November 3, 2011

By Electronic Mail

Anthony Herman, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2011-21 (Constitutional Conservatives Fund PAC)

Dear Mr. Herman:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 with regard to Advisory Opinion Request (AOR) 2011-21, a request submitted on behalf of Constitutional Conservatives Fund PAC ("CCF"), a Leadership PAC that is "at least indirectly established, controlled, maintained or financed by" Senator Michael Shumway Lee.[1]

CCF seeks the Commission's opinion "regarding the applicability of limitations on accepting contributions greater than $5000 from individuals, corporations and unions by certain non-connected Committees for use in conducting Independent Expenditures." AOR 2011-21 at 1. Specifically, CCF asks:

> May a leadership PAC accept source-restricted contributions from any individual, corporation, or union into a separate, segregated non-contribution account for the purpose of conducting Independent Expenditures, in addition to accepting donations subject to the amount and source limitations of 2 USC § 441a(a) for the purpose of making direct contributions to candidates for federal office?

AOR 2011-21 at 10.

This is an easy question, which the Commission should answer with an unequivocal no. The "soft money" ban enacted as part of the Bipartisan Campaign Reform Act of 2002 (BCRA) states:

> A candidate, individual holding Federal office . . . <u>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</u>, shall not . . . solicit,

[1] *See* email dated October 23, 2011 from CCF attorney Dan Backer to the FEC's Messrs. Adkins and Stipanovic, appended to AOR 2011-21.

> receive, direct, transfer, or spend funds in connection with an election for Federal office . . . unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act[.]

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

By its own admission, CCF is an entity "established, controlled, maintained or financed by" Senator Lee and, therefore, it falls squarely within the express language of § 441i(e)(1)(A). As such, CCF – like Senator Lee himself – may solicit or receive only "contributions of up to $5000 from individuals (other than foreign nationals or Federal contractors) and Federal political action committees[.]" AO 2011-12 at 4. Solicitation or receipt of any corporate or union funds by CCF, or funds exceeding $5,000 from individuals or other political committees, would clearly violate Section 441i(e)(1)(A).

I. Advisory Opinion 2011-12 (Majority PAC) confirms that the soft money restrictions of Section 441i apply to entities established by federal candidates and officeholders.

The heart of the argument made by CCF is that case law permits federal PACs to accept unlimited contributions from individuals (and by extension, any contribution from prohibited corporate and union sources) so long as such contributions are to be used only for independent expenditures. *See SpeechNow v. FEC*, 599 F.3d 686 (D.C. Cir. 2010); *see also Carey v. FEC Carey v. FEC*, Civ. No. 11-259-RMC (D.D.C. 2011). But these cases address only federal PACs that are <u>not established by federal candidates or officeholders</u>. Thus, they are not applicable to CCF, which is established by a federal officeholder.

The Commission has already recognized precisely this distinction. In May of this year, two Super PACs, Majority PAC and House Majority PAC, sought an advisory opinion as to whether federal candidates and officeholders are permitted to solicit unlimited individual, corporate, and union contributions on behalf of the two PACs without violating 2 U.S.C. 441i(e). AOR 2011-12 at 1.

By a unanimous 6-0 vote, the Commission correctly advised Majority PAC and House Majority PAC that the answer is:

> No, Federal officeholders, candidates, and officers of national party committees may not solicit unlimited contributions from individuals, corporations, or labor organizations on behalf of independent expenditure-only political committees ("IEOPCs"). However, Federal officeholders and candidates, and officers of national party committees, may solicit up to $5000 from individuals (and any other source not prohibited by the Act from making a contribution to a political committee) on behalf of an IEOPC, because those funds are subject to the Act's amount limitations and source prohibitions.

AO 2011-12 at 3.

Citing Section 441i(e)(1)(A), the Commission explained that federal candidates and officeholders, "their agents, and entities directly or indirectly established, financed, or maintained, or controlled by, or acting on behalf of, Federal officeholders and candidates, may not raise or spend funds in connection with an election for Federal office, 'unless the funds are subject to the limitations, prohibitions, and reporting requirements' of the Act." *Id.* at 3-4 (emphasis added). The Commission correctly explained: "Section 441i was enacted by Congress long after the Act's contribution limits and source prohibitions. It was upheld by the Supreme Court in *McConnell v. FEC*, 540 U.S. 93, 181-184 (2003), and remains valid since it was not disturbed by either *Citizens United* or *SpeechNow*." AO 2011-12 at 4 (citing *RNC v. FEC*, 698 F. Supp. 2d 150, 156-60 (D.D.C. 2010), *aff'd* 130 S. Ct. 3544 (2010) (rejecting RNC's as-applied challenge to the restrictions of 2 U.S.C. § 441i(a))).

II. Leadership PACs such as CCF are entities "established by" federal officeholders and are thus within the express terms of section 441i(e)(1).

The Commission has already ruled that federal officeholders – and entities directly or indirectly established by them – are subject to the restrictions on their fundraising set out in section 441i(e)(1). The only new question presented here is whether a Leadership PAC such as CCF falls within this proscription as an "entit[y] directly or indirectly established, financed, or maintained or controlled by" a federal officeholder.

Leadership PACs do fall within the proscription of section 441i(e)(1) and CCF concedes as much. CCF's Form 1 on file with the Commission identifies Senator Lee as its "Leadership PAC sponsor" and, in response to a question from Commission attorneys with regard to this AOR, CCF stated that it is "at least indirectly established, controlled, maintained or financed by" Senator Lee. CCF's concession is well taken; indeed it is required by law. Federal law defines a Leadership PAC as "a political committee that is directly or indirectly established, financed, maintained or controlled by [a] candidate or individual but which is not an authorized committee of the candidate or individual and which is not affiliated with an authorized committee of the candidate or individual . . . ." 2 U.S.C. § 434(i)(8)(B). This definitional language mirrors the "established, financed, maintained or controlled" language of the soft money ban in Section 441i(e)(1). Thus, by statutory definition, Leadership PACs as entities fall within the restrictions that apply to fundraising by candidates under section 441i(e). There is no room for the Commission to interpret the two statutory provisions – § 441i(e)(1) and § 434(i)(8)(B) – differently.

Thus, CCF describes itself as falling within the same statutory restrictions that apply to Senator Lee's own fundraising, and because of that, CCF is bound by the same restrictions as Senator Lee. That really is the end of the matter.

And as a matter of policy, this makes sense. Leadership PACs lie at the core of BCRA's soft money prohibition. Given that section 441i(e)(1) prohibits a federal officeholder from raising funds outside the federal limits and source prohibitions, it would make no sense for an entity "established, financed, maintained or controlled" by that same officeholder to be permitted to do so – the evasion of the soft money ban would be so easy and obvious as to make the restriction on the officeholder meaningless. As the Court said in *McConnell*, "No party seriously

questions the constitutionality of § 323(e)'s general ban on donations of soft money made directly to federal candidates and officeholders, their agents, or entities established or controlled by them." 540 U.S. at 182 (emphasis added).

For all of these reasons, section 441i(e)(1) prohibits Leadership PACs such as CCF from soliciting and receiving funds "unless the funds are subject to the limitations, prohibitions, and reporting requirements" of FECA.

We appreciate the opportunity to provide these comments to you.

Sincerely,

/s/ Fred Wertheimer	*/s/ J. Gerald Hebert*
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