



May 25, 2011

Dear Representative,

Given recent press reports, you as a Member of Congress may be approached to solicit contributions for a so-called Super PAC, which is an entity that may receive unlimited contributions (including corporate and labor union contributions) and makes only independent expenditures in federal elections. Both Republican and Democratic organizations have expressed an interest in having members of Congress make such solicitations.

Democracy 21 and the Campaign Legal Center are writing to inform you that in our view any federal officeholder or candidate who solicits unlimited contributions for an independent-spending Super PAC is violating the federal law that prohibits federal officeholders and candidates from soliciting unlimited contributions in connection with a federal election.

The ban on soft money enacted in 2002 prohibits federal officeholders and candidates from soliciting or directing any funds in connection with a federal election “unless the funds are subject to the limitations, prohibitions and reporting requirements” of the law. This solicitation prohibition has been upheld by the Supreme Court.

Soliciting unlimited contributions for a Super PAC would violate this prohibition.

This issue arose recently when three members of the RNC formed “Republican Super PAC” (RSPAC) to make independent expenditures in federal elections. RSPAC announced plans to have federal officeholders and candidates solicit unlimited contributions for the PAC.

A RSPAC founder, furthermore, said that the federal officeholders and candidates who solicit such unlimited contributions for RSPAC will be able to earmark those funds to be spent by the PAC to support the election of the federal officeholder or candidate soliciting the funds.

This scheme for federal candidates and officeholders to solicit unlimited contributions is plainly illegal under federal campaign finance law, regardless of whether the funds are earmarked to be spent for the election of the officeholder or candidate soliciting the money.

The argument that officeholders and candidates can solicit unlimited contributions for Super PACs is in direct conflict with the language and purpose of the federal statutory prohibition on officeholders and candidates soliciting unlimited contributions.

This argument would lead to an absurd and obviously corrupting result that a President or member of Congress could solicit a \$5 million donation for a Super PAC with the understanding that the PAC will spend the money on “independent” expenditures to benefit that particular federal officeholder or candidate.

As a practical matter, this kind of solicitation is just as corrupting and creates just as much an appearance of corruption as if the officeholder or candidate was soliciting and receiving a \$5 million donation for his or her own campaign committee.

Federal law prohibits candidates from accepting *any* corporate or labor union contributions for their campaigns and limits individual contributions to \$2,500 per donor per election.

One of the founders of RSPAC has misleadingly argued that officeholders and candidates can solicit unlimited contributions for a Super PAC because the federal ban on coordination between candidates and independent groups applies only to spending, not to fundraising.

But, in fact, the coordination provision is not the provision that is applicable here. It is the ban on solicitation of unlimited contributions, not the coordination restriction, which prohibits you and every other federal officeholder from raising unlimited contributions for a Super PAC.

On May 19, 2009, Majority PAC and House Majority PAC, two Super PACs established to make independent expenditures in support of Senate and House Democratic candidates, submitted an Advisory Opinion request to the FEC.

In the request the pro-Democratic PACs asked the FEC for an advisory opinion on whether it would in fact be legal for federal officeholders and candidates to raise unlimited contributions for their Super PACS. The Advisory Opinion request also states that “if the Commission does not find that such solicitations violate 2 U.S.C. Section 441i, the PACs plan to ask covered officials to make such solicitations on their behalf.”

Supporters of the Super PAC solicitation scheme argue that the scheme is allowed by the decision of the D.C. Circuit Court of Appeals in *Speech Now v. FEC*, which permits PACs making only independent expenditures to raise funds not subject to contribution limits.

However, even though it is permissible under the *SpeechNow* ruling for a Super PAC to raise unlimited funds, it is not permissible for federal officeholders and candidates to solicit such funds.

We believe the only possible correct result in the FEC Advisory Opinion Request is for the Commission to hold that the solicitation of unlimited contributions by federal and candidates is prohibited by law.

The statute prohibiting federal officeholders and candidates from soliciting unlimited funds was upheld by the Supreme Court in *McConnell v. FEC* (2003) and there is nothing in subsequent court decisions, including the *Citizens United* decision, which undermines the *McConnell* decision on this issue.

The solicitation prohibition was not challenged or litigated in *SpeechNow*. Indeed, the group *SpeechNow* made clear in litigating the question of whether it could raise unlimited contributions that it would operate wholly independently of federal candidates, officeholders and political party committees.

The court in *SpeechNow* did not consider and certainly did not authorize federal candidates and officeholders to solicit unlimited contributions for a PAC making independent expenditures in federal elections. There is nothing in the court's opinion to suggest that such solicitations are legal.

In the *McConnell* case, Justice Anthony Kennedy, who otherwise dissented in *McConnell*, said in defending the solicitation ban that it was the one provision that "satisfies *Buckley's* anticorruption rationale and the First Amendment guarantee." Justice Kennedy explained:

The making of a solicited gift is a *quid* both to the recipient of the money and to the one who solicits the payment (by granting his request). Rules governing candidates' or officeholders' solicitation of contributions are, therefore, regulations governing their receipt of *quids*. This regulation fits under *Buckley's* anticorruption rationale."

In summary, any federal officeholder or candidate who solicits unlimited contributions for the Republican Super PAC, Majority PAC, House Majority PAC or any other Super PAC would be violating the law.

We expect that our organizations, and others, will take all steps available to ensure the law is enforced.

Trevor Potter

Fred Wertheimer

/s/ Trevor Potter

/s/ Fred Wertheimer

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