FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OFFICE OF THE CHAIRMAN

DISSENTING OPINION

OF

CHAIRMAN SCOTT E. THOMAS

ADVISORY OPINION 2005-10

At issue in Advisory Opinion 2005-10 was whether federal officeholders could "freely raise" soft money for a November 5, 2005 California statewide special election involving several ballot initiatives. Under the Federal Election Campaign Act ("FECA" or "the Act"), there are certain restrictions placed on the ability of federal officeholders to solicit funds regarding not only an election for Federal office, but also "*any* election other than an election for Federal office." 2 U.S.C. § 441i(e)(1)(emphasis added). Applying this statutory language as well as Federal Election Commission precedent, the General Counsel concluded in a draft response that the federal officeholders could not raise funds without regard to source or limit ('soft money') for the California special election. Under the law, the General Counsel's draft found that the federal officeholders could raise funds for the November special election only so long as the fundraising was subject to the limitations and prohibitions of the Act.

I supported the General Counsel's legal analysis and conclusion. A vote to approve the General Counsel's draft response failed, however, by a vote of 1-5.[1] In view of the plain statutory language and Commission precedent, I continue to believe that federal officeholders should not be allowed to raise unlimited soft money for the November, 2005 California special election.

I.

The Act generally "regulates the raising and soliciting of soft money by federal candidates and officeholders." *McConnell v. Federal Election Commission*, 540 U.S. 93, 181 (2003)("*McConnell*") *citing* 2 U.S.C. § 441i(e). Federal candidates and officeholders "shall not solicit, receive, direct, transfer, or spend" any soft money in connection with an

[1] Although I later voted to refer the matter back to the Office of General Counsel for the drafting of a "bare bones" advisory opinion, I viewed that vote as simply a procedural vote to move the matter after several votes indicated that the General Counsel's recommendation had only the support of one Commissioner. My vote to refer the matter back to the General Counsel's office for further drafting should not be viewed as an endorsement of the eventual result produced by that redraft. As this Dissenting Opinion makes clear, I disagree with that result.

election for Federal office. 2 U.S.C. § 441i(e)(1)(A). Of more relevance, the Act also broadly limits the ability of federal candidates and officeholders to raise or spend soft money in connection with "*any election other than an election for Federal office.*" 2 U.S.C. § 441i(e)(1)(B)(emphasis added). Specifically, federal candidates and officeholders may raise and spend funds in connection with "any election other than election for Federal office" only if such funds comply with the Act's contribution limits for candidates and political committees under 2 U.S.C. § 441a(a)(1), (2), and (3) and the Act's various prohibitions.[2] In upholding these broad restrictions on solicitations, the Supreme Court in *McConnell* explained:

> Large soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself.

540 U.S. at 182.

On June 13, 2005, the Governor of California called for a statewide special election to be held on November 8, 2005 to decide the fate of various ballot initiatives. On June 24, 2005, Representatives Howard Berman and John Doolittle filed an advisory opinion request with the Commission asking whether "they may freely raise funds for committees that are formed solely to support or oppose initiatives on the November 8, 2005 California statewide special election ballot." AOR 2005-10 at 1 (June 24, 2005). In essence, their request boiled down to whether the November 8, 2005 California special election falls within the "any election other than election for Federal office" provision of § 441i(e)(1)(B). If it did, the requestors could raise funds only to the extent the funds complied with the Act's contribution limitations and prohibitions.

In my view, the clear phrase "any election" means just that—*any* election. This broad statutory language includes elections to decide ballot initiatives as well as elections to select public officials. I do not believe the statutory phrase "*any* election" is limited only to "candidate" elections.[3] Indeed, if that was Congress's intent, it would have so

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[2] 2 U.S.C. § 441i(e) provides in its entirety:
"(1) A candidate, individual holding Federal office, agent of a candidate or an individual holding Federal office, or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals 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 under paragraphs (1), (2), and (3) of section 315(a) (2 U.S.C. § 441a(a)); and (ii) are not from sources prohibited by this Act from making contributions in connection with an election for Federal office." (emphasis added).

[3] This definition of "election" is consistent with its common definition which includes a "public vote upon a proposition submitted." Random House Dictionary (Second Edition, 1987) at 627.

stated. Significantly, though, §441i(e)(1)(B) does not say "any election for state or local office" or "any election other than ballot initiatives or ballot referenda." These words of limitation simply are not present in the statutory text. Instead, Congress plainly and clearly stated that the § 441i(e)(1)(B) restrictions on the solicitation of soft money broadly applied to "any election."[4] There is no need to plumb legislative history to see if Congress specifically mentioned ballot measure activity or to further opine what Congress intended.[5]

Only two years ago, the Commission considered the plain meaning of § 441i(e)(1)(B) in Advisory Opinion 2003-12 (Flake), Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6396 (July 29, 2003). In that Advisory Opinion, the Commission specifically found that certain planned ballot initiative activity was covered by the "any election" language of § 441i(e)(1)(B). Unlike Advisory Opinion 2005-10, the Commission explained its reasoning in considerable detail:

> As used in subparagraph (B) of section 441i(e)(1), the term, "in connection with *any election other than* [emphasis in original] an election for Federal office" is, on its face, clearly intended to apply to a different category of elections than those covered by subparagraph (A), which refers to "an election for Federal office." This phrasing, "in connection with any election other than an election for Federal office" also differs significantly from the wording of other provisions of the Act that reach beyond Federal elections. Particularly relevant is the prohibition on contributions or expenditures by national banks and corporations organized by authority of Congress, which applies "in connection with any election to *any political office*." 2 U.S.C. § 441b(a). Where Congress uses different terms, it must be presumed that it means different things. Congress expressly chose to limit the reach of section 441b(a) to those non-Federal elections for a "political office," while intending a broader sweep for section 441i(e)(1)(B) which applies to "any election" (with only the exclusion of elections to Federal office). *Therefore, the Commission concludes that the scope of section 441i(e)(1)(B) is not limited to elections for a political office, and that the activities of [an organization that qualifies a referendum for the election ballot] as described in your request (other than its Federal election activities and electioneering communications) are in*

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[4] Some of my colleagues indicated during discussion that they found the reference to "office" in the statute to have significance. Indeed it does. It helps emphasize the statute's broad reach to any election *other than* an election for Federal office. If anything, the use of the word "office" in this way undermines my colleagues' argument.

[5] At the table during discussion of Advisory Opinion 2005-10, legislative history appeared to be created three years after the fact based upon the *ex parte* contacts of several Representatives commenting on this Advisory Opinion. Ironically, the same enthusiasm and deference accorded those comments was not shown to the timely comments filed by BCRA co-sponsors Senators McCain and Feingold when they commented in 2002 regarding the various deficiencies in the Commission's rulemaking implementing the BCRA legislation passed earlier that same year.

connection with an election other than an election for Federal office. 2 U.S.C. §441i(e)(1)(B).

Id. at 12,787 (emphasis added)(footnotes omitted). Just as the Commission concluded by a 5-1 vote that "the scope of section 441i(e)(1)(B) is not limited to elections for political office" in Advisory Opinion 2003-12, so too, I believe, the Commission should have found that "the scope of section 441i(e)(1)(B) is not limited to elections for federal office" in Advisory Opinion 2005-10. Just as the Commission concluded by a 5-1 vote in Advisory Opinion 2003-12 that "once a ballot measure committee qualifies an initiative or referendum for the ballot, its subsequent activities will be deemed to be 'in connection with any election other than an election for Federal office' under 2 U.S.C. § 441i(e)(1)," *id.* at 12,788, so it should have reached the same result in Advisory Opinion 2005-10.[6]

II.

During the Commission's consideration of Advisory Opinion 2005-10, a motion was made "to direct the General Counsel's Office to prepare an advisory opinion indicating that because ballot initiatives and referenda are not in connection with an election under Section 441i(e), Section 441i(e) does not apply to the activities identified by the requestors and Representatives Berman and Dolittle may solicit funds for such activities outside the amount limitations and source prohibitions of the Act." *See* Draft Minutes for Meeting of August 18, 2005, Agenda Document No. 05-38 at 5-6. This motion failed to pass by a vote of 3-3. Because the Act "clearly requires that for any *official* Commission decision there must be at least a 4-2 majority," a position adopted by less than four Commissioners is not "binding legal precedent or authority for future cases," *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C.Cir. 1988)(emphasis in original), and thus is not a statement of Commission policy. Indeed, given the failure of four Commissioners to agree on any reasoning in Advisory Opinion 2005-10, the significance of this Advisory Opinion is greatly limited. Clearly, it cannot be said that this opinion supersedes Advisory Opinion 2003-12 or other opinions construing the statutory solicitation restrictions.

I voted against the motion to generally exempt ballot initiatives for several reasons. As discussed above, the motion runs contrary to the plain meaning of § 441i(e)(1)(B). In addition, the Commission has taken a similar position in another area of the law where there is no limiting language suggesting a narrow focus on elections to office. Specifically, it is clear that the foreign national prohibitions found at 2 U.S.C.

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[6] The FEC should not lurch back and forth on legal issues such as this. The approach laid out in AO 2003-12 was reasonable. It reflected a difficult consensus. It drew lines that were understandable and that applied to federal candidates/officeholders from all quarters. Changing course abruptly, when the interested parties have been operating for some time under settled principles, reflects poorly on the agency. If there is a perceived need to change the interpretation of the statute, it should be done in a regulation proceeding. This is the course we took regarding the ABC Advisory Opinion (2003-37), Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6418 (February 19, 2004), and it is the approach that should have been pursued by my colleagues here.

§ 441e are not limited to candidate elections. For years, the Commission had taken the opposite position and held that "contributions or expenditures relating only or exclusively to ballot referenda issues, and not to elections to any political office, do not fall within the purview of the Act." Advisory Opinion 1989-32, Fed. Elec. Camp. Fin Guide (CCH) ¶ 5989 at 11,629 (July 2, 1990).

In BCRA, however, Congress "revised 2 U.S.C. § 441e to delete references to 'elections' and 'candidates' for 'any political office,' and substituted the broader phrase 'Federal, State, or local election.' 2 U.S.C. § 441e(a)(1)(A)." Commission Final Rules and Explanation and Justification on "Contribution Limitations and Prohibitions," 67 Fed. Reg. 69928, 69944 (November 19, 2002). "Congress left no doubt as to its intention to prohibit foreign national support of candidates and their committees and political organizations *and foreign national activities in connection with all Federal, State, and local elections.*" *Id.* (emphasis added). In Advisory Opinion 2003-37, *supra*, the Commission recognized congressional intent and made clear that the prohibitions of §441e are not limited to candidate elections: "The Act, as amended by BCRA, prohibits foreign nationals from, among other things, directly or indirectly making a contribution or donation of money or other thing of value, or to expressly or impliedly promise to make a contribution or donation, in connection with a Federal, State, or local election (*this prohibition is not limited to elections for political office).*" *Id.* at 12,881(emphasis added).[7] The failed motion to generally exempt ballot initiatives from § 441i(e)(1)(B) would have clashed with the clear congressional intent behind the comparable statutory language of § 441e and signaled acceptance of the solicitation of foreign national money in ballot initiative elections.[8]

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[7] Advisory Opinion 2003-37 was superseded on other grounds. When the Commission promulgated final rules in the Political Committee Status rulemaking, it created new allocation rules replacing the allocation rules established in Advisory Opinion 2003-37: "The final rules are simpler than the approach taken in Advisory Opinion 2003-37 and proposed in the NPRM at proposed 11 CFR 106.6(f) and (g). These required a combined application of the time/space allocation method under 11 CFR 106.1 and the funds expended method under former 11 CFR 106.6 for public communications that refer to a party and to specific Federal candidates. Advisory Opinion 2003-37 is hereby superseded." Commission Final Rules and Explanation and Justification on "Political Committee Status," 69 Fed. Reg. 68056, 68063 (November 23, 2004)(italics omitted). Any intent to affect the opinion's conclusions regarding the reach of § 441e is noticeably absent.

[8] Interestingly, the Commission specifically declined to create an exemption from the definition of "electioneering communications" for communications that promote a ballot initiative or referendum:

> The Commission believes that communications qualifying for a ballot initiative or referendum exemption could well be understood to promote, support, attack, or oppose Federal candidates. 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.

Commission Final Rules and Explanation and Justification on "Electioneering Communications," 67 Fed. Reg. 65190, 65202 (October 23, 2002).

I also voted against the motion to exempt ballot initiatives from § 441i(e) because the dangers of 'quid pro quo' that motivated Congress to adopt the BCRA solicitation restrictions are present even in the situation at hand. In *McConnell*, the Supreme Court upheld Congress' effort, through the Bipartisan Campaign Reform Act, to "plug the soft-money loophole." 540 U.S. at 133. The Supreme Court found that "there is substantial evidence . . . that large soft-money contributions . . . give rise to corruption and the appearance of corruption." *Id.* at 154.

Federal candidates asking for huge soft money donations for a ballot measure effort do so to promote their favored political result. In the process they get voters who think like they do to register and to vote. An organized army of sympathetic voters in 2005 will surely have some residual benefits in the federal races of 2006. Donors surely know that helping federal candidates/officeholders in these circumstances can expect the latter to be very thankful. This is particularly so where, as here, one of the ballot measures may significantly affect future election boundaries. The mere fact that federal candidates are not on the ballot in November of 2005 does not mean that the effort to fund and win a ballot measure will not have a dramatic impact on the federal elections that will be underway almost immediately thereafter. Thus, I disagree with the notion that somehow the activity at issue in Advisory Opinion 2005-10 will not affect federal elections because it is occurring in a "non-election" year.[9] Federal candidates/ officeholders soliciting huge soft money donations in 2005 would be subjecting themselves to the very situations that Congress sought to eliminate.

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[9] The Commission has never adopted an election year/non-election year rule suggesting that a campaign does not begin until January 1 of an even-numbered election year. To the contrary, both the Act and the Commission's regulations specifically recognize that activity occurring in a non-election year will have an effect on the election year. For example, the limitations on contributions to candidates apply on a 'per election' basis rather than an 'election year' basis. 2 U.S.C. § 441a(a)(1)(A), (2)(A); 11 C.F.R. § 110.1(b). With respect to non-election year activity, the law reflects the reality we all know, namely, that considerable federal election activity occurs in non-election years. Recently, on July 27, 2005 (the middle of a non-election year), the Commission reinforced this very point when it issued a press release entitled "2006 CONGRESSIONAL CAMPAIGNS UNDER WAY." In pertinent part, the Press Release reported that, "[c]andidates seeking election to the 33 Senate seats up for election in 2006 have reported raising $84.8 million and spending $20.2 million during the first six months of 2005." *Id.* at 1. The Press Release found that the mid-year reports by these candidates "indicate more fundraising activity than the first six-month filings by candidates in the recent past." *Id.* Similarly impressive non-election year fundraising totals were shown by the House where 567 candidates raised $130.8 million during the first six months of 2005. *Id.* Obviously, considerable federal activity occurs during a non-election year.

Moreover, it is clear that Congress did not intend § 441i(e)(1)(B) to hinge on whether the activity was occurring in an even year, whether a Federal candidate was on the ballot, or whether "federal election activity" was involved. The statutory language includes no such qualifiers. By contrast, e.g., where Congress has wanted to tie a restriction to "federal election activity," it has done so expressly. *See* 2 U.S.C. § 441i(d)(1); (e)(1)(A). Further, the Commission itself has made clear that the 441i(e)(1)(B) solicitation restrictions apply to nonfederal elections that occur when there is no "Federal election activity" and no federal candidate on the ballot. The Commission recently approved language in AO 2005-2, Fed Elec. Camp. Fin Guide (CCH) ¶ 6472 (April 22, 2005) stating: "Unlike other sections of BCRA specifically dependent upon the appearance of a Federal candidate on the ballot (see, e.g., 2 U.S.C. 431(20)(A)(i) and (ii)), the limitations and prohibitions in 2 U.S.C. 441i(e)(1)(B) apply to a Federal officeholder at any time, regardless of whether any Federal candidate appears on the ballot for the relevant election." *Id.* at 17, 131.

It also was argued that the Commission must, in essence, 'level the playing field.' Of course, that isn't the role of the Federal Election Commission. Even if it were, the Office of General Counsel's draft would have left federal candidates/officeholders, on both sides of the ballot measure, free to solicit substantial sums from virtually every individual and PAC in America -- $5,000 per year. Further, federal candidates/ officeholders, under current advisory opinion interpretations, can be featured guests at ballot measure fundraising events for which soft money is otherwise solicited. *See* Advisory Opinion 2003-36 (Republican Governors Association), Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6417 (Jan. 12, 2004). The FEC also has made it clear that even though someone may be an agent of a federal candidate/officeholder for raising hard money, he or she can nonetheless solicit soft money for some other effort. Finally, there is nothing to prevent other political luminaries—like former Presidents, former Vice Presidents, and former and present non-federal government officials, as well as corporate officials, union officials, movie stars and famous athletes -- from soliciting whatever funds are permissible. It would be truly surprising if opponents of Governor Schwarzenegger's position on these ballot measures cannot find people other than Federal candidates or officeholders to make a soft money pitch to every potential donor. In sum, there is no demonstrable 'need' for the FEC to "level the playing field" and carve yet another loophole in BCRA.

III.

One important issue was raised in Advisory Opinion 2005-10 but left unresolved: in what way do the solicitation restrictions apply where an officeholder is soliciting funds on behalf of a 501(c) group. One of the commenters suggested that, for tax reasons, ballot measure groups might find themselves in this classification rather than in the 527 classification. Compare 26 U.S.C. § 501(c) and § 527. In the Act, Congress chose not to apply the solicitation restrictions to certain solicitations on behalf of 501(c) groups. Congress at 2 U.S.C. § 441i(e)(4) excepted: (1) general solicitations on behalf of 501(c) groups whose primary purpose is not certain types of "Federal election activity"; and (2) specific solicitations limited to $20,000 on behalf 501(c) entities whose primary purpose is these certain types of "Federal election activity." These certain types of "Federal election activity" are: voter registration within 120 days of a Federal election and voter identification, get-out-the-vote and generic campaign activity in proximity to a Federal election. The statute could be read to mean that Federal candidates/officeholders can solicit soft money for a 501(c) ballot measure group as long as it can steer clear of the timeframes and definitions regarding voter registration, etc. *See* 2 U.S.C. § 431(20)(A)(i) and (ii); 11 CFR 100.24(a)(1)-(4).

On the other hand, the Commission's regulations appear to take a somewhat more restrictive approach. The regulations implement the overall statutory scheme by only applying an exception for a group that can further establish its primary purpose is other than "activities in connection with an election." 11 CFR 300.65(a)(2)(i). In other words,

under the regulation the 501(c) exception to the solicitation ban does not apply if it could be said the group's primary purpose is in connection with an election. This would make sense in the situation at hand where a 501(c) ballot measure group – clearly focused on election activity - would raise the potential for all the problems that underlie the broad solicitation restriction language at § 441i(e)(1)(B).

The Commission did not resolve the apparent tension between the statute and the regulation in Advisory Opinion 2005-10.[10] In any event, there is some uncertainty in the attractiveness of the 501(c) general solicitation option given the statutory restriction that the solicitation may "not specify how the funds will or should be spent." 2 U.S.C. § 441i(e)(4)(A). Nevertheless, the applicability of restrictions on 501(c) groups remains uncertain.

IV.

Recently, two federal courts held invalid a number of the Commission's post-BCRA implementing regulations because the Commission's interpretations conflicted with or undermined the clear language of BCRA. *See Shays v. FEC*, 337 F.Supp.2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C.Cir. 2005), *petition for rehearing en banc filed* (August 29, 2005). In *Shays*, the district court observed that one of the Commission's interpretive regulations "would create an immense loophole that would facilitate the circumvention of the Act's contribution limits," 337 F.Supp.2d at 65, another "severely undermines FECA's purposes" and "would permit rampant circumvention of the campaign finance laws and foster corruption or the appearance of corruption," *id.* at 70, while yet another "would render the statute largely meaningless." *Id.* at 79. Similarly, the Court of Appeals commented regarding one set of invalidated regulations that "it seems hard to imagine . . . Representatives and Senators voting for BCRA would have expected regulations like these." 414 F.3d at 98-99. With respect to another set of invalidated regulations, the Court observed: "Congress has clearly spoken to this issue and enacted a prohibition broader than the one the FEC adopted." *Id.* at 107. Regarding another regulation held invalid, the Court of Appeals found "the FEC's rule again conflicts with Congress's unambiguous intent" and "contradicts BCRA's plain text." *Id.* at 109.

[10] Although the Commission in Advisory Opinion 2003-12, supra, did indicate that the exceptions at 2 U.S.C. § 441i(e)(4) operate as a "total exclusion" from the solicitation restrictions at 2 U.S.C. § 441i(e)(1), it nonetheless indicated that a federal officeholder could not solicit soft money on behalf of a 501(c) group that he established, financed, maintained or controlled. The only way the Commission could get to the conclusion it reached was by applying the general solicitation restriction language in § 441i(e)(1). Thus, as it did with its regulation, the Commission read the exception at § 441i(e)(4) so it did not make § 441i(e)(1) superfluous and did not undermine the broad reach of the general solicitation restrictions.

By reading the broad statutory language "*any* election," 2 U.S.C. § 441i(e)(1) (emphasis added), to mean 'only an election of a candidate to office,' the Federal Election Commission in Advisory Opinion 2005-10 once again has disregarded the plain language of the statute and wrongly narrowed the reach of BCRA. Instead of 'plugging the soft money loophole,' the Commission has created a new soft money loophole. As a result, federal office holders are back in the business of soliciting soft money. Because I do not believe this is the result Congress intended, I supported the General Counsel's conclusion that federal officeholders could not raise soft money for the November 8, 2005 California special election.

9/2/05
Date

Scott E. Thomas
Chairman