

As an entity "directly or indirectly established, financed, maintained or controlled by or acting on behalf of" Congressman Flake, the Stop Taxpayer Money for Politicians Committee is fully subject to the restrictions of 2 U.S.C. 441i(e)(1)(A) and (B) in its own right. As such, it may not solicit, receive, direct, transfer, spend or disburse funds:

- in connection with a Federal election, including for Federal election activity, unless such funds are subject to the prohibitions, limitations, and reporting requirements of the Act; and

- in connection with any other election, unless such funds comply with Federal source prohibitions and amount limitations.

i. "Federal Election Activity"

As an entity "directly or indirectly established, financed, maintained or controlled by or acting on behalf of" a Federal candidate or officeholder, the Stop Taxpayer Money for Politicians Committee may not solicit, receive, direct, transfer, spend, or disburse funds for any "Federal election activity" unless such funds are "hard money" 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.

The Committee will in fact engage in considerable amounts of "Federal election activity" as defined at 2 U.S.C. 431(20)(A) (and even under the Commission's interpretation of that statutory term, located at 11 C.F.R. 100.24).

According to its correspondence, starting in June of 2004, the organization will undertake "voter registration programs designed to identify voters who agree with the initiative and to register them to vote if they are not already," including "contacting voters by mail or over the Internet to assist them in registering to vote for the November 2004 general election campaign." The described activity fits the Commission's regulatory definition of "voter registration" activity at 11 C.F.R. 100.24(a)(2) ("*Voter registration activity* means contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote.") If the Committee commences such voter registration activity in June of 2004, *all* of its voter registration activity would occur within 120 days of a regularly scheduled Federal election in Arizona (the primary for U.S. House and Senate elections in Arizona in 2004 is set for September 7, 2004; the general election will be held on November 2, 2004). As such, this voter registration activity would constitute "Federal election activity" under the Commission's regulations.

Moreover, the Committee concedes that it will engage in voter identification, as defined in 11 C.F.R 100.24(a)(4), "from the beginning of its activities." Under the Commission's regulations, voter identification activity falling within the definition of 11 C.F.R. 100.24(a)(4) constitutes "Federal election activity" to the extent it occurs after the date of the earliest filing deadline for access to the primary election ballot for Federal candidates under state law. 11 C.F.R. 100.24(a)(1)(i), (b)(2)(i). In Arizona, that date is 90 days before the primary election (in this two-year election cycle, June 9, 2004).

The Committee also plans to engage in "[g]et-out-the-vote programs designed to get the measure's supporters to the polls in November 2004 by means of telephone, in person door-to-door activity, and other individualized means." Here, the described activity fits the Commission's definition of "get-out-the-vote activity" at 11 C.F.R. 100.24(a)(3) ("*Get-out-the-vote activity* means contacting registered voters by telephone, in person, or by other individualized means, to assist them in engaging in the act of voting"). Indeed, in response to the Commission's question as to whether the Committee anticipates engaging in get-out-the-vote activity as defined in 11 C.F.R. 100.24(a)(4), counsel for the Committee in this matter responded on March 21, 2003: "If permitted, the Committee anticipates engaging in get-out-the-vote activities beginning about 30 days before the November 2004 elections." Get-out-the-vote activity under 11 C.F.R. 100.24(a)(3) constitutes "Federal election activity" to the extent it occurs after the date of the earliest filing deadline for access to the primary election ballot for Federal candidates under state law (11 C.F.R. 100.24(a)(1)(i), (b)(2)(iii)) – which, as stated above, is June 9, 2004 in Arizona. As such, all of the Committee's anticipated get-out-the-vote activity will constitute "Federal election activity."

Finally, the Committee intends to finance "public communications" that will clearly identify a Federal officeholder and/or a Federal candidate in its message. "Public communications" that promote, support, attack or oppose a clearly identified Federal candidate constitute "Federal election activity" – whenever they are distributed. 2 U.S.C. 431(20)(A)(iii); 11 C.F.R. 100.24(b)(3). This is the case even if the communications do not expressly advocate the election or defeat of a Federal candidate or refer to an individual in his or her role as a Federal candidate. Adoption of either an express advocacy test or a requirement that an individual have been referred to "in his or her role as Federal candidate" in order for a "public communication" to be considered within 2 U.S.C. 431(20)(A)(iii) would be blatantly contrary to BCRA and significantly erode the integrity of its Federal candidate and officeholder soft money prohibitions and its ban on certain soft money spending by state and local political parties.

As an entity "directly or indirectly established, financed, maintained or controlled or acting on behalf of" Congressman Flake, the Committee may not solicit, receive, direct, transfer, spend, or disburse funds for the previously mentioned "Federal election activities" unless such funds are "hard money" 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. Moreover, in response to a question raised in the requestor's March 3, 2003 correspondence, there is no "Levin funds" exception from this hard money financing requirement for any entity that is "directly or indirectly established, financed, maintained or controlled" by a Federal officeholder. Under the statute, the Levin Amendment clearly applies only to "any amount expended or disbursed by a State, district, or local committee of a political party." 2 U.S.C. 441i(b)(2)(A).

The Advisory Opinion Request – particularly the correspondence of April 7, 2003 -- indicates that the Stop Taxpayer Money for Politicians Committee (currently organized as a Section 527 tax-exempt organization) received funds while Congressman Flake was affiliated with the committee. It is not evident from the Advisory Opinion Request who donated these funds, and in what amount. To the extent the funds were solicited or received for "Federal election activity" by the Committee, and such funds were not compliant with the source prohibitions, amount limitations, and reporting requirements of the Act, a violation of BCRA has occurred. 2 U.S.C. 441i(e)(1)(A); 11 C.F.R. 300.61.

Such a violation would not be cured by the return of the funds, as has apparently occurred here. Endorsement of that approach would depart from settled principles of law and indeed establish significant incentives for illegal conduct. Specifically, under that approach, individuals and organizations would have an incentive to raise funds in violation of the law, believing that if ultimately "caught" by the Commission, they could avoid liability by returning the funds.

ii. Activities in Connection with Elections

2 U.S.C. 441i(e)(1)(A) and (B)

The prohibitions of 2 U.S.C. 441i(e)(1)(A) and (B) extend beyond the solicitation, receipt, spending, transfer, direction, or disbursement of funds for "Federal election activity." They also prohibit any entity "directly or indirectly established, financed, maintained or controlled or acting on behalf of" a Federal officeholder or candidate – such as the Stop Taxpayer Money for Politicians Committee -- from soliciting, receiving, disbursing, transferring, or spending funds:

- in connection with an election for Federal office, unless the funds constitute "hard money" subject to the prohibitions, limitations, and reporting requirements of the Act (2 U.S.C. 441i(e)(1)(A)/11 C.F.R. 300.61); and

- in connection with any non-Federal election, unless the funds comply with corresponding Federal amount limitations and source prohibitions (2 U.S.C. 441i(e)(1)(B)/11 C.F.R. 300.62).

Notably, Congress specified in 2 U.S.C. 441i(d)(1) and (e)(1)(A) that "funds in connection with an election for Federal office" is a category which includes "funds for Federal election activity" (in turn, "Federal election activity" is defined at 2 U.S.C. 431(20)(A)). However, while including "funds for Federal election activity" in its entirety, "funds in connection with a Federal election" is a broader category – for example, encompassing funds contributed to Federal candidates and officeholders. Furthermore, the prohibitions of 2 U.S.C. 441i(e)(1)(B) extend to the solicitation, receipt, or spending of funds in connection with non-Federal elections.

The Activities of the Stop Taxpayer Money for Politicians Committee Are In Connection with an Election

- **Certain Ballot Measure Committees Intertwined with Candidates**

Whether a ballot measure committee is organized under Section 527 or Section 501(c)(4) of the Internal Revenue Code, facts and circumstances may be present that would properly lead the Commission to deem its activities in connection with an election. Indeed, in Advisory Opinion 1989-32, the Commission confronted a non-profit committee formed to qualify and pass a state ballot initiative measure in California. The initiative was sponsored and promoted by the Lieutenant Governor of California, who organized the non-profit committee. While there were no plans for the ballot initiative committee to send mass mailings or large-scale direct mail pieces mentioning the Lieutenant Governor, he would be involved in personalized letters to donors and press statements on behalf of the committee. He also stood to be a spokesman in paid media for the committee. Moreover, there was a "'substantial overlap'" in personnel between the Lieutenant Governor's campaign committee and the ballot initiative committee, and the committees shared a common fundraiser. Notably, the Lieutenant Governor would be on the same November 1990 Election Day ballot as the initiative being pursued.

The Commission was asked whether the non-profit ballot initiative committee could receive a donation from a foreign national. At the time, 2 U.S.C. 441(e) prohibited

contributions from foreign nationals "in connection with an election to any political office" (including state or local as well as Federal elections). The Commission concluded that a foreign national could not make a contribution to the ballot initiative committee. It believed that the facts and circumstances at hand indicated that that the activities of the non-profit ballot initiative committee should be viewed as "campaign-related." Along these lines, it noted:

> "In this case, although [the ballot initiative committee] will not expressly advocate the election of [the Lieutenant Governor] or solicit funds or other support for his campaign and although you note the statutory prohibitions on transfers to a candidate's election committee, [the Lieutenant Governor] has organized [the ballot initiative committee] with the knowledge that his name will be inextricably linked with the committee before the same electorate voting on his reelection and at the same time as the campaign and voting for such reelection take place. Through communications with the electorate, the [ballot committee] and the [Lieutenant Governor] have actively linked their names; [the ballot committee], going even beyond the statutory requirement, has sent out personalized letters from [the Lieutenant Governor] soliciting donations and press releases quoting [the Lieutenant Governor]. Finally, [the non-profit] is coordinating its efforts with [the Lieutenant Governor's] reelection committee to such an extent that the two committees appear to be functioning as one, including a substantial overlap of key personnel for all major facets of the campaigns."

The Commission concluded that, under these facts and circumstances, the ballot measure committee's proposed activities were in connection with an election (and thus triggered the foreign national contribution prohibition of 2 U.S.C. 441e). We believe that the facts concerning the Stop Taxpayer Money for Politicians Committee thus far combined with the desired degree of future involvement of Congressman Flake, his agents, and his employees with the organization (as indicated in the correspondence from the Congressman's and Committee's counsel) would be analogous to the circumstances facing the Commission in Advisory Opinion 1989-32. Specifically:

- Congressman Flake will at least be a candidate for re-election to the U.S. House of Representatives in the September 2004 primary and, if successful, the November 2004 general election.

- The Stop Taxpayer Money for Politicians Committee was formed by Congressman Flake. He was Chair of the Committee until March 21, 2003 – and desires to resume his role as Chairman.

- Congressman Flake has publicly referred to the initiative to overturn the Arizona Clean Elections Law Act as "my initiative." Chip Scutari, "Ariz. Clean Elections Law Upheld But Foes Fight At Ballot Box in '04," *Arizona Republican*, March 25, 2003, B1, 2003 WL 17688323.

- The Stop Taxpayer Money for Politicians Committee endeavors to qualify an initiative that, like Congressman Flake, would be on the ballot in the November 2004 elections in Arizona and engage in voter mobilization activities focused on turnout for that particular Election Day.

- Congressman Flake desires to be involved in all aspects of the Committee, including its governance; among other things, this would entail "bring[ing] [his] expertise to bear on all the Committee's public communications" and providing "ideas for specific scripts and copy."

- It appears that the Stop Taxpayer Money for Politicians Committee seeks to mention Congressman Flake in its "public communications." The Commission's inquired of Congressman Flake's and the Committee's counsel "whether . . . the Committee anticipates that a Federal candidate or officeholder, such as Rep. Flake . . . will be clearly identified in communications made as part of the campaign." On March 24, 2003, counsel responded: "If permitted, the Committee does wish to clearly identify a Federal officeholder and/or Federal candidate in its messages . . . Rep. Flake is one of the statute's most visible and vocal critics." The correspondence proceeded to indicate that "These communications will be distributed from the beginning of the Committee's activities, which will be more than 120 days before the election, through election day in November 2004."

- According to Congressman Flake's and the Committee's counsel's correspondence of March 24, 2003, communications by the Stop Taxpayer Money for Politicians Committee would be directed to all voters in Arizona, *including Congressman Flake's district.*

- In addition to the Congressman Flake's involvement, present and former employees of Congressman Flake's authorized committee and congressional office would be employed by the Stop Taxpayer Money for Politicians Committee.

- In March 24, 2003 correspondence to the FEC, it was indicated that "[t]he Committee also contemplates hiring individuals who are, or have been, consultants to Mr. Flake's authorized committee, some in this cycle and some in previous cycles."

- According to that March 24, 2003 correspondence, the activities contemplated for present and former employees of Congressman Flake's authorized committee and congressional office, and present and former consultants to his authorized committee, with the referendum committee include voter mobilization efforts for the same Election Day upon which Congressman Flake will be on the ballot, as well as drafting scripts, publications and messages (some of which will constitute "public communications").

Simultaneously, at least some of these individuals would be recruiting volunteers, registering voters, providing strategic advice, getting out the vote, and preparing "public communications" for the Congressman's authorized committee.

- Additionally, Congressman Flake has indicated that he is contemplating a primary challenge to the current senior Senator representing Arizona, who is up for re-election in 2004. Billy House, "McCain May Face '04 GOP Challenge; Rep. Jeff Flake Considers U.S. Senate Run, *Arizona Republic*, Feb. 26, 2003, B1, 2003 WL 15564996 (among other things, quoting Congressman Flake as saying, "At least in a Republican (Senate) primary, ideas would be debated"); "At the Races: Arizona; Flake Confirms Interest in Possible Primary Run," *Roll Call*, Feb. 27, 2003, 2003 WL 7689895. The President of the Club for Growth has indicated that his organization is "encouraging Jeff Flake to run" for Senate. Billy House, "McCain May Face '04 GOP Challenge,"*Arizona Republic*, Feb. 26, 2003, 2003 WL 15564996.

- It was inquired in March 3, 2003 correspondence to the FEC (indeed, while Congressman Flake was still Chair of the Committee) whether the Stop Taxpayer Money for Politicians Committee's "public communications" may mention the senior Senator representing Arizona. Subsequent March 24, 2003 correspondence from the Committee's counsel acknowledged that the organization's communications would be "directed to all voters in Arizona."

Under this particular organization's desired structure and plans, its activities should – consistent with the Commission's approach in Advisory Opinion 1989-32 – be considered in connection with an election (here a Federal election, given the extensive role undertaken by and contemplated for a Federal officeholder). Furthermore, in Advisory Opinion 1989-32, the Commission properly rejected the idea that a contribution from a foreign national could escape being considered "in connection with an election" and thus precluded by 2 U.S.C. 441e if placed in a separate account not used to pay expenses associated with materials that mentioned the Lieutenant Governor's name. Applying these principles here, the Committee (whatever its particular tax status) should not be permitted to solicit, receive, spend, transfer, disburse, or direct any funds unless they constitute Federal funds subject to the amount limitations, source prohibitions, and reporting requirements of the Act.

- **Section 527 Tax-Exempt Organizations**

Section 527 of the Internal Revenue Code is a tax-exempt status reserved for "political organizations" – defined as entities "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function. 26 U.S.C. 527(e)(1). In turn, "exempt function" is defined as:

> "the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal,

> State or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individuals or organizations are selected, nominated, elected or appointed."

26 U.S.C. 527(e)(2). In short, the primary purpose and operation of organizations claiming tax-exempt status under Section 527 of the Internal Revenue Code must be to influence elections.

This point is underscored in a Private Letter Ruling issued by the Internal Revenue Service in 1999, responding to a non-profit corporation's request for a ruling as to whether a broad range of activities, including initiative campaigns, constituted "exempt functions" under Section 527(e)(2) of the Internal Revenue Code. The IRS concluded that this particular organization's ballot initiative activities constituted "exempt functions" *because*, as detailed by the non-profit, they were designed to influence candidate elections. According to the ruling,

> "[Ballot measure, referenda, or initiative] expenditures will be considered for an exempt function where it can be demonstrated that such expenditures were part of a deliberate and integrated political campaign strategy to influence the election for state and local officials by making active use of ballot measures, referenda, and initiative campaigns . . . Based on the particular facts and circumstances described above, it appears that the described activities are inseparable from the candidate selection process. Under the circumstances you describe, expenditures for these activities are primarily for an exempt function within the meaning of Section 527(e)(2) of the Code."

Priv. Ltr. Rul. 199925051 (Mar. 29, 1999), 1999 WL 424878. Thus, as an organization claiming exemption from taxation under Section 527 of the Internal Revenue Code, the Stop Taxpayer Money for Politicians Committee is organized and operated principally to influence elections. On these grounds alone, any solicitation, receipt, spending, disbursement, transfer, or direction of funds by the Committee should for purposes of 2 U.S.C. 441i(e)(1) be considered in connection with an election. Notably, in the seminal case of *Buckley v. Valeo*, the U.S. Supreme Court construed a "political committee" to encompass organizations whose "major purpose" was the "nomination or election of a candidate" – and proceeded to characterize the expenditures of such organizations as "*by definition, campaign related.*" *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (emphasis added). Moreover, such an approach is consistent with Internal Revenue Code's characterization of any organization claiming exempt status under 26 U.S.C. 527 as a "political organization." It also accords with separate BCRA restrictions preventing Federal candidates and officeholders from soliciting corporate or labor funds, or unlimited funds from individuals, for Section 501(c) tax-exempt organizations whose "principal purpose" is to engage in election activity. *See* 11 C.F.R. 300.65.

This means that, at a minimum, the Committee – as an entity "directly or indirectly established, financed, maintained or controlled by or acting on behalf" of a Federal officeholder or candidate -- may not solicit, receive, disburse, transfer, direct or spend funds that are from Federally prohibited sources (*e.g.*, corporations and labor unions), or are from a Federally permissible source but exceed Federal contribution limits.

As noted above, the Advisory Opinion Request indicates that the Stop Taxpayer Money for Politicians Committee received funds while Congressman Flake was affiliated with the committee. It is not evident from the Advisory Opinion Request who donated these funds, and in what amount. Under the immediately preceding analysis, to the extent the funds were from Federally impermissible sources (*e.g.*, corporations and unions) or from individuals in amounts that, in total, exceed the Act's contribution limits, a violation of BCRA has occurred. Such a violation would not be cured by the return of the funds, as indicated previously in this correspondence.

2. Coordination

The Commission has established rules at 11 C.F.R. 109.21 for determining when certain "public communications" paid for by persons or organizations other than candidates or political parties would be considered "coordinated" with a Federal candidate or his or her agents and accordingly treated as an in-kind contribution (subject to Federal source prohibitions, amount limitations, and reporting requirements). In general, these rules require the presence of both a "conduct" element (essentially, acts of "coordination" between candidates or parties and the spenders) and a "content" element (addressing the content and distribution of the "public communication") for there to be a finding of coordination under Federal campaign finance law.[1]

Under the Commission's regulations, a "public communication" may fulfill the content standard even if it does not expressly advocate an election result or refer to a Federal candidate as a candidate. For instance, a "public communication" fulfills the content standard if it is an "electioneering communication" (*i.e.*, the advertisement mentions a Federal candidate, is distributed over television or radio within 60 days of a general election or 30 days of a primary involving the candidate, and can be received by 50,000 or more people in the candidate's electorate). 11 C.F.R. 109.21(c)(1). Along these lines, the Committee's counsel indicated in his March 24, 2003 correspondence to the FEC that the organization's broadcast communications will be receivable by more than 50,000 people in the state as a whole and in Congressman Flake's congressional district in particular.

Under the Commission's regulations, a "public communication" also fulfills the content standard if it mentions a Federal candidate, is distributed 120 days or fewer before a

[1] Moreover, at 11 C.F.R. 109.20, the Commission has retained a separate coordination standard for expenditures that are not made for public communications but that are coordinated with a Federal candidate. Under this standard, an expenditure that is "made in cooperation, consultation or concert with, or at the request or suggestion of" a candidate, his or her authorized committee, or his or her agents would be considered "coordinated" and thus an in-kind contribution to the candidate. 11 C.F.R. 109.20(a) & (b).

general election or a primary election, and is directed to voters in the candidate's jurisdiction. 11 C.F.R. 109.21(c)(4).

It is worth noting that, in the event Congressman Flake merely seeks re-election to the House, this would include "public communications" aired within the 120-day time window that mention him and are distributed as anticipated by the Committee – *i.e.*, "directed to all voters in Arizona, *including those in Rep. Flake's district*" (emphasis added). The "directed to voters" requirement of 11 C.F.R. 109.21(c)(4)(iii) does not read, "directed *exclusively* to voters in the jurisdiction of the clearly identified candidate," or even, "directed *primarily* to voters in the jurisdiction of the clearly identified candidate." Indeed, in the Commission's Explanation and Justification accompanying its coordination rules, the example it chose to illustrate what sort of "public communication" would not be considered "directed to voters" in a highlighted candidate's jurisdiction was a communication mentioning two Federal candidates that was broadcast in Washington, D.C. – and not at all before the electorate of either. Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 431 (Jan. 3, 2003). Given the fact that, under 11 C.F.R. 109.21(c)(4), a "public communication" must mention a Federal candidate *and* be aired fairly proximate to elections in order to satisfy the content standard, advertisements which are aired before more than an insubstantial amount of a candidate's electorate should be considered directed to those individuals.

If the Commission instead were to require that a communication be *exclusively* aired in or directed to the referenced candidate's district in order to meet the content standard of 11 C.F.R. 109.21(c)(4)(iii), this would enable Federal candidates to coordinate, without consequences under 11 C.F.R. 109.21, favorable advertisements mentioning them and aired before their electorates *less than 120 days before an election* – so long as they could demonstrate some degree of broader distribution (the Commission should not overestimate the expense or ease of achieving such broader distribution). Indeed, because of concern about easy prospects for "gaming," Congress rejected an idea pending at the time of BCRA was considered that advertisements mentioning Federal candidates that were aired nationally (as well as before their electorates) be exempted from the "electioneering communications" funding source prohibitions and disclosure requirements.

Moreover, the "conduct" component of coordination may have been triggered already -- and would certainly be triggered under Congressman Flake's plans for future involvement with the Committee. Either would render the Committee's planned spending on "public communications" meeting the "content" standard an in-kind contribution to Congressman Flake. Among other things, the conduct standard is fulfilled if the communication is "created, produced, or distributed at the request or suggestion of a [Federal] candidate . . . or [his or her] agent." 11 C.F.R. 109.21(d)(1)(i). Likewise, it is fulfilled if a communication is "created, produced, distributed at the suggestion of a person paying for the communication and the candidate . . . . assents to the suggestion." 11 C.F.R. 109.21(d)(1)(ii). The conduct standard is also met if a Federal candidate or his or her agent is materially involved in decisions regarding the content of the

communication, the intended audience, the specific media outlet used for the communication, or certain other aspects of the communication." 11 C.F.R. 109.21(d)(2).

In this instance, Congressman Flake formed the Stop Taxpayer Money for Politicians Committee and was the Chairman of the organization for the first two months of its existence (it has been in existence for roughly three months). While he was Chair, he and the Committee submitted an Advisory Opinion request to the Commission inquiring as to whether its broadcast communications may mention the senior Senator from Arizona. Furthermore, on March 24, 2003, his and the Committee's counsel in this matter responded as follows to a subsequent question as to whether a "Federal candidate or officeholder, such as Rep. Flake or Sen. McCain, will be clearly identified in communications made as part of the campaign":

> "If permitted, the Committee does wish to clearly identify a Federal officeholder and/or Federal candidate in its messages, which will likely meet the definition of 'public communications.' The statute that the Committee wishes to repeal is closely identified with Sen. McCain among Arizona residents and Rep. Flake is one of the statute's most visible and vocal critics."

This scenario certainly raises the prospect of Congressman Flake's or his agents' having already requested or suggested the creation, distribution or production of these candidate-specific communications, or having been materially involved in decisions regarding the content of the communications (or other aspects of the communications specified in 11 C.F.R. 109.21(d)(2)). The Commission should not ignore the possibility that the conduct standard may already have been met.

Congressman Flake's and the Committee's counsel's March 24, 2003 correspondence also indicated that "the Committee wishes Rep. Flake and his agents to bring their expertise to bear on all the Committee's public communications . . . [and] would also like Rep. Flake to play a role in selecting the media firm used to create the Committee's public communications and to receive his and his agents ideas for specific scripts and copy." This would certainly fulfill the "material involvement" conduct standard (11 C.F.R. 109.21(d)(2)) and thereby render spending on communications meeting the content standards of 11 C.F.R. 109.21(c) an in-kind contribution to Congressman Flake. The same analysis would apply in the event Congressman Flake makes a personal appearance in advertisements meeting the content standards.

If the Stop Taxpayer Money for Politicians Committee is a corporation (other than an incorporated Federal political committee registered with the FEC), any in-kind contribution it makes to Congressman Flake by virtue of having financed a "coordinated communication" under 11 C.F.R. 109.21 is illegal. Likewise, if the Committee is not incorporated, it still may not use corporate or labor treasury funds to finance a "coordinated communication" under 11 C.F.R. 109.21. If the Committee is not incorporated and has not used corporate or labor funds to finance its "coordinated communications" under 11 C.F.R. 109.21, its spending on such communications is illegal

to the extent it exceeds applicable Federal contribution limits (*i.e.*, $2,000 per election to Federal candidates).[2]

3. Solicitation of Funds (Assuming the Stop Taxpayer Money For Politicians Committee Is Not Considered to Be "Directly or Indirectly Established, Financed, Maintained or Controlled By or Acting on Behalf" of Congressman Flake and Limited to Receiving Funds Subject to Federal Source Prohibitions and Amount Limitations)

a. Section 501(c) Tax-Exempt Organization

Under BCRA and the Commission's soft money regulations, a Federal candidate or officeholder may not make any solicitation on behalf of a Section 501(c) organization for any election activity other than those specified in 11 C.F.R. 300.65(c). 11 C.F.R. 300.65(d). As the Commission explained in the Explanation and Justification accompanying its soft money rules, "Because BCRA permits limited solicitations only for specific Federal election activities, new paragraph (d) of the final rule makes clear that solicitations are not permitted for other election activities, including Federal election activity such as public communications promoting or opposing clearly identified Federal candidates." Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. at 49,109.

Moreover, insofar as a Federal candidate or officeholder solicits funds on behalf of a Section 501(c) tax-exempt organization to obtain funds for the Federal election activities specified in 11 C.F.R. 300.65(c) (*i.e.*, voter registration, voter identification and generic campaign activity), or for an organization whose principal purpose is to conduct those activities, he or she is limited to soliciting funds from individuals only -- and in amounts no larger than $20,000 per year. 11 C.F.R. 300.65(b).

Finally, a Federal officeholder is precluded from raising funds without regard to source or amount limitations for an organization whose principal purpose is to conduct election activities. 11 C.F.R. 300.65(a)(2)(i).

In response to a question posed by counsel for the Congressman and the Committee, none of these restrictions turn on whether or not it is mentioned that the Federal officeholder is a candidate on the ballot.

The Stop Taxpayer Money for Politicians Committee is not organized under Section 501(c) of the Internal Revenue Code at this time. However, according to its Advisory

[2] In addition to undertaking "coordination" analysis, the Commission must consider that the prohibitions of 2 U.S.C. 441i(e)(1) (A) and (B) apply not only to Federal candidates and officeholders themselves but also to any entity "directly or indirectly . . . acting on behalf of 1 or more candidates or individuals holding Federal office." If the Commission does not conclude that Congressman Flake's involvement with the Stop Taxpayer Money for Politicians Committee renders this an entity "acting on behalf of" the Congressman *per se* (*i.e.*, in all instances), it should at least consider the Committee subject to 2 U.S.C. 441i(e)(1)(A) and (B) with respect to particular election-related spending (including spending on "Federal election activity") for which the "acting on behalf" standard has been met.

Opinion Request, the Committee is contemplating reconstituting itself as a Section 501(c)(4) tax-exempt organization, depending on the Commission's response to this Advisory Opinion request. In the event that Commission does not conclude that the Stop Taxpayer Money for Politicians Committee is "directly or indirectly established, financed, maintained or controlled or acting on behalf of" Congressman Flake, we nonetheless believe that, under the Committee's and Congressman Flake's proposed plans, the particular facts and circumstances at hand would support a conclusion that the Committee's activities are necessarily in connection with an election (see analysis in Part B.1.c.ii., "Certain Ballot Measure Committees Intertwined with Candidates"). Thus, all solicitations by Congressman Flake for the Committee (even if reconstituted as a Section 501(c) tax-exempt organization) would be for election activity – and he could raise only $20,000 from individuals per year for the organization, useable only for get-out-the vote, voter registration, voter identification, or generic campaign activity under the Commission's definitions of those terms.

Alternatively (*i.e.*, assuming that the Committee's activities are not considered *per se* election-related), starting in June of 2004, the organization intends to begin engaging in "Federal election activity," including voter registration, get-out-the-vote activity and voter identification that fall within the Commission's respective definitions of these activities. Indeed, as indicated earlier, virtually all of the Committee's contemplated voter registration, get-out-the-vote activity and voter identification would be "Federal election activity" under the Commission's regulations. Its "public communications" would likewise be "Federal election activity" if they promote, support, or attack, or oppose Federal candidates. However, the extent to which the Committee intends to undertake activities, starting in June of 2004, that do not constitute Federal election activity is not clear from the Advisory Opinion request. Likewise, the Advisory Opinion Request does not indicate what portion of the Committee's overall expenditures would constitute Federal election activity and other information relevant to assessing its "principal purpose."

If the organization's principal purpose is in fact to conduct election activity, Congressman Flake may not raise any corporate or labor funds or unlimited funds from individuals for the organization. Moreover, in any scenario, Congressman Flake may not raise any funds on behalf of Committee (if organized as a Section 501(c) tax-exempt organization) for "public communications" promoting or attacking Federal candidates and may raise only limited funds from individuals for get-out-the-vote activity, voter registration, and voter identification.

Furthermore, to whatever extent solicitations of funds for the Committee are permitted, if Congressman Flake raises funds for the organization in a significant amount or on an ongoing basis, this constitutes "financing" the entity and should accordingly trigger a finding that it is "directly or indirectly established, financed, maintained or controlled" by a Federal officeholder or candidate (particularly in combination with his role in having formed the organization). In turn, this would trigger application of 2 U.S.C. 441i(e)(1) to the organization itself.

b. Section 527 Tax-Exempt Organization

The Committee is currently constituted as a Section 527 tax-exempt organization. A Federal candidate or officeholder may not raise funds from prohibited sources (*e.g.*, corporations and unions) for Section 527 tax-exempt organizations, nor may he or she raise funds from individuals that in total exceed applicable Federal amount limitations. Thus, Congressman Flake may not solicit any funds from Federally impermissible sources (*e.g.*, corporations and unions) for the Committee while constituted as a Section 527 tax-exempt organization, nor may he raise amounts from any individual exceeding a total of $5,000 per year.

The Advisory Opinion Request indicates that the Committee, as a Section 527 tax-exempt organization, received funds following its establishment, though the sources of those funds and the amounts provided by any given source are not evident. To the extent Congressman Flake solicited funds for the Committee from Federally impermissible sources, or from individuals in amounts exceeding a total of $5,000 per year, a violation of 2 U.S.C. 441i(e)(1) has occurred. As indicated above, the fact that the Committee apparently returned funds received while Congressman Flake was affiliated with the organization does not vitiate any violation.

4. Electioneering Communications

Corporations (including incorporated tax-exempt organizations) and unions may not directly or indirectly finance "electioneering communications" with their treasury funds. 2 U.S.C. 441b(a), (b)(2), (c); 11 C.F.R. 114.2(b)(2)(iii); 11 C.F.R. 114.14(a). In general, "electioneering communications" constitute television or radio advertisements referring to a clearly identified Federal candidate, aired within 60 days of a general election or 30 days of a primary election involving that candidate, and capable of being received by more than 50,000 persons in the candidate's electorate. 2 U.S.C. 434(f); 11 C.F.R. 100.29. Corporations and unions must instead make payments for these communications from their separate segregated funds, registered as political committees with the Federal Election Commission.[3]

To the extent the Committee is incorporated, it may not use its treasury funds to finance any "electioneering communication." If the Committee is not incorporated, it may not

[3] The Committee is apparently considering reconstituting as a Section 501(c)(4) tax-exempt organization. To the extent it does so, it nonetheless may not qualify for the exception for "qualified non-profit corporations" under 11 C.F.R. 114.10 (allowing certain corporations to finance electioneering communications and even express advocacy communications to the general public with treasury funds) if, among other things, it "directly or indirectly accept[s] donations of anything of value from business corporations or labor organizations." 11 C.F.R. 114.10(c)(4). The Commission elaborated in the Explanation and Justification accompanying its final "electioneering communications" rules that "The final rules maintain the prohibition against QNC's accepting any funds from corporations or labor organizations and do not allow them to accept a *de minimis* amount." Electioneering Communication, 67 Fed. Reg. at 65,207. We note that, according to the initial Advisory Opinion request correspondence of March 3, 2003, the organization intends to raise and spend funds "pursuant to Arizona statute, which permits the use of non-federal funds in any amount from any source except foreign nationals and national banks."

use donations of corporate or labor treasury funds to finance any "electioneering communication," 11 C.F.R. 114.14(b), and it must also disclose any permissible spending on "electioneering communications" and its contributors over certain thresholds to the Commission pursuant to 11 C.F.R. 104.20.

We appreciate the Commission's consideration of these comments.

Sincerely,

Glen Shor
Associate Legal Counsel