October 24, 2008

TO: Chris Lu, Katy Kale
FROM: Blake Roberts
RE: In-kind donations to Transition

I. Question Presented

Do in-kind contributions of goods and services from Obama for America count against the $5,000 per entity cap on donations to Transition?

II. Short Answer

The best reading of the Presidential Transition Act of 1963, as amended, is that the $5,000 cap does not apply to in-kind contributions. Consequently, Obama for America (and any other entity) may donate goods or services without limit to the Obama Transition Project.

III. Discussion

A. Background

Federal campaign finance law permits Obama for America (OFA) funds to be spent on most transition-related activities. Federal law permits campaigns to use contributions for any activity that is both (a) lawful and (b) not "personal use." See 2 U.S.C.A. § 439a (West 2008); 11 C.F.R. § 113.2 (2008); FEC Advisory Opinion 1993-6, 1993 WL 243149 (1993). An expenditure is for personal use when it "fulfill[s] any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office." 2 U.S.C.A. at § 439a(b)(2); 11 C.F.R. at § 113.1(c). Most transition activities would not qualify as personal use because the expense would not exist if Senator Obama was not a federal officeholder. Consequently, federal campaign finance law permits the expenditure of campaign funds on most lawful transition activities.

However, the Presidential Transition Act of 1963, as amended, effectively prohibits the Obama Transition Project from receiving more than $5,000 from OFA. Subsection 5(c) of the Act requires, as a condition of receiving federal funds and services for transition activities, that the "President-elect and Vice-President-elect . . . not accept more than $5,000 from any person, organization, or any other entity for purposes of carrying out activities authorized by this Act." 3 U.S.C.A. § 102 note (West 2008). OFA, a campaign committee, most likely qualifies as an "organization[] or any other entity" under the Act. And the President-elect, through the OTP, would most likely[1] be considered to have "accept[ed] more than $5,000" if the OTP received a transfer of more than $5,000 from OFA.

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[1] One could argue that OFA funds are already under Senator Obama's control and that he does not "accept" the funds from another entity by transferring them from the OFA account to the OTP account. This argument would likely fail because federal law treats OFA as a distinct entity, see 2 U.S.C.A. at § 432(b)(3) (requiring segregation of "funds of a political committee" from "the personal funds of any individual"); § 432(e)(2) ("Any candidate . . . who

B. In-Kind Contributions of Goods and Services

This memo addresses the question of whether in-kind contributions of goods and services from OFA to the OTP would count toward Subsection 5(c)'s $5,000 limit.

The text of the statute suggests that the cap does not apply to the value of goods and services. The statute prohibits only the acceptance of more than "$5,000" (5,000 dollars) and makes no reference to goods, services, or their value. The ordinary meaning of this language would limit the prohibition to the receipt of $5,000 of currency or other negotiable instruments. For example, a creditor owed "$5,000" would have the right to refuse $5,000 worth goods or services offered in payment. Thus, the plain language of the provision suggests that the value of donated goods and services does not count toward the cap.

Another provision in Section 5 of the Act reinforces this ordinary meaning. Subsection 5(a) requires the disclosure of "all money . . . including currency of the United States and of any foreign nation, checks, money orders, or any other negotiable instruments payable on demand." In this provision, Congress comprehensively describes the various forms of contributions it requires to be disclosed — but all of the terms refer to monetary contributions rather than the provision of goods and services. It seems unlikely that Congress would (impliedly) restrict in-kind donations and at the same time omit them from a comprehensive list of contributions it required to be disclosed.

Further, the same legislation that amended the Presidential Transition Act of 1963 to add the Subsection 5(a) disclosure requirement and the Subsection 5(c) $5,000 cap, in another section, expressly required the disclosure of the estimated value of certain types of in-kind contributions to the 1988-1989 Transition. See Presidential Transitions Effectiveness Act, § 5, Pub. L. 100-398, codified at 3 U.S.C.A. § 102 note (West 2008) ("The President-elect . . . shall provide an estimate . . . of the aggregate value of in-kind contributions . . . received for transition activities for – (1) transportation; (2) hotel and other accommodations; (3) suitable office space; and (4) furniture, furnishings, office machines and equipment, and office supplies."). The fact that Congress expressly required the disclosure of in-kind donations in a separate section of the Presidential Transitions Effectiveness Act makes it highly unlikely that they impliedly capped them in a separate section requiring (stricter) disclosure of monetary contributions. And, from a practical perspective, it seems unlikely that the Act would permit the 1988-89 Transition to receive in-kind donations for some large expenses (transportation, office space, furniture, office equipment) but simultaneously prohibit it from receiving more than $5,000 in in-kind donations from any individual, organization, or entity.

The legislative history further supports the interpretation that Subsection 5(c) does not cap in-kind contributions. Senator Glenn, the floor manager in the Senate, described the relevant passages as follows:

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receives a contribution . . . shall be considered . . . as having received the contribution . . . as an agent of the authorized committee or committees of such candidate."), and because OFA's treasurer, not Senator Obama, controls OFA's expenditures and legal compliance, see 11 C.F.R. at §§ 102.7(c); 103.3(b); 110.1(k)(3).

> Fourth, in return for public transition funding, the President-elect must disclose all private cash raised for pre- or post-election transition activities, including the source, amount, and associated expenditures. As a result, we will know both where the private cash is coming from and what the money is buying.
> Fifth, the President-elect may not accept private cash contributions from any source which exceed $5,000 total pre- and/or post-election.
> . . .
> Seventh, for 1988 only, the President-elect must make an estimate of the aggregate value of all in-kind contributions in four categories: (1) transportation, (2) hotel and other accommodations, (3) office space, and (4) office equipment and supplies.

134 Cong. Rec. S10648 (Aug. 2, 1988) (Statement of Sen. Glenn) (emphasis added).

Similarly, the House floor manager stated: "The compromise [bill] allows private funding of transition activities, but limits contributions to $5,000 from any person, organization, or other entity. It also requires a report . . . on the in-kind contributions received by the transition." 134 Cong. Rec. H5844 (July 26, 1988) (floor statement of Rep. Brooks). Again, this statement distinguishes between "private funding," which is limited by the $5,000 cap, and "in-kind contributions," which only requires a report.

These passages demonstrate that Congress saw "private cash contributions" / "private funding" as a distinct category from "in-kind contributions" and intended the $5,000 cap to apply only to private cash contributions.

To be sure, there is some evidence that could support reading the $5,000 cap in Subsection 5(c) to apply to in-kind donations. It is a plausible reading of the text that "$5,000" refers to $5,000 of value rather than $5,000 of currency and other negotiable instruments. And Rep. Brooks's floor statement references limiting "contributions to $5,000" before discussing the required report on 1988-89 "in-kind contributions." It is also easy to imagine the policy rationale for setting limits on in-kind contributions.[2] But the textual and historical evidence discussed above outweighs these points.

IV. Conclusion

The best reading of the Presidential Transition Act of 1963, as amended, is that the $5,000 cap does not apply to in-kind contributions. Consequently, OFA (and any other entity) may donate goods or services without limit (and without a reporting requirement) to the OTP.

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[2] But see Senate Committee on Governmental Affairs, Report on S. 2037 (Presidential Transitions Effectiveness Act) (Apr. 20, 1988) 16-17 ("Several witnesses raised the issue of the need for disclosure of in-kind contributions . . . to the presidential transition. Though the Committee noted the extensive election regulations which currently govern in-kind contributions to a presidential campaign, it had no evidence that in-kind contributions have or will become a problem in presidential transitions. Further, the Committee again took note of Senator Stevens' concern that the transition not be unduly burdened with regulation. Nevertheless, the Committee is concerned lest in-kind contributions of transportation, hotel, office space, and other administrative services become the preferred channel for making undisclosed contributions. Therefore . . . the Committee adopted a provision requiring . . . in return for funding provided under the Act, and for the 1988-89 transition only . . . an estimate . . . of the aggregate value of in-kind contributions in four areas . . . These estimates will allow the Committee to evaluate the possible need for future revisions of the Act.).