October 8, 2014

By Electronic Mail

Lisa J. Stevenson
Deputy General Counsel, Law
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2014-12 (RNC and DNC)

Dear Ms. Stevenson:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to the alternative draft responses to Advisory Opinion Request ("AOR") 2014-12. This request was submitted on behalf of the Republican National Committee and the Democratic National Committee (collectively, the "National Party Committees") and seeks "an opinion that they may each raise Federal funds … under a separate contribution limit, … solely to finance convention expenses for their 2016 presidential nominating conventions that would previously have been paid for with public funds." AOR 2014-12 at 1. The Campaign Legal Center and Democracy 21 strongly support Draft A, which correctly concludes that the National Party Committees may not raise convention funds under a separate contribution limit.

With this request, the National Party Committees continue their relentless and outrageous quest to get the Federal Election Commission (the "FEC" or "Commission") to eviscerate the hard money contribution limits bit by bit by creating separate limits to fund the activities of the National Party Committees. We have strongly objected to these efforts in prior requests, which have included attempts to create separate contribution limits to pay for recounts (Advisory Opinion 2006-24 and Advisory Opinion 2009-04) and an expanding list of other activities—*e.g.*, pre-election legal and administrative expenses to prepare for possible recounts (Advisory Opinion 2010-14), recounts in some unspecified future election (Advisory Opinion 2010-18) and, most recently, party legal defense expenses in litigation wholly unrelated to recounts and elections contests (Advisory Opinion 2011-03).[1]

In a new twist, the National Party Committees now rely on the Gabriella Miller Kids First Research Act, § 2(a), Pub. L. No. 113-98, 128 Stat. 1085 (2014), which repealed public funding for the nominating conventions, as a justification for the FEC to grant them yet another separate contribution limit, this time to fund the nominating conventions. According to the requestors,

[1] Most recently, in Advisory Opinion Request 2013-10, the Democratic Senatorial Campaign Committee, Democratic Congressional Campaign Committee, the National Republican Congressional Committee and the National Republican Senatorial Committee sought an advisory opinion allowing them to pay for office building expenses "using funds from the same segregated Federal accounts from which they can pay for recounts, legal defense, and other disbursements," AOR 2013-10 at 1, pursuant to previous advisory opinions where the FEC acquiesced to such demands. However, after seeing a draft opinion that refused to carve out yet another exception to the contribution limits, the request was withdrawn.

"Congress was silent on a replacement framework for funding the essential task of nominating presidential candidates," requiring the National Party Committees to "identify private sources of funding for their presidential nominating conventions." AOR 2014-12 at 2 (footnote omitted). The solution proposed by the National Party Committees is that they be allowed either to raise Federal funds "into a segregated account subject to an additional, separate contribution limit in order to pay for 2016 convention expenses," or to "establish separate convention committees, just as they did to receive the public funds." *Id.* Either way, the National Party Committees want an additional contribution limit.

I. The Repeal of Convention Funding Did Not Create "Uncertainty" or a "Gap" in the Campaign Finance Laws

At the outset, we note for the record that it was former House Majority Leader Cantor, other Republican leaders in Congress, and President Obama, who joined together to repeal the public funds for the party conventions. They did so fully aware of the fact that they were not providing "replacement funds" for their respective parties to help pay for the conventions and with no apparent interest in or concern about this result.

At its core, the Advisory Opinion Request is based on the false premise that the National Party Committees are entitled to either public funding or some special contribution dispensation to fund the presidential nominating conventions. However, holding the nominating convention is one of the core functions of the national party committees and is, by definition, an election. 52 U.S.C § 30101(1)(B) ("The term 'election' means—(b) a convention or caucus of a political party which has the authority to nominate a candidate").[2] Because of its central place in the election of the president, Congress provided an option for the parties to receive public funding for the conventions. 26 U.S.C § 9008 [repealed]; 11 C.F.R. Part 9008. However, in return for accepting the public funding, the parties had to agree to not make expenditures with respect to the nominating conventions that exceeded the amount of payment to which they were entitled. 26 U.S.C. § 9008(d). Further, the national parties had to agree to a series of requirements to be eligible for the funds, including establishing a convention committee, special reporting requirements, agreeing to provide documentation and agreeing to an audit and examination. *See* 11 C.F.R. § 9008.3.

Because public funding was voluntary, a National Party Committee could "elect to receive all, part, or none of the amounts" to which it was entitled. *Id.* § 9008.6(a). If the party committee opted to receive only part of the public funding, or if insufficient funds were available to provide the full entitlement, it was allowed to receive and use private contributions to make up the difference between the public funding and the total expenditure limitation. *Id.* § 9008.6(a)(2). However, Congress did not provide an additional contribution limit under which private funds could be raised and any private contributions the party received to defray convention expenses were subject to the Party's base contribution limits. *Id.* § 9008.6(a)(3). Moreover, consistent with this scheme, Congress did not provide an additional limit when it repealed the public funding of the conventions.

[2] A political party is defined as "an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." 52 U.S.C. § 30101(16).

Thus, it is clear that public funding was an option that was supposed to replace the fundraising the parties would otherwise have to undertake, and was not intended to be a supplement to the parties' fundraising. Contrary to the requestors' assertion, therefore, the repeal of the convention funding did not leave any "uncertainty" or "gap" in the campaign finance laws. Rather, it removed one funding option, leaving the National Party Committees free to use the regular contributions raised under the existing party limits. This is no different than if a National Party Committee had decided to accept only partial public funding, or no public funding at all, when the funding was available. Presumably, the requesters would not have asked for a new contribution limit if they had voluntarily opted out of the system.

II. Draft A Correctly Concludes that the Statute and Commission Regulations Clearly Prohibit Raising Convention Funds Under a Separate Limit

As Draft A explains, the Federal Election Campaign Act, 52 U.S.C. §§ 30101-30146 (formerly 2 U.S.C. §§ 431-457) ("FECA"), the Presidential Election Campaign Fund Act, 26 U.S.C. 21 §§ 9001-9013 (the "Funding Statute"), and the Commission's regulations make clear that (1) the conventions are "elections"; (2) all funds raised by a National Party Committee are subject to the limitations and prohibitions of FECA, even if spent for administrative purposes; (3) all funds raised by the National Party Committees to defray the expenses of the conventions are contributions subject to the limits and prohibitions; and (4) any separate account set up by a National Party Committee would be subject to a single common contribution limit of the National Party Committee. As is explained above and Draft A lays out in detail, this request does not involve any gray areas or ambiguity in the law. Since the statutes and regulations are clear, permitting the National Party Committees to raise contributions in excess of the existing limits would be contrary to law and is outside the FEC's authority. We strongly support—and urge the Commission to approve—Draft A.

III. Draft B's Assertion that a "Convention Committee" Would Be a Separate National Party Committee with its Own Limit is Contrary to the Plain Language of the Statute and Previous Advisory Opinions

The Commission's alternative Draft B boldly goes where not even the National Party Committees expressly dared to go in their request and absurdly asserts that a convention committee can be considered a separate "national committee" of a political party with its own contribution limit.

First, the draft correctly notes that 52 U.S.C. § 30101(14) defines a "national committee" as "the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level, as determined by the Commission." However, it cannot seriously be argued that a convention committee is "responsible for the day-to-day operation of such political party at the national level" under any common understanding of what that phrase means. Instead, Draft B attempts to make the statute meaningless by misapplying and carefully omitting key language from previous FEC Advisory Opinions. It begins by discussing how the Commission determines whether an entity is a national committee:

> In conducting this inquiry, the Commission generally considers whether the political committee nominates candidates for various federal offices and in numerous states, engages in certain activities on an ongoing basis rather than with respect to a particular election, publicizes issues of importance to the party and its adherents throughout the nation, holds a national convention, establishes a national office, and establishes state affiliates. *See, e.g.*, Advisory Opinion 2006-36 (Green Senatorial Campaign Committee) at 4; Advisory Opinion 2001-13 (Green Party of the United States) at 3.

Draft B at 5.

The Commission has also said that a relevant factor in determining national committee status is "the degree to which [the committee's] successful ballot access efforts extend beyond the Presidential and Vice-Presidential level to other Federal races," so the definition of a national committee would not appear to cover a committee responsible *only* for a presidential nominating convention. Advisory Opinion 2001-13 (Green Party of the United States) at 3. However, Draft B brushes aside as irrelevant the inconvenient fact that the convention committees focus only on presidential elections, asserting that the Commission's "inquiry is intended to ensure that 'only those committees whose activities [are] broadly focused — *such as . . . in more than one State or geographical area'* qualify for national committee status. *See* Advisory Opinion 2006-36 (Green Senatorial Campaign Committee) at 4." Draft B at 5 (emphasis added). Unfortunately, this is not exactly what the Commission said in Advisory Opinion 2006-36.

The quoted phrase from Advisory Opinion 2006-36—including the language conveniently elided in Draft B—makes it clear that focusing on nationwide presidential races is insufficient to qualify for national committee status. It reads: "The Commission has recognized the national party committee status of only those committees whose activities were broadly focused – *such as on multiple races or offices* in more than one State or geographical area." Advisory Opinion 2006-36 at 4 (emphasis added) (quoting Advisory Opinion 2001-13). The truncated quotation in Draft B is little better than a misrepresentation of the advisory opinion it quotes.

Draft B also completely ignores footnote 5 of Advisory Opinion 2006-36, which immediately follows the part of the opinion it selectively quotes:

> In previous advisory opinions, *the Commission concluded that a committee or political party did not qualify for national committee status if its activity was focused solely on the Presidential and Vice-Presidential election* (Advisory Opinions 1980-131 and 1978-58), or if it was limited to one State (Advisory Opinion 1976-95), or if it had only very few Federal candidates on State ballots (Advisory Opinions 1992-44 and 1988-45) . . . .

Id. at 5 n.5 (emphasis added) (internal quotation marks omitted) (quoting Advisory Opinion 2001-13 at 3 n.6).

By omitting "such as on multiple races or offices" from the quote and ignoring footnote 5 in Advisory Opinion 2006-36, Draft B attempts to silently overrule a key part of the analysis of whether a committee qualifies for national committee status. In the face of the Commission's consistent refusal to provide national committee status to committees focused only on the presidential and vice-presidential elections, mischaracterization is the only way Draft B can claim to be consistent with previous Commission opinions. Draft B's lack of candor and misstatement of previous Commission decisions is alone sufficient reason to reject it.

IV. Draft B's Analysis Will Lead to a Proliferation of National Committees with their Own Limits

If the Commission approves Draft B, the impact of its analysis should not be underestimated. National party committees benefit from higher contribution limits, compared to what can be given to candidates, state party committees and PACs. 52 U.S.C § 30116(a)(1)(B). Further, after the decision in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), there is no aggregate limit on what an individual can give to all candidates, PACs and party committees. Given this, the analysis used in Draft B would enable the proliferation of numerous national party committees, each established for the specific purpose of paying for one of the "day-to-day operations" of a national political party and each with its own separate contribution limit. For example, since Draft B relies on the fact that one of the activities of a national committee is putting on nominating conventions, there would be nothing to prevent the formation of a separate national committee (with yet another separate contribution limit) for each party committee activity, such as fundraising, paying administrative costs, "supporting voter registration and get-out-the-vote drives," "publicizing issues of importance to the party and its adherents throughout the nation," or establishing a national office and State affiliates. Advisory Opinion 2006-36 at 4.

The history of Commission rulings that allowed private funding of the publicly financed presidential nominating conventions was one long slippery slope, as the Commission allowed more and more unlimited individual, corporate, and labor funding of the national conventions through the continual redefinition of what the party had to pay for and what would be considered non-convention expenses. Now that Congress has ended the public funding of the conventions, the Commission should refuse Draft B's invitation to just jump off the cliff and allow the conventions to become a means of further eviscerating the hard money contribution limits applicable to the political parties. For these reasons, we urge the Commission to adopt Draft A and to reject Draft B.

We appreciate the opportunity to submit these comments.

Sincerely,

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