BRENNAN CENTER FOR JUSTICE
161 Avenue of the Americas, 5th Floor
New York, New York 10013
phone: 212-998-6730
fax: 212-995-4550

FAX TRANSMITTAL

We are sending 11 pages (including this page)

Date: January 24, 2000

To: **Rosemary C. Smith (fax: 202-219-3923)**

From: Deborah Goldberg (*direct line: 212-998-6748; e-mail: deborah.goldberg@nyu.edu*)

Message: Enclosed are the Brennan Center's comments on the proposed rulemaking on coordinated communications. Hard copy will follow by mail. I will also e-mail the document (in a slightly different format, since you will not have our letterhead), to facilitate loading it onto your website.

BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW

Deputy Director, Democracy Program
direct line: 212-998-6748
deborah.goldberg@nyu.edu

January 24, 2000

VIA FACSIMILE AND
FIRST CLASS MAIL
Rosemary C. Smith,
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Proposed Rules on General Public Communications Coordinated with Candidates: Comments of Brennan Center for Justice at NYU School of Law

Dear Ms. Smith:

The Brennan Center for Justice at NYU School of Law respectfully submits these comments on the Commission's proposed new rules governing coordinated communications made in support of or in opposition to clearly identified candidates and paid for by persons other than candidates, candidates' authorized committees, or party committees.[1] We also request an opportunity to testify at the public hearing scheduled for February 16, 2000.

The Commission has requested comment on:

- the text of the proposed rules, including a number of alternative approaches to particular provisions and a series of questions arising out of their application to two hypothetical fact patterns; and

- whether the proposed rules or a different standard should be applied to political party expenditures for general public political communications that are coordinated with particular candidates, and, if not, why and what different standard should be applied.

---

[1]Hereinafter, the term "candidate" includes the candidate's committee, a party committee, or any of their agents, unless the context of these comments indicates otherwise.

As is explained below, the Brennan Center has some serious concerns about the proposed rules and believes that they should not be applied to political party expenditures.

Introduction

The Commission states that its proposed rules are intended to incorporate the standard for coordination articulated by the United States District Court in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999). Although the *Christian Coalition* definition begins on the right track, we believe it is ultimately too narrow to capture commonplace forms of coordination and therefore opens a dangerous loophole in the federal campaign financing system.

The *Christian Coalition* court first recognized the constitutionality of treating expressive expenditures — what the Commission proposes to call "general public political communications" — as coordinated if they were made at the request or suggestion of a candidate. *See id.* at 91. The Brennan Center has no objection to the Commission's proposal to codify that ruling. As the *Christian Coalition* court said: "The fact that the candidate has requested or suggested that a spender engage in certain speech indicates that the speech is valuable to the candidate, giving such expenditures sufficient contribution-like qualities to fall within the Act's prohibition on contributions." *Id.* at 92.

Provided that the following standard is understood to establish *sufficient* (but not necessary) conditions for coordination, the Center also agrees that:

> 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 . . . ; or (4) "volume" (*e.g.* number of copies of printed materials or frequency of media spots).

Id. Such control, discussions, or negotiation should certainly *suffice* to establish the Commission's right to regulate the expenditures as contributions, as would spending in response to a candidate's request or suggestion.

But the Commission should reject the idea that coordination *requires* a candidate's suggestion, request, or control, or substantial discussions or negotiations with the candidate. And the Commission should jettison the *Christian Coalition* court's explanation that: "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." *Id.* Treating conditions that are sufficient for coordination as if they were also necessary conditions, and requiring the functional equivalent of a partnership — or, as the Commission has construed it, "collaboration or agreement" — in the absence of a candidate's

request, suggestion, or control, would open an enormous loophole in the already troubled federal campaign finance system.[2]

For example, the following situation could not be regulated under the Commission's definition:

> A candidate meets with his campaign manager and chief fundraiser. Together they decide that, although it would be desirable to conduct a direct mail campaign throughout the candidate's district, the available funds will cover advertising only in cities. At the supermarket that night, the treasurer of the local farmers' PAC casually asks the fundraiser, "Will the campaign be sending literature to rural areas?" The fundraiser truthfully replies, "No, not enough money." The PAC then decides to send brochures modeled on the campaign mailings to homes throughout the countryside.

The fundraiser made no explicit request or suggestion, and he exercised no control over the PAC's brochures. There was no substantial discussion or negotiation. The PAC spending therefore would not count as coordinated under the *Christian Coalition* standard. But surely the PAC's advertising cannot be regarded as truly independent. The PAC requested key information about the campaign's advertising needs and strategy from an high-ranking insider and then made expenditures to fulfill those needs and further that strategy.

Similarly, the proposed rules are grossly under-inclusive because they would not prevent a Fortune 500 company from contacting a candidate's advertising agency, and asking to have the same creative personnel assigned to the campaign design millions of dollars of corporate "issue ads" supporting the candidate in battleground states. Those expenditures are "coordinated" not because of any specific agreement between the candidate and the company but because of the coordinated use of campaign-related resources.

The above examples illustrate some of the more obvious weaknesses of the *Christian Coalition* definition. The standard fails to cover expenditures that are plainly not independent and that are of real value to campaigns. The test is thus inconsistent with the purposes of the Federal Election Campaign Act ("FECA"), which seeks to reduce the potential for real and perceived corruption. Fortunately, as is explained below, the First Amendment does not preclude the Commission from adopting a broader and more realistic definition.

---

[2]The Commission is correctly proposing not to use the standard of "partners or joint venturers." Partners are generally understood to be co-owners of property, with rights of ultimate control, and to be jointly and severally liable for obligations of the partnership. *See* Uniform Partnership Act §§ 202, 306 (1997). Entities that coordinate communications with candidates are almost never in that close a relationship.

The Constitutional Context

Under current Supreme Court precedent, there is no pressing reason for the Commission to adopt the *Christian Coalition* standard for coordination, which has been endorsed only by that lone district court. *Buckley v. Valeo*, the Supreme Court's leading campaign finance case regarded independent expenditures — expenditures that were *not* coordinated — as those "totally independent of the candidate and his campaign." 424 U.S. 1, 47 (1976) (*per curiam*). It was that total independence, the "absence of prearrangement or coordination," that persuaded the Court that independent expenditures might not only be of little assistance to candidates but actually prove counterproductive (and thus of no value as a *quid pro quo*). *Id.* The more contact the Commission permits between candidates and outside persons making expenditures in electoral campaigns, the more the Commission undermines *Buckley*'s rationale for holding that limits on independent expenditures are unconstitutional. Insisting that only genuinely independent expenditures escape treatment as contributions is fully consistent with *Buckley*.

More recently, the plurality in *Colorado Republican Federal Campaign Committee v. FEC* decided that the Republican party had not coordinated its expenditures only because there was no evidence of any "general or particular understanding" between the party and any candidate. 518 U.S. 604, 614 (1996). A "general understanding" between a candidate and supporters intending to make expenditures could be established with far less communication than the *Christian Coalition* court — or the Commission's proposed rules — would require to establish coordination. A general understanding would exist if a PAC informed a candidate precisely where it planned to distribute voter guides, and the candidate responded, "Thanks for the tip." That kind of collusion could be regulated consistently with *Buckley* and *Colorado Republican* and should not be permitted to slip under the Commission's radar screen. Given the national political parties' recent proclivities to make large "soft money" donations to non-profit groups that circulate voter guides and air "issue ads," these concerns are real.

In sum, there is nothing in the Constitution, as interpreted by this nation's highest court, that would require the Commission to embrace the cramped the *Christian Coalition* conception of coordination, which opens up opportunities for the exchange of information and allocation of resources between candidates and others making expenditures in electoral campaigns. Because the potential for corruption and the appearance of corruption increase with each new opportunity, the Commission would do well to take a different approach to defining "coordination." As is explained below, the Commission can provide guidance consistent with constitutional constraints to persons wishing to make legitimate independent expenditures, without creating a gaping new loophole in FECA. The Commission should not abdicate to an isolated district court its responsibility to articulate a practicable standard of coordination consistent with both the purposes of FECA and the requirements of the First Amendment.

The Proposed Rules

A. The Rules Should Offer Sufficient, But Not Necessary, Conditions.

We have three general comments to make on the text of the rules. First, subject to our more specific comments below, Paragraph (c) would provide useful guidance without creating a major new loophole if subsections (1)-(3) were understood as sufficient, but not necessary conditions for coordinated expenditures. In other words, the provisions offer plausible *examples* of the kinds of behavior that would be considered coordination, but they should not be understood as alternative and exhaustive prerequisites.

B. The Rules Should Include Additional Conditions That Suffice for Coordination.

Second, if the Commission were to clarify the meaning of coordination by identifying a series of sufficient conditions, the rules should add the following:

> *Coordination with candidates and party committees.* A general public political communication is considered to be coordinated if the communication is paid for by any person other than a candidate, the candidate's authorized committee, or a party committee, and:
>
> - in the same election cycle in which the communication occurs, the person retains the professional services of an individual or entity that, in a non-ministerial capacity, is providing or has provided campaign-related services — including polling or other campaign research, media consulting or production, direct mail, or fundraising — to a candidate who is pursuing election or nomination to the same office as any candidate clearly identified in the communication, or
>
> - the communication replicates, reproduces, republishes, distributes, or disseminates, in whole or substantial part, a broadcast or written, graphic, or other form of campaign material designed, produced, or distributed by the candidate, the candidate's authorized committee, or their agents, or
>
> - the communication is based on information: (i) about the candidate's electoral campaign plans, projects, or needs (ii) provided by the candidate, the candidate's committee, or their agents directly or indirectly to the person making the expenditure or that person's agent, with an express or tacit understanding that the person is considering making an expenditure, or
>
> - prior to the election, the person informs a candidate who is pursuing election or nomination to the same office as any candidate clearly identified in the communication about the communication's contents; timing, location, mode, or frequency of dissemination or distribution; or intended audience, or

- in the same election cycle in which the communication occurs, the person is serving or has served in a formal executive, policy-making, or advisory position with the candidate's campaign or has participated in strategic or policy-making discussions with the candidate's campaign relating to the candidate's pursuit of nomination or election to office.

These examples provide considerably more direction to those who are interested in spending independently to influence elections than the current regulations provide. Most importantly, they provide some *objective* criteria for presumed coordination — *e.g.*, republication of candidates' own ads or use of candidates' consultants — which reflect the way that coordination has actually tended to operate during the course of electoral campaigns. Because it is highly unlikely that any person engaging in this conduct would be operating independently of a candidate's campaign, there is little risk that these conditions will tread unnecessarily on rights of free speech and association.

C. The Commission Should Carve Exceptions for Protected Conduct.

Third, to the extent that the Commission is concerned about specific types of expressive activity that might appear to fall within the definition but nevertheless merit First Amendment protection, the Commission would do well to use the device it employs in § 100.23(d). That proposed rule correctly carves a specific exception for responses to inquiries about legislative or policy positions from the scope of coordinated communications.

The Commission might also wish to carve an exception for discussions limited to legislative or policy positions with elected officials, to ensure that core lobbying activities are not construed as coordination with a candidate. Notwithstanding the *Christian Coalition* decision, the Commission was correct to argue that it is possible to distinguish among discussions about the candidate's position on a policy issue or bill, which is a legitimate issue for lobbying, and conversations about when during a campaign it would be advantageous for the candidate to take a stand or how and to whom the position should be communicated in campaign advertising, which are strategic electoral decisions to which truly independent spenders should not be privy. The Commission should not be so eager to concede defeat with respect to this distinction.

The approach recommended here, whereby the Commission would provide guidance about the types of conduct that would suffice for coordination and the types of conduct that would be exempt from the rules, differs from the Commission's attempt to define comprehensive necessary and sufficient conditions for coordination. This approach does not provide the level of certainty that the Commission's proposed definition offers, but absolute certainty is not a constitutional requirement, as even the *Christian Coalition* court recognized. *See* 52 F. Supp. at 92. The recommended approach provides ample direction as to what conduct will count as coordination, does not unnecessarily limit First Amendment freedoms, and avoids creating loopholes in federal election law. In other words, it strikes an appropriate balance between the need for regulatory clarity and precision and the compelling interest in protecting the integrity of federal elections against threats presented by coordinated communications. *See id.*; *see also Denver Area Educ. Telecommunication Consortium v. FCC*, 518 U.S. 727, 741 (1996) (plurality

opinion) ("[T]he First Amendment embodies an overarching commitment to protect speech . . . without imposing judicial formulas so rigid that they become a straightjacket that disables government from responding to serious problems.").

D. The Draft Rules Should Be Revised Consistently with the Foregoing Concerns.

In addition to the foregoing general remarks, we have the following comments on specific provisions:

§ 100.23 Coordinated General Public Political Communications. The Commission's decision to define coordinated communications, rather than coordinated expenditures, helps to clarify the fact that coordination may occur even if the communication does not contain "express advocacy."

Alternatives 1-A and 1-B for Paragraph (c) Introductory Text. The use of geographic limitation language in Alternative 1-B to address an issue that has nothing to do with geography creates more problems than it solves. The potential concern about multi-state media markets that the Commission identifies in the Supplemental Notice of Proposed Rulemaking, *see* 64 Fed. Reg. 68954, is a real one. In addition, Alternative 1-B would introduce a new loophole whereby candidates would coordinate major out-of-jurisdiction solicitation drives, effectively shifting a major portion of their fundraising costs to outside groups, to whom the candidates would then be enormously indebted. The Commission can adopt Alternative 1-A and still address the legitimate concern about national legislative campaigns in which proposed statutes are identified by the names of key sponsors, who also happen to be candidates for federal office. The Commission can simply draft an exception for those circumstances, as it has done in § 100.23(d).

Alternatives 2-A and 2-B for Paragraph (c)(1). Only Alternative 2-A is true to the language and purpose of FECA, which excludes from the definition of "independent" any expenditures made in "cooperation," "consultation," or "concert" with, or "at the request or suggestion of," any candidate, or authorized committee or agent of the candidate. Under the statute, independence can be defeated with communications that go only one way — such as requests or suggestions from a candidate to which the person intending to pay for a general public political communication gives no indication of assent. Independence is violated, even without the mutual "collaboration or agreement" that Alternative 2-B would additionally require, because the information from the candidate is used in the person's decision-making about the communication and makes the communication more valuable to the candidate. Alternative 2-B should therefore be rejected because it would invite widespread circumvention of FECA's limits on coordinated expenditures through delivery of key campaign information or resources, which the recipient would simply decline to acknowledge.

Subsections (2) and (3) under Paragraph (c). These provisions, under which coordination would not occur without either "collaboration or agreement" or actual "control or decision-making authority" by the candidate over aspects of the communication would replicate the problems of Alternative 2-B. Such entanglements should certainly suffice for coordination, but none of them should be necessary. The three alternative prerequisites for coordination stated

in subsections (c)(1)-(3) should therefore be reformulated as illustrative examples of coordination, in conjunction with the additional four examples described above.

The Hypotheticals

There can hardly be any question that the facts of the first hypothetical constitute coordination under the Commission's proposed rules. If candidate Smith's complaint to a wealthy contributor, who Smith already knows is planning to make an "independent" expenditure, about a specific issue that Smith would like to see publicized but that he does not want to include in his own advertising, coupled with the supporter's expressed gratitude for the information and a subsequent ad implementing Smith's idea, does not count as a "suggestion" from Smith under Alternative 2-A, or even a suggestion about the content of a communication resulting in "collaboration or agreement" under Alternative 2-B, it is difficult to imagine what would. The circumstances might even constitute an implicit "request," again satisfying either Alternative.

Even if the supporter said nothing during the meeting, the facts would satisfy Alternative 2-A. But it is a closer question whether they would satisfy Alternative 2-B, and the difficulty in deciding that question is precisely what makes that Alternative unacceptable. The advertisement implementing Smith's idea should not be regarded as independent just because the supporter cleverly keeps quiet at the meeting; the coordination occurs because of the information transmitted to and used by the supporter. Any definition of "coordination" that does not admit of this possibility is an open invitation to abuse.

The Commission most certainly has jurisdiction over the communication described in the first hypothetical. The plain language of FECA states that "expenditures made by any person . . . at the request or suggestion of" a candidate are not "independent," and therefore "shall be considered to be contributions made to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i); *see id.* § 431(17). Congress authorized the Commission to administer and enforce FECA and delegated to the Commission the power and responsibility to promulgate implementing regulations. *See id.* § 438(a)(8) ("The Commission shall . . . prescribe rules, regulations, and forms to carry out the provisions of this Act . . . ."). Because the communications described in the first hypothetical are governed directly by FECA, there can be no question that they are subject to the Commission's jurisdiction.

The fact that the communication in the first hypothetical does not include "magic words" — such as "defeat" or "vote against" — should not change this analysis. The timing of the commercial (the weekend before election day) and the plea to "keep [a litany of candidate Jones' supposed flaws] in mind on Tuesday" unmistakably exhort the listener to oppose the election of Congressman Jones and thus constitute the express advocacy governed by FECA. But even if the absence of "magic words" is understood to preclude express advocacy, the blatant coordination of the communication brings the ad within the Commission's jurisdiction. To suggest that the Commission could treat coordinated communications as contributions only if the communications contained express advocacy would open the door to collusive outside underwriting of campaign-related communications that do not expressly advocate a candidate's

election or defeat but financially benefit candidates' campaigns. *See Christian Coalition*, 52 F. Supp. 2d at 88. Such communications would carry the same value as direct contributions (because the risk presented by truly independent advertising would be eliminated) and carry the same potential for corruption. The sham "issue advocacy" by corporations and unions that so plagues our system now would become infinitely more corrosive because it could be planned directly with the candidates. Creating such a loophole would be manifestly contrary to FECA, which intended to prohibit corporations and labor unions from using their general treasury funds to influence elections. *See* 2 U.S.C. § 441b(a).

The communication initially described in the second hypothetical would also appear to be captured by Alternatives 1-A and 1-B of the Commission's proposed rules, because the Senator obviously authorized the announcement in agreeing to serve as the League's spokesperson. But it is possible that the communication really ought not be treated as a contribution. The hypothetical states that the League seeks to reinforce the public's confidence in Texas savings and loan institutions, not to benefit the Senator's campaign, so the ad might be a case of genuine "issue advocacy" outside the Commission's jurisdiction. On the other hand, it is unclear why a federally regulated industry would enlist an incumbent candidate as a "public service" announcer during an election year, and thus provide free publicity in the midst of a campaign, if the industry had no intention to help the Senator with his re-election.

In other words, the content and timing of the League's ad do seem to matter. If the League's "public service announcement" had not been aired during an election year, we would be less inclined to view the ad as a surreptitious in-kind campaign contribution. We are more likely to view it that way if the League runs the advertisement a week before the election, because the timing increases the candidate-approved ad's value to his campaign. Concluding the ad with the words "Please support Senator William Moore!" leaves no doubt in our minds.

The Commission's concern whether, before deciding whether to apply its coordination regulations, it should decide whether a political communication is "in connection with" or "for the purpose of influencing" an election, is therefore understandable. But the answer to the question is probably "no." If the Commission is concerned that the mere appearance of a sitting official in a public service announcement, even outside an election year, will count as coordination, the Commission can craft a specific exception to cover those circumstances.

Alternatively, the Commission could treat the sufficient conditions for coordination that would appear in paragraph (c)(1) as rebuttable presumptions of coordination. In an enforcement proceeding, persons paying for communications presumptively treated as coordinated would be permitted to offer evidence that the communication was not really an in-kind contribution to the campaign. The Commission would retain the overall burden of proving by a preponderance of the evidence that the coordination rule properly applied to the supporter.

If the Commission concludes that it cannot prescribe any coordination rule without defining "in connection with" or "for the purpose of influencing" an election, the Commission should defer promulgating coordination rules. As the Commission well knows, the meaning of those terms is inextricably bound to the definition of "express advocacy" — a matter of heated

controversy in both Congress and the courts. The Commission should not attempt to resolve a debate of that magnitude in the course of a rulemaking about coordination.

Coordinated Party Expenditures

The Commission has asked whether the coordination rules developed pursuant to this rulemaking should also be applied to political party expenditures for general public political communications that are coordinated with particular candidates. The answer is almost certainly "no," because parties stand on a different footing with respect to their candidates than do other entities or individuals. Political parties exist principally for the purpose of electing candidates, and party spending is "by definition, campaign related." *Buckley*, 424 U.S. at 79. But the question is not a simple one, and the Commission would do well to publish an independent Notice of Proposed Rulemaking if it is contemplating new regulations on coordinated expenditures by political parties.

In *Colorado Republican*, the Supreme Court held that when a political party has not yet selected a nominee from various contending primary candidates, the government may not conclusively presume that all party expenditures are coordinated. *See* 518 U.S. at 619. *Colorado Republican* leaves open the possibility that the government could establish a *rebuttable* presumption of coordination between parties and candidates of the same party, even before a nominee has been selected. Given the extremely close relationship between a political party and candidates of that party, a rebuttable presumption of coordination would appear to be warranted. The party could rebut the presumption with evidence akin to that presented in *Colorado Republican*.

Once a nominee *has* been selected, the coordination rule *should* take the form of a conclusive presumption. Nothing in *Colorado Republican* precludes such a rule. Such a rule recognizes the reality of how parties and candidates operate and protects the integrity of FECA's public funding scheme for presidential candidates and limitations on party contributions to candidates.

Conclusion

The Commission should exercise great caution in adopting any rules governing coordination. Unless the rules are crafted carefully, there is grave risk that the rulemaking will inadvertently open new loopholes in FECA. The Commission would do better to permit the case law on coordination standard to develop further, or to wait for Congress to address the issue, than to adopt rules that invite circumvention of the federal campaign finance laws. If the Commission decides to proceed, it should do so only after incorporating the revisions suggested here.

Respectfully submitted,

Deborah Goldberg

Deborah Goldberg
Brennan Center for Justice at NYU School of Law