FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

ADVISORY OPINION 2003-12
DISSENTING OPINION OF COMMISSIONER DAVID M. MASON

Advisory Opinion 2003-12 presented a number of matters of first impression under the Bipartisan Campaign Reform Act ("BCRA")[1] and the Commission's implementing regulations. While I agree with my colleagues regarding most of the specific conclusions in the opinion, I could not agree that the participation of a *Federal* officeholder was a reasonable basis for concluding that an activity was in connection with a *non-Federal* election and, thus, did not support the final opinion.

I agree with the Opinion's conclusion on the facts presented that Rep. Flake established the Stop Taxpayer Money for Politicians Committee ("STMP") to promote a state ballot initiative. Under the BCRA, organizations directly or indirectly established, financed, maintained or controlled by Federal candidates or officeholders may raise or spend only "hard money" (funds subject to the amount limitations and source prohibitions of the Federal Election Campaign Act of 1971, as amended ("FECA")) for activities in connection with any election.[2] If the activity is in connection with a Federal election, any funds so spent must, in addition, comply with the FECA's reporting requirements.[3]

As a threshold matter neither the statute nor the Commission's regulations address whether a state ballot initiative qualifies as an "election." The statutory definition of election,[4] which existed prior to and was not amended by the BCRA, encompasses Federal elections only, which per force do not include initiatives or referenda. The Commission's regulatory definition of election is clearly restricted to elections for office, i.e. candidate elections.[5] There appears to have been no mention of initiatives or referenda in the legislative history of the BCRA. The lack of statutory or prior regulatory specificity thus left this determination to the Commission's discretion. Looking to other arguably analogous authorities, the Supreme Court has afforded greater First Amendment protection to spending associated with referenda than for that associated with candidate elections.[6] The Internal Revenue Service generally classifies referendum spending as lobbying rather than campaign activity.[7] In light of those authorities, I joined Commissioners Smith and Toner in supporting a draft opinion that concluded that a referendum was not an "election" for purposes of BCRA. While that position did not command

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[1] The Bipartisan Campaign Reform Act of 2003, Pub. L. No. 107-155, 116 Stat. 81 (2002).
[2] 2 U.S.C. § 441i(e)(1)(B)(i) and (ii).
[3] 2 U.S.C. § 441i(e)(1)(A).
[4] 2 U.S.C. § 431(1).
[5] 11 C.F.R. § 100.2(a).
[6] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S 765 (1978).
[7] "Lobbying expenses include amounts paid or incurred for...[a]ttempting to influence the general public, or segments of the public, about elections, legislative matters, or referendums." IRS Taxpayer Information Publication Pub. 557, Tax-Exempt Status for Your Organization, Chap. 13, 2003 WL 21386435 (Revised May 2003).

a majority, I acknowledge that the opposite position, albeit lacking specific authority, was arguably reasonable based on a commonsense understanding of an otherwise undefined term.

Assuming that a referendum is an "election," I agree with the final opinion that it is reasonable to conclude that efforts to qualify a measure for the ballot are not "in connection with" an election whereas post-qualification efforts to persuade voters to cast ballots for or against a measure are "in connection with" an election. This distinction is valid for three reasons. First, if the ballot qualification efforts are not successful (and such efforts often do fail) then there will be no vote on the initiative and, thus, no "election," and there is certainly no particular election to be associated with an initiative effort until it qualifies for the ballot. Second, the principal focus of an initiative effort in the qualification stage, signature gathering, is not among the activities (such as voter registration, GOTV, certain public communications) designated in BCRA, FECA or Commission regulations as inherently election related. Third, in most instances the ballot qualification effort will be sufficiently remote in time from the election so as to be outside the time periods of special scrutiny for most BCRA purposes (30, 60 or 120 days).[8]

Having reached a reasonable distinction between pre- and post-qualification initiative efforts in terms of their connection to an election, my colleagues then abandon that distinction, and any statutory moorings, to conclude that initiative efforts controlled by a Federal officeholder are in connection with a non-Federal election, even in the qualification stage. This conclusion appears to arise from a regulatory presumption that a Federal officeholder must be up to something self-interested when participating in a state ballot initiative effort, a presumption I would not enshrine as a blanket regulatory policy.[9] Moreover, even permissible assumptions or generalizations must arise from the laws the Commission enforces. Unfortunately, the interpretation expressed in this advisory opinion amounts to circular logic at best and ultimately is contrary to the statute we are applying.

BCRA limits certain fundraising activities of Federal officeholders and candidates. The fundraising so limited is described in the statute as that "in connection with an election for Federal office" and that "in connection with any election other than an election to Federal office." The Commission concluded that the state initiative at issue is not an election for Federal office,[10] but that it was a non-Federal election. The Commission further concluded that pre-qualification activities are not generally "in connection with" any election but then circled back to the threshold question to make a

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[8] See 11 C.F.R. § 110.29(a)(2) (definition of electioneering communication incorporating distribution within 60 days before a general election or within 30 days of a primary election); 11 C.F.R. § 109.21(c)(4)(ii) (content standard for coordinated communication incorporating public distribution or dissemination 120 days or fewer before a primary, general, special, runoff, primary preference, convention, or caucus); 11 C.F.R. § 100.24(b)(1) (definition of federal election activity encompassing voter registration activity during 120 days before a regularly scheduled Federal election).

[9] *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("When the Government defends a regulation on speech as a means to ... prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured") (citation and internal quotation marks omitted)).

[10] Following the text and logic of the BCRA the Commission might have concluded that an initiative voted on in the same election at which a Federal candidate is on the ballot is "in connection with" a Federal election. However, the BCRA's enumeration of specific and limited Federal Election Activities which must be paid for with "hard money" when conducted by candidates and parties would lead back to a conclusion that only those specified activities, and not the entire initiative effort, are subject to BCRA's limitations.

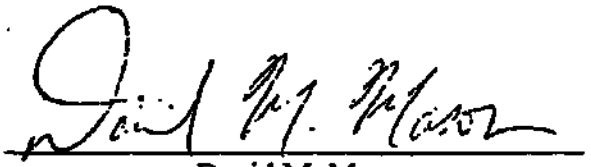
contradictory conclusion that control by a *Federal* officeholder is conclusive and irrebuttable proof of a connection to a *non-Federal* election, despite the fact that but for the participation of the officeholder there would be no connection to any election whatsoever.

By collapsing the "control" and "connection" tests into a closed loop the Commission threatens to erase any limitation in the statute with a *per se* conclusion that any fundraising by a Federal officeholder (or an organization controlled by a Federal officeholder) is in connection with an election. The requirement that an activity be "in connection with" an election to be regulated is simply washed away by this blanket presumption. The BCRA makes precisely such a blanket policy as to national political parties,[11] but limits its application to officeholders, a limitation obliterated in this opinion.

On what basis is the Commission now to reject the suspicion that purely charitable fundraising may not somehow provide a political benefit for an officeholder? There is no logical guideline in this opinion, and thus distinctions that will undoubtedly be proffered in the future will appear arbitrary.

During discussion of this Advisory Opinion several Commissioners noted that the draft ultimately approved was not to their (or perhaps any single Commissioner's) individual liking, even acknowledging that the result was "not pretty." I commend my colleagues' efforts to reach a consensus decision despite disparate views in order to provide regulated entities with clear guidance. I would normally join in such efforts but our compromises in statutory interpretation must remain within the bounds of the statute. In concluding that control by a Federal officeholder per se establishes a connection with a non-Federal election, this opinion failed to do so.

August 11, 2003



David M. Mason
Commissioner

[11] 2 U.S.C. § 441i(a).