UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRISTOPHER SHAYS and MARTIN MEEHAN Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 06–CV–1247 (CKK)

MEMORANDUM OF POINTS AND AUTHORITIES OF U.S. SENATORS JOHN McCAIN AND RUSSELL D. FEINGOLD AS *AMICI CURIAE* OPPOSING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, Legislation and Legislative History:

Regulations and Agency Materials:

Miscellaneous Sources:

INTRODUCTION AND SUMMARY OF ARGUMENT

Nearly three years ago, *amici* Senators McCain and Feingold filed a brief *amici curiae* with this Court in the "related case" *Shays v. FEC* ("*Shays I*"), 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005), urging the Court to invalidate numerous regulations promulgated by Defendant Federal Election Commission (FEC) to implement the Bipartisan Campaign Reform Act of 2002 (BCRA).[1] *Amici* once again ask this Court to recognize, for reasons detailed herein, that the FEC's re-promulgated rules regarding "coordinated communication," federal candidate and officeholder solicitation at state party fundraising events, and "federal election activity" undermine and unduly compromise the purposes and intent of BCRA and the Federal Election Campaign Act[2] (FECA). On this basis, *amici* respectfully urge this Court to deny Defendant FEC's motion for summary judgment.

ARGUMENT

I. FEC "Coordination" Regulation Violates FECA, BCRA, and the APA.

A. FEC "Coordination" Analysis in the Pre-BCRA Era Did Not Rely on an "Express Advocacy" Content Standard.

In 1976, the Supreme Court recognized that, to be effective, any limitations on campaign contributions must apply to expenditures made in coordination with a candidate and construed the FECA contribution limits to include "all expenditures placed in cooperation with or with the consent of a candidate, his agents or an authorized committee of the candidate …." *Buckley v. Valeo*, 424 U.S. 1, 46–47 n.53 (1976) (emphasis added); *see also id.* at 78.[3] Congress codified the *Buckley* Court's treatment of coordinated expenditures when it amended FECA in 1976 to

[1] Pub. L. No. 107–155, 116 Stat. 81.
[2] Codified at 2 U.S.C. §§ 431 *et seq*.
[3] The broad language of *Buckley* regarding coordination was echoed in subsequent Supreme Court decisions on the same topic. *See, e.g., Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 614–17 (1996); *see also FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 443–47 (2001).

provide that an expenditure made "in cooperation, consultation, or in concert with or at the request or suggestion of a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." Pub. L. No. 94–283, § 112, 90 Stat. 475 (codified at 2 U.S.C. § 441a(a)(7)(B)(i)).

For more than 25 years, regulation of coordinated spending under federal law focused principally on the conduct of the spenders and candidates involved; the only relevant content standard was that which is inherent in the statutory definition of "expenditure"—"any purchase, [or] payment … made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i) (emphasis added). The FEC's promulgation in 2002 of a separate content test for "coordinated communications"—largely resting on an "express advocacy" standard for communications disseminated outside of specified pre-election time periods—marked a substantial departure from and narrowing of the agency's historic analysis of coordinated spending. *Amicus* Center for Competitive Politics (CCP) misrepresents the history of the FEC's regulation of coordinated spending, arguing that "[p]re-BCRA, the Commission consistently, if not formally, applied the express advocacy content standard when determining whether allegedly coordinated expenditures qualified as 'contributions[.]'" CCP *Amicus* Brief at 1–2. The FEC's pre-BCRA regulations, litigation briefs, Advisory Opinions (AOs) and public documents pertaining to enforcement actions all belie CCP's claim.

In 1980, the FEC promulgated a regulation interpreting the 1976 FECA coordination amendments noted above. Under the 1980 conduct-based regulation, an expenditure was not considered "independent" if made pursuant to "any arrangement, coordination or direction by the candidate or his or her agent prior to the publication, distribution, display or broadcast of the communication." 11 C.F.R. § 109.1(b) (1980).

The FEC's interpretation of this regulation for nearly 20 years—as not requiring "express advocacy"—is aptly reflected by FEC AOs in the 1980s and 1990s employing the statutory "for the purpose of influencing" content test in the context of coordinated spending.[4] The district court decision in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), acknowledged the FEC's longstanding position that "any consultation between a potential spender and a federal candidate's campaign organization about the candidate's plans, projects, or needs renders any subsequent expenditures made for the purpose of influencing the election 'coordinated,' i.e., contributions." *Id.* at 89 (emphasis added). Indeed, the FEC explicitly rejected the "express advocacy" position that CCP attributes to it, arguing in *Christian Coalition* that the limitation of its "coordination" regulation to "express advocacy" would defeat the purposes of FECA. *See FEC v. Christian Coalition*, No. 96–1781, PLAINTIFF FEC'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT 8–9 (Oct. 8, 1998).

Although the district court in *Christian Coalition* found the FEC's conduct-based regulation of coordinated expenditures to be unconstitutionally overbroad, because a spender could trigger it "merely by having engaged in some consultations or coordination with a federal candidate," which prompted the court to formulate its own "narrowly tailored" conduct-based definition of coordination, *see* 52 F. Supp. 2d at 91–92,[5] the court definitively and correctly rejected the Christian Coalition's argument that the "express advocacy" standard was applicable as a content test in the coordinated expenditure context. *See Christian Coalition*, 52 F. Supp. 2d

[4] *See, e.g.*, AO 1982–56 (EX 1), AO 1983–12 (EX 2), AO 1988–22 (EX 3), and AO 1990–5 (EX 4).

[5] The district court's "narrowly tailored" conduct-based definition of coordination provided that coordination could be found only where an expenditure was "requested or suggested" by a candidate, or where there had been "substantial discussion or negotiation between the campaign and the spender over" a communication's contents, timing, audience or the like, "such that the candidate and the spender emerge as partners or joint venturers in the expressive expenditure …." *Christian Coalition*, 52 F. Supp. 2d at 92. The *Christian Coalition* court's coordinated conduct analysis was seriously flawed; but is not at issue in this case.

at 88. Further, the FEC's papers in *Christian Coalition* make clear that the FEC was not employing an "express advocacy" standard in the pre-BCRA era; on the contrary, the FEC argued strenuously against an "express advocacy" standard in that case.

Following the *Christian Coalition* decision, the FEC repealed its longstanding coordination regulation and codified a version of the court's conduct standard into a new rule. *See* 65 Fed. Reg. 76138 (Dec. 6, 2000); *see also* 66 Fed. Reg. 23537 (May 9, 2001); 11 C.F.R. § 100.23. Although the conduct standard of the new rule was even narrower than that employed by the district court (*i.e.*, under the 2000 rule, coordination could only be found as a result of an actual "agreement or collaboration"),[6] the FEC's coordination regulation still contained no separate content standard. As had been the case since the 1970s, when the "coordination" doctrine came into existence, the only content restriction employed by the FEC was its broad definitional language of the term "expenditure"—*i.e.*, "for the purpose of influencing."

Although CCP's *amicus* brief contends that an "express advocacy" standard had been employed by the FEC in the pre-BCRA era, it fails to acknowledge that CCP's co-founder Bradley A. Smith, who was an FEC Commissioner from 2000 until 2005, observed in a 2001 document that the FEC had "so far not adopted" the express advocacy content test for the regulation of coordinated spending.[7]

CCP's erroneous assertion that the FEC employed an "express advocacy" content standard in the pre-BCRA era relies heavily on its characterization of a Statement of Reasons signed by two Commissioners as the formal adoption by "the Commission" of an "express advocacy" content standard. CCP *Amicus* Brief at 4–5. To be certain, Commissioners Mason and Smith indicated in their joint MUR 4538 Statement of Reasons their unwillingness to take

[6] This regulation was subsequently repealed by section 214 of BCRA.
[7] *See* Commissioner Bradley A. Smith, "Statement For The Record for MUR 4624" in *In re The Coalition, et al.*, MUR 4624 (Nov. 7, 2001) (EX 5).

enforcement action against the Alabama Republican Party, because the Party's ads did not contain express advocacy.[8] But a third Commissioner who voted against further enforcement action, Commissioner Sandstrom, did not join the Mason-Smith Statement and instead wrote a separate Statement explaining that he voted not to proceed against the Party because of "concerns about due process" (*i.e.*, concerns that the FEC had not made clear what standards govern in the regulation of coordinated spending);[9] and the fourth Commissioner who voted to take no further action, Commissioner Wold, left the FEC without authoring or signing a Statement of Reasons as to why he voted to take no further action against the party. The Mason-Smith Statement indicated that Commissioner Wold had historically focused his coordination analysis on conduct—not on an express advocacy content test[10]—and that Commissioner Wold had initially voted in the Alabama Republican Party action to find "probable cause" that a violation had occurred even though the ads at issue contained no express advocacy.[11] Thus, Commissioners Mason and Smith were alone in their employment of an "express advocacy" standard—and the opinion of two Commissioners falls far short of constituting the position of "the Commission." Remarkably, CCP argues, "there can be little doubt that the Commission understood for years before BCRA was implemented that coordinated expenditures only violated FECA if they expressly advocated the election or defeat of a candidate." CCP *Amicus* Brief at 2 (emphasis added). Yet CCP fails to identify a single instance in which a majority of the

[8] *See* Statement of Reasons of Commissioners Mason and Smith in *In re Alabama Republican Party et al.*, MUR 4538 (FEC May 23, 2002) (EX 6).
[9] *See* Statement of Reasons of Commissioner Sandstrom in *In re Alabama Republican Party et al.*, MUR 4538 (FEC August 13, 2002) (EX 7).
[10] "Throughout the recent history of party coordinated matters, Commissioners maintained differing but largely individually consistent positions with respect to the threshold for finding a communication to be a coordinated contribution. … Commissioners Mason and Wold focused on the degree or amount of coordination." Statement of Reasons of Commissioners Mason and Smith in *In re Alabama Republican Party et al.* 1–2, MUR 4538 (FEC May 23, 2002) (EX 6).
[11] *Id.* at 6 n.11.

Commission actually employed an express advocacy standard in the context of regulating coordinated spending.[12]

This pre-BCRA history of federal statutes, court decisions, FEC regulations and FEC enforcement actions makes clear that from the *Buckley* Court's 1976 acknowledgment of the need to regulate coordinated spending until 2002, the regulation of coordination was not limited by the express advocacy test. The incorporation of an express advocacy content standard into the post-BCRA "coordination" rule, and retention of that standard in the revised rule at issue in this case, constitutes a significant departure from, and a narrowing of, the Commission's historic regulation of "coordination"—which undermines and violates FECA, BCRA and the Administrative Procedures Act (APA), 5 U.S.C. §§ 551 *et seq*.

B. BCRA's Legislative History and the Supreme Court's *McConnell* Decision Make Clear That Effective Regulation of Coordinated Spending Is Vital to the Integrity of Federal Campaign Finance Law—and that the "Express Advocacy" Test Is Functionally Meaningless and Ineffective.

Through enactment of BCRA in 2002, Congress extended FECA's coordination provisions beyond candidates to include expenditures coordinated with party committees. *See* 2 U.S.C. § 441a(a)(7)(B)(ii). More importantly, section 214 of BCRA repealed the FEC's narrow 2000 coordination rule and directed the FEC to promulgate broader coordination rules. *Amicus* Sen. Feingold gave a lengthy, detailed explanation of the intent behind this provision on the floor of the Senate. *See* 148 Cong. Rec. S2144–45 (daily ed. Mar. 20, 2002) (EX 9). Sen. Feingold made clear that effective restrictions on coordination are needed "to prevent circumvention of the

[12] CCP first cites the Statement of Reasons signed by four Commissioners in *On the Audits of "Dole For President Committee, Inc." et al.* (FEC June 24, 1999) (EX 8), which never even hints that the Commission employed the express advocacy test. CCP then cites the *Christian Coalition* litigation, conveniently failing to mention that the FEC argued strenuously and successfully against the express advocacy test in that case. Finally, CCP cites two separate Statements of Reasons (EX 6 and EX 7)in the Alabama Republican Party enforcement action, signed by a total of three—not a majority of four—Commissioners, and one of which is based on "concerns about due process," not express advocacy.

campaign finance laws[,]" and that "[a]bsent a meaningful standard for what constitutes coordination, the soft money ban in the bill would be seriously undermined." *Id*. at S2144. Sen. Feingold further made clear that the FEC's pre-BCRA coordination regulations failed to cover coordinated activities "that, if permitted, could frustrate the purposes of the bill[,]" *id.*, and that, "[t]o remedy this problem," the FEC's new coordination rules "need to make more sense in the light of real life campaign practices than do the current regulations." *Id.* at S2145.

Amicus Sen. McCain shared Sen. Feingold's sentiments, adding: "we expect the FEC to cover 'coordination' whenever it occurs, not simply when there has been an agreement or formal collaboration[,]" and that "the current FEC regulation is far too narrow to be effective in defining coordination in the real world of campaigns and elections and threatens to seriously undermine the soft money restrictions contained in the bill." *Id.*

BCRA section 214 was challenged on First Amendment grounds in *McConnell v. FEC*, 540 U.S. 93 (2003), where plaintiffs/appellants argued that BCRA section 214 and the mandated new implementing regulations were "overbroad and unconstitutionally vague because they permit a finding of coordination even in the absence of an agreement." *Id*. at 220. The Court rejected this conduct-based argument, explaining that "expenditures made after a 'wink or nod' often will be as useful to the candidate as cash[,]" and "[f]or that reason, Congress has always treated expenditures made 'at the request or suggestion of' a candidate as coordinated." *Id*. at 221–22 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 446 (2001)).

Elsewhere in the *McConnell* decision, the Court revisited the express advocacy test, in the context of rejecting the plaintiffs'/appellants' claim that BCRA's "electioneering communication" provisions are unconstitutional because they regulate independent non-express advocacy. *McConnell*, 540 U.S. at 190. After explaining that the *Buckley* Court had employed

the express advocacy test in narrow circumstances (not in the context of coordinated expenditures[13]), the *McConnell* Court further explained that the "express advocacy limitation" was "the product of statutory interpretation rather than a constitutional command." *McConnell*, 540 U.S. at 191–92. The Court continued:

> Nor are we persuaded, independent of our precedents, that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad. Indeed, the unmistakable lesson from the record in this litigation, as all three judges on the District Court agreed, is that *Buckley*'s magic words requirement is functionally meaningless. Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. … *Buckley*'s express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system.

Id. at 193–94 (internal citations and footnotes omitted) (emphasis added).

The *McConnell* Court's observations regarding both the ineffectiveness of the express advocacy standard and Congress's intent to address this ineffectiveness through enactment of BCRA make clear that the current coordination rule's dependence on the express advocacy test is ineffective and undermines the purposes and intent of BCRA and FECA.

C. FEC Has Failed to Explain and Justify Numerous Deficiencies of the "Coordination" Regulation Including, But Not Limited To, Its Dependence on the Express Advocacy Test.

The D.C. Circuit Court in *Shays I* took issue with two aspects of the content prong of the FEC's coordination regulation—"the 120-day time frame" and "the weak restraints outside of it." 414 F.3d at 100. Plaintiffs in the present case have addressed "the 120-day time frame" issue, aptly demonstrating that many candidates, political parties and outside spenders have paid

[13] The *Buckley* Court narrowly construed the definition of "expenditure" to include only express advocacy as applied to expenditures made independently of candidates by individuals and groups without a "major purpose" of influencing elections. *See Buckley*, 424 U.S. at 78–80. As explained above, *see infra* section I(A), the *Buckley* Court treated coordinated expenditures as in-kind contributions and found no need to narrowly construe FECA's regulation of such in-kind contributions. *See id.* at 78.

for campaign ads that ran outside the FEC's pre-election windows in prior elections. *Amici* principally target our comments in this brief, as we did in comments submitted to the FEC during the 2006 coordination rulemaking, to the "weak restraints" outside of the pre-election window. *See* Sens. McCain and Feingold and Reps. Shays and Meehan, Comments on Notice 2005–28 (Jan. 13, 2006) (EX 10). In repealing an ineffective coordination standard and directing the FEC to issue a new one through enactment of BCRA section 214, *amici* did not expect that the FEC would issue a rule that was, in important ways, even weaker than the one Congress repealed when it enacted BCRA. Yet that is precisely what the Commission did.

The FEC's 2002 and 2006 coordination rules are deeply flawed—allowing much coordinated activity clearly meant to influence an election to escape any regulation at all. One problem with the 2002–03 rule was that, as a matter of law, no ad running more than 120 days before an election or convention would be considered to be coordinated, no matter how coordinated in fact the ad really was, unless the ad met the "functionally meaningless" express advocacy test or constituted republication of campaign materials. The Commission exacerbated this problem in 2006 by reducing the pre-congressional election timeframe to 90 days (and maintaining the 120 day pre-primary period for the presidential election).

It is *amici*'s experience as candidates that campaign ads are in fact run earlier than 90 days before congressional elections, and more than 120 days before presidential primary elections—by parties, by outside groups, and by candidates themselves.[14] Plaintiffs have offered an abundance of evidence confirming *amici*'s experience. *See* MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT at 12–26. The FEC's rule, which

[14] Indeed, the "John Edwards for President" committee ran a full-page ad in *Roll Call* on Jan. 24, 2007—approximately one year prior to the first primary election. (EX 11) The Edwards ad did not contain express advocacy and, under the FEC's existing "coordinated communication" regulations, could have been fully and overtly coordinated with and paid for by a corporation, labor union, or any other group or individual without being considered a contribution to the Edwards campaign.

applies only a "functionally meaningless" express advocacy test outside the pre-election time frames, allows "a coordinated communication free-for-all for much of the election cycle." *Shays*, 414 F.3d at 99.

In an effort to eliminate this "coordinated communication free-for-all," *amici* urged the FEC in its 2006 rulemaking to adopt a non-express-advocacy-dependent rule that would provide appropriate and realistic coverage of election-related advertising, without infringing on other activities, such as lobbying. Specifically, *amici* proposed that an ad meeting the coordination "conduct" standard be regulated as a "coordinated communication" if the ad is:

- sponsored by a federal political committee and is an "expenditure" (*i.e.*, for the purpose of influencing the election of the candidate with whom it is coordinated), regardless of when it is distributed;
- sponsored by any person other than a federal political committee (*e.g.*, a 527 group not registered as a political committee, an individual, corporation, labor union or other non-profit group), is distributed within 30 days of a primary election or 60 days of a general election and is targeted to the electorate of the candidate or the candidate of the party with whom it is coordinated, regardless of whether the ad refers to a candidate or party;[15]
- sponsored by any person other than a federal political committee and is distributed during the period beginning 120 days prior to the primary election and ending on the day of the general election, the ad refers to a clearly identified candidate or political party, and is targeted to the electorate of the identified candidate or the identified party's candidate(s) (this is similar to current rule for presidential candidates);
- sponsored by a 527 group not registered as a political committee, distributed prior to the 120-day time period, the ad promotes, attacks, supports or opposes a clearly identified candidate or party and is targeted to the electorate of the identified candidate or the identified party's candidate(s); or
- sponsored by any person other than a federal political committee or 527 group, distributed prior to the 120-day time period, the ad comments on the character or the qualifications or fitness for office of a clearly identified federal candidate or party, and is targeted to the electorate of the identified candidate or the identified party's candidate(s).

[15] This point is to address a flaw in the 2002 rule that the plaintiffs in the *Shays I* litigation brought to the court's attention. Plaintiffs argued that the 2002 rule permitted coordination right up to the day of the election on "thematic" ads—ads that echo a candidate's positions on key issues but do not mention the name of the candidate (or party). Such ads, the plaintiffs argued, could be of significant benefit to the candidate, particularly if coordinated. The D.C. Circuit acknowledged this problem as well. *Shays*, 414 F.3d at 98.

See Sens. McCain and Feingold and Reps. Shays and Meehan, Comments on Notice 2005–28 at 3–4 (EX 10). The FEC ignored *amici*'s recommended alternative to the express advocacy test and arbitrarily re-promulgated a rule that not only continues to allow the "coordinated communication free-for-all for much of the election cycle," but expands the free-for-all by shrinking the congressional pre-election timeframe from 120 to 90 days.

It is no answer for the FEC to argue that its new-found use for 11 C.F.R. § 100.22(b), which defines "expressly advocating" somewhat more broadly than the so-called "magic words" test, remedies the problem of the coordination regulation's dependence on the express advocacy test. *See* DEFENDANT FEC'S MOTION FOR SUMMARY JUDGMENT at 48; *see also* 11 C.F.R. § 100.22(b) (EX 12). Even this slightly broader definition of "expressly advocating" will not capture some of the most obvious types of political advertising that candidates would find most helpful.[16] It is a simple matter to write an ad script containing enough ambiguity that three or more FEC commissioners would deem it to fall short of "expressly advocating" a candidate's election, but that undoubtedly would influence a candidate's election.[17] For this reason, it is critical that the FEC's coordination regulations steer clear of the "express advocacy" standard.

II. BCRA's Language, Structure and Legislative History, Together with the Supreme Court's *McConnell* Decision, Make Clear That Federal Candidates Are Prohibited From Soliciting "Soft Money" at State Party Fundraising Events.

This Court held in *Shays I* that the FEC's regulation allowing federal candidates to speak at state party fundraisers "without restriction or regulation" (*i.e.*, overtly solicit soft money) was arbitrary and capricious because the Commission had failed to explain why distinguishing

[16] *E.g.*, the Jan. 24, 2007 *Roll Call* ad, *supra* note 14 (EX 11).

[17] *See, e.g.*, "First General Counsel's Report" and "Certification," *In re Bush for President, Inc., et al.*, MUR 4982 (FEC 2001–02) (applying 11 C.F.R. § 100.22(b) but finding no "reason to believe" federal law had been violated); *see also* "First General Counsel's Report" and "Certification," *In re Suburban O'Hare Commission*, MUR 4922 (FEC 1999–2000) (applying 11 C.F.R. § 100.22(b) but finding no "reason to believe" federal law had been violated).

between solicitation and other speech would "in any way [be] more vexing in the context of state political party fundraisers than … outside of such venues where nonfederal money solicitation is almost completely barred." 337 F. Supp. 2d at 92; *see also* 11 C.F.R. § 300.64(b). The FEC responded to the *Shays I* decision by retaining the 2002 rule and issuing a new Explanation and Justification (E&J) for the rule. *See* 70 Fed. Reg. 37649. Like the 2002 E&J, the 2005 E&J fails to adequately explain why distinguishing between solicitations and other speech at a state party fundraising event is more difficult than in other contexts, and why it would be especially intrusive for the Commission to enforce BCRA's soft money ban in the context of state party fundraisers. Consequently, the rule remains arbitrary and capricious in violation of the APA.

BCRA's language, structure and legislative history make clear that federal candidates are prohibited from soliciting "soft money" at state party fundraising events. Despite a statute that contains an explicit prohibition on soft money solicitations by federal candidates and officeholders, the FEC issued a rule permitting federal candidates and officeholders to engage in overt and blatant solicitation of soft money, so long as they do so in the context of a state party fundraising event. As this Court found in *Shays I*, this is contrary to the "natural reading" of the statute. 337 F. Supp. 2d at 91.

In generally prohibiting a candidate from "solicit[ing]," but in allowing a candidate to "attend" or "speak" at a state party fundraiser, Congress provided a clearly delimited safe harbor for federal candidates to be present and to speak at a state party fundraiser; but plainly stopped short of authorizing such candidates to solicit non-federal funds at the fundraiser. To "speak" and to "solicit" are very different terms; the statutory language authorizes the former, but prohibits the latter. The FEC's current regulation conflates the two, based on the erroneous assumption that in authorizing a candidate to speak at a fundraiser, the statute necessarily

authorizes the candidate to solicit as well. There is no basis in the statute or its legislative history to support this reading. Congress is familiar with the term "solicit" and knows how to use it, as is evident elsewhere in BCRA, but chose not to use it in the state party fundraiser provision.

BCRA states that a federal candidate or officeholder may "speak" at a state party fundraiser, not that such a person may "speak without restriction or regulation." Accordingly, the "natural reading" of section 441i(e)(3) is that, while federal candidates can attend, speak or be a featured guest at a state party event, they may not solicit, receive, direct, transfer or spend non-federal funds in connection with that event. BCRA's structure reinforces this conclusion. The section immediately following the state party fundraiser provision explicitly sets forth circumstances in which federal candidates and officeholders are permitted to make solicitations for soft money. *Compare* 2 U.S.C. § 441i(e)(3) (entitled "Fundraising Events") *with* 2 U.S.C. § 441i(e)(4) (entitled "Permitting Certain Solicitations"). The latter section expressly allows solicitations by federal candidates and officeholders on behalf of nonprofit organizations, pursuant to specified conditions and restrictions. The juxtaposition of these two provisions, and the different ways in which they are drafted, indicates that while section 441i(e)(4) is a limited exception to the general ban on soft money solicitation, section 441i(e)(3)—the state party fundraiser provision—is not such an exception, and accordingly, does not permit solicitations under such circumstances.[18]

BCRA's legislative history and Congress' evident purpose in section 441i(e) similarly confirm that Congress neither intended nor authorized the Commission-created exemption from BCRA's prohibition of soft money solicitation. BCRA was intended to eliminate corruption and

[18] To the same effect is the provision immediately preceding the state party fundraising provision, section 441i(e)(2), which allows "solicitation" by a federal officeholder or candidate who is also a candidate for state office, subject to various restrictions. Again, this illustrates that when Congress intended to allow federal candidates or officeholders to solicit non-federal funds, it said so directly and explicitly.

appearance of corruption resulting from federal officeholders and candidates raising soft money for themselves or for party organizations. To this end, BCRA established a rule that is both clear and "simple: Federal candidates and officeholders cannot solicit soft money funds, funds that do not comply with Federal contribution limits and source prohibitions, for any party committee—national, State, or local." 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). The Commission's initial 2002 proposed rule correctly relied on this legislative history, and cautioned that, "while [federal candidates or officeholders] may attend, speak, or be a featured guest at a State or local party fundraising event, they cannot solicit funds at any such event." Notice of Proposed Rulemaking (NPRM) 2002-7, Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 35654, 35672 (May 20, 2002).

More generally, as the Supreme Court recognized in *McConnell*, BCRA was designed to "plug the soft-money loophole," through which "parties have *sold* access to federal candidates and officeholders … giv[ing] rise to the appearance of undue influence." *McConnell*, 540 U.S. at 133, 153-54 (emphasis in original). The Court explained further that without "restriction on solicitations, federal candidates and officeholders could easily avoid FECA's contribution limits by soliciting funds from large donors and restricted sources to like-minded organizations engaging in federal election activities." *Id.* at 182-83. The Court in *McConnell* recognized that Congress had carved out a single exception to the general ban on soft money solicitation, permitting certain "limited solicitations of soft money" for 501(c) nonprofit organizations. *Id.* at 183. *See also* 2 U.S.C. § 441i(e)(4). After recognizing this exception to the solicitation ban, the Court noted that the provision which allows federal candidates and officeholders to attend and speak at state party fundraisers, along with the provision that allows them to solicit hard money contributions in connection with nonfederal elections, together "preserve the traditional

fundraising role of federal officeholders by providing limited opportunities for federal candidates and officeholders to associate with their state and local colleagues through joint fundraising activities." *McConnell*, 540 U.S. at 183 (emphasis added). *See also* 2 U.S.C. §§ 441i(e)(1)(B) and 441i(e)(3). This discussion, and the Court's juxtaposition of section 441i(e)(3) with section 441i(e)(1)(B), makes clear that the Court did not interpret section 441i(e)(3) to permit federal candidates to solicit soft money at state party events, but rather to attend and speak at party fundraisers, but to solicit only federal funds permitted by section 441i(e)(1)(B).

It is untenable to conclude, as the FEC has done, that in a law designed to close loopholes, Congress *sub silentio* authorized a loophole allowing federal candidates and officeholders to solicit unlimited amounts of soft money at any state party fundraising event.[19] Had Congress intended that result, it surely would have said so expressly—as it very easily could have done by adding "solicit" to the activities listed in the state party fundraiser provision.

Finally, the Commission's justification for this soft money loophole—that distinguishing between solicitations and other speech at a state party fundraising event is more difficult than in other contexts—is belied by the Commission's approach to regulating federal candidate and officeholder solicitations at other types of non-federal soft money fundraising events. During the Commission's 2005–06 rulemaking on the definitions of "solicit" and "direct," mandated by this Court's decision in *Shays I*, the Commission noted:

> In certain advisory opinions, the Commission has permitted attendance and participation by Federal candidates and officeholders at fundraising events for non-Federal funds held by State and local candidates, or by non-Federal political

[19] The opportunity for abuse of this loophole is exacerbated by the lack of any definition of what constitutes a "fundraising event for a State, district, or local committee of a political party." 2 U.S.C. § 441i(e)(3). Thus, nothing prevents a federal candidate or officeholder from calling together a group of wealthy donors, labeling the gathering a "fundraising event for a State, district, or local committee of a political party," and conducting unrestricted solicitation of soft money at such an event. This Court in *Shays I* noted that it "shares Plaintiffs' concern" that this scenario "could lead to widespread abuse …." 337 F. Supp. 2d at 91 n.60.

> organizations, so long as the solicitations included, or were accompanied by, a disclaimer adequately indicating that the Federal candidate or officeholder was only asking for Federally permissible funds. *See* Advisory Opinions 2003–03, 2003–05, and 2003–36. The Commission requests comment on whether these advisory opinions, allowing attendance and limited participation at such functions, subject to various restrictions and disclaimer requirements, struck the proper balance.

NPRM 2005–24, Definitions of "Solicit" and "Direct," 70 Fed. Reg. 56599, 56602 (Sept. 28, 2005) (footnote omitted). The Commission's response to comments received on the effectiveness of the "disclaimer" requirements, published several months later in the Final Rule and E&J in the "solicit" and "direct" rulemaking, is worth quoting at length.

> The Commission sought comment on whether the principles enunciated in these [disclaimer] advisory opinions should be incorporated into the Commission's regulations or should be superseded. … One commenter favorably characterized the disclaimers as a "safe harbor" enabling Federal candidates to participate and speak at such events "in a way that complies with the statute." …
>
> Some commenters urged the Commission to incorporate the disclaimers into regulations and observed that the advisory opinions provided detailed guidance "without having caused any known abuse or confusion."
>
> The incorporation of the disclaimer requirements into a rule applicable to non-party committee fundraisers was first addressed in the rulemaking on Federal candidate solicitations at party fundraising events. During the hearings on that rulemaking, a commenter observed that the disclaimer requirements are "understood" and "the community is complying with them," a view echoed in the current rulemaking. In the Explanation and Justification for the Party Committee Events Final Rules, the Commission indicated that it was not necessary "to initiate a rulemaking to address the issues in Advisory Opinions 2003–03, 2003–05, and 2003–36 at this time." The Commission continues to stand by that determination.

Definitions of "Solicit" and "Direct," Final Rules and E&J, 71 Fed. Reg. 13926, 13930–31 (Mar. 20, 2006) (internal citations omitted) (emphasis added).

The Commission's well-understood disclaimer requirements applicable to federal candidate and officeholder attendance at state candidate and non-party political organization soft money fundraisers have for years "provided detailed guidance" for the regulated community

"without having caused any known abuse or confusion"—while maintaining the integrity of the BCRA soft money ban. Thus, the Commission has at its ready disposal an effective means of facilitating federal candidate and officeholder attendance at state party fundraisers without undermining the BCRA soft money ban—these same disclaimer requirements. The Commission's unwillingness to employ these disclaimer requirements in the context of state party fundraisers is inexplicable, arbitrary, capricious and in violation of BCRA and the APA.

III. FEC "Federal Election Activity" Regulations—As Interpreted in Advisory Opinion 2006–19—Clearly and Unduly Compromise BCRA's "Soft Money" Ban and Violate the APA.

The FEC's regulatory definitions of the terms "voter registration activity" and "get-out-the-vote activity" (GOTV), two types of "federal election activity" (FEA), are critical to the effectiveness of BCRA's soft money ban. *See* 11 C.F.R. §§ 100.24(a)(2)–(3). Plaintiffs in *Shays I* challenged the FEC's 2002 rules defining these terms and this Court concluded that the challenge was not ripe for review because "the exact parameters of the Commission's regulation [we]re subject to interpretation." *Shays I*, 337 F. Supp. 2d at 100. The Commission has now confirmed—through issuance of AO 2006–19—that its regulations allow state and local parties to use soft money to fund activities that undoubtedly influence federal elections. We agree with plaintiffs Shays and Meehan that their challenge to these regulations is now ripe for review, and the Commission's regulation is inconsistent with and unduly compromises BCRA's purposes.

In AO 2006–19, the Commission made clear that the "assist" through "individualized means" requirement in its regulations defining "GOTV" and "voter registration activity" amounts to an "individualized content" standard. The Commission advised the Los Angeles County Democratic Party (LACDP) that it need not treat proposed robo-calls and direct mail as federal "GOTV" activity and, consequently, was free to pay for the activities entirely with soft money. Although the Commission claims to have relied on four separate factors to conclude that

the LACDP's proposed activities did not constitute "GOTV" activity, the "individualized" factor can only be understood as a threshold requirement that precludes consideration of any other factors if not met. The Commission concluded that "[t]he proposed direct-mail piece is a 'form letter' that will not provide any individualized information to any particular recipient (such as the location of the particular recipient's polling place)," and that the proposed robo-calls "are the functional equivalent of a 'form letter' and, similarly, do not provide any individualized information to any particular recipient." "Thus," the Commission concluded, "the planned communications are generic in nature and do not provide any individualized assistance to voters." AO 2006–19 at 4 (emphasis added) (EX 13).

The importance of this analysis can not be overstated. In one stroke of the keyboard, the Commission made clear how incredibly narrowly it views its definitions of "GOTV activity" and, by extension, "voter registration activity"; the definitions of both terms in the FEC's regulations apply only to the act of "contacting registered voters by telephone, in person, or by other individualized means." The Commission in AO 2006–19 interpreted the "individualized means" of contact requirement as an individualized content requirement, and concluded that an individual's phone number or home address is not sufficiently unique to the recipient to meet the regulation's "individualized" requirement. Therefore, the Commission will only apply BCRA's "GOTV" and "voter registration activity" provisions to communications containing content unique to the recipient—"such as the location of the particular recipient's polling place." AO 2006–19 at 4. Under AO 2006–19, a state party could use entirely soft money to pay for direct mail and robo-calls, even on election day, so long as the same piece of mail or the same robo-call is sent to all recipients and, therefore, does not constitute an "individualized means" of assistance. For example, the following robo-call, which would provide no "individualized

information to any particular recipient," would not constitute "GOTV activity": "Today is election day. Polls are open from 7 a.m. until 8 p.m. Don't forget to get-out-and-vote Democratic / Republican!" Consequently, the FEC's regulations defining "voter registration" and "GOTV" activity clearly and unduly compromise BCRA's soft money ban and are arbitrary and capricious in violation of the APA.

Finally, the FEC argues that its limitation of these FEA definitions to include only activities that "assist" through "individualized means" is necessary to "preserve the traditional role of state and local party organizations" and to "avoid unnecessarily infringing on their First Amendment interests." *See* DEFENDANT FEC'S MOTION FOR SUMMARY JUDGMENT at 16. *Amici* agree with the FEC that state party First Amendment rights should not be infringed. Congress fully recognized the important role that state and local parties play in our electoral system; but Congress also recognized that BCRA's soft money ban would be meaningless if state and local parties were permitted to spend soft money on activities influencing federal elections. To this end, Congress incorporated the Levin Amendment into BCRA precisely for the purpose of facilitating important state and local party "voter registration" and "GOTV" activities <u>without compromising BCRA's soft money ban</u>. Plaintiff Rep. Shays explained:

> [T]here is a range of activities that state parties engage in that, by their very nature, affect both federal and non-federal elections … such as get-out-the vote drives or voter registration drives. These activities—registering voters to vote in elections that have both federal and non-federal candidates, or engaging in activities designed to bring them to the polls to vote for federal and non-federal candidates—clearly have an impact on both federal and non-federal elections.

148 Cong. Rec. H409 (daily ed. Feb. 13, 2002) (EX 14). Rep. Shays further explained that, under pre-BCRA law:

> [S]tate parties [paid] for these "mixed" activities using a mixture of both hard and soft money pursuant to allocation formulae set by the Federal Election Commission. But these allocation rules [had] proven wholly inadequate to guard

> against the use of soft money to influence federal campaigns. Much state party "party building activity" [had been] directed principally to influence federal elections, and all of the party voter activity inevitably does have a substantial impact on federal campaigns.

Id. Congress closed this soft money loophole by requiring that state and local parties use federal hard dollars to pay for "a category of activities which clearly affect federal elections and which the bill defines as 'federal election activities.'" *Id.* BCRA's Levin Amendment, however, allows state and local party committees to raise funds under their respective states' campaign finance laws, up to $10,000 per donor, to pay for certain FEA. *See* 2 U.S.C. § 441i(b)(2). One of the Levin Amendment's original co-sponsors, Sen. Ben Nelson, explained:

> The ability of state parties to carry out traditional activities such as voter registration, is another issue addressed by the Levin Amendment, which I was pleased to join as an original sponsor. State and local candidates rely on get-out-the-vote efforts and voter registration activities which are usually funded by the state party. Since this campaign finance reform bill, prior to the Levin Amendment, would have severely limited state parties, it became apparent that we needed to ensure that such crucial activities are not abolished as well.

147 Cong. Rec. S3240 (daily ed. Apr. 2, 2001) (EX 15).

BCRA's legislative history is clear—Congress understood that state and local party "voter registration" and "GOTV" activity influences federal elections and could undermine BCRA's soft money ban. Accordingly, Congress purposefully brought these activities within the scope of BCRA, and incorporated the Levin Amendment specifically to facilitate the continuation of such important state and local party activities without compromising BCRA's soft money ban. For this reason, it is unnecessary for the Commission to narrow the reach of BCRA's FEA provisions in order to preserve the important role of state and local parties.

CONCLUSION

The Court should deny Defendant FEC's motion for summary judgment.

Respectfully submitted,

/s/ J. Gerald Hebert
J. GERALD HEBERT
(D.C. Bar No. 447676)
PAUL S. RYAN
(D.C. Bar No. 502514)
THE CAMPAIGN LEGAL CENTER
1640 Rhode Island Ave. NW, Suite 650
Washington, DC 20036
Tel: (202) 736-2200
Fax: (202) 736-2222

Counsel for *Amici Curiae*
Senators John McCain and Russ Feingold

Dated: Feb. 16, 2007

EXHIBIT 1

Federal Election Commission Advisory Opinion Number 1982-56

Back to Federal Election Commission Advisory Opinions Search Page

Federal Election Commission Main Page

October 29, 1982
CERTIFIED MAIL
RETURN RECEIPT REQUESTED
ADVISORY OPINION 1982-56
James P. Seidensticker, Jr.
Legal Counsel for Congressman Andrew Jacobs, Jr.
United States House of Representatives
Washington, D.C. 20515
Dear Mr. Seidensticker:
This responds to your request for an advisory opinion on behalf of Congressman Andrew Jacobs concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to the appearance of Congressman Jacobs in a series of television advertisements in which he endorses a candidate for local office. Your request sets forth the following facts: Congressman Andrew Jacobs is the incumbent Democratic Congressman from the 10th District in Indiana, which is located entirely within the boundaries of Marion County, Indiana. Congressman Jacobs is also presently a candidate for reelection to Congress from the 10th District in Indiana. He has recently appeared in a series of television advertisements in which be endorses Ann Delaney, a Democratic candidate for Prosecutor of Marion County. A transcript of the advertisement itself, together with a brief description of the visual, is attached to your request and describes the advertisement as follows:

The opening of the spot is a close-up picture of Ann Delaney with the words across the bottom "Paid for by the Ann Delaney for Prosecutor Committee."
The narrator is reciting: "Ann Delaney is the Democrat running for Marion County Prosecutor so you expect the Democrats to recognize her hardhitting courtroom qualifications." Marion County Sheriff Jim Wells, an incumbent candidate for Sheriff then comes around the corner of the County Court House and says: "Ann Delaney turns arrests into convictions. Vote for Ann Delaney." His name is printed across the picture as he makes his comments. Then Congressman Jacobs comes down the steps of the Federal Building with

"Congressman Andy Jacobs" across the picture and says: "I think Ann Delaney is one of the best courtroom prosecutors we've ever had in this country." Then the narrator continues, "but would you expect her opponent to agree which he did when he said 'she's a tiger in the courtroom.'" There is a picture of just a blank with a tiger behind it and it comes back to Ann Delaney's face in close-up. The narrator continues: "Vote for the tiger; vote for Ann Delaney."

You state that the advertisement runs approximately 30 seconds of which Congressman Jacobs occupies approximately 7 seconds. The expenditures made to date by the Ann Delaney for Prosecutor Committee to run the advertisement total $3,000.

The specific questions presented in your request are whether, under the foregoing circumstances, the Ann Delaney for Prosecutor Committee has made an in-kind contribution to Congressman Jacobs' committee for reelection to Congress, and whether Congressman Jacobs' committee has received an in-kind contribution and made an expenditure under the Act. You also inquire as to the proper reporting of this activity.

The Act defines the term "contribution" as any gift, subscription, loan, advance, or deposit of money or anything of value made by any person "for the purpose of influencing any election for Federal office." 2 U.S.C. SS 431(8)(A)(i) Commission regulations make it clear that the term "anything of value" includes all in-kind contributions. See 11 CFR 100.7(a)(1)(iii)(A). The Commission has previously recognized that although media or other public appearances by candidates may benefit their election campaigns, the person defraying the costs of such an appearance will not be deemed to have made a contribution in-kind to the candidate absent an indication that such payments are made to influence the candidate's election to Federal office. See Advisory Opinions 1982-15, 1981-37, 1980-30, 1980-28, 1978-4, 1977-42, 1977-31 (as qualified by Advisory Opinion 1981-37), copies enclosed. In a similar situation where an incumbent Member of Congress who was a candidate for reelection endorsed, via a newspaper advertisement, a candidate for delegate to a national nominating convention, the Commission held that the political committee paying for the advertisement would not be deemed to have made an in-kind contribution to the Member of Congress' campaign so long as: 1) the purpose of the advertising is to advocate the election of the candidate receiving the endorsement, rather than that of the Member of Congress; and 2) the text of the advertisement emphasizes the election of the candidate being endorsed, and not the reelection campaign of the Congressman. See Advisory Opinion 1980-28. Under the circumstances described in your request, it does not appear that payment of the expenses associated with the appearance of Congressman Jacobs in the advertisements would

constitute a contribution in-kind by the Ann Delaney for Prosecutor Committee. You state that the purpose of the advertisement, as well as of the Congressman's appearance therein, is to endorse and influence the election of Mrs. Delaney. Moreover, the content of the advertisement does not reflect an intent to influence Congressman Jacobs' reelection. The advertisement identifies the Congressman only as "Congressman Andy Jacobs". It contains no mention of his own candidacy, does not advocate his election or the defeat of his opponent, and contains no solicitation of funds to his campaign. Accordingly, payment of the costs incurred in connection with Congressman Jacobs' appearance would not constitute an in-kind contribution to his campaign and would not be reportable by his campaign committee.

The Commission expresses no opinion as to the application, if any, of the Communications Act of 1934, as amended, the regulations promulgated thereunder by the Federal Communications Commission, or of any other statutes, including State law, which are outside the Commission's jurisdiction.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. SS 437f.

EXHIBIT 2

Federal Election Commission Advisory Opinion Number 1983-12

Back to Federal Election Commission Advisory Opinions Search Page

Federal Election Commission Main Page

June 13, 1983
CERTIFIED MAIL
RETURN RECEIPT REQUESTED
ADVISORY OPINION 1983-12
J. Curtis Herge, Esq.
Sedam & Herge
8300 Greensboro Drive
McLean, Virginia 22102
Dear Mr. Herge:
This responds to your letter of March 23, 1983, supplemented by your letter of April 12, 1983, requesting an advisory opinion on behalf of your client, the National Conservative Political Action Committee ("NCPAC"), concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to a proposed Constituent Congratulations Program.
According to your request, NCPAC proposes to produce and broadcast a series of thirty second television messages about incumbent U.S. Senators. These TV spots will be shown in 1983 and 1984. You state that the scripts of the proposed messages will be substantially similar to the following:

Visual Voice
Footage of Member's In (year of election), (name
Inauguralof state) elected (name of
Member) to be its represen-
tative in Washington, D.C. as
(name of state) United States
Senator.
Footage of MemberSince (year of election), U.S.
at Desk Working Senator (name of Member) has
supported legislation to help
(name of state).
Footage of Working(Name of Member) has helped
Laborers bring defense contracts to
(name of state) ... This means
jobs for (name of state) and a
better military for America.
Footage of Member(Name of Member) has fought to
make government more efficient
and less wasteful...saving
the people of (name of state)

tax dollars.
Congratulations (name of state),
you've elected a winner.
(Name of Member) works...for
(name of state).

You further state that film footage of the Senators to be used in the proposed messages will be obtained from various sources, including archives, television stations, and the Senators themselves.1/ You indicate that when film footage is obtained from the Senator, or when the Senator cooperates in the shooting of the film, the Senator will be advised as to the intended use of the film, will be provided a copy of the script of the proposed message, and will have the right to refuse to participate in the program.
In addition, you state that the Constituent Congratulations Program will be administered without respect to the candidacy or prospective candidacy of its subjects, although you decline to state how many of the proposed messages will have as their subjects Senators whose current terms of office expire in 1985.2/ You note that the Senators will be selected on the basis of whether, in NCPAC's view, "their records in Congress have been commendable." Based on this factual situation, you state your view that the cost of producing and broadcasting the messages would not constitute a contribution or an expenditure under the Act, and that any such costs should be considered only as disbursements and reported by NCPAC as such.

1/ With respect to film footage secured from archives or television stations, it is not clear from your request whether any coordination, consultation, or contact with the Senator would be necessary in order to use such film in the NCPAC program. Nor does the request indicate whether, even if not obligatory, such coordination would nevertheless occur.
2/ In your letter of April 12, 1983, responding to questions posed by the Office of General Counsel by letter of April 4, you declined to state the number of Senators, and the expiration dates of their current terms, who will be featured in the described NCPAC program.

The Commission notes initially that all of the subjects of the proposed broadcasts are incumbent members of the U.S Senate.3/ In addition, on the basis of your request, as supplemented, the Commission further assumes that the principal if not sole focus of the program will be Senators whose terms of office expire in 1985. (See footnote two.) Of the 33 Senators whose seats are up in 1984, two have publicly announced that they will not be seeking reelection. The remaining 31 have either filed statements of their 1984 candidacy pursuant to 2 U.S.C. SS 432(e) and (g), or have raised contributions or made expenditures with respect to 1984 which, in the aggregate, exceed

$5,000, thereby triggering 1984 candidate status. Thus, for purposes of this opinion the Commission will assume that all of the subjects of the proposed broadcasts are currently candidates under the Act.4/

Under the Act and Commission regulations, the term "contribution" means any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office. 2 U.S.C. SS 431(8); 11 CFR 100.7(a)(1). Similarly, the term "expenditure" is defined to include any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing an election for Federal office. 2 U.S.C. SS 431(9) and 11 CFR 100.8(a)(1). Contributions to candidates whether made in monetary form or in kind are subject to limitation under 2 U.S.C. SS 441a(a). Moreover, under SS 441a(a) (7) (B) (i), expenditures by any person in cooperation, consultation, or concert with a candidate are considered contributions to that candidate and accordingly limited as contributions under SS 441a(a)(1) or (a)(2) to either $1,000 or $5,000 respectively.

The question presented by your request is whether payments by NCPAC for the proposed Constituent Congratulations Program

3/ In your letter of April 12, 1983, you state that NCPAC presently proposes that only members of the United States Senate be featured in the program.

4/ In view of the assumed 1984 candidate status of the Senators to be included in the NCPAC program, the Commission does not reach or address, either explicitly or by implication, any issues with respect to whether expenditures for the proposed programs would in other circumstances result in candidate status, or be attributed to the $5,000 thresholds for candidate status, under 2 U.S.C. SS 431(2) and 11 CFR 100.3(a).

would be considered as having been made for the purpose of influencing a Federal election and would therefore constitute both expenditures and contributions in-kind under the Act if made in coordination or consultation with a candidate. To the extent that coordination or consultation with the subject Senators will take place in order to obtain film footage for use in the broadcasts or for other purposes incident to the subject program, and in light of the facts presented in your request, the Commission concludes that any payments for the proposed messages would constitute expenditures by NCPAC and contributions in-kind to the featured candidates. See 2 U.S.C. SS 441a(a)(7)(B). On the other hand, to the extent film footage for the program does not consist of "campaign materials" and is obtained from, "archives" or "television stations"5/ without any cooperation, consultation, or contact with the subject Senator or any of his or her agents, and to the further extent the program is otherwise implemented without such involvement by the subject Senator or any of his or

her agents, then payments for the subject program would not come within 2 U.S.C. SS 441a(a)(7)(B) and thus would not be contributions in kind. Such payments would, however, be reportable disbursements by NCPAC. 2 U.S.C. SS 434(b)(4) and (b)(6)(B), 11 CFR 104.3(b)(3).
The Commission reaches this conclusion for a number of reasons. First, NCPAC's status as a political committee within the purview of the Act, and as a "political organization" for Federal income tax purposes, see 26 U.S.C. SS 527(e), support the inference that its payments to produce and broadcast the proposed messages are for the purpose of influencing the 1984 Senate elections. The purpose and functions of an organizational entity are material and relevant to the Commission's characterization of the underlying purpose of a specific activity or program of that entity. See Advisory Opinion 1978-56, copy enclosed, in which the Commission held that a national organization's expenses incident to the activities of a candidate, which he pursued in his capacity as chairman of the organization that did not participate in Federal elections, would not be considered contributions to the candidate or expenditures by the organization to influence his nomination.

5/ Since your request, as supplemented, neither describes nor explains the circumstances under which NCPAC may obtain film footage from "archives" or "television stations," nor gives the original source and content of such footage, the Commission does not reach any issues and expresses no opinion concerning the application of 2 U.S.C. SS 441a(a)(7)(B)(ii) to the subject program.

In addition, the content of the proposed messages indicate that an election influencing purpose undergirds the program. Each 30 second spot will prominently feature video footage of a Senator with mention of his or her name five times. The spots include eight verbal references to the State represented by the Senator and make explicit, complimentary comments congratulating the electorates in those states for electing the Senator in a prior election. The fact of a previous election is mentioned three times. These specific references to the Senator's identity, home state, past election, and commendable service to the state are in marked contrast to the cryptic, generalized mention of issues that occurs in the spots. Compare Advisory Opinion 1977-54 (copy enclosed), in which the Commission held that funds contributed by corporations (and others) to advocate opposition to ratification of the Panama Canal treaties would not be considered contributions, even though the issue advocacy campaign was headed by a Congressional candidate, because the focus of the issue advocacy was not limited to the candidate's electorate, and the issue advocacy campaign was not combined with electioneering by the candidate. For other examples of activities held not to be for the purpose of influencing an

election, even though involving the participation of an individual who was a candidate at the time, see Advisory Opinions 1978-4 and 1982-56, copies enclosed. Moreover, the timing of the proposed broadcast, which will be shown during the eighteen months prior to the 1984 general election, is another feature of the program supporting the view that the messages will be for the purpose of influencing a Federal election.

Finally, the Commission notes that the activity in question does not appear to have any specific and significant non-election related aspects that might distinguish it from election influencing activity. No such characteristics have been identified by the requestor. This contrasts sharply with situations considered by the Commission in several prior advisory opinions. For example, in Advisory Opinion 1981-37 (copy enclosed), the Commission held that where the purpose of an activity (in that case a public discussion program moderated by a Congressman) was not to influence the nomination or election of a candidate for Federal office but rather was in connection with the duties of a Federal officeholder, payments for advertising or sponsorship would not result in a contribution or expenditure under the Act. Similarly, in Advisory Opinion 1978-88 (copy enclosed), the fact that the purpose of a candidate's appearance was to make an appeal for funds for a charitable, nonpolitical purpose was central to the Commission's holding that no contribution to the candidate resulted from such an appearance. See also Advisory Opinion 1977-42 (copy enclosed), which recognized that an individual who was also a candidate could, under certain conditions, pursue employment with a broadcast station that would not be viewed as having an election influencing purpose.

Thus, the Commission has recognized that even though certain appearances and activities by candidates may have election related aspects and may indirectly benefit their election campaigns, payments by non-political committee entities to finance such activity will not necessarily be deemed to be for the purpose of influencing an election. The instant case is, however, distinguishable from the cited opinions. The Commission concludes that the proposed messages to be financed by NCPAC are designed to influence the viewers' choices in an election, and therefore the payments to produce and broadcast such programs must be considered to be for the purpose of influencing a Federal election. See Advisory Opinion 1980-106 (copy enclosed). Moreover, to the extent the stated coordination and consultation occurs in obtaining the film clips for NCPAC's use, the expenditures will also result in contributions by NCPAC to the respective Senate candidates who are featured. As contributions, the expenditures will be limited by 2 U.S.C. SS 441a(a). See 2 U.S.C. SS 441a(a)(7)(B) and compare Advisory Opinion 1981-44.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in

your request. See 2 U.S.C. SS 437f.

EXHIBIT 3

Federal Election Commission Advisory Opinion Number 1988-22

Back to Federal Election Commission Advisory Opinions Search Page

Federal Election Commission Main Page

July 5, 1988
CERTIFIED MAIL
RETURN RECEIPT REQUESTED
ADVISORY OPINION 1988-22
J. Miles Reid
McCormick, Barstow, Sheppard, Wayne a Carruth
P.O. Box 24013
Fresno, California 93779-4013
Dear Mr. Reid:
This responds to your letters of March 31 and May 4, 1988, requesting an advisory opinion on behalf of the San Joaquin Valley Republican Associates ("Republican Associates") concerning application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to proposed activities involving operation of a library, publication of a newsletter, and sponsorship of debates and luncheons.
Your letters explain that Republican Associates is a non-profit, non-member, mutual benefit corporation under California law, and is prohibited by its charter from engaging in "business activities." You state that Republican Associates is a tax exempt "political organization" under section 527 of the Internal Revenue Code, and that all of its income has been for tax-exempt functions, but that its charter does not permit it to endorse or financially contribute to political candidates.1/ You also state that Republican Associates may eventually seek to change its status from a section 527 organization to a section 501(c)(4)

1/ The term "Political organization" is defined by the Code as "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function"; "exempt function" is defined as "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization ..." 26 U.S.C. SS 527(e)(1) and (2).

organization under the Code. As a 501(c)(4) organization, Republican Associates would be precluded by the general prohibitions of 2 U.S.C. SS 441b from financing activity "in connection with" Federal elections from its general corporate

treasury. A section 501(c)(4) organization may, however, make expenditures and contributions to influence Federal elections through a separate segregated fund. 2 U.S.C. SS 441b(b)(2). See Advisory Opinion 1984-17.

You state that Republican Associates was formed for the express purpose of promoting political ideas, that it has "no ties" to any political party and, as previously noted, that it is "unable to endorse or make financial contributions to any political candidate." Republican Associates' "Articles of Incorporation" describe its "specific purpose" as being "to help elect more Republicans to office by enhancing significantly the visibility of the Republican Party, Republican ideas, Republican thought and Republican personalities within the San Joaquin Valley of California."

You propose to engage in four types of activities that, as discussed below, may involve the providing of some benefit to candidates for Federal office: publication and distribution of a Periodical newsletter, sponsorship of luncheons, sponsorship of debates and operation of a "campaign" library. You ask whether, under the Act and regulations, the financing of such activities by Republican Associates would constitute "contributions" to or "expenditures" on behalf of any candidates for Federal office, and, if it finances such activities, whether receipts of Republican Associates would constitute "contributions" to it.

Under the Act and Commission regulations, the term "contribution" means any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office. 2 U.S.C. SS 431(8)(A); 11 CFR 100.7(a)(1). Similarly, the term "expenditure" is defined to include any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office. 2 U.S.C. SS 431(9)(A); 11 CFR 100.8(a)(1). Contributions to candidates, whether made in monetary form or "in-kind," are subject to limitation under 2 U.S.C. SS 441a(a). Moreover, expenditures by any person in cooperation, consultation or concert with a candidate are considered contributions to that candidate. 2 U.S.C. SS 441a(a)(7)(B)(i).

Your questions necessarily raise another issue: if the proposed activities or any other activities engaged in by Republican Associates are considered to involve contributions or expenditures "for the purpose of influencing any election for Federal office" under the Act and are made or received in amounts in excess of $1000 in a calendar year, Republican Associates would then be subject to registration and reporting requirements as a "political committee" under the Act. 2 U.S.C. SS 431(4)(a); 11 CFR 100.5(a).2/ For purposes of this opinion, the Commission is not treating Republican Associates as a subordinate committee of a State committee of a political party (see 2 U.S.C. SS 441a(d)) or a local committee of a political party (see 2 U.S.C. SS 431(4)(C); 431(8)(B)(v), (x), (xii); 431(9)(B)(iv), (viii), (ix)). See also

11 CFR 110.7(b), (c); 100.5(e)(4); 2 U.S.C. SS 441a(a)(5) ; 11 CFR 100.5(g).

Your request also broadly raises the question of whether Republican Associates falls within the exemption from the Act's prohibition against corporate contributions or expenditures "in connection with" federal elections prescribed by the U.S. Supreme Court for independent spending by certain incorporated political organizations. FEC v. Massachusetts Citizens for Life, Inc., 107 S.Ct. 616 (1986) ("MCFL"). See 2 U.S.C. SS 441b. Your description of Republican Associates generally tracks the three features" of MCFL that the Court found "essential" to its holding: 1) formed for the express purpose of promoting political ideas and not engaged in business activities, 2) having no shareholders or other' persons affiliated so as to have a claim on

its assets or earnings and 3) not established by nor accepting donations from, business corporations or labor unions (under one of two hypothetical "alternatives" that your request proposes for your sources of funding). MCFL, 107 S.Ct. at 631.

The Commission concludes, however, that Republican Associates would not be entitled to the exception drawn in MCFL that exempts "independent" spending of voluntary political organizations from either the prohibitions of SS 441b or the requirements of registering and reporting a "political committee." First, the Commission observes that some of Republican Associates' proposed activity on behalf of candidates would not be "independent expenditures," but rather would involve coordination with candidates and result in "in-kind contributions" to candidates.

2/ Commission regulations permit a political committee that finances political activity in connection with Federal, State and local elections to either establish a separate Federal account that is used for all its receipts and disbursements in Federal elections or to establish a political committee that will receive only contributions subject to the prohibitions and limitations of the Act. 11 CFR 102.5(a)(1). Where a political committee establishes a separate Federal account, such an account shall comply with the registration and reporting requirements of the Act. See generally 11 CFR Parts 102 and 104. Only funds subject to the prohibitions and limitations of the Act shall be deposited in such separate Federal account. 11 CFR 102.5(a)(2). All disbursements, contributions, expenditures, and transfers by the committee in connection with any Federal election shall be made from its Federal account. Moreover, no transfers may be made to the Federal account from any other account maintained by such organization for the purpose of financing activity in connection with non-federal elections. 11 CFR 102.5(a)(1). Pursuant to 11 CFR 106.1(c) ,administrative expenses shall be allocated between the Federal account and any other account maintained by the political committee for the purpose of financing activity in connection with non-federal elections. 11 CFR 102.5(a)(1)(i).

Second, and more importantly, the Court in MCFL was addressing political organizations "that only occasionally engage in independent spending on behalf of candidates." Id. at 630. The Court stated:

> [S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee ... As such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns.

Id. Therefore, Republican Associates will be required to register a political committee, or register itself as a political committee, if its proposed activity, or any other political activity it conducts, constitutes contributions or expenditures under the Act and crosses the $1000 per year threshold.3/

1. Republican Associates Newsletter

Republican Associates proposes to publish and distribute a monthly or quarterly newsletter that will discuss political events and activity that may be of interest to supporters of the Republican party, including discussions of candidates and campaigns for Federal office and opportunities for involvement in such campaigns. As your request suggests, and the newsletter examples you provided indicate, discussions of candidates may

3/ The Commission notes that its regulations specifically allow political committees to incorporate "for liability purposes only." 11 CFR 114.12(a). See 26 U.S.C. SS 527(e)(1) .

not, or need not necessarily, include statements of actual endorsement or explicit advocacy, but may include statements generally supporting or promoting Republican candidates or criticizing their Democratic opponents. The newsletter will also regularly feature a calendar which lists meetings and events sponsored by various candidates for Federal and other elective offices, by political party organizations, and by Republican Associates itself. Republican Associates will distribute the newsletter to persons who are contributors, who have attended previous Republican Associates' events, and who are prospects for contributing or attending in the future.

Preliminarily, the Commission notes that the proposed newsletter would not appear to fall within the exception to the definition of "expenditure" known as the "press exemption." 2 U.S.C. SS 431(9)(B)(i). It does not seem from your description that the newsletter would be a regularized periodical deriving revenues from subscriptions or advertising, but rather a free communication that Republican Associates will send out to

encourage continued or potential financial and organizational support from among the general public. See Advisory Opinion 1980-109. Furthermore, if Republican Associates' activities trigger registration and reporting requirements as a political committee under the Act, the express statutory language of the "press exemption" excludes publications of political committees. Also, Commission regulations state that expenditures made on behalf of more than one candidate shall be attributed to each candidate in proportion to, and shall be reported to reflect, the benefit reasonably expected to be derived. 11 CFR 106.1(a). In previous advisory opinions involving political party committee newsletter activities, the Commission concluded that a reasonable allocation basis would be the percentage of column inches or space in the newsletter which pertained to Federal elections or candidates for Federal office. Advisory Opinions 1981-3 and 1978-46. Accordingly, payment for costs associated with those candidate-related statements or references in Republican Associates' newsletters that should be attributed to Federal candidates as "contributions" or "expenditures" under the Act should be allocated to those candidates or to a Federal "account," as discussed below, based on column inches in the newsletter or on some other reasonable basis that reflects the benefit reasonably expected to be derived.

The Commission concludes that differing legal consequences will result under the Act and regulations for candidate-related statements or references appearing in the proposed newsletters, depending upon the nature of the statement and whether such statement is made in coordination with the Federal candidate to whom the statement refers. As described below, those consequences determine whether the costs incurred in publishing the newsletters containing such statements or references will be considered to be contributions to or expenditures on behalf of, and, therefore, allocable to, candidates for Federal office, and further determine if or how such costs must be reported to the Commission and whether those costs count toward the threshold for incurring political committee obligations.

a. Independent expenditures.

If statements, comments or references regarding clearly identified candidates appear in the newsletter and expressly advocate their election or defeat, or solicit contributions on their behalf, and such communications are not made with the cooperation, consultation or prior consent of, or at the request or suggestion of, the candidates or their agents, then the payments for the allocable costs incurred in making the communications will constitute "independent expenditures" on behalf of the identified candidates. 2 U.S.C. SS 431(17); 11 CFR 109.1. See Advisory Opinion 1979-80. All such payments count toward the $1000 political committee threshold for registration and reporting requirements, since they constitute "expenditures" on behalf of candidates under the Act.

If such expenditures on behalf of any one candidate exceed

$250 and Republican Associates has not otherwise qualified or does not thereby qualify for reporting obligations as a political committee, then the payments must be reported by letter or other communication to the Commission as an "independent expenditure" on behalf of that candidate or candidates; if such expenditures on behalf of any one candidate do not exceed $250, and Republican Associates does not qualify for reporting obligations as a political committee, then no reporting obligation is incurred on the basis of that activity alone. 2 U.S.C. SS 434(c)(1) and (2); 11 CFR 105.4 and 109.2.

If Republican Associates qualifies for reporting obligations as a political committee, such payments to any person aggregating in excess of $200 in a calendar year must be reported on Schedule E as itemized "independent expenditures" on behalf of that candidate or candidates, and such payments to any person not exceeding $200 in a calendar year must be reported on Schedule E as unitemized. 2 U.S.C. SS 434(b)(6)(B)(iii); 11 CFR 104.3(b)(3)(vii).

b. In-kind contributions.

If statements, comments or references regarding clearly identified candidates appear in the newsletter and are made with the cooperation, consultation or prior consent of, or at the request or suggestion of, the candidates or their agents, regardless of whether such references contain "express advocacy" or solicitations for contributions, then the payment for allocable costs incurred in making the communications will constitute "expenditures" by Republican Associates and "in-kind contributions" to the identified candidates. 2 U.S.C. SS 441a(a)(7)(B) . All such payments count toward the $1000 "political committee" threshold for registration and reporting requirements.

As presented by your proposed and sample newsletters, reportable "in-kind contributions" to candidates would include those instances where," in coordination with candidates, newsletters contained substantive statements generally favoring a candidate or criticizing his opponent or contained references to a candidate's campaign events in a scheduling feature. The Commission bases its conclusion on the presumption that the financing of a communication to the general public, not within the "press exemption," that discusses or mentions a candidate in an election-related context and is undertaken in coordination with the candidate or his campaign is "for the purpose of influencing a federal election." See Advisory Opinion 983-12. Such a communication made in coordination with a candidate presumptively confers "something of value" received by the candidate so as to constitute an attributable "contribution," even though the value of the benefit so conferred may be relatively minor. Given the nature and purposes of your organization as described in your request, it is unlikely that such a presumption of a "purpose of influencing a Federal election" could be rebutted with reference to newsletter activity undertaken in coordination with Federal

candidates. Compare Advisory Opinions 1982-56 and 1978-56.

c. Expenditures lacking express advocacy or coordination.

If statements, comments or references regarding clearly identified candidates appear in the newsletter and do not expressly advocate their election or defeat, nor solicit contributions on their behalf, and such communications are not made with the cooperation, consultation or prior consent of, or at the request or suggestion of, the candidates or their agents, then the payment for allocable costs incurred in making these types of communications will constitute operating expenses generally allocable to federal political activity. Payments for such communications are not specifically allocable to candidates, since they lack "express advocacy" or a solicitation for contributions so as to constitute "independent expenditures," and lack coordination with a candidate in their making, or any other indicia of receipt, so as to constitute "in-kind contributions."4/ Expenses associated with these communications nevertheless constitute "expenditures" for federal political activity within the meaning of the Act, so as to count toward the political committee threshold and to require reporting if made by a political committee.

Payments for these communications that are allocable to federal political activity must be made from funds raised permissibly under the Act and regulations. 11 CFR 102.5(a). If Republican Associates has qualified as a political committee, or crosses the $1000 threshold by engaging in this activity, payments for these communications must be made from a separate federal account or from a political committee which has accepted only contributions subject to the prohibitions and limitations of the Act. 11 CFR 102.5 (a)(1). If Republican Associates does not qualify as a political committee and does not maintain a federal account, it must be able to demonstrate through a reasonable accounting method that sufficient funds permissible under the Act were received by it to permit payments for these communications. 11 CFR 102.5(b)(1)(ii).

Republican Associates Sponsored Luncheons

You state that Republican Associates will sponsor monthly luncheons for those persons who receive the newsletter. Republican Associates will charge attendees an amount that covers the cost of the lunch and the facilities and will keep any excess revenue. The luncheons will feature speakers, some of whom may be candidates for Federal office. Candidates will be permitted to make their literature available, but no campaign posters or other political decorations will be permitted in the facility. Additionally, Republican Associates will request that candidates not solicit contributions, but will permit requests for campaign volunteers.

A payment of costs to sponsor and finance public appearances by candidates for Federal office that are "campaign-related" is considered made "for the purpose of influencing Federal elections"

4/ The previously cited opinions regarding allocation of newsletter expenses to candidates, Advisory Opinions 1981-3 and 1978-46, involved political party committees, for which coordination with candidates is presumed and "independence" precluded. See FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 28, n.1, (1981).

and to constitute a "contribution" to or "expenditure" on behalf of such candidates, unless such payment is specifically exempted by the Act or regulations. See Advisory Opinions 1986-37 and 1986-26. As sponsor of these luncheons, Republican Associates appears to be responsible for payment of the costs associated with the event and will keep any profits and, presumably, cover any shortages arising out of the receipts from luncheon attendees.
The Commission has considered the nature and purposes of an event sponsored by a group and involving the active participation of a candidate for Federal office to determine if such an event is campaign-related. The Commission has stated that if an event involves (i) the solicitation of political contributions or (ii) the express advocacy of a candidate's election or defeat, then the event would be viewed as a campaign event for the purpose of influencing a Federal election; the Commission has also concluded that the absence of express advocacy or solicitations will not preclude a determination that public appearances are campaign-related. See Advisory Opinions 1986-37, 1984-13, 1982-50, and 1982-16.
The active participation by candidates for Federal office as featured speakers at luncheons sponsored by Republican Associates would involve coordination with the candidate in the providing to and receipt of a benefit for the candidate. Payment of the costs of such an appearance would presumptively constitute a "contribution" by Republican Associates to the candidate. Given the nature and purposes of your organization as described in your request, it is unlikely that such a presumption of a "purpose of influencing a Federal election" could be rebutted with reference to your sponsoring of candidate appearances. Compare Advisory Opinions 1931-37, 1981-26, 1930-89 and 1978-4. Payments for luncheon expenses constituting "contributions" to candidates would, of course, count toward the $1000 threshold for qualifying as a political committee and be reportable.
Republican Associates Sponsored Debates
Republican Associates proposes to sponsor and finance debates between candidates for Federal office. In advance of the debates, you will request that candidates not make any solicitation for contributions, but candidates will be permitted to make requests for campaign volunteers.
Commission regulations provide that payments made by a qualified non-profit corporation to finance a nonpartisan candidate debate are exempted from the definition of "contribution" or "expenditure" under the Act. 11 CFR 100.7(b)(21) and 100.3(b)(23). See also 11 CFR 110.13 and

114.4(e). Your request indicates that you are "contemplating seeking status as a 501(c)(4) organization" but are not presently a qualified nonprofit corporation within this exemption. Therefore, sponsorship by Republican Associates of debates involving candidates for Federal office would be considered in the same manner as sponsorship of candidate appearances (discussed above), with an increased likelihood that such appearances would be viewed as campaign-related and that payments to fund such appearances would constitute "contributions" to the participating Federal candidates.

Republican Associates Library

Republican Associates proposes to maintain a library composed of publications concerning "campaign management" and clippings from newspapers and other periodicals related to political events, personalities and issues. Republican Associates will also obtain lists of campaign contributors and registered voters from public records and make those lists available to interested persons. Although use of library materials will be free of charge to all registered Republicans, persons using the library must pay for all copies requested, and Republican Associates will not conduct any research activities on behalf of candidates.

The Commission concludes that funding of a "campaign" library by Republican Associates would constitute general administrative expenses, incurred in the context of its day-to-day operation, and not "contributions" or "expenditures" attributable to any particular Federal candidate. See 11 CFR 106.1(c). If Republican Associates meets the threshold for "political committee" reporting obligations, the operating expenses incurred by Republican Associates to maintain the library would require allocation between federal and non-federal functions on a reasonable basis, and must be so reported. See 11 CFR 106.1(e). The allocable federal share of such expenses must be paid from funds raised permissibly under the Act and regulations for financing federal political activity, and made from a separate federal account or as a political committee which has accepted only contributions subject to the prohibitions and limitations of the Act. See 11 CFR 102.5. Furthermore, the Commission concludes that if Republican Associates provides additional library services for a federal candidate that result from the request of or coordination with such candidate, any additional expenses incurred in providing such services would be attributable to that candidate as an in-kind contribution. See 11 CFR 106.1(a) and 106.1(c).

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request.

EXHIBIT 4

Federal Election Commission Advisory Opinion Number 1990-5

Back to Federal Election Commission Advisory Opinions Search Page

Federal Election Commission Main Page

April 27, 1990

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1990-5

Margaret R. Mueller
8848 Music Street
Novelty, Ohio 44072

Dear Ms. Mueller:

This responds to your letters dated March 12, 1990, and March 24, 1990, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to publication of a newsletter discussing public policy issues during your campaign for Federal office.

You state that you are a Republican candidate for the U.S. House of Representatives in the 11th District of Ohio, and that you also ran for that seat in 1986 and 1988.1/ Since March of 1989, Music Street Publishing Company, which you own, has been publishing a monthly newsletter called "SPEAKOUT!" You state the newsletter is intended to provide a non-partisan forum for persons whom you met during the 1988 campaign for Congress to speak out on community and governmental problems and issues of general public interest.

Articles appearing in the newsletter have included opinion pieces (including many written by you) dealing with different issues of public concern, such as drug use, taxes, toxic waste cleanup and other environmental matters, and, in particular, Congressional term limitation. Some articles specifically refer to problems in the 11th Congressional District or the northeast corner of Ohio.2/ You write

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1/ Your Statement of Candidacy and a Statement of Organization for the 1990 election campaign were received by the Clerk of the House on March 27, 1990. It appears from your filings that your principal campaign committee for the 1986 and 1988 elections will continue to function

as your principal campaign committee for 1990.

2/ For example, the February, 1990, issue contains an article on the growing of marijuana in the district entitled "11th District Shocker," and a questionnaire which includes a question making reference to toxic waste dumps in the 11th District.

monthly editorials expressing your views that are intended to encourage differing responses. Newsletters also contain humor pieces, lists of little known facts, investment advice and other miscellaneous information, and most issues have also included a notice of a SPEAKOUT! meeting to be held each month.

The newsletter has contained several articles regarding Congressional term limitation that were reprinted from other sources and headlined with the title of an organization named "Coalition to End the Permanent Congress."3/ You have also published an article soliciting donations to the group and an editorial written by you endorsing the group's positions on issues. You say you wish to continue to use the name of the organization in the newsletter.

You state that newsletter publication has been funded by your personal funds and through the sale of advertisements.4/ According to the newsletters' masthead, a subscription may be purchased at a price of $20 for 12 monthly issues.

You say you "want to keep the paper going because it is just catching on after a year," and that you would continue publishing the newsletter regardless of whether you are elected to Congress. You state that, during the present campaign, you will "keep it nonpartisan and probably emphasize local and state issues so the paper does not get clouded with federal issues which might be related to my running." It appears, therefore, that you wish to continue your publication as an activity unrelated to the campaign.

You ask whether you may continue publishing the newsletter during your 1990 campaign for Congress. Your request raises the question of whether the Commission considers operating expenses of publishing your newsletter to be expenditures for the purpose of influencing a Federal election under the Act and, therefore, whether payments for such expenses by any person constitute contributions to a Federal candidate under the Act. 2 U.S.C. Sc431(8)(A)(i) and Sc431(9)(A)(i); 11 CFR

3/ You describe the organization, of which you are a board member, as a bipartisan group advocating the limiting of Congressional tenure to 12 years, outlawing political action committees and cutting the franking privilege. You state that the Coalition "has no money to support any candidate"

but "would favor anyone who would End the Permanent Congress." The Commission assumes from your description that the Coalition is not engaged in supporting the election or defeat of specific Federal candidates and is not a "political committee" under the Act.

4/ You state that "no big corporations" have placed ads and that the advertisers have been small businesses. A review of the newsletters submitted by you indicates that a number of advertisements have been paid for by corporations.

100.7(a)(1) and 100.8(a)(1).5/ Your inquiry presents the Commission with the difficult task of reconciling your status as a candidate for Federal office with the assertedly nonpartisan nature of your proposed newsletter publication and distribution activity.

The Commission has frequently considered whether particular activities involving the participation of a Federal candidate, or communications referring to a Federal candidate, result in a contribution to or expenditure on behalf of such a candidate under the Act. The Commission has determined that financing such activities will result in a contribution to or expenditure on behalf of a candidate if the activities involve (i) the solicitation, making or acceptance of contributions to the candidate's campaign, or (ii) communications expressly advocating the nomination, election or defeat of any candidate. Advisory Opinions 1988-27, 1986-37, 1986-26, 1982-56, 1981-37, 1980-22, 1978-56, 1978-15, 1977-54 and 1977-42. The Commission has also indicated that the absence of solicitations for contributions or express advocacy regarding candidates will not preclude a determination that an activity is "campaign-related." Advisory Opinions 1988-27, 1986-37, 1986-26, 1984-13 and 1983-12.

In prior opinions, the Commission has concluded that contributions or expenditures for Federal candidates would not result in circumstances involving candidates serving as chairpersons of political, charitable and issue advocacy organizations (Advisory Opinions 1978-56, 1978-15, and 1977-54, respectively), a candidate appearance endorsing a candidate for local office in television advertisements (Advisory Opinion 1982-56), and a candidate hosting a radio public affairs program (Advisory Opinion 1977-42). The Commission has rarely faced the question of whether candidate involvement is campaign-related, however, in the factual context of activity sponsored or funded by the candidate personally.6/

5/ The publication of a newsletter or small newspaper raises the issue of application of the exemption from treatment as an expenditure or contribution for newspapers, magazines or other regularly published periodicals ("press exemption"). 2 U.S.C. Sc431(9)(B)(i); 11 CFR 100.7(b)(2) and 100.8(b)(2). See

Advisory Opinion 1980-109. The express statutory language of the exemption, however, excludes publications owned by the candidate. By its own terms, the "press exemption" would not be applicable to your newsletter under the facts you have presented.

6/ Advisory Opinion 1978-72 involved a candidate who proposed to publish and sell pamphlets, on a nationwide basis, that set out his views on several philosophical questions. The Commission concluded that receipts from sales of the pamphlets would not constitute contributions under the Act, nor would payments by the candidate be expenditures, as long as the contents of the pamphlets, and advertising for them, did not include solicitations for the candidate's campaign or express advocacy of the election or defeat of any clearly identified

In Advisory Opinion 1983-12, the Commission reviewed a group's proposal to produce and air television commercials that included footage of particular U.S. Senators, comments about a Senator's record in office and a message congratulating the citizens of the appropriate state for having elected their Senator. The Commission observed in that opinion:

... the Commission has recognized that even though certain appearances and activities by candidates may have election related aspects and may indirectly benefit their election campaigns, payments by non-political committee entities to finance such activity will not necessarily be deemed to be for the purpose of influencing an election.

The Commission distinguished its prior opinions to conclude, however, that the portion of the proposed activity involving participation of candidates or their campaigns in providing the film footage would render advertisements produced and aired in cooperation with the candidates contributions for the purpose of influencing those candidates' elections under the Act. Several factual elements presented in that request were signficant in the Commission reaching its conclusion: the requestor was a political committee actively engaged in making contributions to or expenditures on behalf of candidates; the content of the proposed advertising messages made reference to the Senators' previous election and the voters' role in electing a praiseworthy officeholder; the ads were to be run during the time period preceding the 1984 elections; and the activity in question "[did] not appear to have any specific and significant non-election related aspects that might distinguish it from election influencing activity." Compare Advisory Opinion 1984-13 (Congressional candidates of one political party invited to speak at a meeting of an incorporated trade association).

The significance of candidate involvement in activity for which an inference of campaign purpose could be drawn was also noted by the Commission in Advisory Opinion 1988-22, involving proposed newsletter activities by a partisan organization. The Commission described the following legal consequences of activity undertaken in coordination with a candidate's campaign:

If statements, comments or references regarding clearly identified candidates appear in the newsletter and are made with the

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(Footnote 6 continued from previous page)
candidate. The Commission viewed receipts from the endeavor as "earned business income," and noted the requestor's assertion that "very little of the proceeds or political effect would be applicable to [his] local campaign."

cooperation, consultation or prior consent of, or at the request or suggestion of, the candidates or their agents, regardless of whether such references contain "express advocacy" or solicitations for contributions, then the payment for allocable costs incurred in making the communications will constitute "expenditures" by [the organization] and "in-kind contributions" to the identified candidates. 2 U.S.C. Sc441a(a)(7)(B) ... As presented by your proposed and sample newsletters, reportable "in-kind contributions" to candidates would include those instances where, in coordination with candidates, newsletters contained substantive statements generally favoring a candidate or criticizing his opponent or contained references to a candidate's campaign events in a scheduling feature. The Commission bases its conclusion on the presumption that the financing of a communication to the general public, not within the "press exemption," that discusses or mentions a candidate in an election-related context and is undertaken in coordination with the candidate or his campaign is "for the purpose of influencing a federal election." See Advisory Opinion 1983-12. Such a communication made in coordination with a candidate presumptively confers "something of value" received by the candidate so as to constitute an attributable "contribution," even though the value of the benefit so conferred may be relatively minor.

Given the nature and purposes of your organization as described in your request, it is unlikely that such a presumption of a "purpose of influencing a Federal election" could be rebutted with reference to newsletter activity undertaken in coordination with Federal candidates. Compare Advisory Opinions 1982-56 and 1978-56.

Here, publication of the newsletter has been originated, sponsored, implemented and funded by you, a current candidate for Federal office. SPEAKOUT! was apparently inspired by your experiences as a previous candidate for Congress. It is sent primarily to persons whom you encountered during your prior campaign, many of whom may be potential supporters of your candidacy. Persons involved in your campaign for Congress are also apparently involved in publishing your newsletter. The contents of the newsletters include articles concerning public policy issues that may broadly be related to local and national political concerns, including the makeup of Congress. Therefore, any reference to or discussion of your candidacy or campaign in the newsletter, or presentation of policy issues or opinions closely associated with you or your campaign, would be inevitably perceived by readers as promoting your candidacy, and viewed by the Commission as election-related and subject to the Act.

Editions of the newsletters that you have distributed thus far do not mention your candidacy or campaign for Congress, and, taken alone, may not reveal an apparent or objectively recognizable "purpose to influence" your Congressional race or any particular election to Federal office.7/ The content of the newsletters does suggest other significant purposes of informing the public about current issues of public interest and encouraging discussion of such issues.8/ Although these purposes are not inherently election-related activity and publication of your newsletter is an ongoing enterprise, continued publication of the newsletter since you have become a candidate could potentially be used to advance your candidacy.

The Commission concludes that the expenses incurred in the publication and distribution of your proposed newsletters would be considered expenditures for the purpose of influencing your election to Congress if: (1) direct or indirect reference is made to the candidacy, campaign or qualifications for public office of you or your opponent; (2) articles or editorials are published referring to your views on public policy issues, or those of your opponent, or referring to issues raised in the campaign, whether written by you or anyone

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7/ You submitted a copy of a March, 1990, issue which was printed but not distributed. This issue contained a front page article announcing your 1990 candidacy for Congress and featuring your picture, and a full-page article written by

your husband advocating your candidacy. The article announcing your candidacy contains a statement of your platform that refers to the Coalition to End the Permanent Congress. You state that you had 10,000 copies of this issue printed, but that you sent none out and threw them away. Instead, you sent out an issue that contained no references to your candidacy.

8/ Disseminating information and expressing viewpoints about issues of public policy and community interest are, of course, strongly protected elements of free speech under the First Amendment. Buckley v. Valeo, 424 U.S. 1, 42, n. 50 (1976). The U.S. Supreme Court has upheld the jurisdiction of the FECA in regulating the financing of similar speech when engaged in by candidates for Federal office, or groups supporting Federal candidates, "for the purpose of influencing a Federal election." 2 U.S.C. Sc431(9)(A)(i); see Buckley, supra, at 46-7, n. 53. Although the Commission cannot ignore a campaign-related purpose for types of activity for which no other purpose is plausible, neither can it impute such purpose to Constitutionally protected activity lacking an identifiable nexus to support of a candidate.

else;9/ or (3) distribution of the newsletter is expanded significantly
beyond its present audience, or in any manner that otherwise indicates utilization of the newsletter as a campaign communication. The Commission concludes that each edition of the newsletter should be viewed separately and in its entirety in determining whether a newsletter would be considered an expenditure for your campaign. Any campaign-related content within a particular edition would render expenses of publishing that edition a campaign expenditure.10/

Publication and distribution of issue content newsletters on an ongoing basis, and absent the elements described above, would not be viewed as conferring recognizable benefit or value upon your campaign for Congress sufficient to invoke the jurisdiction of the Act. The Commission would not necessarily view continued distribution of this type of newsletter as campaign-related activity, constituting expenditures under the Act, however, simply because you have been identified with its creation or serve as its editor, or because your name continues to be identified on its masthead as its editor. Advisory Opinions 1978-56, 1978-15 and 1977-54. See also Advisory Opinion 1985-38.

You may, of course, publish campaign-related editions of the newsletter as an activity of the campaign. Your committee would then assume the costs for that newsletter edition, either directly making the payments to the providers of goods and services for the newsletter or paying the Music Street Publishing Company for the expenses in

publishing that issue. In order to avoid a prohibited corporate contribution by the publishing company, the committee must make its payments to the publishing company within a commercially reasonable time. Payments for the production and circulation of the newsletter would be operating expenditures of your campaign committee and reported as such. In addition, payments for advertising space in campaign-related newsletters would be contributions to the campaign and, if made from a corporate source, would be prohibited. 2 U.S.C. Sc441b; 11 CFR 114.2. See Advisory Opinion 1985-39.

This response constitutes an advisory opinion concerning

9/ For example, publication of articles or editorials about the issue of Congressional term limitation or related to the Coalition to End the Permanent Congress would be considered campaign-related, due to your focus upon that issue in your campaign for Congress and your candidacy's association with that organization.

10/ The Commission considered an alternative analysis under which only those portions of a particular newsletter issue that might be viewed as campaign-related would be allocable as a campaign expenditure. The Commission distinguished that allocation approach, due to your involvement in the entirety of the newsletter operation. Compare Advisory Opinions 1988-22, 1981-3 and 1978-46 (publishing of newsletters by partisan organization or party committees).

application of the Act or regulations prescribed by the Commission to the specific transaction or activity set forth in your request. See 2 U.S.C. Sc437f.

Sincerely,

(signed)

Lee Ann Elliott
Chairman for the
Federal Election Commission

Enclosures (AOs 1988-27, 1988-22, 1986-37, 1986-26, 1985-39, 1985-38, 1984-13, 1983-12, 1982-56, 1981-37, 1981-3, 1980-109, 1980-22, 1978-72, 1978-56, 1978-46, 1978-15, 1977-54, and 1977-42)

EXHIBIT 5

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: The Commissioners
Staff Director
Deputy Staff Director
General Counsel

FROM: Office of the Commission Secretary

DATE: November 7, 2001

SUBJECT: Statement For The Record for MUR 4624

Attached is a copy of the Statement For The Record for MUR 4624 signed by Commissioner Bradley A. Smith.

This was received in the Commission Secretary's Office on Wednesday, November 7, 2001 at 3:26 p.m.

cc: Vincent J. Convery, Jr.
Information Division
Press Office
Public Disclosure

Attachment

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

In the Matter of	)	
	)	
	)	**MUR 4624**
	)	
The Coalition	)	
National Republican Congressional Committee, *et al.*	)	

STATEMENT FOR THE RECORD

COMMISSIONER BRADLEY A. SMITH

I.

I voted in favor of the General Counsel's Report of April 20, 2001 recommending that the file be closed. However, while some commissioners seem to feel this case indicates that the Commission's rules regarding coordination and political committees do not sufficiently restrain political speech and participation,[1] I believe that this case is illustrative of the need for still further protections for Americans wishing to participate in the political life of our nation. In particular, limiting the Commission's reach in cases involving allegations of coordinated public communications to communications involving express advocacy,[2] is, in my view, sound interpretation of both the statute and judicial precedent, and is required by the Constitution.

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[1] *See* Statement of Reasons of Commissioner Scott E. Thomas and Chairman Danny L. McDonald, (hereinafter "Thomas/McDonald Statement"); Statement for the Record of Commissioner Karl J. Sandstrom (hereinafter "Sandstrom Statement").

[2] The term "express advocacy" stems from the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). In that case, the court limited the reach of sections 608(e)(1) and 434(e) of the FECA to those communications that "in express terms advocate the election or defeat of a clearly identified candidate," *id.* at 44, then held that a cap on section 608(e)(1) expenditures, even as narrowed, was unconstitutional. As examples of express advocacy, the Court offered such terms as "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley* at 44, n.52. This limitation on the reach of regulation has been reaffirmed by the Supreme Court, *see Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (hereinafter "*MCFL*"), and countless lower courts, *see infra* note 27. The question in this case is whether or not this limitation applies to communications that are coordinated with the campaign.

The broad facts and procedure of this case are substantially as put forth in the Statement of Reasons filed by Commissioner Thomas and Chairman McDonald.[3] In March of 1997, the Democratic National Committee ("DNC") filed a complaint alleging that various Republican Party affiliated committees, and a large number of business and trade associations supportive of the general agenda of Republicans in Congress, had in 1996 committed massive violations of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"). This triggered a four-year investigation of more than 60 committees and organizations plus several individual respondents. The Commission's attorneys took nine depositions, collected thousands of pages of documents, and interviewed numerous other witnesses, before this case came to its merciful end.[4]

Despite the fact that the Commission has now found no violations in this case, I strongly suspect that the original complainant, the Democratic National Committee, considers its complaint to have been a success. The complaint undoubtedly forced their political opponents to spend hundreds of thousands, if not millions of dollars in legal fees, and to devote countless hours of staff, candidate, and executive time to responding to discovery and handling legal matters. Despite our finding that their activities were not coordinated and so did not violate the Act, I strongly suspect that the huge costs imposed by the investigation will discourage similar participation by these and other groups in the future.[5]

We cannot fault the complainant DNC for pursuing its political goals through the legal tools made available to it, but nor can we on the Commission blind ourselves to the fact that the substantial majority of the complaints filed with the Commission are filed by political opponents of those they name as respondents. These complaints are usually filed as much to harass, annoy, chill, and dissuade their opponents from speaking as to vindicate any public interest in preventing "corruption or the appearance of corruption."[6] This knowledge makes it particularly important that we be sensitive to the possibility that

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[3] *See* Thomas/McDonald Statement at 2-4.

[4] I joined the Commission on June 26, 2000, at which time the case had been going on for over three years. Two weeks later, on July 11, 2000, I joined in a 5-0 Commission vote in favor of an additional round of discovery. I now recognize the error of that vote, and, for the reasons stated below, will no longer lend my vote to any matter that prolongs the legal agony of citizens and groups whose communications do not contain express advocacy.

[5] Several of the Respondents in this MUR have also expressed their belief that the General Counsel's Report of April 20, 2001, while ultimately recommending that no action be taken against them, unfairly maligns their actions and insinuates illegal conduct. *See* Letter of Jan Witold Baran to Commission, June 13, 2001; Letter of Benjamin L. Ginsberg, et al. to Acting General Counsel Lois G. Lerner, July 5, 2001. I share the concerns of these respondents that reports to the Commission ought not be used to impugn the activities and motives of respondents when the evidence does not support continuing with the case or when no violation is found, and I believe that this type of tone will further discourage individuals and groups from participating in political activity in the future.

[6] The phrase "corruption or appearance of corruption" comes from *Buckley v. Valeo*, 424 U.S. 1, 25 (1976), and serves as the constitutionally valid rationale for regulating political speech in the form of campaign contributions and expenditures. Although this case involves the DNC complaining about Republican candidates and organizations and their allies, it goes without saying that Republicans file charges against Democrats.

our interpretations of the Act can, and sometimes do, chill what is and ought to be constitutionally protected political speech.

In this case, the Office of General Counsel concluded that it could not prove that the activities and disbursements of the respondents were coordinated with candidates and committees pursuant to the regulations promulgated by the Commission only last December. *See* 11 C.F.R. § 100.23. These coordination rules were themselves a salutary effort to address problems of vagueness and overbreadth in the Commission's prior practices, which lacked any clear definition of "cooperation, consultation, or concert," *see* 2 U.S.C. § 441a(a)(7)(B)(i), and provided inadequate guidance to groups and individuals as to what activities would be deemed "coordinated" under the Act. *See Federal Election Commission v. Christian Coalition,* 52 F. Supp.2d 45 (D.D.C. 1999); *see also Clifton v. Federal Election Commission*, 114 F.3d 1309 (1st Cir. 1997). Groups and individuals who petition the government, contact their elected representatives, or perhaps are friends or acquaintances of representatives or Congressional staffers, former staffers, or friends and acquaintances of the same, need guidance on what conduct falls short of coordination without concluding that the only clear way to avoid liability is to refrain from making independent expenditures. The conduct standard implemented by the new coordination rule is a vast improvement over the past practices of the Commission, providing much-needed guidance to makers of independent expenditures.[7]

Unfortunately, in promulgating 11 C.F.R. § 100.23, the Commission provided scant guidance to groups engaged in issue advocacy,[8] by not addressing the question of whether a content standard, as well as a conduct standard, would be required before coordinated public communications would be subject to the rule.[9] This failure is

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[7] Commissioners Thomas and McDonald, who voted against adoption of the regulations, complain that the regulations are unduly strict. Thomas/McDonald Statement at 4-14. For reasons I state below, I believe they comply with the Act and that our old practices exceeded the scope of both the Act and the Constitution. Commissioners Thomas and McDonald also argue that the Commission has thwarted the will of the Senate, Thomas/McDonald Statement at 17, by implementing these regulations in the wake of the Senate's passage of S.27, the McCain-Feingold bill. Section 214 of S. 27 would effectively repeal the coordination rule of 11 C.F.R. 100.23. We are not, of course, entrusted with implementing the will of the Senate, at least not until such time as the House of Representatives manifests the same "will" and the President has either signed the bill, allowed it to become law without his signature, or had his veto over-ridden by the necessary two-thirds majority of each house. *See generally, INS v. Chadha*, 462 U.S. 919 (1983). I note that although the Senate received the proposed final rule on December 7, 2000, it did not "disapprove" the rule by resolution within thirty legislative days of its receipt, as it was free to do pursuant to 2 U.S.C. § 438(d).

[8] As terms of art, "independent expenditures" expressly advocate the election or defeat of a candidate. Though not limited in amount, they are subject to other provisions of the Act. "Issue advocacy," on the other hand, is political discussion that does not contain explicit words of advocacy of election or defeat, and so has been protected by the Supreme Court from regulation. *See Buckley*, 424 U.S. at 44, n.52; *MCFL*, 479 U.S. at 249. The issue here is whether an issue ad, if coordinated with a candidate, becomes subject to the Act.

[9] In the Explanation and Justification of the final rule, the Commission claims that it is "addressing the constitutional concerns raised in *Buckley* by creating a safeharbor for issue discussion." *See* Notice #2000-21, Final Rule on General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 Fed. Reg. 76138, 76141 (Dec. 7, 2000). This statement is true but applies only with respect to 11 CFR section 100.23(d), which makes clear that a candidate's response to

important, because as this case demonstrates, the conduct standard alone does not provide an adequately bright line to prevent the specter of investigation and litigation from chilling constitutionally protected speech. When a person decides to make independent political expenditures, he opens himself up to two potential burdens under the Act. The first burden is to report those independent expenditures in excess of $250.00. *See* 2 U.S.C. §.434(c). The second is to defend against allegations that the advocacy was somehow authorized by or coordinated with a candidate which, if true, would lead to still greater limits on the person's political activity. *See* 2 U.S.C. § 431(17). Respondents can spend substantial sums defending themselves against such allegations, and this possibility will cause many speakers to avoid engaging in what ought to be constitutionally protected speech. Thus, a bright line test is needed. A content test—express advocacy—provides such a bright line. If a financier of general public communications is not willing to defend against charges that his speech was authorized by a candidate, or prefers not to disclose the sources of his funding, *see e.g. NAACP v. Alabama,* 357 U.S. 449 (1958), *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), he can simply delete from his message words of express advocacy and speak on any other topic of his choosing. If he is investigated nonetheless, he can be assured that the investigation will be short, non-intrusive, and inexpensive, merely by demonstrating the absence of express advocacy in his communications. Absent a content standard, however, no such immediate defense is available if the Commission launches an investigation into the alleged coordination with candidates. Further, such an investigation is likely to be highly intrusive, as is demonstrated by this case and another recent high-profile matter eventually resulting in no finding of a violation, MUR 4291 (American Federation of Labor and Congress of Industrial Organizations). The investigation can include extensive rifling through the respondents' files, public revelations of internal plans and strategies, depositions of group leaders, and the like. Such allegations and investigations may be avoided only by completely avoiding all contact with candidates, because even minimal contact could trigger a credible allegation. Oddly, the less immediately obvious evidence there is that the conduct would meet the standard of 11 C.F.R. § 100.23, the more intrusive the investigation is likely to be, as the Commission searches for evidence of the veracity of the complaint. The effect of the rule becomes essentially the same as that of the rule struck down in *Clifton*; "it treads heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office," and is therefore, "patently offensive to the First Amendment." 114 F.3d 1309, 1314 (1st Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998).

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an inquiry regarding her position on issues will not suffice to establish coordination. *Id.* Otherwise, the Commission has not provided an adequate safeharbor for issue discussion, for it has not, as of yet, determined the content standard necessary for regulating coordinated communications. *See id.*, at 76141 ("The Commission is not adopting any content standard as part of these rules *at this time.*")(emphasis added). The Commission's conscious decision not to address a content standard should not be read as a presumption that the Commission has made a final decision against requiring a content standard, however, for as the Explanation & Justification also explains, "the Commission may revisit the issue of a content standard for all coordinated communications when it considers candidate-party coordination." 65 Fed Reg. at 76141.

With that in mind, I believe that the Act, the Constitution, judicial precedent, and sound public policy require us to limit our enforcement to cases in which communications, whether or not coordinated with a candidate, expressly advocate the election or defeat of candidates for federal office. Failure to include such a content standard has and will have a chilling effect on political participation and speech.

II.

Institutional competence and prudence requires that executive agencies charged with enforcing the law, even more than the courts, ought to adhere to the general precept of not unnecessarily deciding Constitutional issues. Thus I first analyze our authority under the statute. I believe that the statute, as interpreted by the Supreme Court, does not authorize us to regulate issue advocacy, even when such advocacy is coordinated with a candidate.

Corporate expenditures and contributions are prohibited under section 441b of the Act. The phrase "contribution or expenditure" in section 441b is defined separately in 2 U.S.C. section 441b(b)(2).[10] Nevertheless, in *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986)("*MCFL*"), the United States Supreme Court looked to the general definitions section of the Act, 2 U.S.C. section 431, to define the scope of the term "expenditure" as used in section 441b. *See* 479 U.S. at 245-46. The *MCFL* Court also held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of 441b." *Id.* at 249. There is no reason to believe that section 431, the general definitions section, is not as applicable in construing the term "contribution" in section 441b as it is in construing the term "expenditure" in 441b. Section 431(8)(B)(vi) states that the term "contribution" does not include "any payment made or obligation incurred by a corporation or labor union which, under section 441b(b) of this title, would not [first] constitute an expenditure by such corporation or labor organization." 2 U.S.C. § 431(8)(B)(vi). Because the Court has determined that the term "expenditure," as used in section 441b, is limited to communications containing express advocacy, and because the Coalition did not engage in express advocacy, the corporate respondents in this MUR did not make prohibited "expenditures" under section 441b. They therefore cannot have made prohibited in-kind "contributions" under section 441b, by way of section 441a(a)(7)(B)(i). Likewise, the committees involved in this MUR could not have accepted in-kind corporate contributions from the Coalition in violation of 2 U.S.C. section 441b.

[10] 2 U.S.C. § 441b(b)(2) provides as follows:

> For the purposes of this section ... the term 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money or any other services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section. ...

Nor do I believe that non-corporate respondents violate the Act through coordinated issue advocacy. In *Buckley,* the Supreme Court held that the phrase "'for the purpose of influencing' an election or nomination," appearing in the definition of "expenditure" at 2 U.S.C. section 431(9)(A)(i), limited the meaning of "expenditure" to communications containing express advocacy, at least when, as in this case, the speaker was not a political committee. 424 U.S. 1 at 79-80. After the *Buckley* decision was handed down, Congress, fully aware of the Court's restrictive interpretation of the term "expenditure" in section 431(9)(A)(i), used the term "expenditure" in amending section 441a(a)(7)(B)(i). Section 441a(a)(7)(B)(i) provides that "*expenditures* made by any person in cooperation, consultation, or concert with ... a candidate ... shall be considered to be a contribution to such candidate." (emphasis added). Congress's post-*Buckley* use of the term "expenditure"—where the statutory definition of the term as interpreted by the Supreme Court is limited to communications containing words of express advocacy — indicates that even coordinated public communications must contain express advocacy before they can be transformed into regulable in-kind contributions.[11]

Indeed, Congress has responded to the courts on this topic before. After *Buckley,* Congress limited the disclaimer provisions to apply specifically to express advocacy communications, 2 U.S.C. § 441d(a), even where those communications are coordinated with a candidate.[12] If Congress had intended for coordinated issue advocacy communications to be within the jurisdiction of the FECA, it surely would have required a disclaimer for such communications.

Finally, that the Act as currently written requires express advocacy before coordinated public communications are subject to its terms is evidenced by the fact that, in pending legislation, the Senate has approved an amendment to do away with any requirement of express advocacy in the coordination provisions of the Act.[13]

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[11] Additionally, section 431(8)(A)(i) of the Act limits the definition of "contribution" to any gift, etc. "made ... for the purpose of influencing" a federal election. 2 U.S.C. § 431(8)(A)(i). This is the same statutory phrase as is used in the definition of "expenditure," 2 U.S.C. § 431(9)(A)(i), and which was construed by the *Buckley* Court to require a showing of express advocacy. The *Buckley* Court referred to 2 U.S.C. § 431(8)(A)(i) and 2 U.S.C. § 431(9)(A)(i) as "parallel provisions." *Buckley* at 77.

[12] *See* Pub. L. No. 94-283, 90 Stat. 497, May 11, 1976 (amending 2 U.S.C. § 441d). 2 U.S.C. § 441d(a)(2) provides in pertinent part:

> Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate ... such communication ... (2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee.

Prior to *Buckley,* the Second Circuit had also held that issue advocacy could not be subject to the disclosure provisions of the FECA, *United States v. National Committee for Impeachment,* 469 U.S. 1135 (2d Cir. 1972).

[13] *See* S. 27, Sec. 214, 107th Congress, 1st Session (commonly known as the "McCain-Feingold" bill) (amending the Act's definition of "contribution" to include "any coordinated expenditure or other disbursement made by any person in connection with a candidate's campaign, regardless of whether the expenditure or disbursement is a communication that contains express advocacy.")

Given that the respondents in this case did not engage in express advocacy, this should have ended the matter in the spring of 1997, without the extensive investigation that followed. The Commission may only pursue violations of the FECA. *See* 2 U.S.C. § 437g(a)(2). For me this is adequate to dismiss the case.[14] However, recognizing that the statute is not a model of clarity in this regard, and in light of the apparent certainty of other commissioners that the Act at least allows for regulation of coordinated issue advocacy, I believe it worthwhile to set forth more fully why it is both wise policy, and constitutionally required, to limit our enforcement efforts to communications including express advocacy.

III. A.

The starting point for any analysis of the constitutional and policy issues involved in enforcing the FECA is the recognition that "[t]he Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Buckley,* 424 U.S. at 14. With that in mind, a key concern of the Supreme Court's *Buckley* decision was to prevent the Act from having a "chilling" effect on speech pertaining to public issues and affairs. *See* 424 U.S. at 41, n. 47. The Court noted that:

> vague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to steer far wider of the unlawful zone... than if the boundaries of the forbidden areas were clearly marked.' 'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'

424 U.S. at 41, n. 48 (citations omitted).

In *Buckley*, the Supreme Court accepted contribution limits as constitutionally permissible, but struck down limits on expenditures as violations of the First Amendment. There were three major reasons for providing greater protection to expenditures than to contributions. First, the Court noted that limits on contributions were a lesser burden on speech because a contribution, unlike an expenditure for public communications, did not "communicate the underlying basis for the support." 424 U.S. at 21. Second, limits on expenditures "reduce [] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. Limits on contributions to candidates, on the other hand, do not necessarily have the effect of materially reducing political discussion because they "leave the contributor free to become a member of any political association" and permit such associations "to aggregate large sums of money to promote effective advocacy." *Id.* at 22. Finally, limits on contributions "focus [] precisely on the problem of ...

[14] The Commission also made "reason to believe" findings under section 441d for failure to make disclaimers. As section 441d, by its express terms, only applies to "communications expressly advocating election or defeat," this charge could have been easily dismissed as well.

corruption...." By contrast, limitations on expenditures raise the concerns of vagueness that cause "citizens to steer far and wide of the unlawful zone." *Id.* at 41, n. 48.

Thus, in analyzing section 608(e)(1) of the Act, which provided that "[n]o person may make any expenditure ... relative to a clearly identified candidate during a calendar year which ... exceeds $1,000," the Court held that "the use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech." *Id.* at 41. It continued:

> The constitutional deficiencies [of vagueness] can be avoided only by reading §608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate. ... [F]unds spent to propagate one's views on issues without expressly calling for a candidate's election or defeat are thus not covered.... [I]n order to preserve the provision against invalidation on vagueness grounds, §608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.

Buckley at 43-44.

These same concerns arose when the Court considered the Act's disclosure provisions. Once again, the Court could have regulated issue advocacy, but did not. Rather, the Court chose again to give the term 'expenditure' a limiting construction. The Court stated:

> [T]he [disclosure] provision raises serious problems of vagueness, ... [that] may deter those who seek to exercise protected First Amendment rights. Section 434(e) applies to '[e]very person ... who makes contributions or expenditures.' 'Contributions' and 'expenditures' are defined ... in terms of money or other valuable assets 'for the purpose of influencing' the nomination or election of candidates for federal office. It is the ambiguity of this phrase that poses constitutional problems.
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> There is no legislative history to guide us in determining the scope of the critical phrase 'for the purpose of ... influencing'.... Where the constitutional requirement of definiteness is at stake, we have the further obligation to construe the statute, if that can be done consistent with the legislative purpose, to avoid the shoals of vagueness.
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> When we attempt to define 'expenditure' ... we encounter line-drawing problems of the sort we faced in §608(e)(1). Although the phrase 'for the purpose of ... influencing' an election or nomination, differs from the language used in §608(e)(1), it shares the same potential for encompassing both issue discussion and advocacy of a political result.

Id. at 76-79. (Citations omitted). The Court worried that the "general requirement that 'political committees' and candidates disclose their expenditures could raise similar vagueness problems, for 'political committee' is defined only in terms of the amount of annual 'contributions' and 'expenditures,' and could be interpreted to reach groups engaged purely in issue discussion." *Id.* at 79. However, because the vagueness problems associated with the term "political committee" had already been largely resolved due to narrow readings of the statute by lower courts, it was not the effect upon groups defined as "political committees" under the Act that particularly concerned the Court.

The Court was more concerned about the effects that a vague and overbroad law could have upon the otherwise lawful First Amendment activities of other groups and individuals.[15] The Court, therefore, narrowed the term "for the purpose of influencing" to save the definition of the terms "expenditure" and "contribution" from being unconstitutionally overbroad: "To insure that the reach of §434(e) is not impermissibly broad, we construe "expenditure" ... in the same way we construed the terms of §608(e)—to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. Thus, the Court concluded:

> [Section] 434(e) as construed imposes independent reporting requirements on individuals and groups only in the following circumstances: (1) when they make contributions earmarked for political purposes or authorized or requested by a candidate ... to some person other than a candidate or political committee, and (2) when they make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.
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> As [constitutionally] narrowed, §434(e), like §608(e)(1), does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result.

Buckley at 80.

In reviewing the *Buckley* decision then, we see that each time the *Buckley* Court considered the definition of "expenditure," it narrowly interpreted the term to avoid

[15] *See Buckley* at 79. Our new coordination regulations deal specifically with groups and individuals, exempting party committees and authorized committees. 65 Fed Reg. 76141-76142.

vagueness or overbreadth.[16] Concerns of vagueness and overbreadth were foremost in the *Buckley* Court's thinking in interpreting all aspects of the FECA. Most importantly, it found that the qualifying phrase "for the purpose of influencing," which is also part of the Act's definition of "contribution," 2 U.S.C. § 431(8)(A)(i), could be saved from vagueness problems only by construing it as applying to "words that in express terms advocate ... election or defeat."

The *Buckley* Court referenced coordinated communications only in passing. In arguing *Buckley*, the parties defending the Act contended that its limitation on independent expenditures was necessary to prevent would-be contributors from avoiding the contribution limitations of the Act by paying directly for media advertisements or other portions of the candidate's campaign activities. The Court addressed this concern with a brief statement that "controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act" under Section 608(c)(2)(B), *id.* at 46 (emphasis added), noting that "§608(e)(1) does not apply to expenditures 'on behalf of a candidate' within the meaning of §608(c)(2)(B). The latter subsection provides that expenditures 'authorized or requested by the candidate' ... are to be treated as expenditures of the candidate and contributions by the person making the expenditure." *Id.* at 46, n.53.

What the Court did not specifically address is whether it intended the same limiting construction of the term "expenditure" it had applied to sections 608(e)(1) and 434(e) to apply to section 608(c)(2)(B). Clearly the Court did not intend for independent issue advocacy to be regulated, but one might argue that in holding that authorized or requested "expenditures" are "contributions" under the Act, the Court meant to include coordinated issue advocacy. However, the *Buckley* Court's example of a coordinated "expenditure" that would be treated as a contribution, itself taken from the legislative history of the Act, is an express advocacy ad.

> [A] person might purchase billboard *advertisements endorsing a candidate*.... [I]f the advertisement was placed in cooperation with the candidate's campaign organization, then the amount would constitute a gift by the supporter and an expenditure by the candidate—just as if there had been a direct contribution enabling the candidate to place the advertisement himself.

Buckley at 46, n. 53 (emphasis added). Nothing suggests that the Court did not intend to extend to section 608(c) the narrow definition of "expenditure" it had given the term in section 608(e). Of course, it is possible that the Court never considered that a candidate would request or authorize "media advertisements" that did not expressly advocate the election or defeat of one candidate or another. After all, the legal distinction between

[16] *See also Federal Election Commission v. Survival Education Fund*, 65 F.3d 285, 294-95 (2d Cir. 1995) (holding that the phrase "contributions ... earmarked for political purposes" must, for reasons of vagueness, also be limited to contributions earmarked for communications that expressly advocate the election or defeat of candidates for office).

express ads and issue ads did not exist before *Buckley*, so there would have been no reason for a campaign to request an ad that did not expressly advocate election or defeat. Still, the most probable interpretations of *Buckley* are that it either limited the term "expenditure" in section 608(c)(2)(B) to disbursements for express advocacy, or simply did not address the issue. That the Court intended to find coordinated issue ads to be covered by the Act seems the least probable interpretation.

The question we face is whether, in light of Congress's actions, the holdings in *Buckley* and its progeny, the Constitutional concerns raised by the Supreme Court and lower courts, and our position as officials of the executive branch who have independently taken an oath to uphold the Constitution,[17] we can or should interpret the Act as reaching coordinated spending for issue advocacy communications.

In considering the question, I note first that each of the Constitutional concerns raised by the *Buckley* Court as reasons for providing greater protection to expenditures than to contributions is present in the context of coordinated issue advocacy disbursements. First, the coordinated issue advocacy disbursements do more than merely "serve as a general expression of support;" they do in fact "communicate the underlying basis for the support." *See Buckley*, 424 U.S. at 21. Second, restrictions on coordinated issue advocacy spending are, as a practical matter, likely to lead to a "reduc[tion] in the quantity of expression by restricting the number of issues discussed." *See id.* at 19. Arguably, of course, these groups might simply run their ads independently, so that no such speech reduction would result. As we know, however, groups regularly work with members of Congress to promote shared agendas. As the *Buckley* Court recognized, "[d]iscussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections." *Id.* at 43, n. 50. If the Act applies to coordinated issue advocacy, many groups will be unable both to work with elected representatives and to run ads attempting to influence public opinion on issues of mutual interest. In short, the groups will be asked to surrender either their rights of free speech and association or their rights of speech and to petition for redress. As already noted, the threat of investigation is itself often sufficient to chill speech. It is exactly our job, as the administrative agency with expertise in enforcing the Act, to recognize the practical effects of differing interpretations of the Act and to set policy accordingly.

Most importantly, efforts to regulate coordinated issue advocacy raise exactly the vagueness concerns at the heart of *Buckley*. For example, if Common Cause, having coordinated its legislative efforts with Senator McCain, were to also run advertisements in support of its agenda that mentioned the Senator, whether or not their ads would violate the Act would depend upon whether or not the Commission believed that they

[17] *Unlike some of my colleagues, I do not interpret that oath to mean that we can fulfill our constitutional* obligations simply by ignoring constitutional considerations until and unless we are bound by judicial ruling. Rather, as representatives of a co-equal branch of government, our obligation requires us to consider the constitutional implications of our actions even when we have not been bound by judicial decisions.

were "for the purpose of influencing an election." This is the exact standard that the Supreme Court found, without more, to be unacceptably vague even in terms of the less burdensome disclosure provisions of the Act.

Because of the resulting vagueness, *see Buckley*, 424 U.S. at 41, n. 48, we can anticipate that groups will, in the future, "'steer far wider of the unlawful zone'...than if the boundaries of the forbidden areas were clearly marked." The present case illustrates that only too well. The enormous costs, imposition, and length of the investigation that has occurred in this case suggests that at least some of the more than 60 respondents involved, and who knows how many other groups and individuals that have witnessed the debacle, will "steer far wide" rather than risk a lengthy investigation, even if that investigation does ultimately lead to a finding of "no probable cause."[18]

At one time, a majority of the Commission seems to have recognized this vagueness problem. On June 24, 1999, Commissioners Wold, Mason, and Sandstrom, joined by then Commissioner Elliott,[19] issued a statement of reasons rejecting the enforcement of coordination cases under a vague, "electioneering message" content standard.[20] The Commission majority at that time correctly concluded that the vague "electioneering message" standard offered no guideposts for free discussion, even in cases where such discussion was coordinated or presumably coordinated with a candidate, writing:

> The vagueness and overbreadth problems of the "electioneering message" and "relative to" standards are thus two sides of the same counterfeit coin. They are vague because it is not clear when they encompass issue discussion and not candidate advocacy. They are overbroad because, given the nature of campaigning, they will inevitably encompass both. For the same substantive reasons that the Supreme Court held the "relative to" standard in the FECA to be unconstitutional, the Commission may not employ the "electioneering message" standard. *Even in the context of coordinated, or presumably coordinated, communications in which the "electioneering message" test has generally been proposed* (see 11 C.F.R. §114.49c)(5)(ii)c)(5)(ii)(B)(E) (regulation of voter guides)), *the Commission may not ignore these constitutional requirements.*

Statement of Reasons of Vice Chairman Darryl R. Wold, and Commissioners Lee Ann Elliott, David M. Mason, and Karl J. Sandstrom on the Audits of "Dole for President Committee, Inc." (Primary), "Clinton/Gore '96 Primary Committee, Inc.," "Dole/Kemp '96, inc." (General), Dole/Kemp '96 Compliance Committee, Inc." (General),

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[18] Everyone at this Commission is well aware of a favorite saying of the practicing campaign finance law bar: "The process is the punishment."

[19] I did not join the Commission until June of 2000.

[20] This appears to have been the standard used by the Commission in deciding whether or not coordinated issue advocacy was subject to the Act prior to adoption of 11 CFR § 100.23. *See* Advisory Opinion 1985-14 [1976—1990 Transfer Binder] Fed. Elec. Camp. Fin. Guide (CCH), ¶ 5819 at 11185.

"Clinton/Gore '96 General Election Legal and Compliance Fund" at 6, (June 24, 1999) (emphasis added).

Shortly thereafter, the Federal District Court for the District of Columbia decided *Federal Election Commission v. Christian Coalition*, 52 F. Supp.2d 45 (D. D.C. 1999). That decision held that corporate expenditures for coordinated issue ads were subject to the contribution prohibitions of 2 U.S.C. section 441b.[21] *Id.* Because this single district court decision seems to have contributed to a re-evaluation of the Commission's previously expressed appreciation for and insistence upon definite content standards, I will address this decision and related precedent at some length.[22]

III. B.

In *MCFL* the Supreme Court had held that issue advocacy by corporations and unions does not constitute an "expenditure" pursuant to the Act. 479 U.S. at 249. Thus, corporate and union communications lacking express advocacy are not only not "independent expenditures"[23] under Section 441b—they are not "expenditures" at all. Nevertheless, the *Christian Coalition* court concluded that whether or not corporate or union activity is prohibited or protected turns upon whether the activity is "in connection with an election," and not whether the activity is an "expenditure," under the Act because, "[t]he real issue ... is whether an expenditure is 'authorized' by a campaign or 'coordinated' with the campaign." 52 F. Supp.2d at 87-88. The *Christian Coalition* court went on to argue that "*Buckley*, in its treatment of coordinated expenditures as in-kind contributions, left undiscussed the First Amendment concerns that arise with respect to 'expressive coordinated expenditures.' ... It can only be surmised that the *Buckley* majority purposely left this issue for another case."[24] 52 F. Supp.2d at 85.

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[21] In doing so the district court failed to address the impact of 2 U.S.C. § 431(8)(B)(vi) in light of the Supreme Court's holding in *MCFL*, *supra*. *See ante* pp. 4-5.

[22] I presume that the *Christian Coalition* case was a factor in this change as all three Commissioners still on the Commission reversed course on the need for clear content standards after that opinion. Another possibility is that these commissioners believe that vagueness and overbreadth can be cured by a content standard somewhere between the "electioneering message" standard they specifically rejected and the express advocacy test they have so far not adopted, though to date no such standard has been proposed.

[23] The district court stated that "corporations and unions can make *independent expenditures* that are related to a federal election campaign so long as those expenditures are not for communications that advocate the election or defeat of a clearly identified candidate." *Christian Coalition* at 48 (emphasis in the original). Because the term "independent expenditure" is defined within the FECA as requiring express advocacy, *see* 2 U.S.C. § 431(17), and section 441b prevents corporations and unions from making *any* FECA "expenditures," we know that the district court meant "issue advocacy" by its use of the term "independent expenditures" in the above sentence.

[24] The *Buckley* Court allowed contributions to be carved from First Amendment protection largely because contribution limits "involve [] little direct restraint on [one's] political communication [and] does not in any way infringe on the contributor's freedom to discuss candidates and issues." *Buckley* at 21. Investigating issue advocates on the theory that their communications may be coordinated with a candidate is a direct restraint on a speaker's freedom to discuss candidates and issues.

In addressing the issue, the *Christian Coalition* court next recognized a need to differentiate between "expenditures on non-communicative materials, such as hamburgers or travel expenses for campaign staff," which, like direct contributions to the candidate, do not communicate the underlying basis of support, and expenditures "in which the spender is responsible for a substantial portion of the speech." *Id.* at 85, n. 45. The latter, which the court termed "expressive coordinated expenditures," are speech-laden or communicative, and therefore different from other non-communicative in-kind contributions. *Id.* Ultimately, however, the court concluded that coordinated issue advocacy could be regulated, believing that it is the "fact of coordination" that is significant, not the character of the underlying item that is coordinated. The court seemed to conclude that the lesson of *Buckley* is that it is the independence of the speech, rather than its communicative value, that determines its level of constitutional protection. In other words, the court focused only on the corruption side of the coin, but not on the First Amendment side. Thus, the court found that independent speech is deserving of clear content standards, but where independence fades—or at least a complainant alleges it has faded—speech may be extensively investigated regardless of its content and without regard for whether that speech constitutes speech of the spender. *See id.* at 87, n. 50.

The district judge in *Christian Coalition* reasoned that *Buckley* specifically read an express advocacy standard only into the statutory provisions regarding *independent* expenditures 'relative to' a clearly identified candidate and 'for the purpose of influencing any election for Federal office.' 52 F. Supp.2d at 87, n.50. Therefore, the court concluded, for all other parts of the FECA, the *Buckley* Court must have "used the term 'expenditure' advisedly, leaving intact the normal, broad meaning Congress had given it." *Id.* But what "normal, broad meaning" had Congress given the definition of "expenditure"? Webster's Dictionary defines "expenditure" as "the act of expending; a spending or using up of money, time, etc.; disbursement." *Webster's New Twentieth Century Dictionary of the English Language*, p. 644, 2d ed., 1977. Clearly the Act did not intend, nor would it be constitutional to prohibit all expenditures or contributions by a person in excess of $1000, at least not in the broad, everyday meaning of the terms. Thus Congress had limited the scope of both the terms "expenditure" and "contribution" to, "[a]nything of value ... *for the purpose of influencing any election for Federal office.*" 2 U.S.C. §§ 431(9)(A)(i) and 431(8)(A)(i) (emphasis added). The *Buckley* Court, however, found that the phrase "for the purpose of influencing" was still insufficiently precise to overcome concerns of vagueness and overbreadth,[25] and so narrowed it to cover only express advocacy. 424 U.S. at 79. If, as the *Christian Coalition* court maintained, the *Buckley* Court defined that critical phrase only with regard to *independent* expenditures, then that phrase must still be imbued with some semblance of meaning before deciding which coordinated disbursements are regulable "expenditures," and therefore "contributions" subject to the Act.

[25] "There is no legislative history to guide [the courts] in determining the scope of the critical phrase 'for the purpose of influencing,'" *Buckley*, at 77, yet "[i]t is the ambiguity of this phrase that poses constitutional problems." *Id.*

When a group engages in public discussion of political issues and coordinates its activity with a candidate or committee, the critical phrase that turns the speech into prohibited or limited activity is that it is speech "for the purpose of influencing an election." The court in *Christian Coalition* seemed to assume that because the Supreme Court did not specifically define the phrase as being limited to express advocacy in the context of coordinated expenditures, it must have decided that groups that are alleged to have engaged in coordinated speaking are not faced with the same concerns of vagueness and overbreadth. In fact, the Supreme Court has simply never specifically answered the question.[26]

There is no normal, accepted meaning of the phrase, "for the purpose of influencing," and Congress has not provided one. An "unconstitutionally overbroad statute may not be enforced *at all* until an acceptable construction has been obtained." *McGautha v. California*, 402 U.S. 183, 259 (1971), *reh'g. denied*, 406 U.S. 978 (1972). Either the Commission or the courts must give the phrase "for the purpose of influencing" some prospective, content-based meaning.[27]

IV.

The approach to coordinated expenditures adopted by Commissioners Thomas and McDonald would relieve the Commission from any need to clearly define which speech is "for the purpose of influencing" elections until after an extensive investigation. They would have this determination made by the Commission on a case-by-case basis after an investigation, which would be, in effect, a search for evidence of the respondent's true intent based upon a totality of the circumstances. These Commissioners believe a complete investigation in this case, for example, could have shown that the "the Coalition's communications were undertaken for the purpose of influencing federal elections" because the Coalition "aired ads in the weeks before the election;" "dropped

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[26] *See* ante at 13.

[27] In the context of FECA, the courts have consistently used an "express advocacy" test to give meaning to the Act's vague or overly broad provisions. *See e.g. Buckley v. Valeo*, 424 U.S. 1 (1976); *Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *Maine Right to Life v. FEC*, 98 F.3d 1 (1st Cir. 1996), *cert. denied* 118 S. Ct. 52 (1997); *FEC v. Christian Action Network, Inc.*, 92 F.3d 1178 (4th Cir. 1996) (*summarily affirming* 894 F. Supp. 947 (W.D. Va. 1995)); *Faucher v. FEC*, 928 F.2d 468 (1st Cir.), *cert. denied*, 502 U.S. 820 (1991); *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980) (*en banc*); *Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448 (D. Co.), *rev'd on other grounds*, 59 F.3d 1015 (10th Cir. 1995), *vacated on other grounds*, 116 S. Ct. 2309 (1996); *Right to Life of Michigan v. Miller*, 23 F. Supp.2d 766 (W.D. Mich. 1998); *FEC v. National Org. for Women*, 713 F. Supp. 428 (D. D.C. 1989); *FEC v. American Fed'n of State, County & Mun. Employees*, 471 F. Supp. 315 (D. D.C. 1979). *See also FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (holding that the First Amendment prohibits limits on independent expenditures that expressly advocate the election or defeat of a candidate, and noting in dicta "[t]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages ... can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view."); *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997) (holding that the Commission's efforts to regulate "issue advocacy" as "contributions" exceeded its powers under the FECA, and stating, "we do not take Congress to have authorized rules that sacrifice First Amendment interests.")

direct mail ten days before the election;" and "took credit" for the reelection of many members of Congress. Thomas/McDonald Statement, at 12, n. 6, (internal citations omitted). Additionally, they would find that "[t]here is no indication that the Coalition was formed for any purpose other than building ... public support for certain candidates [and] nothing suggesting that the Coalition engaged in ... issue discussion outside the context of elections." Thomas/McDonald Statement at 15. The capstone for the Commissioners is a quote from the Coalition itself: "Our ultimate objective is to return a pro-business, fiscally responsible majority for the 105th Congress." Thomas/McDonald Statement at 16 (emphasis omitted), quoting *The Washington Post*, August 8, 1996.[28]

These criteria offer no prospective guidance and contribute little if anything to overcoming the vagueness problem. Because, as the Supreme Court noted in *Buckley*, "campaigns themselves generate issues of public interest," 424 U.S. at 42, and because public interest in issues is often highest close to an election, the logical time to engage in issue advocacy is close to an election.[29] Similarly, groups will ultimately hope that if politicians do not adopt their positions on issues, the voters will turn against them. Surely, we cannot regulate issue ads simply because they will affect what issues and stances voters think are important. That does not make their conduct "for the purpose of influencing" a federal election as the meaning of that crucial phrase has been defined to avoid vagueness problems in the context of independent expenditures. *See Federal Election Commission v. GOPAC*, 917 F. Supp. 851 (D. D.C.) (1996). Thus the type of criteria on which Commissioners Thomas and McDonald would rely fails, even after the

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[28] Commissioners Thomas and McDonald also cite these facts for the proposition that the Coalition was a "political committee" that must register under 2 U.S.C. § 433 and report its activity under 2 U.S.C. § 434. Thomas/McDonald Statement at 15-17. The Act defines "political committee" as "any ... association ... of persons which receives *contributions* ... or makes *expenditures* aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A) (emphasis added). The *Buckley* Court cautioned that the broad statutory definition of 'political committee,' which turns on the terms contribution and expenditure and on the phrase "for the purpose of influencing any election" had the potential for encompassing "both issue discussion and advocacy or a political result" and thus might encroach upon First Amendment freedoms. *Buckley* at 79. Therefore, to fulfill the purposes of the Act, the term political committee "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* While an organization's purpose may be evidenced by its public statements of its purpose, *see MCFL* at 262, such an inquiry is secondary to the requisite of finding "expenditures" or "contributions" in excess of $1,000. So "[e]ven if the organization's major purpose is the election of a federal candidate or candidates [, as Commissioners Thomas and McDonald insist the evidence would conclude,] the organization does not become a "political committee" *unless* or *until* it makes *expenditures* in cash or in kind." *See Machinists* at 392. The argument that "major purpose" alone is enough to make a group a "political committee" or make disbursements into "expenditures" as defined by the Act was specifically rejected in *Federal Election Commission v. GOPAC*, 917 F. Supp. 851, 861-62 (1996)("As a matter of law, the Commission ... failed to demonstrate that GOPAC became a political committee within the meaning of the Act by *spending or receiving* $1,000 or more and engaging in 'partisan politics' and 'electioneering.'")(emphasis added).

[29] Furthermore, Congress is often still in session within, for example, 60 days of an election, and engaged in more than the usual number of floor votes while attempting to wrap up the session. *See* Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. Legis. 179, 192 n. 85 (1998); *See also Mills v. Alabama*, 384 U.S. 214 (1966)(striking down a limited ban on express advocacy close to an election).

fact, to provide any meaningful distinctions that would not chill constitutionally protected speech.

Equally important, "[n]o matter what facts [the Commission] finds through [an] investigation, the requisite jurisdiction for the investigation itself must stand or fall on the purely legal claim...." *Federal Election Commission v. Machinists Non-Partisan Political League*, 655 F.2d 380, 390 (D.C. Cir. 1981) (hereinafter "*Machinists*"). In *Machinists*, the Circuit Court of Appeals for the District of Columbia had to determine whether to enforce a Commission subpoena against a "draft" committee where it was unclear whether the Commission had statutory authority to regulate draft committees at all. *Id.* The Court stated that any alleged compelling interests the Commission may assert in seeking information, can be compelling and granted effect if the Commission first has authority to regulate a particular type of speech or activity. *Id.* But the Court held that "the highly sensitive character of the information sought simply makes it all the more important that the court be convinced that jurisdiction exists." *Id.* at 389.

In the current MUR, the purely legal claim is that coordinated issue advocacy is "for the purpose of influencing elections" and so subject to regulation under the FECA. In deciding the question of Commission jurisdiction, the *Machinists* Court warns us that "[i]n this delicate first amendment area, there is no imperative to stretch the statutory language, or read into it oblique references of Congressional intent...." Rather, "[a]chieving a reasonable, constitutionally sound conclusion in this case requires just the opposite. 'It is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality.'" *Id.* at 394, quoting *Richmond v. United States*, 275 U.S. 331 (1928).

Certainly we, as Commissioners, should equally avoid interpretations of the statute that raise constitutional questions, at least absent a clear expression of intent from Congress. We are obliged to be certain we are acting within the confines of the FECA and the Constitution. We cannot use ambiguities to expand our regulatory authority. Even if Commissioners do not believe that the *Buckley* Court limited the phrase "for the purpose of influencing" to express advocacy when applied to coordinated communications, they must concede that our guidance in this area is at a minimum. To avoid serious constitutional concerns, we should adopt an objective, bright line express advocacy standard as a predicate to investigating allegedly coordinated issue discussion.

Indeed, the D.C. Circuit has also admonished this agency to use clear, bright line standards, not only to address constitutional concerns, but for more mundane, practical reasons as well. In *Orloski v. F.E.C.*, 795 F.2d 156, 165 (D.C. Cir. 1986), the Court of Appeals wrote that, "[a]dministrative exigencies mandate that the FEC adopt an objective, bright-line test for distinguishing between permissible and impermissible corporate donations." Certainly this would apply to permissible and impermissible non-corporate donations as well. The *Orloski* court went on to add that, "an objective test is required to coordinate the liabilities of donors and donees. The bright-line test also is necessary to enable donees and donors to easily conform their conduct to the law and to

enable the FEC to take the rapid, decisive enforcement action that is called for in the highly-charged political arena." *Id.* Each of these concerns apply in the context of coordinated issue advocacy—as the naming of over 60 respondents and the length of the investigation in this MUR show, without an objective content standard neither donees nor donors can "easily conform their conduct to the law," and the FEC cannot take "rapid, decisive enforcement action." And, of course, *Orloski* also warned of the need for a bright line to avoid a chilling effect on protected speech: "A subjective test based upon the totality of the circumstances [such as that favored by Commissioners Thomas and McDonald in this MUR] would inevitably curtail permissible conduct." *Id.*

In fact, *Orloski* warned of other practical problems with a subjective test, many of which are on exhibit in this case. Wrote the court:

> "[A subjective test] would also unduly burden the FEC with requests for advisory opinions ... and with complaints by disgruntled opponents who could take advantage of a totality of the circumstances test to harass the sponsoring candidate and his supporters. It would further burden the agency by forcing it to direct its limited resources toward conducting a full-scale, detailed inquiry into almost every complaint, even those involving the most mundane allegations. It would also considerably delay enforcement action. Rarely could the FEC dismiss a complaint without soliciting a response because the FEC would need to know all the facts bearing on motive before making its "reason to believe" determination.

Id. at 165. These considerations, and in particular the chilling effect on speech of this uncertainty, argue for an objective, express advocacy test over the vague, *post hoc*, subjective test favored by Commissioners Thomas and McDonald.

Commissioner Sandstrom, in his turn, voices a concern for vagueness and overbreadth, but argues that the "express advocacy test is a *subjective*, content-based test about which reasonable minds can on occasion reach different results," and for that reason, ought to be applied "only where more objective criteria are unavailable." Sandstrom Statement at 6. Commissioner Sandstrom then argues that the objective criteria should be whether the ads were tested for their effect on voters' candidate preferences. Based on this, he voted against the General Counsel's recommendation to take no further action in this case.

First, Commissioner Sandstrom errs in thinking that the express advocacy test is subjective. A subjective test depends on the mental impression of the respondent at the time his communications were made. An objective test relies on independently verifiable facts, such as whether or not a communication contains express words of advocacy of election or defeat. While it is true that the inexactness of language means that reasonable minds can sometimes reach differing results on whether or not certain words are express

words of advocacy of election or defeat,[30] in the overwhelming majority of cases the express advocacy standard is very easy to apply. The occasional disagreement does not mean that the express advocacy test is "subjective," that it fails to provide notice to the regulated community, or that it fails to provide courts a standard of reviewing the actions of legislatures, regulatory commissions, prosecutors, and inferior courts. By an "objective" test, it is not meant that every adjudicator will reach the same result in every case, but rather that the test will not rely on the subjective motives of the speaker. Commissioner Sandstrom's proposed objective criteria — whether or not the ad was tested for effect on voter candidate preferences — is, like the express advocacy test, objective in that it does not rely on intent, but is, like the express advocacy test, subject to disagreement as to whether it has been met.[31]

More important, Commissioner Sandstrom's proposed standard provides no guidance to a group that had not so tested its ads. That is, the presence of such testing might quickly allow the Commission to find a purpose to influence a federal election, but its absence would not allow the respondent to quickly demonstrate no such purpose. (I do not think that Commissioner Sandstrom means to propose that *only* issue ads that are tested for effect on voters' candidate preferences would be subject to regulation). Nor would the Commission be expected to routinely accept a respondent's denial of such testing without an investigation. Respondents would therefore continue to be subject to extensive investigations on the basis of allegations filed by their political adversaries. Thus, the chilling effects on speech, not to mention the other problems outlined in *Orloski*, would still be present. Furthermore, groups engage in issue advocacy in the ultimate hope of changing government policy. One way to assure that issue ads will be effective is to test them on voters to see if they are likely to encourage voters to put the desired pressure on legislators and candidates to adopt the favored positions. The right to engage in political issues discussion would lose much of its meaning if groups and individuals were limited to communications that were not effective in mobilizing voters.

The express advocacy test is an instrument of law designed to further constitutional aims by limiting actions of legislatures and regulatory bodies that would chill protected political speech through their overbreadth and vagueness. The existence of express advocacy is a threshold requirement for regulating the communicative expenditures of unions, corporations, groups or individuals. No matter the degree of dissatisfaction with the results the test yields, we are not permitted, nor would it be wise, to jettison the express advocacy test simply because we might believe in any given case that "more objective criteria" are available.[32]

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[30] *See e.g. Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), *cert den.* 484 U.S. 850 (1987); MUR 4922 (Suburban O'Hare Commission).

[31] For example, my standard for determining what constitutes "test[ing] an ad's influence on voters' choice of federal candidate" may differ from Commissioner Sandstrom's. Does it include, for example, asking generically whether a voter would be more or less inclined to favor a candidate who takes particular positions? Or asking not if the ad would affect one's vote or even preference, but merely the respondent's opinion of the individual in question? Or suppose that the ads are tested for voters using candidates in a Senate race, but then run in a House race? I am sure many more variations are available.

[32] It goes without saying that there is no basis in the statute or judicial interpretations of the statute for

It is true that the express advocacy test often yields results with which some individuals are unhappy. Many observers fear that coordinated issue advocacy has the potential to corrupt candidates and officeholders. The *Christian Coalition* court, for example, warned that were the express advocacy standard "imported" into section 441b's contribution prohibition, "it would open the door to unrestricted corporate or union underwriting of numerous campaign-related communications that do not expressly advocate a candidate's election or defeat." 52 F. Supp.2d at 88. This would, feared the court, "present real dangers to the integrity of the electoral process." *Id.* at 92. Of course, all of this is nothing more than the district court saying that its concern about *quid pro quo* corruption overrides the vagueness and overbreadth problems inherent in regulating issue advocacy. The Supreme Court faced the same issues in *Buckley* and reached the opposite conclusion, recognizing that issue advocacy would be used to influence campaigns: "It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." 424 U.S. at 45. Regulating coordinated issue advocacy, no matter how much it may or not benefit a campaign, plunges the discussion of issues back into a morass of regulation and resuscitates the concerns of vagueness and overbreadth the Court addressed in *Buckley*. A content standard is needed to alleviate this problem, but at this time our coordination regulations possess no content standard beyond the vague statutory language that expenditures be made for the purpose of influencing a federal election.[33] This is effectively no content standard at all, as the *Buckley* Court held in discussing the disclosure provisions of the Act, and as another Supreme Court case, cited extensively in *Buckley,* makes clear.

In *Thomas v. Collins*, 323 U.S. 516 (1945), Thomas, a national union leader, was accused of violating a Texas statute requiring "all labor union organizers operating in ... Texas ... to file [for an organizer's card] with the Secretary of State before soliciting any members for his organization." *Id.* at 519, n. 1. The statute required organizers to carry the card whenever "soliciting" members, and to exhibit the same when requested to do so by prospective members. The statute was invalidated because speakers would not know in what ways they could speak about the labor movement, or about labor issues, without

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Commissioner Sandstrom's proposal to define groups as political committees by essentially redefining "expenditure" and "contribution" to include ads tested for their effect on voter candidate preferences. Commissioner Sandstrom is also justifiably concerned that the rules be made clear. Sandstrom Statement at 4-5. In addition to being well grounded in judicial precedent, the express advocacy test has the advantage of being clear, simple to understand for the inexperienced, easy to apply in the overwhelming majority of cases, and familiar to regular participants in campaigns.

[33] Some have suggested that "the purpose of influencing" be found in 'any ad featuring a candidate's name or likeness.' But this is little improvement, for reasons of overbreadth, over the 'relative to a candidate' standard the Court rejected as vague in deciding *Buckley*. Limiting the content standard to any ad containing a clearly-identified candidate is unconstitutionally overbroad for as the Court observed in *Buckley*, "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." 424 U.S. at 42.

carrying a card. In short, the statute was invalidated because it lacked a definite content standard.

The Court suggested that had the statute included a precise content standard, equivalent to the express advocacy test later adopted in *Buckley*, the regulation could have been valid under the State's police power because, "[a] speaker in such circumstances could avoid the words 'solicit,' 'invite,'[or] 'join.'" *Id.* at 534. However,

> [w]ithout such a limitation, the statute forbids any language which conveys, or reasonably could be found to convey, the meaning of invitation. How one might 'laud unionism' as the State and State Court concede Thomas was free to do, yet in these circumstances not imply an invitation, is hard to conceive. ... In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation, puts the speaker in these circumstances wholly at the mercy of his hearers. ... Such a distinction offers no security for free discussion.

Id. at 535.

The Court made the point most relevant to the problem posed by our current coordination regulations:

> The vice [in a statute prohibiting the issuing of invitations without an organizer's card] is not merely that invitation ... is speech. It is also that its prohibition forbids or restrains discussion which is not or may not be invitation. The sharp line cannot be drawn surely or securely.

Id. at 535-36 (emphasis added). Similarly, the "vice" in the coordination regulations is not that they regulate ads that a candidate may authorize or request. The vice of the regulations is that unless they are limited to phrases of a particular kind, speakers who want to discuss more generic matters will not know whether they will be investigated under the regulations. A speaker seeking to discuss issues without risking investigation can avoid words such as 'vote for,' 'elect,' 'vote against,' or 'defeat.' But absent a content standard, our regulations provide no guidance as to which types of phrases will be deemed to "influence the outcomes of elections," and our regulations will limit or chill much speech that is not or may not be "for the purpose of influencing" a federal election.

Nor can the lack of a content standard can be effectively offset through a restrictive test for coordination. While other considerations lead me to support a conduct test for coordination similar to that enunciated in *Christian Coalition* and since incorporated into our regulations at 11 C.F.R. § 100.23, the truth is that such a restrictive test for proving coordination can, absent a content standard, actually make investigations more intrusive and chilling of speech. The reason is because the more difficult evidentiary burden the Commission faces to prove coordination requires a more intrusive investigation to gather facts that are usually in control of the respondent. Thus, while the

coordination rule of *Christian Coalition* solves the *notice* problem of the Commission's old "insider trading" standard, it does not address the fundamental *vagueness* problem. "The objectionable quality of vagueness and overbreadth does not depend [just] upon [the] absence of fair notice to a[n] accused ... but [more importantly] upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a ... statute susceptible of sweeping and improper application." *NAACP v. Button*, 371 U.S. 415, 432-433 (1963). A content standard provides advance notice to actors of what kind of speech the FEC may investigate, and reduces the risk of arbitrary, discriminatory, or capricious enforcement far more effectively than a purely conduct based standard.

Absent a content standard, it does not appreciably warm the environment for speech to say that the standard for actually proving and punishing coordination "must be restrictive," as the court did in *Christian Coalition*. 52 F. Supp.2d at 88. This is because a restrictive conduct standard does nothing to alleviate the ease with which allegations may be made and intrusive, expensive investigations launched. The Supreme Court in *Thomas v. Collins*, assessing the chilling effect of the Texas statute upon speech, did not discuss the defendant's likelihood of success at trial, or the difficulty that the State would have in proving whether the defendant violated the organizer-card ordinance, or the elements involved in that proof. The mere threat of prosecution was sufficient to chill speech and make the statute unconstitutional. ("The threat of ... arrest ... hung over every word." *Id.* at 534.) Because the threat of prosecution (or investigation) can itself chill speech, *see Virginia v. American Booksellers Ass'n.*, 484 U.S. 383, 392-93 (1998), a tough conduct standard does not eliminate the need for a clear content standard. A precise content standard along with the new conduct standards outlined in 11 CFR § 110.23 would work as bookends in enforcing the Act while removing an unconstitutional chill from protected speech and associational activities.

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V.

Investigations into allegations of coordination will often involve demands for access to an organization's detailed legislative and political plans, including intrusion into the most sensitive internal political discussions. *See generally, AFL-CIO, et al. v. FEC*, Civ. Action No. 01-1522 (GK), Dist. Ct., District of Columbia. The express-advocacy content standard ensures that investigations into allegations of coordination are only visited upon those groups, corporations or unions who first cross a bright, content line.

The dangers to the First Amendment posed by such broad government investigations of political activity have been recognized time and again by the federal courts. *See e.g., F.E.C. v. Larouche Campaign*, 817 F.2d 233, 234 (2d Cir. 1987)(recognizing that the Commission's investigative authority should be constrained or clearly delineated due to the sensitive nature of the activities the agency regulates, and holding that where a case implicates First Amendment concerns, "the usual deference to the administrative agency is not appropriate and protection of the constitutional liberties of the target of the subpoena calls for a more exacting scrutiny of the justification offered by the agency.") In *Buckley*, the Supreme Court recognized that "compelled disclosure

[of political activities], in itself, can seriously infringe on privacy of associations and belief guaranteed by the First Amendment." 424 U.S. at 64. Justice Frankfurter made the same point over forty years ago: "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigatory process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of association, and freedom of communication of ideas." *Sweezy v. New Hampshire*, 354 U.S. 234, 235 (1957) (Frankfurter, J., concurring). Investigations into such areas of constitutional sensitivity ought to be triggered only where respondents can know that they have crossed a bright line.[34]

The suggestion that a bright line can be found by the fact of communicating with a candidate—in other words, that a speaker can find a safeharbor by not communicating at all with a candidate in the two, four or six-year period between elections, is not realistic.[35] Indeed, one reason for our passing the new coordination regulation was the recognition that our old enforcement standard, presumptively finding coordination based on any contact between the speaker and the candidate, was unrealistic. For example, in seeking to prove coordination between the Christian Coalition and various Republican candidates, the Commission's evidence included the fact that public officials addressed meetings of the organization. *See Christian Coalition*, 52 F. Supp.2d at 68, 71, 76. Public officials have a legitimate need to communicate with their constituents, these constituents have a right to listen to their elected officials, and "nowhere in the Act did Congress expressly limit an incumbent's right to communicate with his constituency." *Orloski v. Federal Election Commission*, 795 F.2d 156, 163 (D.C. Cir. 1986). Groups and candidates talk all the time, and to force groups to choose between talking to candidates or losing their safeharbor is likely to be as chilling on the First Amendment rights to speak and to petition the government as the conduct standard the Commission just rejected.

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[34] I do not suggest that the Commission may make no inquiries at all until it is sure that express advocacy exists. The Commission could conduct a *Reader's Digest* inquiry, even to the point of enforcing subpoenas, to be certain no express ads were run. *See Reader's Digest Ass'n. v. FEC*, 509 F. Supp. 1210 (S.D.N.Y) (where factual questions existed regarding whether the Commission had statutory authority to conduct a full investigation, the court adopted a two-step process to govern its continuation; the first stage of the investigation would be solely for the purpose of determining whether statutory authority existed). As a factual matter, complaints are normally filed because someone—usually the speaker's political opponent—has seen the ads in question. The ads are described in or attached to the complaint, so even a *Reader's Digest* inquiry will be rare. When the ads are not shown by the complaint to be issue ads, the respondent can typically attach the ads to the response, and if they do not include express advocacy, the enforcement ends there at very low cost to both respondent and Commission.

[35] Chairman McDonald and Commissioner Thomas state that the Act and the *Buckley* Court required only a "general understanding" to find coordination and presumably would state that persons speaking with legislative officials or candidates in the 2, 4 or 6 years between elections do so at their own risk. *See* Thomas/McDonald Statement at 7. I disagree with this conclusion, for the reasons stated in *Clifton*. *See* 114 F.3d 1309 at 1314. The district court in *Christian Coalition* also seemed not to appreciate the First Amendment dilemma in this area, mischaracterizing the choice as one between "lobbying the *campaign* on issues but spending no money on the election ... or remaining walled off from the *campaign* so that all campaign-related expenditures are clearly independent." *Christian Coalition*, 52 F. Supp. 2d at 89, n. 53 (emphasis added). Approximately fifty percent of all "campaigns" involve office holders who make up "the government," and with whom the speaker may wish to confer on legislative issues pursuant to the First Amendment right to "petition for a redress of grievances." U.S. CONST. amend. I.

Issue discussion ought not, and constitutionally cannot, be regulated merely because an issue ad may be of benefit to the candidate or his campaign. Issue discussion will almost always, at some point, benefit some campaign, as the *Buckley* Court understood. The purpose of the express advocacy test is not to neatly separate those communications that are intended to influence a campaign from those that are not, but to protect the rights of all citizens to engage in protected speech. In this respect, the test is similar to many other prophylactic tests found in the law. For example, in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court recognized that "to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Miranda,* at 467.[36] The warnings that law enforcement officials have been required to give to suspects ever since are not a sifting screen to divine the subjective intent of the suspect; not one tool among many for determining whether his confession was voluntary. Likewise, the express advocacy test is not a sifting screen to divine the subjective intent of a respondent, to determine whether in his mind the speech he engaged in was for the purpose of influencing an election. Rather, both the *Miranda* warnings and the express advocacy test are objectively ascertainable threshold requirements promulgated by Courts to protect the constitutional rights of citizens. Neither test is disposable, even though there may be other evidence that a confession was voluntary, or that a respondent's speech was "for the purpose of influencing" an election. As stated by the Court in *Miranda*, the "privilege is so fundamental to our system of constitutional rule and the expedient of giving adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Miranda* at 468. The First Amendment is no less fundamental,[37] and the expedient of applying the express advocacy test so simple, that we may not and ought not pause to inquire in individual cases whether *speech* can be "for the purpose of influencing" an election without first finding express advocacy.[38]

Campaign finance laws and regulations have, over time, become weapons in the arsenals of candidates and party committees, and we should not quickly minimize the far-reaching aspects of these regulations. In 2000 the Congressional Committee Chairman of one major political party went so far as to sue his counterpart under the RICO statute.[39] If

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[36] The *Miranda* warnings were re-affirmed last year as a constitutionally based approach for determining the admissibility of statements made during a custodial interrogation that could not be overruled by statutory enactment. *Dickerson v. United States* 530 U.S. 428 (2000).

[37] *See e.g.*, *Buckley v. Valeo*, 424 U.S. at 14 ("Discussion of public issues and debate [is] integral to the operation of the system of government established by our Constitution.")

[38] The law is full of blanket rules, in addition to *Miranda*, that are adopted in order to protect rights or to provide for increased accuracy or efficiency, even if in a particular case the application of the rule does not seem to achieve its purpose. For example, statutes of limitations may prevent an action even when evidence is not stale; the exclusionary rule often prevents evidence from being used in trials though it is known to be probative; the parole evidence rule may make a contract unenforceable though the evidence is clear that such a deal was made, to name just a few.

[39] In 2000, DCCC Chairman, Patrick Kennedy (D-R.I.) sued the NRCC and Tom DeLay (R-Tx.) under the

our coordination regulations proceed without an adequate content standard, it will take the political elite about three minutes to deduce that nearly all allegations of coordination will be followed by an FEC investigation, to which the respondent can offer no affirmative defense that will quickly terminate the investigation. Given that groups frequently have contacts with officeholder/candidates, credible allegations of coordination will be easy to make. If the complaint is reasonably well-crafted,[40] the Commission will have no choice but to find "reason to believe" that a violation has occurred. This is low-hanging fruit for any party, candidate, person or group seeking to silence and harass opposing voices in an election cycle.

Whether express advocacy is present in any written or broadcast message, however, is a legal question susceptible of a quick preliminary determination by the Commission. It therefore acts as an affirmative defense the Commission can accept or reject in the initial stages of the MUR. Absent such a test, a respondent's preliminary denial of coordination, even when backed by signed affidavits, will never amount to anything more than a self-serving factual (not legal) representation. If in the future the Commission adopts an incorrect content standard, or effectively no content standard, there will be no affirmative defense that could save an advocate from a protracted investigation. The express advocacy bright line serves as that affirmative defense. If the Commission abandons that bright line, any group or individual which seeks to both engage in issue discussion and has even a passing contact with elected officials may be subject to allegations that will trigger the type of massive investigation, and corresponding costs, seen in this MUR. Thus it will be among the most aggressive moves the Commission has taken towards chilling debate in the United States.

The expensive, intrusive, lengthy investigation of MUR 4624, like the similar four-year investigation in MUR 4291, would have been readily avoided by the simple application of an express advocacy content standard. Adopting this standard is, in my view, required by both the statute and the Constitution. But even if not required, it is certainly a permissible standard under the statute, and offers many benefits. It provides clear notice to the community; it should result in fewer Advisory Opinion requests than the mere conduct standard; it will result in fewer expansive investigations which eat up Commission resources; it will reduce the role of litigation in campaigns; and most importantly, it avoids any concerns about constitutionality, and will not have the chilling effect on speech of an approach without a clear content standard.

Thus I would have ended this MUR on much simpler grounds, at a much earlier date, by finding that the Coalition's spending for issue advocacy, whether or not

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RICO statute. *See* Juliet Eilperin, *House Democrats Sue DeLay; Action Accuses Whip of Extortion, Money Laundering in Fundraising*, THE WASHINGTON POST, May 4, 2000, at A06.

[40] Commission policy has been to treat complaints liberally. If the complainant swears an affidavit (as he is essentially required to do in swearing out a complaint, *see* 2 U.S.C. §437g(a)), the Commission will nearly always be required to launch into a full investigation to fairly decide whether the complainant or respondent has the better factual representation. "Rarely could the FEC dismiss a complaint ... because the FEC would need to know all the facts bearing on motive before making its ... determination." *Orloski* at 165.

otherwise coordinated, was as a matter of law not for the purpose of influencing an election and not subject to regulation under the FECA.

Bradley A. Smith, Commissioner

11/6/01
Date

EXHIBIT 6

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: The Commissioners
Staff Director
Deputy Staff Director
General Counsel

FROM: Office of the Commission Secretary

DATE: May 28, 2002

SUBJECT: Statement Of Reasons for MUR 4538

Attached is a copy of the Statement Of Reasons for MUR 4538 signed by Chairman David Mason and Commissioner Bradley Smith.

This was received in the Commission Secretary's Office on

Friday, May 24, 2002 at 1:43 p.m.

cc: Vincent J. Convery, Jr.
OGC Docket (5)
Information Division
Press Office
Public Disclosure

Attachment

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

FEDERAL ELECTION COMMISSION

***In re* Alabama Republican Party and Timothy R. Baer, as treasurer; Parker for Congress and Stan McDonald, as treasurer; William R. Archer, Jr.; Wayne Parker, Jr.**	)	**MUR 4538**

STATEMENT OF REASONS OF CHAIRMAN DAVID M. MASON, and COMMISSIONER BRADLEY A. SMITH

On September 19, 2001, the Commission voted 4-2[1] to take no further action with respect to the Alabama Republican Party and Timothy Baer, as treasurer, regarding violations of 2 U.S.C. §§ 441a(a)(2)(A), 441b(a) and 441a(f), and 11 CFR 102.5; and to take no further action regarding coordination allegations with respect to Parker for Congress and Stan McDonald, as treasurer. Because of the recent history of Commission action on matters of mass media communications allegedly coordinated between political parties and their candidates, we could not vote to proceed against the Respondents in this matter consistent with fundamental fairness. We write to explain the proceedings that led to this conclusion.

History of Commission Action on Coordination of Political Parties with their Candidates

Relevant Commission action with respect to coordination of mass media advertising by political parties with their candidates had its genesis in the 1996 elections. Throughout the recent history of party coordination matters, Commissioners maintained differing but largely individually consistent positions with respect to the threshold for finding a communication to be a coordinated contribution. Former Commissioner Elliot and Commissioner Smith, who replaced her, refused to make coordination findings in the absence of express advocacy because of First Amendment overbreadth concerns. Commissioner Sandstrom refused to make coordination findings absent express advocacy

[1] Vice-Chairman Mason and Commissioners Sandstrom, Smith and Wold voted in favor of the motion. Commissioner Michael Toner succeeded Commissioner Wold before the issuance of this Statement of Reasons. Chairman McDonald and Commissioner Thomas voted against the motion.

because of due process (notice) concerns. Commissioner Thomas required communications to be "for the purpose of influencing" an election in order to be considered coordinated communications. Commissioners Mason and Wold focused on the degree or amount of coordination.

In the audits of the Clinton and Dole presidential campaign committees the Commission did not seek a repayment of presidential matching funds under 2 U.S.C. § 441a(b) even though the national party media ads at issue appeared to have been coordinated with their respective candidates. The Commission's decision was based on the notice and overbreadth concerns of Commissioners Sandstrom and Elliot, joined by Commissioners Mason and Wold in regard to the Commission's previous advisory opinion-derived, vague and overbroad "electioneering message" standard for determining whether a coordinated ad is truly a "contribution," i.e., for the "purpose of influencing" an election, 2 U.S.C. § 431(8)(A), (9)(A).[2] Statement of Reasons of Vice Chairman Darryl R. Wold and Commissioners Lee Ann Elliot, David M. Mason and Karl J. Sandstrom on the Audits of "Dole for President Committee, Inc. (Primary), *et al.*

Before a Statement of Reasons was issued in any subsequent party coordination matter, the court in *FEC v. Christian Coalition*, 52 F.Supp.2d 45 (D. D.C. 1999) narrowly construed the scope of regulable coordinated expenditures. In so doing it rejected as constitutionally "overbroad" a significant part of the Commission's regulatory definition of coordination: "any consultation between a potential spender and a federal candidate's campaign organization about the candidate's plan's, projects, or needs." *Id.* at 89 (referring to the prior version of 11 CFR 109.1(b)(4)). The court also gave short shrift to the Commission's argument that two similarly worded FECA provisions -- 2 U.S.C. §§ 431(17)[3] and 441a(a)(7)(B)(i)[4] -- support 11 CFR 109.1(b)(4), by referring to the "First Amendment, not the Act," as the proper dividing line separating prohibited and protected "issue-oriented" expenditures. *Id.* at 89-90. The court then defined the scope of regulable coordinated expenditures upon First Amendment grounds:

> I take from *Buckley* [*v. Valeo*, 424 U.S. 1 (1976)] and its progeny the directive to tread carefully, acknowledging that considerable coordination

[2] Then-Vice Chairman Wold, Commissioners Elliot, Mason also did not believe there was a basis for ordering repayment under the Presidential Primary Matching Payment Account, 26 U.S.C. § 9031 *et seq.* Memorandum from Commissioner Mason, *Dole and Clinton Audits – Repayment Determinations*, Agenda Document 98-92, Nov. 25, 1998; Supplemental Reply Memorandum from Commissioner Mason, *Dole and Clinton Audits: Why "Excess Expenditures" is not a Basis for Repayment Determinations*, Agenda Doc. 98-92A, Nov. 25, 1998.

[3] The Commission was relying upon a partial converse of the definition of "independent expenditure" in 2 U.S.C. § 431(17), which provides that such is an "expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate . . . and which is not made in concert with, or at the request or suggestion of, any candidate."

[4] 2 U.S.C. § 441a(a)(7)(B)(i) provides that, for purposes of the FECA's contribution limits, "expenditures made by any person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate,. . . . shall be considered to be a contribution to such candidate."

> will convert an expressive expenditure into a contribution but that the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some consultations or coordination with a federal candidate.
>
> First Amendment clarity demands a definition of "coordination" that provides the clearest possible guidance to candidates and constituents, while balancing the Government's compelling interest in preventing corruption of the electoral process with fundamental First Amendment rights to engage in political speech and political association. . . .
>
> In the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners. This standard limits § 441b's contribution prohibition on expressive coordinated expenditures to those in which the candidate has taken a sufficient interest to demonstrate that the expenditure is perceived as valuable for meeting the campaign's needs or wants. [*Id.* at 91-92.][5]

The *Christian Coalition* standard became the basis upon which the Commission promulgated 11 CFR 100.23, which defines the conduct of what can be considered coordinated mass media communications between *non-parties* and candidates.[6] The

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[5] By refusing to fall back on or even address the sufficiency of the statutory language standing alone, the court would appear to have tacitly held that these provisions standing alone suffered from some constitutional defect that only a narrowing construction, which it was to provide, would remedy.

[6] 11 CFR 100.23 provides:

Sec. 100.23 Coordinated General Public Political Communications.

(a) Scope--(1) This section applies to expenditures for general public political communications paid for by persons other than candidates, authorized committees, and party committees.

(2) Coordinated party expenditures made on behalf of a candidate pursuant to 2 U.S.C. 441a(d) are governed by 11 CFR 110.7.

(b) Treatment of expenditures for general public political communications as expenditures and contributions. Any expenditure for general public political communication that includes a clearly identified candidate and is coordinated with that candidate, an opposing candidate or a party committee supporting or opposing that candidate is both an expenditure under 11 CFR 100.8(a) and an in-kind contribution under 11 CFR 100.7(a)(1)(iii).

(c) Coordination with candidates and party committees. An expenditure for a general public political communication is considered to be coordinated with a candidate or party committee if the communication--

(1) Is paid for by any person other than the candidate, the candidate's authorized committee, or a party committee, and

regulation explicitly excluded political parties from its coverage because of anticipated Supreme Court review of the constitutionality of the FECA's party coordinated expenditure limits, 2 U.S.C. § 441a(d). The Court upheld these limits in *FEC v. Colorado Republican Fed. Campaign Comm.*, 121 S.Ct. 2351 (2001).

Applying the *Christian Coalition* standard, the Commission in MUR 4378, on a 2-3 vote,[7] failed to support the General Counsel's recommendation to find probable cause to believe that the National Republican Senatorial Committee had made excessive in-kind contributions to Montanans for Rehberg through coordinated media ads. Then-Vice Chairman Wold and Commissioners Elliot and Mason could not find probable cause because the "General Counsel conclude[d] that 'there was no prior coordination with regard to specific content, timing and placement of the individual NRSC advertisements' and that the ads 'were apparently produced without the [candidate's] prior knowledge or approval as to content, timing and target audiences.'" Statement of Reasons of Vice Chairman Darryl R. Wold and Commissioners Lee Ann Elliot and David M. Mason at 3 (quoting GC's PC Br. at 30, 53). The General Counsel's recommendation was also based on the by-then rejected "electioneering message" standard.

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(2) Is created, produced or distributed–
(i) At the request or suggestion of the candidate, the candidate's authorized committee, a party committee, or the agent of any of the foregoing;
(ii) After the candidate or the candidate's agent, or a party committee or its agent, has exercised control or decision-making authority over the content, timing, location, mode, intended audience, volume of distribution, or frequency of placement of that communication; or
(iii) After substantial discussion or negotiation between the creator, producer or distributor of the communication, or the person paying for the communication, and the candidate, the candidate's authorized committee, a party committee, or the agent of such candidate or committee, regarding the content, timing, location, mode, intended audience, volume of distribution or frequency of placement of that communication, the result of which is collaboration or agreement. Substantial discussion or negotiation may be evidenced by one or more meetings, conversations or conferences regarding the value or importance of the communication for a particular election.

(d) Exception. A candidate's or political party's response to an inquiry regarding the candidate's or party's position on legislative or public policy issues does not alone make the communication coordinated.

(e) Definitions. For purposes of this section:
(1) General public political communications include those made through a broadcasting station (including a cable television operator), newspaper, magazine, outdoor advertising facility, mailing or any electronic medium, including the Internet or on a web site, with an intended audience of over one hundred people.
(2) Clearly identified has the same meaning as set forth in 11 CFR 100.17.
(3) Agent has the same meaning as set forth in 11 CFR 109.1(b)(5).

[7] Then-Chairman Thomas and Commissioner McDonald voted in favor of the General Counsel's recommendation. Vice Chairman Wold and Commissioners Elliot and Mason voted against the recommendation. Commissioner Sandstrom abstained.

When the allegations of coordination between the respective national parties and the Clinton and Dole presidential campaign committees were later addressed in the enforcement context, the Commission, on 3-3 votes,[8] failed to find reason to believe that the presidential committees had accepted excessive contributions in the form of media ads paid for by the respective national political parties and allegedly coordinated with those campaigns. MURs 4969 and 4713. Chairman Wold and Commissioner Mason, two of the three Commissioners who were willing to go forward, found reason to believe the parties had engaged in excessive coordination on the basis of the statutory language, 2 U.S.C. § 441a(a)(7)(B)(i), as narrowly construed in *Christian Coalition*. Commissioner Thomas appears to have applied a "purpose of influencing" test. Commissioners Elliot and Sandstrom refused to vote for findings based on the content concerns described above.

Commissioner McDonald refused to find reason to believe because of his perception that the law was unsettled and the "apparent inconsistent application of the law [a reference to MUR 4378 and the different treatment of the Dole and Clinton campaigns in the audit and enforcement tracks] governing whether ads are made 'for the purpose of influencing' an election and improperly coordinated." Statement of Reasons of Vice Chairman Danny L. McDonald at 5. While it may be true that the application of the previous version of 11 CFR 109.1(b)(4) would have yielded a different result in MUR 4378, what Chairman McDonald observes is not "inconsistency" but a focused inquiry under the *Christian Coalition* standard into the facts and the effect of prior communications between parties and their candidates concerning mass media advertisements.

In MUR 4503, the Commission, in a rare display of unity on party coordination matters, voted unanimously to find probable cause to believe that the South Dakota Democratic Party had made excessive contributions to Tim Johnson for South Dakota through certain coordinated media ads. At Commissioner Thomas's suggestion, however, the Commission had restricted its investigation to communications that contained express advocacy and took no action with respect to coordinated communications that did not contain express advocacy. Such a limit concerning the content of the communications apparently removed concerns raised by Commissioner Sandstrom (due process), Commissioner Smith (overbreadth) and Chairman McDonald (consistency).

The same day, however, in MUR 4476, the Commission failed, on a 3-3 vote,[9] to find probable cause to believe the Wyoming Democratic State Central Committee had

[8] Then-Chairman Wold and Commissioners Mason and Thomas voted to approve the General Counsel's recommendations.

[9] Vice-Chairman Mason and Commissioners Thomas and Wold voted in favor of the General Counsel's recommendation. Chairman McDonald and Commissioners Sandstrom and Smith voted against it.

coordinated media ads with the Karpan for Wyoming campaign. Even though there was no express advocacy, coordination was incontrovertibly present:

> [T]he Karpan Committee discussed the contents of the State Party's anti-Enzi [Karpan's opponent] ads and mailings with the State Party and with the State Party's consultants, suggesting subjects for the ads and suggesting changes to the wording of some ads and mailings; gave input regarding the placement of some of the media ads and into the number of media ads and target of mailings; and sought financing for the ads and mailings from [the] DSCC which transferred funds to the State party to help pay for the communications. The Karpan Committee sought to ensure the accuracy of the communications to prevent any harm to the Karpan campaign caused by any inaccuracies in the communications, and its role in consulting on the content of the communications appears to have helped ensure that the topics of the anti-Enzi communications echoed positions and actions that raised the most doubts with voters about Mike Enzi. [GC's Rep. #7 at 4.]

In MUR 4872, the Commission failed, in a 3-2 vote,[10] to find probable cause to believe that the Republican Party of Louisiana made excessive coordinated expenditures, which involved express advocacy. Commissioners Smith and Wold, who voted not to find probable cause in this matter based their decision, in part, on the legal basis for the General Counsel's theory, i.e., that use of selected quotations from an earlier coordinated communication in a subsequent but otherwise independent communication (after the party and candidate had parted ways), without more, transforms the independent expenditure into a coordinated contribution. Had the coordination been otherwise present, it appears that the Commission would have found probable cause because of the presence of express advocacy.

Alabama Republican Party

As mentioned above, the Commission voted 4-2 to take no further action against the Alabama Republican Party regarding alleged violations of 2 U.S.C. §§ 441a(a)(2)(A), 441b(a) and 441a(f), and 11 CFR 102.5, and to take no further action regarding coordination allegations with respect to Parker for Congress. The initial vote on this matter was 4-2[11] to find probable cause. The ads at issue did not contain express advocacy, but substantial decision-making authority was exercised by a vendor common to both the party and the candidate over ad scripts, distribution and timing. After, having opposed coordinated findings on non-express advocacy communications in MURs 4476,

[10] Chairman McDonald, Vice-Chairman Mason and Commissioner Thomas voted in favor of the General Counsel's recommendation. Commissioners Smith and Wold voted against it while Commissioner Sandstrom was not present at the meeting.

[11] Chairman McDonald, Vice Chairman Mason and Commissioners Thomas and Wold initially voted in favor of the General Counsel's recommendation. Commissioners Sandstrom and Smith voted against it.

4713 and 4969, citing consistency concerns, Chairman McDonald was now willing to go forward against the Alabama Republican Party even though express advocacy was not present. In light of this apparent change of course, Vice Chairman Mason moved to reconsider the vote, which eventually resulted in the present outcome.

Whatever consistency concerns may have existed in February of 2000 when the Commission disposed of MURs 4713 and 4969 have only been heightened since that time. The extensive patterns of direct communications among the party, candidate and vendor regarding the ads at issue in MUR 4476 was no less compelling evidence of coordination than the indirect communication presumed by virtue of the functions exercised by a common vendor in the present matter. In addition, Commissioner Sandstrom has consistently raised notice concerns (citing Advisory Opinion 1995-25) as a bar to prosecution of parties for coordination of non-express advocacy communications. Commissioners Mason and Smith agree that those notice concerns are substantial and that they, too, have been exacerbated by the record of Commission action on party coordination matters over the past two years.

In only one instance -- MUR 4503, where the communications at issue contained express advocacy -- has the Commission found party communications to be coordinated contributions to a campaign. A majority of the Commission could not agree to make reason-to-believe or probable-cause findings regarding non-express advocacy communications in that matter and others preceding it where evidence for coordination was, in some matters, far more compelling. In light of this record, it would be fundamentally unfair to proceed against the Alabama Republican Party. In addition, for pending matters, the Commission's actions leave express advocacy as the de facto content standard for determining whether communications are for the purpose of influencing an election, even when coordination is present.

The Commission's uncertain policy guidance and the absence of a consistent enforcement policy have, separately or together, made it impossible for the Commission to cite political parties for coordinating non-express advocacy communications with candidates. Recognizing some of our concerns, Commissioner Thomas has suggested that a proper course would be to make findings against party committees that have coordinated non-express advocacy communications but not seek penalties. The problem with this approach is that, absent some agreement about the basis for such findings, it would not provide any more adequate guidance than now exists. Further, while some taint might attach to such findings (raising fairness concerns in our minds), it is arguable that no judicially-cognizable injury would result, frustrating the process of judicial review that normally is available to ensure that our standards and actions comply with constitutional and statutory requirements. *See* 2 U.S.C. § 437g(a)(8). If a consensus does exist regarding a specific standard for determining when party communications become contributions to candidates by virtue of coordination, the Commission should announce that standard through the regulatory process and apply it prospectively rather than making ad hoc retrospective judgments through our enforcement process.

Given the state of affairs in which the Commission presently finds itself, we cannot proceed against the Respondents in this matter, and we will not be making party coordination findings on further matters arising out of 1998 and 2000 elections absent express advocacy communications.

May 23, 2002

David M. Mason
Chairman

Bradley A. Smith
Commissioner

EXHIBIT 7

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: The Commissioners
Staff Director
Deputy Staff Director
General Counsel

FROM: Office of the Commission Secretary

DATE: August 13, 2002

SUBJECT: Statement Of Reasons for MUR 4538

Attached is a copy of the Statement Of Reasons for MUR 4538 signed by Vice Chairman Karl J. Sandstrom.

This was received in the Commission Secretary's Office on Tuesday, August 13, 2002 at 9:29 a.m.

cc: Vincent J. Convery, Jr.
OGC Docket (5)
Information Division
Press Office
Public Disclosure

Attachment

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Alabama Republican State Party	)	MUR 4538
and Timothy R. Baer, as treasurer, et al.	)	

STATEMENT OF REASONS

On September 19, 2001, the Commission voted 4-2[1] to take no further action with respect to the Alabama Republican Party and Timothy Baer, as treasurer, regarding alleged violations of 2 U.S.C. §§ 441a(a)(2)(A), 441b(a) and 441a(f) and 11 CFR 102.5; and to take no further action regarding coordination allegations with respect to Parker for Congress and Stan McDonald, as treasurer. Although the advertisements at issue did reference a clearly identified federal candidate, they did not contain express advocacy.

In light of the Commission's failure to formally supersede Advisory Opinion 1995-25, I voted not to proceed against the respondents in this MUR because of the same concerns about due process I have consistently raised in enforcement matters relating to media advertisements alleged to be coordinated between candidates and party committees. *See Statement of Reasons of Commissioner Karl J. Sandstrom in MURs 4553, 4671, 4407, 4544 and 4713 (June 21, 2000)* and MUR 4994 (*December 18, 2001*). I once again urge the Commission to provide clarity to party committees and candidates about how the Commission intends to enforce the coordinated expenditure limits of 2 U.S.C. § 441a(d).

8/12/2002
Date

Karl J. Sandstrom, Vice Chairman

[1] The initial vote was 4-2 to find probable cause, with Chairman McDonald, Vice Chairman Mason and Commissioners Thomas and Wold voting in favor of the General Counsel's recommendation; Commissioners Sandstrom and Smith dissenting. Subsequently, Vice Chairman Mason moved to reconsider the vote, which resulted in a 4-2 vote to take no further action. Vice Chairman Mason and Commissioners Sandstrom, Smith and Wold voted in favor of the motion; Commissioners McDonald and Thomas dissented.

EXHIBIT 8

STATEMENT OF REASONS of

VICE CHAIRMAN WOLD and

COMMISSIONERS LEE ANN ELLIOTT,

DAVID M. MASON and,

KARL J. SANDSTROM

On The Audits Of

"DOLE FOR PRESIDENT COMMITTEE, INC." (PRIMARY),

"CLINTON/GORE '96 PRIMARY COMMITTEE, INC.,"

"DOLE/KEMP '96, INC." (GENERAL),

"DOLE/KEMP '96 COMPLIANCE COMMITTEE, INC." (GENERAL),

"CLINTON/GORE '96 GENERAL COMMITTEE, INC.," and

"CLINTON/GORE '96 GENERAL ELECTION

LEGAL AND COMPLAINCE FUND"

Pursuant to 26 U.S.C. §§ 9038(a) and 9007(a), the Federal Election Commission ("the Commission") audited the "Dole For President Committee, Inc.," the "Clinton/Gore '96 Primary Committee, Inc.," "Dole/Kemp '96, Inc.," the "Dole/Kemp '96 Compliance Committee, Inc.," the "Clinton/Gore '96 General Committee, Inc." and the "Clinton/Gore '96 General Election Legal And Compliance Fund." In doing so, our Audit Division and Office of General Counsel (collectively the "staff") analyzed media advertisements the Democratic and Republican National Committees (collectively "the parties") ran during 1995 and 1996. The purpose of this analysis was to determine whether the cost of these advertisements constituted in-kind contributions (coordinated expenditures) by the parties on behalf of their respective presidential candidates' committees (which, among other things, could have caused the presidential committees to exceed their primary or general election spending limits in violation of 2 U.S.C. § 441a(b)).

In analyzing these advertisements, the staff examined their content for the presence of two factors to determine whether the advertisement were "for the purpose of influencing" an election for Federal office, as that phrase is used in 2 U.S.C. § 431 (8)(A) ("contribution") and (9)(A) ("expenditure"): Whether the advertisements referred to a "clearly identified candidate" and whether they contained an

"electioneering message". Because the staff found that both factors were present, the staff recommended that the Commission determine that the costs of the advertisements were in-kind contributions from the parties to their respective presidential campaign committees. The staff also recommended that the Commission determine that the applicable spending limits were exceeded based in part on the cost of the advertisements and that the Commission require a repayment of presidential matching funds. For various reasons, the Commissioners unanimously rejected the staff's repayment recommendations.

We write here to express our disagreement with the use of "electioneering message" as a test to determine whether communications are "for the purpose of influencing" elections and, therefore, constitute expenditures or contributions under the Federal Election Campaign Act ("FECA"). Specifically, we agree that: (1) The phrase "electioneering message" cannot serve as a substantive test to describe the content of communications that are "for the purpose of influencing" an election because it is derived only from advisory opinions and is not found either in the FECA or in regulations promulgated by the Commission in accordance with the rulemaking procedures specified in the FECA; and (2) The phrase "electioneering message" cannot be used as a shorthand expression of the Commission's interpretation of the statutory standard of "for the purpose of influencing" an election because the advisory opinions from which the phrase is drawn do not convey a clear and consistent application of the statutory standard, and the phrase, standing alone, is both too vague and too broad to have a sufficiently definite meaning. Therefore, we conclude that the phrase "electioneering message" should not be used to describe the content of communications which the Commission would determine to be "for the purpose of influencing" an election to Federal office.

Procedural Defects With Employing The "Electioneering Message" Standard

Congress included an express prohibition in the FECA against the Commission using advisory opinions to establish rules of conduct. Subpart (b) of 2 U.S.C. § 437f, the section governing the use of such opinions, provides that the Commission may employ rules of law that are not set forth in the FECA only if it complies with the procedures set forth in 2 U.S.C. § 438(d) in promulgating them. By necessary implication, subpart (b) of § 437f prohibits the Commission from using advisory opinions as rules of law, for the Commission does not follow the requirements of 2 U.S.C. § 438(d) in drafting such opinions; instead, it follows the requirements of § 437f.

As a result, the Commission may not use advisory opinions as a substitute for rulemaking. Rulemaking is not simply the preferred method for filling in gaps in the FECA. It is the required method. 2 U.S.C. § 437f(b), note five, *supra*. Where the law is of uncertain application, advisory opinions cannot be used as a sword of enforcement. *See generally id*. The regulated community can, however, use advisory opinions as shields against Commission enforcement actions in appropriate circumstances. 2 U.S.C. § 437f(c).

> Advisory opinions are binding only in the sense that they may be relied on *affirmatively* by any person involved in the specific transaction or activity discussed in the opinion or in any materially indistinguishable transaction or activity. . . . On the other hand, to the extent that the advisory opinion *does not affirmatively approve* a proposed transaction or activity, it is binding on no one – not the Commission, the requesting party, *or third parties*.

This reading of the FECA's rulemaking requirements, of course, does not prevent the Commission from enforcing the FECA in novel or unforeseen circumstances. It only requires that, absent controlling regulations or the authoritative interpretations of the courts, the Commission's enforcement standard be the natural dictate of the language of the statute itself.

The threshold problem with the "electioneering message" standard, then, is that it is not a rule. It is only a shorthand phrase that purports to describe the Commission's reasoning in two advisory opinions. See note two, *supra*. The phrase is not defined in either of those opinions. In fact, it does not appear at all in one of them. Rather than being promulgated pursuant to the requirements of the FECA (*see* 2 U.S.C. §§ 438(d) and 437f(b) & (c)), the "electioneering message" standard is an amalgam of these advisory opinions. Even at that, it is not the most natural, let alone the only reasonable, reading of those opinions. In fact, it is difficult to draw any clear meaning from a comparison or combination of AOs 1984-15 and 1985-14 (*see* "Substantive Difficulties," *infra*).

As a result, the regulated community most likely does not have *notice* as to how this standard will govern its conduct, and it certainly did not have an opportunity to *comment* on whether it should. Because of its procedural infirmities, the Commission may not employ the phrase "electioneering message" as expressing a general rule for determining whether communications are "for the purpose of influencing" a federal election.

Substantive Difficulties With The "Electioneering Message" Standard

Apart from its procedural infirmities, the "electioneering message" standard suffers from serious problems of vagueness and overbreadth. As presented by the staff, a communication satisfies this standard if it includes statements which are "designed to urge the public to elect a certain candidate or party," or which would tend to diminish support for one candidate or garner support for another candidate." *See, e.g.*, Report on DFP, Agenda Document 98-87, 11/19/98 at 14 (citing AO 1984-15); Report on CGP, Agenda Document 98-87, 11/19/98 at 10 (citing AO 1984-15).

Such formulations, the Supreme Court has held, offend the First Amendment. In *Buckley v. Valeo*, 424 U.S. 1, 42-44 (1976), the High Court held as impermissibly vague the "relative to . . . advocating the election or defeat of [a clearly identified] candidate" standard in 18 U.S.C. § 608(e) (1970) of the original FECA. The "diminish support for one candidate" prong – like the "relative to" standard in the original FECA – is especially problematic because "the distinction between discussion of issues and

candidates and *advocacy of election or defeat of candidates* may often dissolve in practical application." *Buckley*, 424 U.S. at 42 (emphasis added).

The factual question of what a particular statement was *designed* to do also gives rise to vagueness problems. The fact that the term "electioneering" and the phrase "designed to urge the public to elect a certain candidate or party" were plucked out of context from a four-decade old Supreme Court opinion (*United States v. Auto Workers*, 352 U.S. 567 (1957) (*UAW*)) does not resolve the question. First, it is clear that *UAW* was not enunciating a constitutionally-permissible standard for regulating speech, but describing a particular communication in the course of an opinion explicitly refusing to reach a ruling on the constitutionality of regulating the specific speech so described. *See id*. at 591 (internal citation omitted) ("Clearly in this case it is not absolutely necessary to a decision to canvass the constitutional

issues."). Second, the speech at issue in *UAW* included specific endorsements of candidates. *Id*. at 584. Third, the *per curiam* opinion in *Buckley* cites the dissent in *UAW*, *see* 424 U.S. at 43 (citing *UAW*, 352 U.S. at 595-596 (Douglas, J., dissenting)), which had urged that the FECA's predecessor statute be declared unconstitutional as applied to the electioneering speech at issue in *UAW*.

The relationship, if any, of the two prongs of the "electioneering message" test underscores the test's vagueness. Read narrowly, "urge the public to elect a candidate," AO 1985-14 at 7, could be construed as equivalent to communications "that expressly advocate the election or defeat of a clearly identified candidate." *Federal Election Commission v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238, 249-250 (1986) (quoting *Buckley*, 424 U.S. at 80). In contrast, there is virtually nothing which could be said about a candidate for federal office which might not be interpreted as " diminish[ing] support for one candidate [or] garner[ing] support for another candidate." *See, e.g.*, Report on DFP, Agenda Document 98-87, 11/19/98 at 14 (citing AO 1984-15); Report on CPG, Agenda Document 98-87, 11/19/98 at 10 (citing AO 1984-15).

The "electioneering message" test is also unconstitutionally overbroad for related reasons. As the *Buckley* Court observed,

> [c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

424 U.S. at 42. Regulation of any statement which " diminishes [or garners] support for [a] candidate," AO 1984-15 at 5, would encompass, then, virtually any meaningful utterance identifying a candidate.

The vagueness and overbreadth problems of the "electioneering message" and "relative to" standards are thus two sides of the same counterfeit coin. They are vague because it is not clear when they encompass issue discussion and not candidate advocacy. They are overbroad because, given the nature of campaigning, they will inevitably encompass both. For the same substantive reasons that the Supreme Court held the "relative to" standard in the FECA to be unconstitutional, the Commission may not employ "the electioneering message" standard. Even in the context of coordinated, or presumably coordinated, communications in which the "electioneering message" test has generally been proposed (*see* 11 C.F.R. § 114.4(c)(5)(ii)(B)(2)(E) (regulation of voter guides)), the Commission may not ignore these constitutional requirements.

Conclusion

Given the procedural and substantive infirmities with the "electioneering message" standard, the Commission may not employ it in administering the FECA, the Presidential Primary Matching Payment Account Act, the Presidential Election Campaign Fund Act, or its own regulations.

June 24, 1999

Darryl R. Wold
Vice Chairman

Lee Ann Elliott
Commissioner

David M. Mason
Commissioner

Karl J. Sandstrom
Commissioner

EXHIBIT 9

or constructing a State or local party office building. It is the intent of the authors that State law exclusively govern the receipt and expenditure of non-Federal donations by State or local parties to pay for the construction or purchase of State or local party office buildings. Thus, non-Federal donations received by a State or local party committee in accordance with State law could be used to purchase or construct a State or local party office building without any required match consisting of Federal contributions.

CLARIFYING TERMS IN THE BILL

Ms. COLLINS. Madam President, I would like to ask the sponsors a question concerning the term ''refers to'' in certain provisions of the bill. I have heard the argument made that the definitions of ''Federal election activity'' and ''electioneering communication'' are somehow vague because they are defined to include a communication that ''refers to a clearly identified candidate for Federal office.'' Can the sponsors address that argument?

Mr. FEINGOLD. I would be happy to respond to my friend from Maine, and I appreciate her question. In the bill, the phrase ''refers to'' precedes the phrase ''clearly identified'' candidate. That latter phrase is precisely defined in the Federal Campaign Election Act to mean a communication that includes the name of a federal candidate for office, a photograph or drawing of the candidate, or some other words or images that identify the candidate by ''unambiguous reference.'' A communication that ''refers to a clearly identified candidate'' is one that mentions, identifies, cites, or directs the public to the candidate's name, photograph, drawing, or otherwise makes an ''unambiguous reference'' to the candidate's identity.

SECTION 213

Mr. THOMPSON. Madam President, I would like to ask the sponsors to explain section 213 of the bill concerning independent and coordinated expenditures made by party committees. Can the sponsors also discuss how this provision is consistent with the Supreme Court's decision in the Colorado cases?

Mr. MCCAIN. I would be happy to respond to the Senator's question. Section 213 of the bill allows the political parties to choose to make either coordinated expenditures or independent expenditures on behalf of each of their candidates, but not both. This choice is to be made after the party nominates its candidate, when the party makes its first post-nomination expenditure—either coordinated or independent—on behalf of the candidate.

This provision is entirely consistent with the Supreme Court's rulings in the two Colorado Republican cases. In the first of those cases, the Court held that a party had a constitutional right to make unlimited independent expenditures, using hard money funds, on behalf of its candidates. But of course, those party expenditures must be fully and completely independent of the candidate and his campaign. The second Colorado Republican case held that Congress may limit the size of coordinated expenditures made by parties on behalf of their candidates, in order to deter corruption and the appearance of corruption that could result from unlimited expenditures that are coordinated.

This provision fully recognizes the right of the parties to make unlimited independent expenditures. But it helps to ensure that the expenditure will be truly independent, as required by Colorado Republican I, by prohibiting a party from making coordinated expenditures for a candidate at the same time it is making independent expenditures for the same candidate. We believe that once a candidate has been nominated a party cannot coordinate with a candidate and be independent in the same election campaign. After the date of nomination, the party is free to choose to coordinate with a candidate, or to operate independently of that candidate. If it chooses the former, it is subject to the limits upheld in Colorado Republican II. If it chooses the latter, it is free to exercise its right upheld in Colorado Republican I to engage in unlimited hard money spending independent of the candidate.

Section 213 provides, for this purpose only, that all the political committees of a party at both the state and national levels are considered to be one committee for the purpose of making this choice. This will prevent one arm of the party from coordinating with a candidate while another arm of the same party purports to operate independently of such candidate. This provision is intended to ensure that a party committee which chooses to engage in unlimited spending for a candidate is in fact independent of the candidate.

Mr. FEINGOLD. I agree with the Senator from Arizona's answer to the question from the Senator from Tennessee.

SECTION 214

Mr. LIEBERMAN. Madam President, I would like to ask the sponsors a question concerning section 214 of the bill, which deals with coordination. Some concern has been expressed about this provision by outside groups that participate in the legislative process through lobbying and grassroots advertising and also participate in electioneering through their PACs, or currently, through sham issue ads. Can the sponsors explain what is intended by section 214, and answer the concerns expressed by some of these organizations?

Mr. FEINGOLD. I would be happy to address this question, and I thank the Senator from Connecticut for raising it. It is important that our intent in this provision be clear.

The concept of ''coordination'' has been part of Federal campaign finance law since Buckley versus Valeo. It is a common-sense concept recognizing that when outside groups coordinate their spending on behalf of a candidate with a candidate or a party, such spending is indistinguishable from a direct contribution to that candidate or party. Accordingly, such coordinated spending by outside groups is, and should be, treated as a contribution to the candidate or party that benefits from such spending. As such, it is subject to the source and amount limitations under federal law for contributions to federal candidates and their parties. An effective restriction on outside groups coordinating their campaign-related activities with federal candidates and their political parties is needed to prevent circumvention of the campaign finance laws.

The bill bans soft money contributions to the national political parties, which totaled $463 million during the 2000 election cycle. Specifically, under the bill, corporations and unions can no longer donate amounts from their treasuries to the national parties, and wealthy individuals can no longer write six-figure checks to the national parties. The legislation shuts down the soft money loophole in order to prevent the corruption and unseemly appearances that arise when national parties and Federal officeholders solicit unlimited donations from special interests and then spend those donations to support federal candidates.

Absent a meaningful standard for what constitutes coordination, the soft money ban in the bill would be seriously undermined. In the place of outside special interests donating six-figure checks to the national parties to be spent on Federal elections, these entities could simply work in tandem with the parties and Federal candidates to spend their own treasury funds—soft money—on federal electioneering activities. This would fly in the face of one of the main purposes of the bill to get national parties and Federal candidates out of the business of raising and spending soft money donations.

Unfortunately, based on a single district court decision, the Federal Election Commission's current regulation defining when general public political communications funded by outside groups are considered coordinated with candidates or parties fails to account for certain types of coordination that may well occur in real-world campaigns. The FEC regulation is premised on a very narrowly defined concept of ''collaboration or agreement'' between outside groups and candidates or parties.

This current FEC regulation fails to cover a range of de facto and informal coordination between outside groups and candidates or parties that, if permitted, could frustrate the purposes of the bill. For example, if an individual involved in key strategic decision-making for a candidate's political advertising resigned from the candidate's campaign committee, immediately thereafter joined an outside organization, and then used inside strategic information from the campaign to develop the organization's imminent soft

money-funded advertising in support of the candidate, a finding of coordination might very well be appropriate. The FEC regulation, however, would find coordination neither in this circumstance nor in various other situations where most reasonable people would recognize that the outside entities' activities were coordinated with candidates. This would leave a loophole that candidates and national parties could exploit to continue controlling and spending huge sums of soft money to influence federal elections.

The dangers of coordinated soft money spending were noted by Senator FRED THOMPSON during his Committee's review of 1996 election activity. The Minority Report of the Senate Committee on Governmental Affairs states:

> The fact that coordination of soft money spending and fundraising has become commonplace and expected should be examined by Congress. By permitting such coordinated efforts to raise soft money and spend it on political activities that advance the interests of presidential campaigns, the federal election laws create a tremendous loophole to both contribution limits and spending limits. As the Chairman [Senator Thompson] has acknowledged:
>
> Acceptance of this activity would allow any candidate and his campaign to direct and control the activities of a straw man . . . . For such activity, these straw men could use funds subject to no limit and derived from any source . . . . If the interpretation is that this is legal and this is proper, then we have no campaign finance system in this country anymore.

To remedy this problem, the bill requires the FEC to reexamine the coordination issue and promulgate new coordination rules. These rules need to make more sense in light of real life campaign practices than do the current regulations. The bill accordingly repeals this FEC regulation and requires that the Commission promulgate a replacement regulation. The bill does not change the basic statutory standard for coordination, which defines and sets parameters for the FEC's authority to develop rules describing the circumstances in which coordination is deemed to exist.

Section 214 directs the FEC to promulgate new regulations on coordinated communications and lists four specific subjects that the FEC must address in those new regulations. It does not dictate how the Commission is to resolve those four subjects.

On one issue, section 214 does direct the outcome of the Commission's deliberations on new regulations. The current FEC regulations say that a communication will be considered to be ''coordinated'' if it is created, produced or distributed ''after substantial discussion'' between the spender and the candidate about the communication, ''the result of which is collaboration or agreement.'' This standard is now contained in 11 C.F.R. § 100.23(c)(2)(iii).

The FEC's narrowly defined standard of requiring collaboration or agreement sets too high a bar to the finding of ''coordination.'' This standard would miss many cases of coordination that result from de facto understandings. Accordingly, section 214 states that the Commission's new regulations ''shall not require agreement or formal collaboration to establish coordination.'' This, of course, does not mean that there should not be a finding of ''coordination'' in those cases where there is ''agreement or formal collaboration.'' But it does mean that specific discussions between a candidate or party and an outside group about campaign-related activity can result in a finding of coordination, without an ''agreement or formal collaboration.''

Existing law provides that a campaign-related communication that is coordinated with a candidate or party is a contribution to the candidate or party, regardless of whether the communication contains ''express advocacy.'' Accordingly, the bill provides that an ''electioneering communication'' that is coordinated with a candidate or party is considered a contribution to the candidate or party.

Mr. MCCAIN. If the Senator from Wisconsin would yield, let me elaborate a bit on his discussion, with which I completely agree, and address the specific concern raised by some of these groups.

It is important for the Commission's new regulations to ensure that actual ''coordination'' is captured by the new regulations. Informal understandings and de facto arrangements can result in actual coordination as effectively as explicit agreement or formal collaboration. In drafting new regulations to implement the existing statutory standard for coordination—an expenditure made ''in cooperation, consultation or concert, with, or at the request or suggestion of'' a candidate—we expect the FEC to cover ''coordination'' whenever it occurs, not simply when there has been an agreement or formal collaboration.

On the other hand, nothing in the section 214 should or can be read to suggest, as some have said, that lobbying meetings between a group and a candidate concerning legislative issues could alone lead to a conclusion that ads that the group runs subsequently concerning the legislation that was the subject of the meeting are coordinated with the candidate. Obviously, if the group and the candidate discuss campaign related activity such as ads promoting the candidate or attacking his or her opponent, then coordination might legitimately be found, depending on the nature of the discussions. We do not intend for the FEC to promulgate rules, however, that would lead to a finding of coordination solely because the organization that runs such ads has previously had lobbying contacts with a candidate.

Section 214 represents a determination that the current FEC regulation is far too narrow to be effective in defining coordination in the real world of campaigns and elections and threatens to seriously undermine the soft money restrictions contained in the bill. The FEC is required to issue a new regulation, and everyone who has an interest in the outcome of that rulemaking will be able to participate in it, and appeal the FEC's decision to the courts if they believe that is necessary.

CONTRIBUTIONS BY MINORS

Ms. COLLINS. Madam President, I wanted to ask the sponsors about a provision that was not included in the Senate bill—the prohibition on contributions by minors. Can you explain the justification for this new provision?

Mr. MCCAIN. The Senator is correct that section 318 was added in the House. It is an important provision, and the Senator from Wisconsin and I supported it being included in the bill.

Under the FEC's current regulations at 11 C.F.R. § 110.1(i)(2), children under the age of 18 may make contributions to political candidates and committees as long as the child knowingly and voluntary makes the decision to contribute. In addition, the child must make the contribution out of his or her own funds, which the child is in control of, such as the proceeds of a trust or money in a savings account in the child's own name.

Unfortunately, notwithstanding these regulations, we believe that wealthy individuals are easily circumventing contribution limits to both political candidates and parties by directing their children's contributions. Indeed, the FEC in 1998 notified Congress of its difficulties in enforcing the current provision. Its legislative recommendations to Congress that year cited ''substantial evidence that minors are being used by their parents, or others, to circumvent the limits imposed on contributors.''

Accordingly, Section 318 of the bill prohibits individuals 17 years old or younger from making contributions or donations to and a candidate or a committee of a political party.

We believe it is appropriate for Congress to prohibit minors from contributing to campaigns because we agree with the Commission that there is substantial evidence that individuals are evading contribution limits by directing their children to make contributions. According to a Los Angeles Times study, individuals who listed their occupation as student contributed $7.5 million to candidates and parties between 1991 and 1998. Upon further investigation, some of these contributions where made by infants and toddlers. In another instance, the paper found that two high school sisters contributed $40,000 to the Democratic Party in 1998. When asked about the contribution, the high school sophomore answered that it was a ''family decision.''

We believe that this and other examples justify the prohibition on minor contributions that is included in the bill as a way to prevent evasion of the contribution limits in the law. In our view, this provision simply restores the

EXHIBIT 10

"Meyer, Matt" <Matt.Meyer@mail.house.gov>

01/13/2006 05:50 PM

To "'coordination@fec.gov'" <coordination@fec.gov>
cc
bcc
Subject Comments of BCRA Sponsors

Attached please find comments on Notice 2005-28 from Sen. John McCain, Sen. Russ Feingold, Rep. Christopher Shays and Rep. Marty Meehan, the principal sponsors of the BCRA. A signed copy of the comments will be transmitted by fax.

The postal address for the Senators is "U.S. Senate, Washington, DC 20510" and for the Members of the House is "U.S. House of Representatives, Washington, DC 20515." The public e-mail addresses used by the members are generally not a good way to reach them directly.

If you have any questions, please contact Matt Meyer of Rep. Shays' staff at 202/225-5541. Thank you.

<<Sponsor Comments.DOC>> Sponsor Comments.DOC

January 13, 2006

By Electronic Mail

Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Notice 2005–28

Dear Mr. Deutsch:

As the principal House and Senate sponsors of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), we appreciate the opportunity to comment on the Commission's proposed changes to the rule governing coordination for purposes of the campaign finance laws.

In BCRA, we included section 214 in order to repeal an earlier Commission regulation that, in our view, had far too narrowly construed the concept of "coordination." That section of BCRA also directed the Commission to draft a new regulation on coordination that did not include the narrow and inappropriate limitation that coordination cover only situations where there is a formal collaboration or agreement between a candidate and a spender. As Senator McCain said on the Senate floor:

> Section 214 represents a determination that the current FEC regulation is far too narrow to be effective in defining coordination in the real world of campaigns and elections and threatens to seriously undermine the soft money restrictions contained in the bill.

148 Cong.Rec. S2145 (daily ed. March 20, 2002). Similarly, Senator Feingold noted:

> This current FEC regulation fails to cover a range of de facto and informal coordination between outside groups and candidates or parties that, if permitted, could frustrate the purposes of the bill…. To remedy this problem, the bill requires the FEC to reexamine the coordination issue and promulgate new coordination rules. *These rules need to make more sense in the light of real life campaign practices than do the current regulations.*

Id. at. S2144-45 (emphasis added).

When the Commission undertook its post-BCRA rulemaking to implement the requirement of section 214, we submitted comments that set forth our view on what would constitute effective and appropriate regulations for the coordination standard to remedy the serious problems in the flawed regulations repealed by Congress. We attach those comments here, and re-submit them for the record in this rulemaking.

In repealing an ineffective coordination standard and directing the Commission to issue a new one, we did not intend for the Commission to issue a rule that was, in important ways, even weaker than the one Congress repealed. Yet that is what the Commission did. As the D.C. Circuit Court of Appeals said about the Commission's post-BCRA rule, "To be sure, it seems hard to imagine that Representatives and Senators voting for BCRA would have expected regulations like these." *Shays and Meehan v. FEC,* 414 F.3d 76, 98-99 (D.C. Cir. 2005). We did not.

Unfortunately, the Commission's 2002 rule promulgated after BCRA is deeply flawed. Once again, the Commission wrote a rule that would allow much coordinated activity that was clearly meant to influence an election escape any regulation at all, and thus operate entirely outside the law. One problem this time was that the Commission decided that as a matter of law no ad running more than 120 days before a primary or general election would be considered to be coordinated, no matter how coordinated in fact the ad really was, unless the ad contained express advocacy or constituted republication of campaign materials. Given that the Supreme Court in *McConnell v. FEC*, 540 U.S. 90 (2003), had just declared the express advocacy test to be "functionally meaningless," this meant, in effect, that there would be no coordination rule at all for any ad run more than 120 days before an election.

It is our experience as candidates that campaign ads are in fact run earlier than 120 days before an election – by parties, by outside groups, and by candidates themselves. Certainly there was no basis in BCRA or any other statute for the Commission to conclude to the contrary, with the effect of allowing a candidate or party to write a campaign ad, hand it over to a corporate or union spender and direct that spender where and when to run the ad, using unlimited corporate or union funds. But that is the effect of the Commission's approach. During the debate on BCRA, Senator Feingold made this very point, stressing that no ban on soft money would be effective in the absence of a strong and realistic coordination rule:

> Absent a meaningful standard for coordination, the soft money ban in the bill would be seriously undermined. In the place of outside special interests donating six-figure checks to the national parties to be spent on Federal elections, these entities could simply work in tandem with the parties and candidates to spend their own treasury funds – soft money – on federal electioneering activities.

148 Cong. Rec. S2144.

That is why Representatives Shays and Meehan brought a lawsuit to challenge this regulation, as well as numerous other regulations issued by the Commission to implement BCRA. We strongly agree with the decision of the district court and the D.C. Circuit Court of Appeals in *Shays and Meehan v. FEC,* where this rule was invalidated. Both courts recognized the serious loopholes that are once again opened up by the Commission's coordination rule.

As the D.C. Circuit said*,* the Commission's rule, which applies only a "functionally meaningless" express advocacy test for coordination outside the 120-day period, means that "the FEC has in effect allowed a coordinated communication free-for-all for much of each election cycle*."* *Id.* 414 F.3d at 99.

We urge the Commission to adopt a new coordination rule that will provide appropriate and realistic coverage of the ads that are subject to that rule, without infringing on other activities, such as lobbying.

For political committees, the Commission should require that all their expenditures which are coordinated with a candidate, whenever made, are covered by the coordination rule. For political committees, the statute itself defines the term "expenditure" and there is no need for any limitation on this.

As for other types of spenders, such as corporations, labor unions, other groups, individuals and 527s that are not registered as political committees, we agree that it makes sense to treat communications differently depending on how close they are made to an election. But the Commission should carefully set out rules that make sense in the real world both of legislative lobbying and political campaigns.

In Title II of BCRA, Congress identified a pre-election period (30 days before a primary, and 60 days before a general election) as a time when communications that mention candidates can be presumed to be intended to influence elections. We believe that the same reasoning applies to communications that are coordinated with a candidate. Any communication that is coordinated with a candidate, regardless of its content, should be considered a contribution to that candidate if the communication is targeted to the electorate of that candidate within the pre-election period. The fact of the coordination itself indicates that such ads can provide assistance of real value to a candidate, and will usually be run for purposes of influencing the candidate's election. For example, if a candidate asks a corporation or a labor union to run a television advertisement in the last week of a campaign commenting on an important issue in a campaign – such as social security, or medical malpractice reform, or national security – that ad should be considered a contribution to the candidate regardless of whether the candidate, or an opponent, is mentioned.

Second, a longer pre-election period should apply if a communication mentions a clearly-identified candidate, is targeted to the electorate of that candidate, and is coordinated with that candidate or that candidate's opponent. We believe that a period

starting 120 days prior to a primary and running all the way to the general election would be appropriate to capture ads that are mostly likely to be made to influence an election. For states with an early primary, there is a significant period of time after the primary and before the pre-general election period starts. Allowing ads to be coordinated with a candidate in this period, but be defined as falling outside of the coordination rule, would open up enormous opportunities for abuse and fails to recognize the realities of political advertising campaigns in an election year.

Finally, the coordination rule must cover communications that are coordinated with a candidate and made prior to the 120-day pre-primary election period if they are clearly meant to affect a future election, even if the election is some time away. Otherwise, in states with late primaries, the period not covered by the rule would essentially allow campaign contributions by entities not subject to contribution limits. For 527 groups, which have identified themselves with the IRS as "political organizations," any ad that is coordinated, targeted, and promotes, supports, attacks or opposes a candidate should be covered by this rule.

For corporations unions, other groups and individuals, we believe a different standard would be appropriate. Certainly these entities engage in lobbying campaigns that may mention officeholders or candidates. But communications that are coordinated with a candidate and targeted to that candidate's electorate should be covered by the rule if they comment on the character, qualifications, or fitness for office of the candidate or the candidate's opponent or potential opponent.

We urge the Commission to issue a new coordination rule that addresses the inadequacies of the existing rule as confirmed by the courts. Continuing litigation over the rules to implement BCRA disserves the public and those who are required to abide by the rules. We hope the Commission will take this opportunity to promulgate a rule that is consistent with the goals and purposes of the campaign finance laws.

Sincerely,

John McCain
U.S. Senate

Russell D. Feingold
U.S. Senate

Christopher Shays
Member of Congress

Marty Meehan
Member of Congress

EXHIBIT 11

LAST NIGHT, YOU HEARD THE PRESIDENT SPEAK. TODAY, LISTEN TO THE AMERICAN PEOPLE.

The names printed here represent a sample of more than 80,000 people who have joined John Edwards in calling on Congress to block funding of Bush's escalation of the war in Iraq.

Members of Congress: You have the power to block this escalation. Use it.

To join us in speaking out against the escalation, visit **JohnEdwards.com**

JOHN EDWARDS08

TONIGHT:
DISCUSS THE STATE OF THE UNION WITH JOHN EDWARDS.
JOIN A LIVE ONLINE VIDEO DISCUSSION.
WEDNESDAY, JAN. 24TH
9:30PM ET / 6:30PM PT
WWW.JOHNEDWARDS.COM

EXHIBIT 12

(i) Overnight delivery service means a private delivery service business of established reliability that offers an overnight (*i.e.*, next business day) delivery option.

(ii) Postmark means a U.S. Postal Service postmark or the verifiable date of deposit with an overnight delivery service.

(c) *Electronically filed reports.* For electronic filing purposes, a document is timely filed when it is received and validated by the Federal Election Commission by 11:59 p.m. Eastern Standard/Daylight Time on the filing date.

(d) *48-hour and 24-hour reports of independent expenditures*—(1) *48-hour reports of independent expenditures.* A 48-hour report of independent expenditures under 11 CFR 104.4(b) or 109.10(c) is timely filed when it is received by the Commission by 11:59 p.m. Eastern Standard/Daylight Time on the second day following the date on which independent expenditures aggregate $10,000 or more in accordance with 11 CFR 104.4(f), any time during the calendar year up to and including the 20th day before an election.

(2) *24-hour reports of independent expenditures.* A 24-hour report of independent expenditures under 11 CFR 104.4(c) or 109.10(d) is timely filed when it is received by the Commission by 11:59 p.m. Eastern Standard/Daylight Time on the day following the date on which independent expenditures aggregate $1,000 or more, in accordance with 11 CFR 104.4(f), during the period less than 20 days but more than 24 hours before an election.

(3) *Permissible means of filing.* In addition to other permissible means of filing, a 24-hour report or 48-hour report of independent expenditures may be filed using a facsimile machine or by electronic mail if the reporting entity is not required to file electronically in accordance with 11 CFR 104.18. Political committees, regardless of whether they are required to file electronically under 11 CFR 104.18, may file 24-hour reports using the Commission's website's on-line program.

(e) *48-hour statements of last-minute contributions.* In addition to other permissible means of filing, authorized committees that are not required to file electronically may file 48-hour notifications of contributions using facsimile machines. All authorized committees that file with the Commission, including electronic reporting entities, may use the Commission's website's on-line program to file 48-hour notifications of contributions. *See* 11 CFR 104.5(f).

(f) *24-hour statements of electioneering communications.* A 24-hour statement of electioneering communications under 11 CFR 104.20 is timely filed when it is received by the Commission by 11:59 p.m. Eastern Standard/Daylight Time on the day following the disclosure date. (*See* 11 CFR 104.20(a)(1) and (b)). In addition to other permissible means of filing, a 24-hour statement of electioneering communications may be filed using a facsimile machine or by electronic mail if the reporting entity is not required to file electronically in accordance with 11 CFR 104.18.

(g) *Candidate notifications of expenditures from personal funds.* A candidate's notification of expenditures from personal funds under 11 CFR 400.21 or 400.22 is timely filed if it is received by facsimile machine or electronic mail by each of appropriate parties as set forth in 11 CFR 400.21 and 400.22 within 24 hours of the time the threshold amount as defined in 11 CFR 400.9 is exceeded and within 24 hours of the time expenditures from personal funds are made under 11 CFR 400.21 and 400.22.

[67 FR 12839, Mar. 20, 2002, as amended at 68 FR 416, Jan. 3, 2003; 68 FR 3995, Jan. 27, 2003; 70 FR 13091, Mar. 18, 2005]

§ 100.20 Occupation (2 U.S.C. 431(13)).

Occupation means the principal job title or position of an individual and whether or not self-employed.

§ 100.21 Employer (2 U.S.C. 431(13)).

Employer means the organization or person by whom an individual is employed, and not the name of his or her supervisor.

§ 100.22 Expressly advocating (2 U.S.C. 431(17)).

Expressly advocating means any communication that—(a) Uses phrases such as ''vote for the President,'' ''re-elect your Congressman,'' ''support the Democratic nominee,'' ''cast your ballot for the Republican challenger for

U.S. Senate in Georgia,'' ''Smith for Congress,'' ''Bill McKay in '94,'' ''vote Pro-Life'' or ''vote Pro-Choice'' accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, ''vote against Old Hickory,'' ''defeat'' accompanied by a picture of one or more candidate(s), ''reject the incumbent,'' or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say ''Nixon's the One,'' ''Carter '76,'' ''Reagan/Bush'' or ''Mondale!''; or

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

[60 FR 35304, July 6, 1995]

§ 100.23 [Reserved]

§ 100.24 Federal election activity (2 U.S.C. 431(20)).

(a) As used in this section, and in part 300 of this chapter,

(1) *In connection with an election in which a candidate for Federal office appears on the ballot* means:

(i) The period of time beginning on the date of the earliest filing deadline for access to the primary election ballot for Federal candidates as determined by State law, or in those States that do not conduct primaries, on January 1 of each even-numbered year and ending on the date of the general election, up to and including the date of any general runoff.

(ii) In an odd-numbered year, the period beginning on the date on which the date of a special election in which a candidate for Federal office appears on the ballot is set and ending on the date of the special election.

(2) *Voter registration activity* means contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote. Voter registration activity includes, but is not limited to, printing and distributing registration and voting information, providing individuals with voter registration forms, and assisting individuals in the completion and filing of such forms.

(3) *Get-out-the-vote activity* means contacting registered voters by telephone, in person, or by other individualized means, to assist them in engaging in the act of voting. Get-out-the-vote activity shall not include any communication by an association or similar group of candidates for State or local office or of individuals holding State or local office if such communication refers only to one or more State or local candidates. Get-out-the-vote activity includes, but is not limited to:

(i) Providing to individual voters, within 72 hours of an election, information such as the date of the election, the times when polling places are open, and the location of particular polling places; and

(ii) Offering to transport or actually transporting voters to the polls.

(4) *Voter identification* means creating or enhancing voter lists by verifying or adding information about the voters' likelihood of voting in an upcoming election or their likelihood of voting for specific candidates. This paragraph shall not apply to an association or similar group of candidates for State or local office or of individuals holding State or local office if the association or group engages in voter identification that refers only to one or more State or local candidates.

(b) As used in part 300 of this chapter, *Federal election activity* means any of the activities described in paragraphs (b)(1) through (b)(4) of this section.

(1) Voter registration activity during the period that begins on the date that is 120 calendar days before the date that a regularly scheduled Federal election is held and ends on the date of

EXHIBIT 13

Federal Election Commission Advisory Opinion Number 2006-19

Back to Federal Election Commission Advisory Opinions Search Page

Federal Election Commission Main Page

6

FEDERAL ELECTION COMMISSION
Washington, DC 20463
June 5, 2006

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2006-19

Laurence S. Zakson, Esq.
Reich, Adell, Crost & Cvitan
3550 Wilshire Boulevard, Suite 2000
Los Angeles, CA 90010

Dear Mr. Zakson:

We are responding to your advisory opinion request on behalf of the Los Angeles County Democratic Party Central Committee ("LACDP") concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to certain communications LACDP is planning to undertake in connection with an election to be held on June 6, 2006. Because the communications in question promote only non-Federal candidates, will not be made in close proximity to the date of the election, are insufficiently targeted, and are not individualized, they do not constitute get-out-the-vote activity, and thus do not constitute Federal election activity.

Background

The facts presented in this advisory opinion are based on your letters received on May 8 and May 10, 2006.

LACDP is a local party committee that is registered with the Commission as a political committee. On June 6, 2006, the voters in the City of Long Beach ("Long Beach"), located within Los Angeles County, will vote for local

candidates in the non-partisan, general election as well as for Federal candidates in the primary election. LACDP intends to make pre-recorded, electronically dialed telephone calls and send direct mail to all voters registered as Democrats in Long Beach between four and fifteen days prior to the election (i.e., between May 22 and June 2, 2006). Sample scripts of these telephone calls and a draft of the direct-mail piece are attached to this advisory opinion. See Attachment A. The telephone scripts state that Election Day is June 6, a certain candidate is endorsed by the Democratic Party for Long Beach Mayor, and voters are urged to vote for that mayoral candidate on June 6, 2006. The direct-mail piece conveys a similar message, and also identifies municipal candidates endorsed by LACDP for City Council and School Board. Both the telephone scripts and the direct-mail piece state the date on which the election will be held, but neither refers to any candidate for Federal office. See id.

Question Presented

Do LACDP's planned communications to all registered Democrats in Long Beach, California constitute "Federal election activity" that must be paid for entirely with Federal funds or a mix of Federal funds and Levin funds?

Legal Analysis and Conclusions

No, LACDP's planned communications to all registered Democrats in Long Beach, California do not constitute "Federal election activity" that must be paid for entirely with Federal funds or a mix of Federal funds and Levin funds. Accordingly, LACDP may pay for the planned communications entirely out of non-Federal funds. See 11 CFR 100.24(c)(1).1

The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA"), amended the Act by adding a new term, "Federal election activity" ("FEA"), to describe certain activities that State, district, and local party committees must pay for with either Federal funds or a combination of Federal and Levin funds.2 2 U.S.C. 431(20) and 441i(b)(1). BCRA's requirements regarding FEA apply to all State, district, and local party committees and organizations, regardless of whether they are registered as political committees with the Commission. Id.

As amended by BCRA, the Act specifies that voter identification, get-out-the-vote ("GOTV") activity, and generic campaign activity (collectively, "Type II FEA") constitute FEA only when these activities are conducted "in

connection with an election in which a candidate for Federal office appears on the ballot." 2 U.S.C. 431(20)(A)(ii); 11 CFR 100.24(b)(2). As part of the definition of "Federal election activity," the Commission also defined the phrase "in connection with an election in which a candidate for Federal office appears on the ballot" ("Type II FEA time period"). See 11 CFR 100.24(a)(1); see also Explanation and Justification for Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064 (July 29, 2002); Explanation and Justification for Interim Final Rule on Definition of Federal Election Activity, 71 Fed. Reg. 14357 (March 22, 2006). In States such as California that conduct primaries, the Type II FEA time period begins on the date of the earliest filing deadline for access to the primary election ballot for Federal candidates and ends on the date of the general election, up to and including the date of any general runoff election.3 See 11 CFR 100.24(a)(1)(i). Thus the Type II FEA time period in California in 2006 is from March 10, 2006 to November 7, 2006.4

The definition of "Federal election activity" includes a definition of "get-out-the-vote activity." See 11 CFR 100.24(a)(3). "Get-out-the-vote activity" means "contacting registered voters by telephone, in person, or by other individualized means, to assist them in engaging in the act of voting." Id. Get-out-the-vote activity "includes, but is not limited to: (i) Providing to individual voters information such as the date of the election, the times when polling places are open, and the location of particular polling places; and (ii) Offering to transport or actually transporting voters to the polls." Id.

In two recent Explanations and Justifications, the Commission provided additional guidance with respect to the meaning of the complementary terms "individualized means" and "assist," as used in the definition of "get-out-the-vote activity." In 2002, the Commission stated that "GOTV has a very particular purpose: assisting registered voters to take any and all necessary steps to get to the polls and cast their ballots, or to vote by absentee ballot or other means provided by law. The Commission understands this purpose to be narrower and more specific than the broader purposes of generally increasing public support for a candidate or decreasing public support for an opposing candidate." 67 Fed. Reg. at 49067. In 2006, the Commission reiterated this view, stating, "[I]n the Commission's extensive enforcement experience, general exhortations to register to vote and to vote are so common in political party communications that including encouragement to register to vote and to vote would be overly broad, is not necessary to effectively

implement BCRA, and could have an adverse impact on grassroots political activities." 71 Fed. Reg. at 8929. For this reason, the Commission explained that it "declines to impose FEA funding restrictions on State, district, and local party committees' mere `encouragement' of registering to vote or voting." Id.

The Commission considers several facts in your request as relevant to the analysis of whether the proposed communications would be GOTV activities. First, the communications promote the election of only non-Federal candidates. Second, LACDP will conduct the proposed communications four or more days prior to the election; the more removed from election day, the less effect the communications are likely to have on motivating recipients to go to the polls. A communication made several days prior to an election is more likely to be a "general exhortation" to vote or "mere encouragement" to vote, as opposed to a communication that assists a voter in engaging in the act of voting by individualized means. Third, there is no indication that LACDP has engaged in any activity to target these communications to any specific subset of Democratic voters. Rather, LACDP intends to send the communications to all registered Democrats in Long Beach. The proposed direct-mail piece is a "form letter" that will not provide any individualized information to any particular recipient (such as the location of the particular recipient's polling place). The proposed pre-recorded, electronically dialed telephone calls are the functional equivalent of a "form letter" and, similarly, do not provide any individualized information to any particular recipient. Thus, the planned communications are generic in nature and do not provide any individualized assistance to voters. Fourth, the communications contain only the date of the election and do not include such additional information as the hours and location of the individual voter's polling place. Merely including the date of an election in a communication that advocates the election or defeat of only State and local candidates does not turn that communication into GOTV activity.

Based on these facts, the Commission concludes that LACDP's proposed communications do not constitute assisting voters in engaging in the act of voting by individualized means. See 11 CFR 100.24(a)(3). Thus, the proposed communications would not be GOTV activities, and therefore are excluded from the definition of Federal election activity under 11 CFR 100.24(c)(1).

This response constitutes an advisory opinion concerning the application of the Act and Commission

regulations to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f. The Commission emphasizes that if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a
conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Michael E. Toner
Chairman

FEDERAL ELECTION COMMISSION
Washington, DC 20463

CONCURRING OPINION IN ADVISORY OPINION 2006-19
OF
COMMISSIONER HANS A. VON SPAKOVSKY

The Federal Election Commission has approved Advisory Opinion 2006-19 for the Los Angeles County Democratic Party Central Committee ("the LACDP") by a vote of 5-1. The opinion, dated June 5, 2006, advises the LACDP that its proposed communications to municipal election voters do not constitute "get-out-the-vote activity" under the Bipartisan Campaign Reform Act of 2002 ("BCRA"), and therefore are not subject to the restrictions and funding requirements imposed by federal campaign finance law. I voted with the majority and agree fully with the Advisory Opinion issued. I write separately only to detail the existence of additional grounds for finding that the proposed activity does not constitute Federal election activity.

The City of Long Beach, California, is holding a municipal general election on June 6, 2006. (This election is referred to both as a "run-off" election and a "concurrent" election.) The City of Long Beach held a nonpartisan primary election on April 11, 2006.5 The election on June 6, 2006, features those races in which no candidate received a majority of the votes cast in April.6 Incidentally, June 6 is also the date that the State of California is holding its state primary elections.7

The LACDP wishes to make voters aware of which candidates it has endorsed in the municipal general election and encourage voters to support these candidates. The municipal general

election, like the April 11 primary, is nonpartisan. The State primary ballot, however, is partisan, and voters will cast either a Democratic or Republican ballot. Thus, voters will not be made aware of the municipal election candidates' partisan affiliations or tendencies simply by looking at the ballot. The LACDP's desire to make its proposed communications is certainly understandable in these circumstances.

When Long Beach voters go to the polls on June 6, they will confront an unusual situation. Each polling place will feature two separate voting locations. At one location, voters will vote a ballot dedicated to the municipal candidates running for Mayor, City Council, and School Board. At the second location, voters will vote a different ballot dedicated to county, State, and Federal primary candidates. As the City of Long Beach's government website states:

On Tuesday, June 6, residents will vote at one polling place on two different ballots; one for City candidates and one for State and County candidates and issues. Voters will visit two sign-in tables at the same polling place, and will use two different voting systems to cast their ballots. Absentee voters will need to vote and send in two ballots, one for the City and another for the County and State.8

In other words, voters will have the choice of voting one or both ballots.

According to the City of Long Beach, two ballots will be used because "Tuesday June 6th 2006 is a concurrent election, when the city's election takes place on the same day as the Statewide Primary. In the City of Long Beach, city ballots need to be cast and counted separately from the county, because the City of Long Beach uses a different voting system than the county."9 The City of Long Beach obviously regards its municipal elections as separate and distinct from county, State, and Federal elections.

The LACDP's proposed activity relates exclusively to the municipal ballot. The Bipartisan Campaign Reform Act of 2002 ("BCRA") defined the term "Federal election activity" to include, in relevant part, "voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot)."10 Obviously, there is no Federal candidate on the municipal ballot. Thus, not only are the proposed

communications not GOTV activity, they are also not being "conducted in connection with an election in which a candidate for Federal office appears on the ballot." The plain and unambiguous language of the statute indicates that the LACDP's proposed activity is not "Federal election activity," and is thus not subject to the restrictions of federal campaign finance law.

June 5, 2006

_____/S/_____
Commissioner Hans A. von Spakovsky

_____

1 The allocation requirement set forth at 11 CFR 106.7(c)(5) is inapplicable to the communications at issue. The section applies only to certain communications that do not promote or oppose a Federal candidate or non-Federal candidate. As noted above, the proposed communications are candidate-specific.

2 "Federal funds" are funds subject to the amount limitations, source prohibitions, and reporting requirements of the Act. See 11 CFR 300.2(g). "Levin funds" are funds raised by State, district, and local party committees pursuant to the restrictions in 11 CFR 300.31 and disbursed subject to the restrictions in 11 CFR 300.32. See 11 CFR 300.2(i).

3 In States that do not hold primary elections, the Type II FEA time period begins on January 1 of each even-numbered year and ends on the date of the general election. See 11 CFR 100.24(a)(1)(i).

4 This date assumes that there will be no general runoff election.

5 See City of Long Beach Charter, Art. XIX, 1901 ("The primary and general municipal elections for elective officers of the City shall be held in even numbered years, on the second Tuesday in April and the first Tuesday after the first Monday in June, respectively . . . ."), available at http://cms.longbeach.gov/cityclerk/refer/charter/intro.htm.

6 See City of Long Beach Charter, Art. XIX, 1906 ("In the event that any candidate for nomination to an elective office shall receive a majority of the votes cast for all the candidates for nomination to such office at any primary nominating election, the candidate so receiving such majority shall be deemed to be and declared by the City Council to be elected to such office."), available at http://cms.longbeach.gov/cityclerk/refer/charter/intro.htm. Sample ballots provided by the City of Long Beach, City Clerk's Department, indicate that voters will cast votes for Mayor, City Council Member (Districts 2, 3, and 5), and

Board of Education Member (District 5) on June 6.
7 The state primary ballots include county, State, and Federal offices, along with State ballot initiative measures.
8 http://www.longbeach.gov/news/displaynews.asp?NewsID=1756 (last visited May 22, 2006).

9 http://www.2votetuesday.com/ (last visited May 22, 2006).
10 2 U.S.C. 431(20)(A)(ii) (emphasis added).

EXHIBIT 14

are not to raise or spend, nor to direct or control, soft money. This ban covers all activities of the national parties, even those that might appear to affect only non-federal elections. Because the national parties operate at the national level, and are inextricably intertwined with federal officeholders and candidates, who raise the money for the national party committees, there is a close connection between the funding of the national parties and the corrupting dangers of soft money on the federal political process. The only effective way to address this problem of corruption is to ban entirely all raising and spending of soft money by the national parties.

SHAYS-MEEHAN'S TREATMENT OF STATE PARTY SOFT MONEY

The treatment of the state parties is different. This is because state parties obviously engage in activities which are purely directed to non-federal elections. The Shays-Meehan bill does not regulate the kind of money that can be raised by the state parties. That is left to state law. What the bill does do is direct the state parties to spend only hard money on those activities which affect, even in part, federal elections. This is necessary to prevent blatant evasion of the federal campaign finance laws.

This approach is in many ways similar to current law. Currently, if a state party engages in activity that directly affects federal elections—such as running an ad that says ''vote for Congressman Smith''—the state party would be required to spend hard money on these activities. Similarly, if the state party engages in activity that purely affects state elections—such as an ad that says ''vote for Governor Smith''—it could spend whatever non-federal money is permitted under state law.

The Shays-Meehan bill does not change either one of these propositions.

But there is a range of activities that state parties engage in that, by their very nature, affect both federal and non-federal elections. These are the familiar ''party building activities,'' such as get-out-the vote drives or voter registration drives. These activities—registering voters to vote in elections that have both federal and non-federal candidates, or engaging in activities designed to bring them to the polls to vote for federal and non-federal candidates—clearly have an impact on both federal and non-federal elections.

Under current law, state parties pay for these ''mixed'' activities using a mixture of both hard and soft money pursuant to allocation formulae set by the Federal Election Commission. But these allocation rules have proven wholly inadequate to guard against the use of soft money to influence federal campaigns. Much state party ''party building activity'' is directed principally to influence federal elections, and all of the party voter activity inevitably does have a substantial impact on federal campaigns. Further, the state parties run TV and radio ads, purportedly as ''issue ads,'' that directly praise or criticize federal candidates by name without using words like ''vote for'' or ''vote against''—and the FEC has taken the unrealistic position that such ads have an impact on both federal and non-federal elections, and should accordingly be funded with an allocated mixture of hard and soft money.

The Shays-Meehan bill addresses these problems by simply applying the principle of current law—that state parties must use solely hard money to pay for activities that affect federal elections—to a category of activities which clearly affect federal elections and which the bill defines as ''federal election activities.'' Section 101(b) of the bill defines these activities as the following:

(i) Voter registration activity in the last four months before a Federal election,

(ii) Voter identification, GOTV, and generic campaign activity (i.e., activity relating to a party not a specific candidate) that is conducted in an election in which a Federal candidate appears on the ballot,

(iii) Public communications (also a defined term that includes communications by radio, TV, newspapers, phone banks and other methods of public political advertising) that refer to a clearly identified Federal candidate and that promotes or supports, or attacks or opposes, a federal candidate for that office.

(iv) Services provided by employees of a state or local party who spend more than 25 percent of their compensated time on Federal elections.

This definition of ''Federal election activities'' is significant because in section 101(a) of the bill (new section 323(b) of the Act), there is a requirement that state parties spend only Federal money (hard money) on ''Federal election activities.'' That is how the Shays-Meehan bill prevents soft money from being injected into federal races through the state parties.

Again, the bill does not restrict fundraising by state parties. That is left as a matter of state law. But it does say to the state parties that when they spend money on activities that affect federal elections, including the defined category of ''Federal election activities,'' they must spend solely hard money for those activities.

The lack of a state party soft money provision is a fundamental shortcoming of the proposal of Mr. NEY and Mr. WYNN. The restrictions on state parties using soft money to influence federal elections is one of the most important features of the Shays-Meehan bill. Much of the soft money being raised today by the national parties is transferred to state parties to be spent on activities that influence federal elections. An effective effort to address state party soft money spending to influence federal elections is absolutely essential to real campaign finance reform and solving the soft money problem.

THE LEVIN AMENDMENT

Critics have contended that the state parties should not be prevented from spending money that is legal in their state on activities that are designed to improve voter turnout and assist state candidates in a state election. When the McCain-Feingold bill was considered in the Senate last year. Senator CARL LEVIN of Michigan, a long-time and strong supporter of the bill, worked with the sponsors of the legislation to craft a provision to allow limited spending of soft money by state parties on a limited subset of state party activities. On the Senate floor, Senator LEVIN explained that his amendment:

> . . . will allow the use of some non-Federal dollars by State parties for voter registration and get out the vote, where the contributions are allowed by State law, where there is no reference to Federal candidates, where limited to $10,000 of the contribution which is allowed by State law, and where the allocation between Federal and non-Federal dollars is set by the Federal Election Commission.

Senator LEVIN also specified: ''These are dollars not raised through any effort on the part of Federal officeholders, Federal candidates, or national parties. These are non-Federal dollars allowed by State law.''

CHANGES TO THE LEVIN AMENDMENT IN SHAYS-MEEHAN

In addressing the Levin amendment in our substitute, the sponsors of the Shays-Meehan bill wanted to accomplish two things. First, we wanted to respect the original intent and purpose of the Levin amendment. Second, we wanted to make sure that it did not create a new loophole for corporations, unions, wealthy individuals to exploit. In our view, those purposes were not in conflict, since Senator LEVIN made it clear it was not his intent to undermine the campaign finance reform effort, but only to support legitimate state party activities that promote voter participation by allowing a limited amount of non-federal money to be used for those purposes.

The changes in the Levin amendment incorporated in our substitute have been agreed on with the sponsors of the Senate bill. They do not change the essential thrust of the Levin amendment, but they do provide additional restrictions to help ensure that the amendment will not become a new loophole in the law.

DESCRIPTION OF REVISED LEVIN AMENDMENT

With that background in mind, let me describe the Levin amendment, as modified in the Shays-Meehan substitute. New section 323(b)(2)(A) of the FECA permits state parties to spend non-federal money (soft money) on certain Federal election activities, as long as the spending is made up of both Federal money (hard money) and soft money in a ratio to be prescribed by the FEC. The activities that state and local parties can pay for under this exception are voter registration in the last 120 days prior to an election, and certain GOTV and other activities specified in new section 301(20(A)(ii).

Under new section 323(b)(2)(B)(i), the exception applies only if the activity paid for does not refer to a clearly identified Federal candidate. In addition, under new section 323(b)(2)(B)(ii), the exception does not apply to any activity that involves a broadcast, cable or satellite communication, unless that communication refers only to state and local candidates. In other words, GOTV efforts paid for in part with so-called ''Levin money'' may mention state or local candidates or contain a generic party message, but they cannot mention Federal candidates. And if these efforts are carried out through radio or TV ads they must mention clearly identified state or local candidates only, or they will be subject to the state party soft money restrictions and no ''Levin money'' can be used. To be clear, ''Levin money'' cannot be used by state parties to pay for broadcast ads that mention federal candidates.

In addition, the soft money or ''Levin money'' portion of the spending is subject to a number of restrictions. Under new section 323(b)(2)(B)(iii), it must be legally raised under state law, and no person can give more than $10,000 per year to a individual state or local committee, even if state law permits greater contributions. So if a state allows direct corporate or labor union contributions to political parties corporations and unions can make contributions of up to $10,000 or the state limit, whichever is lower, to the party committee each year. Obviously, if a state prohibits corporate or labor union contributions to political parties, the Levin amendment does not supersede that prohibition, and corporate

or union contributions of ''Levin money' would be banned.

After the Senate passed the Levin amendment, the question arose whether the amendment was intended to limit a donor to a single $10,000 contribution to all of the non-Federal political committees in a state, or to permit separate contributions to the state committee and local committees. Since the Senate appears to have intended that there is not a single per donor limit on all contributions to party committees in a state, further restrictions on the raising and spending of ''Levin money'' by the committees are imposed in order to prevent the Levin amendment from becoming a new loophole.

Accordingly, under new section 323(b)(2)(B)(iv), the version of the amendment contained in the Shays-Meehan substitute, all of the non-Federal and Federal money spent on the activities authorized by the Levin amendment must be raised solely by the committee doing the spending. Transfers of money between committees are not permitted. Thus, a county committee of a political party may accept a $10,000 contribution, but it must raise and spend that money itself, and it cannot work with any other party committee in raising or spending that money. It cannot transfer that money to the state committee. Furthermore, it must itself raise the hard money allocation required by the FEC, and it may not accept a transfer of hard money from a state or national party committee to satisfy that allocation requirement.

Finally, and very importantly, in new section 323(b)(2)(C), we affirm that federal candidates or officeholders and the national parties may not participate in the raising or spending of the soft money that is permitted to be spent under the Levin amendment. In addition, joint fundraisers between state committees or state and local committees are not permitted. Prohibiting Members of Congress and Executive Branch officials from being involved in soft money fundraising is one of the central purposes of the campaign finance reform effort. Consistent with Senator LEVIN's original intent, this new provision will ensure that that central purpose of the bill is not undermined. The joint fundraising prohibition will prevent a single fundraiser for multiple state and local party committees.

Mr. Chairman, let me address two additional questions that have arisen as to the interpretation of the Levin amendment. First, the $10,000 per year limit applies collectively to a corporation and its subsidiaries, and to a union and its locals, in the same way as contributions from PACS set up by subsidiaries and local unions are treated under current law. See 2 U.S.C. § 441a(a)(5). To allow a separate contribution limit to apply to subsidiaries of a corporation or locals of a union would completely undermine the $10,000 limit as a check against the Levin amendment being used to continue the unlimited contributions that the soft money system now permits.

Second, while state and local committees may accept separate contributions of up to $10,000 per year from donors permitted to give that much under state law, state and local committees are not allowed to create their own multiple subsidiary committees to raise separate $10,000 contributions under this provision. The proliferation of new state party committees (e.g., the Northern California Republican Party Committee, the Southern California Party Committee or the New York Democratic Committee A, Committee B, Committee C, etc.) would be in complete contradiction to the provision, which allows only limited amounts of non-federal money to be given to a state or local committee for limited party-building activities that do not refer to federal candidates.

Mr. KLECZKA. Mr. Chairman, today, at long last, the House of Representatives will finally get a fair vote on campaign finance reform legislation. In order to reach this point, 218 Members had to sign a discharge petition to force the anti-reform Republican leadership to bring this measure to the floor for a debate and hopefully passage. H.R. 2356, the Bipartisan Campaign Reform Act of 2001, is necessary if we are to remove the undue influence of soft money on our political process and the unregulated issue advertisements that inundate our airwaves during each election season.

When Congress passed the Federal Election Campaign Act (FECA) of 1971 it included a provision that allowed national political parties to use unregulated contributions, ''soft money,'' for generic party-building activities such as get-out-the-vote drives and voter registration efforts. Initially, the parties adhered to the restrictions on the use of soft money, but soon began shifting soft money contributions to state parties to be used for paid television and radio campaign advertisements. Under FECA, such advertisements were supposed to be paid for by regulated hard money that is raised through limited contributions to political parties and candidates.

We have recently seen an unacceptable increase in the amount of soft money used in campaigns. In the year 2000 elections alone, $495 million in soft money was spent by the parties, an amount that is nearly double the $262 million spent four years earlier. The steadily increasing use of soft money to skirt federal campaign contribution laws has given it a growing role in our system of elections that cannot be allowed to continue.

An equally troubling aspect of today's campaign system is the number of issue advertisements broadcast on the television and radio. Although these ads technically adhere to federal campaign regulations, they violate the spirit of the law. Issue ads are supposed to be used to discuss issues of legislation, not to attack or support candidates, like they often do today. Through this loophole, corporations, unions, and other organizations have avoided federal reporting and disclosure laws by running ads that avoid the magic words ''vote for,'' ''vote against,'' ''support,'' and ''defeat.'' Since the ads are technically campaign ads, the people paying for them do not need to identify themselves or their supporters, which is contrary to the basic tenets of campaign-finance regulations.

H.R. 2356 would fill in the gaps left by FECA. First, it would ban all national party use of soft money. In order to ensure that get-out-the-vote drives and other genuinely generic party activities are not hindered, it would allow state and local parties to spend soft money on these activities. Individuals, corporations, and labor unions can give $10,000 in soft money to party committees organized at the state, county, and local level for these legitimate efforts.

H.R. 2356 would also prevent corporations and organizations from skirting the law with unregulated issue advertisements by requiring that all campaign ads for federal office be paid for with publicly disclosed and regulated campaign funds that are subject to federal contribution limits. This would be achieved by expanding the definition of ''campaign advertisement'' to include any ads that clearly identify a federal candidate made within 60 days of a general election or 30 days of a primary and are targeted to that candidate's electorate.

Some of my colleagues claim that these regulations would violate the freedom of speech guaranteed by the First Amendment. That is simply untrue. Corporations, labor unions, and other organizations would still be permitted to use any funds they have to run ads that discuss issues of legislation, so long as they do not specifically refer to a candidate for federal office. If they do mention a candidate by name, all they have to do is to use hard money, which is regulated, subject to contribution limits and disclosure laws. These groups may also fund advertisements that do attack or support a specific candidate, the only requirement being that they do so through the established regulated process using hard money donations to their political action committees.

This bill would also retain several important hard money contribution limits. Individuals would still be permitted to contribute only $1000 per election to candidates for the House of Representatives and political action committees would be restricted to the current $5000 per election limit.

This day has been a long time coming. We need to reduce the influence of unregulated money which has been flowing at an increasing rate into our political system. H.R. 2356 reigns in soft money and issue advertising that has operated outside the framework of our campaign-finance laws. I urge my colleagues to support the amendments that the reform measure's authors must offer in order to get the complete bill to the floor under the GOP leadership's rule. Similarly, I urge Members to oppose those ''poison pill'' amendments designed to kill the bill, and instead support final passage of this important measure.

Mr. SHAYS. Mr. Chairman, I rise to address the scope of an exception to the definition of ''electioneering communications'' set out in section 201(3)(B), which include (i) news distributed by broadcast stations that are not owned or controlled by a candidate, (ii) independent expenditures, (iii) candidate debates and forums and (iv) ''any other communication exempted under such regulations as the Commission may promulgate . . . to ensure appropriate implementation of this paragraph.'' I wish to discuss the purpose of the fourth exception.

The definition of ''electioneering communication'' is a bright line test covering all broadcast, satellite and cable communications that refer to a clearly identified federal candidate and that are made within the immediate pre-election period of 60 days before a general election or 30 days before a primary. But it is possible that thee could be some communications that will fall within this definition even though they are plainly and unquestionably not related to the election.

Section 201(3)(B)(iv) was added to the bill to provide Commission with some limited discretion in administering the statute so that it can issue regulations to exempt such communications from the definition of ''electioneering

EXHIBIT 15

called issue ads that increasingly dominate the airways during campaign time.

Although I favor public financing, we're not at the point that we can pass public financing. So what are we going to do? My preference is, we change the system with the legislation we have before us. The people want reform; the country needs it; we should do it.

Mr. NELSON of Nebraska. Mr. President, I rise today to express my opposition to the McCain-Feingold bill. To be clear, I am not opposed to the impetus behind this legislation, which is to reform our current campaign finance system. I concur with my colleagues—who support this bill—that the present system is inadequate and inherently flawed. But, unfortunately, this is where our parallel viewpoints diverge.

While I agree that the present campaign finance system is imperfect, I believe that the McCain-Feingold alternative to that system is even more so. This legislation, once enacted, likely will hurt the status quo more than it will help. And, ultimately, I predict it will foster campaign finance regression, rather than institute campaign finance reform.

From the beginning, I have worked with my colleagues to negotiate a more fair and balanced package that, I believe, would have achieved thorough reform. Key parts such as the Hagel amendment on soft money contributions and the amendment on non-severability are not included in this final bill. Had they been included, these amendments would have made the legislation much more effective and comprehensive, and consequently, much more likely to receive my support.

To be fair and consistent, certain aspects of this final bill are laudable and do have my support. I am pleased that the Snowe-Jeffords provision and the Hagel amendment regarding disclosure are included. Increased accountability and transparency for special interest groups are important to the overall reform effort. Moreover, the Wellstone amendment, which extends the Snowe-Jeffords provision to independent advocacy groups, will help remove the facades behind which these groups hide. For too long, special interest groups have funded so-called issue ads whose main objective is to distort the facts. It is encouraging that this bill, as amended, confronts that issue.

The ability of state parties to carry-out traditional activities such as voter registration, is another issue addressed by the Levin amendment, which I was pleased to join as an original co-sponsor. State and local candidates rely on get-out-the-vote efforts and voter registration activities which are usually funded by the state party. Since this campaign finance reform bill, prior to the Levin amendment, would have severely limited state parties, it became apparent that we needed to ensure that such crucial activities are not abolished as well. Without question, I am encouraged by the inclusion of this amendment. It, and the ones regarding increased disclosure, are definitive steps in the direction of genuine campaign finance reform.

That being said, any ground gained by these steps is lost through the ban on soft money and the defeat of the non-severability clause. McCain-Feingold bans soft money contributions only to the national parties. As I have said before, this measure is ineffective, an ultimately unproductive. The soft money ban in this bill will likely be more of a temporary road block than a true dead end. I believe that eventually soft money will find a detour, and it will flow into federal elections from another direction.

A more realistic approach to the unfettered flow of soft money that pollutes our current campaign finance system, would have been to include the Hagel amendment, which would have capped soft money contributions at $60,000. The Hagel measure was pragmatic and essential to real reform. With the absence of this language in the final bill, we are left with a plan than falls short on efficacy and long on futility.

Without the inclusion of a cap, instead of a ban on soft money to national parties, my support for this bill declined, but the nail on the coffin, so to speak, was the defeat of the severability clause. The non-severability amendment was characterized by its opponents as the ''poison pill'' of campaign finance reform. Quite frankly, I thing the total package before us today would have been easier to swallow if it had been included.

The non-severability amendment would have prevented the courts from striking down some provisions and leaving others. Once the courts act, it is possible that the McCain-Feingold campaign finance reform law as passed by Congress will look nothing like the McCain-Feingold finance reform law tweaked by the courts. For this reason, the severability provision only weakens the bill and extends the inequalities fostered by the present system.

My conviction that the current campaign finance system is flawed remains unchanged. Comprehensive reform is undoubtedly needed; however, I do not believe this legislation will achieve that goal. It's often been said that something is better than nothing. Well, in this instance, the reverse rings true. Nothing is better than something. Therefore, I will vote accordingly and reserve my support for a more comprehensive and equitable campaign finance reform package.

Mr. HOLLINGS. Mr. President, the thrust of McCain-Feingold was to eliminate soft money. Now, the final bill doesn't eliminate soft money but, rather, redirects it. Soft money has been taken away from the political parties and redirected to the special interests. The thrust of McCain-Feingold was to minimize the influence of the special interests. It has now become maximized. And finally, the thrust of McCain-Feingold was to eliminate the obscenity of the outrageous amounts of money that it takes in politics to be elected. The final bill now doubles this obscenity. But Senator MCCAIN has become such a symbol. McCain-Feingold has become such a message that Senators, in disregard of the substance but totally on message, will vote for it. I said at the beginning that there was no doubt that under Buckley v. Valeo, the Supreme Court would find McCain-Feingold unconstitutional. While the Court hurt us in Buckley, perhaps this time the Court will save us by finding McCain-Feingold unconstitutional. At least I am sober enough to vote no.

Mr. HATCH. Mr. President, after two weeks of floor consideration, we are now approaching the final vote on the campaign finance reform legislation. I have taken the floor on several occasions over the past two weeks to express my serious concerns with the various provisions of the bill. Given my concerns, and the failure of this body to vote to correct some of the problems, I will be voting against final passage of this well-intended, but seriously flawed legislation.

The one silver lining in the legislation that will likely pass this evening is a provision I authored that passed, which will give expedited judicial review by the Supreme Court of challenges to the constitutionality of the legislation. All of us, supporters and opponents alike, stand to gain by a prompt and definite determination of the constitutionality of many of the bill's controversial provisions. Because the harm these provisions will cause is serious and irreparable, it is imperative that we afford the Supreme Court the opportunity to pass on the constitutionality of this legislation as soon as possible.

Let me say again that I commend and respect the authors of this legislation for their attempts to address a troubling and unfortunate public perception about our political system. However, we also must respect the freedom of speech granted to every American by our Constitution. While the bill may alter or change our system of campaign finance, I think it will do little in actually reform it or making it better. In fact, McCain-Feingold, if passed and enacted into law, will, in my opinion, exacerbate the very problems that it seeks to solve.

The primary provision of McCain-Feingold essentially bans soft money by making it unlawful for national political party committees and federal candidates to solicit or receive any funds not subject to the hard money limitations of the Federal Election Campaign Act. It also nationalizes the state party structure by subjecting state parties to the regulations of the Federal Election Commission when candidates for federal office appear on the general ballot. The net result of this soft money restriction on parties will be to emasculate the present two-party system and to increase the power