**WILMER, CUTLER & PICKERING**
2445 M Street, N.W.
Washington, D.C. 20037-1420
Telephone: (202) 663-6000
Facsimile (202) 663-6363



Date: January 24, 2000

| | | | |
|---|---|---|---|
| For: | Rosemary C. Smith<br>Assistant General Counsel | Facsimile Number: | (202) 219-3923 |
| Company: | Federal Election Commission | Main Number: | (202) 694-1650 |
| From: | Michael Leffel | | |

COMMENTS:
Attached are comments to Notice of Proposed Rulemaking 1999-27, submitted on behalf of Common Cause and Democracy 21, and relating to coordinated general public political communications. These comments have also been sent via e-mail, and a hard copy will follow.

We are beginning to send a communication of 20 pages (including this cover sheet). If transmission is interrupted or of poor quality, please notify us immediately by telephone at (202) 663-6712.

WILMER, CUTLER & PICKERING
2445 M STREET, N.W.
WASHINGTON, D.C. 20037-1420

TELEPHONE (202) 663-6000
FACSIMILE (202) 663-6363
HTTP://WWW.WILMER.COM

ROGER M. WITTEN
DIRECT LINE (202) 663-6170
INTERNET RWITTEN@WILMER.COM

100 LIGHT STREET
BALTIMORE, MD 21202
TELEPHONE (410) 986-2800
FACSIMILE (410) 986-2828

520 MADISON AVENUE
NEW YORK, NY 10022
TELEPHONE (212) 230-8800
FACSIMILE (212) 230-8888

4 CARLTON GARDENS
LONDON SW1Y 5AA
TELEPHONE 011 44(71) 872-1000
FACSIMILE 011 44(71) 839-3537

RUE DE LA LOI 15 WETSTRAAT
B-1040 BRUSSELS
TELEPHONE 011 (322) 285-4000
FACSIMILE 011 (322) 285-4049

FRIEDRICHSTRASSE 95
D-10117 BERLIN
TELEPHONE 011 (49-30) 2022-6400
FACSIMILE 011 (49-30) 2022-6500

January 24, 2000



**VIA E-MAIL & FACSIMILE**

Rosemary C. Smith
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

**Re: Federal Election Commission Supplemental Notice of Proposed Rulemaking 1999-27: General Public Political Communications Coordinated with Candidates**

Dear Ms. Smith:

Common Cause and Democracy 21 jointly submit these comments in response to Notice of Proposed Rulemaking 1999-27, published in the Federal Register on December 9, 1999 (64 Fed. Reg. 68951).

Common Cause is a nonpartisan, nonprofit organization that works for open, accountable government and the right of all citizens to be involved in shaping our nation's public policies. Common Cause has more than 200,000 members nationwide, with active members in every state.

Democracy 21 is a nonpartisan, nonprofit public policy organization that supports campaign finance laws that prevent the undue influence of money in politics, promote competitive elections, and protect the integrity of the electoral and governmental decision making process. Democracy 21 has researched, written, and publicly commented about the relationship of money, power, and influence in the American political process.

## I. Introduction

The new rules proposed in the notice address coordination of political communications that include a clearly identified candidate and are funded by persons other than candidates, candidate committees, or party committees. The proposed rules, which add and define a new term, "coordinated general public political communications," are intended to extend the definition of coordination fashioned in FEC v. Christian Coalition, 52 F. Supp. 2d 45 (D.D.C.

1999), to public communications by all persons other than candidates, their committees, or party committees. [1] The notice also seeks comments on whether the proposed rules should apply to party committee expenditures that are coordinated with candidates.[2]

Common Cause and Democracy 21 believe that the proposed rules (1) are not required by the First Amendment, Buckley v. Valeo,[3] or its progeny, and (2) will seriously undermine the effectiveness of federal campaign contribution limits in preventing corruption and the appearance of corruption in the electoral system. Common Cause and Democracy 21 therefore suggest that the Commission adopt an alternative definition of coordination that more fully advances the government's compelling interest in regulating campaign contributions. Additionally, to prevent corruption and the appearance of corruption, any new definition should include a rebuttable presumption that political communications by party committees are coordinated.

## II. A Summary of the Legislative Background Behind the Definition of Coordinated Expenditures

In the context of political reform, some of the most important measures to come out of the post-Watergate era are the limitations on the amount of money that individuals and political action committees may contribute to federal campaigns. Congress, in its wisdom, held that such measures were necessary in order to put an end to the corruption, and appearance of corruption, so prevalent in a system that practically invited the exchange of large contributions for political favors.[4] To be sure, these limitations have been circumvented in recent years due to the rapid increase in so-called "soft money" contributions made to political parties.

"Soft money," of course, refers to contributions that are made to political parties ostensibly for uses other than in connection with federal elections, but that, in practice, are used to support federal candidates. This loophole was opened by a 1978 Advisory Opinion, FEC Advisory Opinion 1978-20. Common Cause and Democracy 21 are encouraged by the efforts of Congress to eliminate this loophole to the federal campaign contribution limits.[5] Unfortunately, the action of a single district court, with no binding effect on other courts, has

---

[1] See General Public Political Communications Coordinated with Candidates, 64 Fed. Reg. 68951, 68953 (1999) (to be codified at 11 C.F.R. pt. 100) (proposed Dec. 9, 1999).

[2] See 64 Fed. Reg. at 68951.

[3] 424 U.S. 1 (1976).

[4] See Buckley, 424 U.S. at 26-27 & n.28 (1976).

[5] See Bipartisan Campaign Finance Reform Act of 1999, Title I, H.R. 417, 106th Cong. (1999) (Shays-Meehan bill); Bipartisan Campaign Finance Reform Act of 1999, Title I, S. 26, 106th Cong. (1999) (McCain-Feingold bill).

apparently encouraged the Commission to create an entirely new method of circumventing the campaign contribution limits.[6/]

To prevent circumvention of the Federal Election Campaign Act's ("FECA") limits on campaign contributions, Congress provided that "expenditures made by any person in cooperation, consultation, or concert, 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."[7/] Conversely, Congress has defined an "independent expenditure" as one "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."[8/]

It is against this backdrop that the district court in the Christian Coalition case unnecessarily created out of whole cloth a new category of protected speech -- public political expressions that are not substantially negotiated with a candidate or her agent.[9/]

## III. The Christian Coalition Decision and Its New Definition of "Coordinated"

### A. The Christian Coalition Decision

The Christian Coalition opinion began on the right road -- agreeing with the Commission and the Western District of Kentucky in properly holding that in-kind contributions are not limited to expenditures for "express advocacy."[10/] It then, unfortunately took a wrong turn. It abrogated judgments made by Congress and the Commission, by requiring that, in absence of initial prompting by a campaign, a communication must be the result of "substantial discussion or negotiation" such that the candidate and spender become "partners or joint venturers";

---

6/ See Christian Coalition, 52 F. Supp. 2d at 45; see also Statement for the Record by Chairman Scott E. Thomas & Commissioner Danny Lee McDonald, Federal Election Commission, Federal Election Commission v. Christian Coalition, at 2 (December 16, 1999) (criticizing the Commission's decision not to appeal the ruling in Christian Coalition).

7/ 2 U.S.C.A. § 441a(a)(7)(B)(i) (West 1997).

8/ 2 U.S.C.A. § 431(17) (West 1997).

9/ See Christian Coalition, 52 F. Supp. 2d at 92.

10/ See id. at 86-89 (holding that expressive coordinated expenditures are not limited to "express advocacy"); see also FEC v. Freedom's Heritage Forum, Civ. No. 3:98CV-549-S, slip op. at 5, 8 (W.D. Ky. Sept. 29, 1999) ("[T]here is no requirement that a contribution as defined in 2 U.S.C. § 441a must result in or from 'express advocacy' . . . . [W]e do not find any requirement that coordinated expenditures must contain 'express advocacy' in order for them to fall within the purview of the statute . . . ."); cf. Orloski v. FEC, 795 F.2d 156, 167 (D.C. Cir. 1986) (the express advocacy "definition is not constitutionally required for those statutory provisions limiting contributions").

otherwise the communication will not be considered "coordinated."[11] That rule concedes to the Commission that its "approach which would treat as contributions expressive coordinated expenditures made at the request or the suggestion of the candidate or an authorized agent is narrowly tailored" and thus valid.[12] But if a spender approaches a candidate looking for guidance about how best to make expressive expenditures, the opinion would consider those expenditures "coordinated" only if:

> 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" . . . . 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.[13]

The requirement that negotiations and discussions about details of political advertising strategies be "substantial," such that the candidate and spender emerge as "partners" or "joint venturers," opens a wide avenue for circumventing contribution limits or prohibitions. Spenders need only approach the candidates about their plans, rather than vice-versa, to gain the benefit of a formidable obstruction placed in the path of any potential Commission enforcement actions. Under the standard, candidates could arguably pass along valuable strategy information and advice -- including non-public information -- to the potential spenders, so long as they are careful not to engage in a "partnership" or a joint venture through "substantial discussion or negotiations."

### B. The Christian Coalition Standard Conflicts with the FECA and the Commission's Regulations

The definition of coordination in Christian Coalition disregards Congress's statutory definition.[14] Nowhere has Congress required substantial consultation or negotiation; nor does Congress require a partnership or joint venture. Rather, Congress made clear its intent that the spender need only "consult" or "cooperate" with a candidate in order for political expenditures to be considered contributions. This standard recognizes that in sophisticated federal campaigns, merely relaying non-public information to a group can accomplish a candidate's goals for expenditures -- even if the negotiations are not substantial.

The court in Christian Coalition rejected the FECA's standard, arguing that a spender should not have to forfeit the ability to make political speech "merely by having engaged in some

---

[11] See Christian Coalition, 52 F. Supp. 2d at 92.

[12] Id. at 91.

[13] Id. at 92 (emphasis added).

[14] 2 U.S.C.A. § 431(17) (West 1997).

consultations or coordination with a federal candidate."[15] Yet the distinction between expenditures made after such consultation and independent expenditures is the distinction recognized by the Court in Buckley and Colorado Republican[16] and codified by Congress.[17] The Christian Coalition's definition also conflicts with the Commission's current definition, and rejects through its exclusion the Commission's very sensible presumption that expenditures made by current or former campaign fundraisers, officers, or employees are coordinated. These disregarded regulations were promulgated, after opportunity for all interested parties to comment, by an agency with campaign finance experience and expertise.[18]

### C. The First Amendment Does Not Compel the Christian Coalition Definition of "Coordinated"

A court's decision to give the word "coordinated" a narrower definition than intended by Congress and the Commission can only be sanctioned if it is compelled by the First Amendment.[19] Yet, the First Amendment does not compel the narrow definition of coordination in Christian Coalition. In Buckley v. Valeo, the Court upheld the FECA's campaign contribution limitations, in part because they implicate political expression less directly or significantly than a limitation on totally independent expenditures. The Court explained that a contribution limitation

> entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views but does not communicate the underlying basis for the support. . . . A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication . . . .[20]

---

15/ Christian Coalition, 52 F. Supp. 2d at 91.

16/ See 424 U.S. at 47; 518 U.S. at 617.

17/ 2 U.S.C.A. §§ 431(17), 441a(a)(7)(B)(i) (West 1997).

18/ See Michigan Citizens for an Indep. Press v. Thornburgh, 868 F.2d 1285, 1293 (D.C. Cir.), aff'd, 493 U.S. 28 (1989) (listing expertise and democracy-enhancement as the two leading rationales for deferring to an agency's interpretation of a statute under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)).

19/ See Christian Coalition, 52 F. Supp. 2d at 82 n.40 ("[T]he FEC's interpretation of the FECA is presumptively entitled to Chevron deference so long as its statutory interpretation does not run afoul of the First Amendment . . . .") (citing Chamber of Commerce v. FEC, 76 F.3d 1234, 1235 (D.C. Cir. 1996)).

20/ Buckley, 424 U.S. at 20-21.

The Christian Coalition court seized on this rationale for regulating contributions, and found that it does not apply to regulation of "expressive coordinated expenditures."[21] On that basis, it held, without citation, that the First Amendment compels heightened protection for "'expressive,' 'communicative' or 'speech-laden' coordinated expenditures, which feature the speech of the spender, [as opposed to] coordinated expenditures on non-communicative materials."[22]

The Christian Coalition court's heightened protection took the form of applying strict scrutiny review to any regulation of coordinated communicative expenditures.[23] But even that court recognized that "Buckley confidently assured that coordinated expenditures fell within the Act's limits on contributions."[24] Like limits on direct contributions, limits on coordinated expenditures "involve[ ] little direct restraint on . . . political communication."[25] After all, limits on coordinated contributions do not prevent expending parties from making unlimited independent expenditures. They are only limited, as the Court indicated in Colorado Republican, from making expenditures based on "general or particular understanding[s] with a candidate"[26] Limits on coordinated expenditures, therefore, "require less compelling justification" than the strict scrutiny standard applied by the court in Christian Coalition.[27] As the Court reaffirmed today in Nixon v. Shrink Missouri Government PAC, unless there is "no coordination," a

---

21/ Christian Coalition, 52 F. Supp. 2d at 84-85.

22/ Id. at 85 n.45. The opinion claims that Buckley left "undiscussed" these "First Amendment concerns that arise with respect to 'expressive coordinated expenditures.'" Id. at 85.

23/ Id. at 91.

24/ Id.

25/ Buckley, 424 U.S. at 21.

26/ Colorado Republican, 518 U.S. at 614.

27/ See FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 259-60 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on" spending.): Applying less exacting scrutiny to coordinated expenditure regulation is consistent with the standard the Court has applied in more recent First Amendment challenges to other election legislation. In Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997), upholding a ban on "fusion" candidates, the Court weighed the nature of the burden on associational rights against the state's interest, and observed that:

> Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.

Id. at 358 (internal quotations and citation omitted); see also Burdick v. Takushi, 504 U.S. 428, 434 (1992) (upholding ban on write-in voting).

political expenditure is a contribution, and contribution limits survive if they are "closely drawn to match a sufficiently important interest."[28/]

A correct application of Buckley's holding would give proper weight to its central justification, reiterated in Shrink Missouri,[29/] that limitations on direct contributions and coordinated expenditures create the opportunity for actual and apparent corruption, and the government has an overriding interest in preventing that corruption.[30/] The Christian Coalition court gave little weight to this justification, holding that any definition of coordinated expenditures broader than its restrictive definition would be unconstitutionally overbroad because it would regulate some speech that was not the result of quid pro quo corruption.[31/]

This fact alone cannot justify the Christian Coalition decision. It may be true that some expenditures made after a "general or particular understanding" has been reached between a candidate and the spender are not the product of a quid pro quo arrangement. It is no less true that some individuals who wish to give large direct contributions do not have a quid pro quo arrangement with a candidate. The Court in Buckley did not find limits on direct contributions to be unconstitutional despite this fact. As the Court explained, there is an overriding governmental interest in such restrictions because of the possibility of corruption:

> [t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. . . . Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent."[32/]

---

28/ Nixon v. Shrink Missouri Gov't PAC, _____ U.S. _____, 2000 WL 48424, at *6, *8 (U.S. Jan. 24, 2000).

29/ Id. at *6.

30/ See Buckley, 424 U.S. at 25-27 ("Even a 'significant interference with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.") (quoting Cousins v. Wigoda, 419 U.S. 477, 488 (1975)).

31/ Christian Coalition, 52 F. Supp. 2d at 90.

32/ Buckley, 424 U.S. at 26-27 (quoting CSC v. Letter Carriers, 413 U.S. 548, 565 (1973)).

To meet these significant governmental interests, the Court upheld the FECA's limitations on coordinated expenditures contained in the definition of contribution because it thwarted "attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions."[33/] Nowhere did the Court in Buckley suggest that coordinated expenditures were limited to expenditures of parties engaged in "substantial" negotiation, a partnership, or a "joint venture" with a candidate. Instead, the Court contrasted the limits on coordinated contributions with the limits on independent expenditures, striking the latter because the expenditures are "made totally independently of the candidate and his campaign."[34/]

Similarly, in Colorado Republican, the plurality distinguished between truly independent expenditures and those that were coordinated with a candidate or his agents.[35/] The plurality rejected the suggestion, endorsed in Christian Coalition, that an expenditure is independent simply because there is no specific agreement on a particular advertisement or communication. Instead, as stated above, the Court found that any expenditure made "pursuant to [a] general or particular understanding with the candidate" is coordinated.[36/] And today, in Shrink Missouri, the Court stated again that the "constitutionally significant fact" is that there is "no coordination between the candidate and the source of the expenditure."[37/]

The Christian Coalition's substantial-negotiation/partnership/joint-venture standard derives from a refusal to follow what the Supreme Court in Buckley, Colorado Republican, and Shrink Missouri recognized -- that the government's interest in preventing circumvention of contribution limits, and thereby limiting corruption and the appearance of corruption, are sufficiently compelling to justify regulation of expenditures unless those expenditures are "totally independent" of the candidate.

Moreover, the Buckley decision is not based on a failure to consider the interests raised by expressive coordinated expenditures versus "non-expressive" coordinated expenditures, as the court in Christian Coalition asserted.[38/] Rather, Buckley's distinction between independent and coordinated expenditures for express advocacy necessarily contemplated all forms of coordinated expenditures.[39/] Thus, the Christian Coalition decision did not resolve some internal conflict in Buckley; instead, it departed from the Supreme Court's decision to allow regulation of expressive coordinated expenditures without imposing a more rigorous burden for proving

---

33/ 424 U.S. at 47.

34/ Id. (emphasis added).

35/ Colorado Republican, 518 U.S. at 614.

36/ See 518 U.S. at 614 (emphasis added).

37/ Shrink Missouri, 2000 WL 48424, at *8 (emphasis added)(internal quotations omitted).

38/ See Christian Coalition, 52 F. Supp. 2d at 85.

39/ See Buckley, 424 U.S. at 47.

coordination. That is why the decision answered the Commission's strong arguments by relying only on a dissenting opinion by a judge expressing hostility to Buckley's entire holding.[40]

### D. The Appearance of Corruption Under the Christian Coalition Definition

The Christian Coalition decision itself demonstrates how its standard will undermine the government's compelling interests in preventing actual or perceived corruption by permitting wholesale evasion of the contribution limitations. Applying its newly invented standard, the court found that no coordination occurred and thus granted the Christian Coalition's summary judgment motion in the following situations:

- **1992 Presidential Election:** The Christian Coalition's director and chairman had "special access" to a presidential campaign.[41] The director and the campaign "had extensive discussions concerning the campaign's thinking on a number of strategic issues," and the director frequently gave advice, much of which was either followed or implemented independently.[42] The Coalition's director and chairman repeatedly reminded the campaign about the Coalition's plans to help out the campaign by distributing favorable voter guides and making get-out-the-vote calls.[43] And, as the court acknowledged, "[t]he Coalition may well have designed its 1992 presidential voter guides with non-public information gained by [the director] from his proximity to the campaign": the Coalition and the campaign were "singing from the same page."[44] Finally, after the Coalition advised the campaign that its 40 million voter guides would cost $500,000 to produce, the presidential candidate attended a Coalition fundraising event, "perhaps with the understanding that funds raised would go to cover voter guide costs." Despite this unmistakable pattern of discussion and consultation, the district court held that the Coalition's expenditures were not "coordinated" because the Coalition "did most of the talking" in its extensive discussions with the campaign and campaign staff.[45] And the court held that "[e]ven if the evidence incontrovertibly established that [the candidate's fundraiser] appearance was to fund the Coalition's voter guides, that by itself does not" make the corporation's subsequent expenditures coordinated.[46] "Some more overt acts of coordination are required."[47] The district court

---

[40] See Christian Coalition, 52 F. Supp. 2d at 91 (citing Justice Thomas's dissenting opinion in Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 638-39 (1996), for the proposition that the FEC's approach "neglects the fact that expressive coordinated expenditures contain the political speech of the spender; more than the 'speech by proxy' involved in a cash contribution").

[41] Christian Coalition, 52 F. Supp. 2d at 93.

[42] Id. at 94.

[43] See id. at 95.

[44] Id.

[45] Id. at 93.

[46] Id.

thus held that the First Amendment prohibits regulation of activity that most anyone would understand as an evasion of campaign contribution limitations that creates opportunities for apparent or actual quid pro quo corruption.

- **Inglis for Congress; Hayworth for Congress:** In both of these races, Coalition officials also served as volunteers in candidates' campaigns. The official who worked for the Inglis campaign was "privy to various campaign strategies."[48/] That official learned that the campaign sought to downplay the candidate's anti-abortion position in its message. The Coalition then helped the campaign by creating voter guides that included the abortion issue, and distributing those voter guides to the specific constituency most favorably disposed toward the candidate's position on the abortion issue. In the Hayworth race, the campaign volunteer was also responsible, as a Coalition official, for deciding which churches would receive voter guides. Not surprisingly, the Coalition ended up taking "special efforts to target Hayworth's campaign."[49/] In both races, the district court held that the FEC failed to prove negotiations or specific discussions designed to bring the expenditures about, and the Commission was not entitled to any inference that coordination occurred.[50/]

- **North for Senate:** Senior Coalition personnel had close personal and professional ties to senior staff at the North campaign. Through these contacts, the Coalition was privy to much of the North campaign's strategic information. The district court held that, in general, the Coalition's subsequent voter guide distribution and get-out-the-vote calls were not coordinated, because the Commission had not shown that any strategy discussions specifically touched on the Coalition's plans to spend money on the voter guides and calls.[51/] Under the district court's standard, the only evidence of "possible" coordination strong enough to create a fact issue for trial was deposition testimony that North's campaign manager discussed with the Coalition's director which issues should appear on the Coalition's voter guides.[52/]

Each of these situations teems with the same possibilities for corruption and appearance of corruption that accompany large contributions, and it is difficult to imagine that the expenditures in question could be considered completely independent. Rather, it appears that there were "general or particular understanding[s]."[53/] The attempt to "narrowly tailor" a definition of coordination in Christian Coalition has left room for many of the varieties of

---

[47/] Id. at 95.

[48/] Id. at 95.

[49/] Id. at 96.

[50/] See id. at 95-97.

[51/] See id. at 96.

[52/] See id.

[53/] Colorado Republican, 518 U.S. at 614.

sophisticated coordination that occur in the modern American political campaign. And it makes the Commission's task of proving coordination almost insurmountable: under the Christian Coalition court application of its standard, only one expressive coordinated expenditure was allowed to survive even the summary judgment stage. The Christian Coalition opinion reads into the First Amendment an unnecessary requirement that the government be hamstrung in pursuing its interest in preventing corruption and the appearance of corruption in the electoral system.

## IV. The Proposed Rule Adopts the Flaws of the Christian Coalition Decision

The Commission's proposed rule would validate Christian Coalition's departure from Buckley. Such an approach in general is misguided for the reasons discussed above, but three flaws in the rule are particularly worrisome. First, proposed section 100.23 would create a separate category of expenditures for "general public political communications," which closely resemble "expressive coordinated expenditures" under the Christian Coalition opinion. Because Buckley found that the compelling interest in preventing evasion of contribution limitations justifies the concomitant burden on the spender's First Amendment interests, there is no need to create a separate regulatory standard for spending on general communications. Whether expenditures are made for a general public political communication or to subsidize some election service to benefit a candidate, such expenditures pose a risk of corruption if they are not totally independent.

Second, if an expenditure is not requested, authorized, or controlled by a candidate, candidate committee, or party committee's agent, then it would be considered "coordinated" under proposed paragraph (c)(3) only if "collaboration or agreement" results from "substantial discussion or negotiation" regarding the communication's "content, timing, location, mode, intended audience," volume, or frequency of placement. By adopting a "substantial discussion or negotiation" standard that closely resembles that proposed in the Christian Coalition decision, the Commission undermines Congress's demand that expenditures be treated as coordinated if any consultation or cooperation occurs[54] -- a position endorsed by Buckley.[55] The First Amendment does not compel that result and such a definition will create yet another major loophole that undermines the FECA's effectiveness.

---

[54] See 2 U.S.C.A. § 441a(a)(7)(B)(i) (West 1997) ("[E]xpenditures made by any person in cooperation, consultation, or 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.") (emphasis added); 2 U.S.C.A. § 431(17) (West 1997) (defining an "independent expenditure" as one "made without cooperation or consultation with any candidate").

[55] See Buckley, 424 U.S. at 47 (expenditures would be considered independent, rather than coordinated only when they have been "made totally independently of the candidate and his campaign") (emphasis added).

Third, under proposed paragraphs (c)(2) and (c)(3), and under Alternative 2-B for paragraph (c)(1), requests, suggestions, authorization, control, "substantial discussion or negotiation," and "meetings, conversations or conferences regarding" value or import, must relate to "that communication"; otherwise, the communication is not considered coordinated. Under Alternative 2-A for paragraph (c)(1), and under proposed paragraph (c)(2), the Commission's "that communication" limitation would arguably allow candidates to request, suggest, authorize, or control certain types of communications in general. So long as the candidate, candidate's committee, or candidate's agent does not make requests or suggestions regarding certain discrete qualities of a particular communication, that candidate will likely succeed in skirting contribution limitations.[56] This standard contrasts unfavorably with the Supreme Court's statement that coordination includes any "general or particular understanding."[57]

Any difference between the Commission's and the Christian Coalition opinion's definitions of "substantial discussion or negotiation" does not remedy the fundamental flaw in relying on that term itself. Even if courts do not nullify any differences by importing the "partners" or "joint venture" standard from Christian Coalition into the Commission's proposed definition, the Commission will still be required to produce evidence of meetings, conversations, or conferences regarding the value or importance of the particular communication in question. Otherwise, a court will not find coordination under proposed paragraph (c)(3). Candidates and spenders can evade a finding of coordination by speaking more generally of campaign strategies, general types of communications, and general themes or messages.

Common Cause and Democracy 21 believe that this proposed rule will create a blueprint for evasion of campaign contribution regulations. Candidates, campaign professionals, and interest groups will have to be certain to keep their strategy discussions and consultation at a somewhat general level, but not much more is asked of spenders or candidates seeking to evade contribution limits. Candidates must make sure not to directly request certain expenditures, and they must avoid making specific suggestions regarding a particular communication's content, placement, or volume. Instead, the candidate must make sure that the spender is very familiar with the general campaign strategy -- including non-public information. The spender can give the candidate plenty of advance information about how that spender will "independently" employ its resources to implement the strategy.

In Colorado Republican, the Supreme Court observed that "the constitutionally significant fact . . . is the lack of coordination between the candidate and the source of the expenditure."[58] Under the Commission's proposed rule, an understandably cynical public will

---

[56] Although Common Cause and Democracy 21 urge the Commission not to adopt the proposed rule in its current form at all, for the reasons above they consider Alternative 2-A superior to Alternative 2-B.

[57] Colorado Republican, 518 U.S. at 614 (emphasis added).

[58] 518 U.S. at 617.

come to believe that the significant fact is merely the lack of micromanagement, rather than the lack of coordination. And though the definition of coordination in the proposed rule differs slightly from that announced in the Christian Coalition decision, any difference is so small that courts may view the rule as codifying the Christian Coalition standard. Thus, there is a great danger that courts will look to the Christian Coalition outcomes for guidance. If that happens, the Christian Coalition's highly questionable actions will be held up by campaign professionals as proper, indeed sanctioned, methods to circumvent campaign contribution regulations.

## V. A Proposed Definition of Coordination

With respect to the proposed language to be included in a new section 100.23, Common Cause and Democracy 21 urge the Commission to adopt a definition similar to that first proposed by the Commission in NPRM 1997-81997. The Commission included a new proposed section 100.23 that offered various alternative definitions of payments made in coordination with a candidate. Common Cause and Democracy 21 urge the Commission to adopt a definition that uses the rule proposed in NPRM 1997-8 as a framework for consideration:[59]

(a) Payments made in "coordination" with a candidate include:

Alternative 2-B

(1) Payments made by any person in cooperation, consultation or concert with, at the request or suggestion or direction of, or pursuant to any general or particular understanding or arrangement, with a candidate or a candidate's authorized committee or agent, as defined below:

(i) In cooperation or concern with means acting, working or operating together, or conferring or discussing or jointly deciding or planning for one or more persons to take action(s);

(ii) In consultation with means providing information to one or more persons and obtaining their reactions, suggestions or response;

(iii) At the request, suggestion or direction of means asking, ordering, requiring, indicating, telling, or otherwise expressly or impliedly expressing the hope of desire that one or more persons take action(s);

---

[59] An alternative approach that should be considered is the definition of coordinated contained in the McCain-Feingold bill. See Bipartisan Campaign Finance Reform Act of 1999, Title I, S. 26, 106th Cong. (1999).

(iv) Pursuant to any general or particular understanding or arrangement means an express or implied agreement or intention for one or more persons to take action necessary to achieve a common goal.

(2) Payments made by any person to finance the dissemination, distribution, display, republication or reproduction, in whole or in part, of any broadcast or any written, graphic or other form of campaign materials prepared by the candidate or any agent or authorized committee of the candidate, but not including the use of those materials in communications that advocate the candidate's defeat or are incorporated into a news story, commentary or editorial exempted under 11 CFR 100.7(b)(2) or are incorporated into a corporation's or labor organization's expression of its own views under 11 CFR 114.3(c)(1); and

Alternative 3-A

(3) Payments made based on information about the candidate's plans, projects or needs provided to the expending person by the candidate, or the candidate's authorized committee or agents.

(b) A candidate's agents include persons who during the same election cycle in which the payment is made--

Alternative 4-A

(1) Hold or have held executive, policymaking, or other significant advisory or fundraising positions with the candidate's authorized committee;

(2) Have participated in strategic or policymaking communications with the candidate or campaign officials, or

(3) Are providing or have provided campaign-related services such as polling, media advice, direct mail, fundraising or campaign research, unless such persons do not make decisions, or participate in decision-making, regarding the candidate's plans, projects or needs.

Alternative 4-B

(c) Payments made in coordination with a candidate do not include payments by any person whose only contact with the candidate, candidate's authorized committee or agents is to receive Commission guidelines on independent expenditures.[60]

---

[60] As Common Cause and Democracy 21 stated in a January 7, 2000 letter in response to Notice of Inquiry 1999-24, relating to use of the Internet for campaign activity, Common Cause and

This definition incorporates the distinction between independent expenditures and coordinated expenditures in the FECA and defined by the Court in Colorado Republican. As noted above, section 431(17) of the FECA defines an "independent expenditure" as one that is "made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate." (emphasis added.)

Including general or particular understandings about campaign needs and strategy within the definition of coordination enables the Commission to continue to enforce the FECA's core anti-corruption function. As the plurality recognized in Colorado Republican, it is only in those circumstances where there is no "general or particular understanding" between a candidate and the source of an expenditure on the candidate's behalf that the risk of corruption from unlimited expenditures becomes insufficiently compelling to justify statutory limits on the spending of individuals and political parties alike.[61/]

Such coordination is present, however, in circumstances where candidates communicate about matters of strategic significance with other individuals or committees wishing to make expenditures on their behalf -- even if the discussions do not rise to the level of creating a partnership or joint venture. Otherwise, the rules would, in effect, permit unlimited coordinated expenditures as long as the specific communication was not substantially discussed -- a result contrary to the regulatory regime established by the FECA.[62/] For these reasons, the Common Cause/Democracy 21 proposal more appropriately upholds the government's interest, while avoiding any unjustified conflict with spenders' First Amendment rights.

Based on its experience, the Commission cannot seriously doubt that in today's sophisticated political campaigns, interest groups and campaign aides would not easily evade the contribution limits by abusing the Commission's new definition of coordination. Numerous FEC enforcement actions demonstrate why a broader definition is more appropriate to combat the potential for corruption. They also indicate that communications between a candidate (or the candidate's agent) and the source of an expenditure regarding general strategy issues is sufficient to establish that the expenditure at issue was not "totally independent" and should therefore be deemed to be a contribution subject to the appropriate statutory dollar limit. In addition to the examples in the Christian Coalition case, in FEC Matter Under Review 2841, the Commission

---

Democracy 21 assume that the Commission will continue to regulate advocacy on the Internet that is coordinated with a campaign. However, Common Cause and Democracy 21 suggested that the mere establishment of links by individuals (the equivalent of stating an address online), even when coordinated by a campaign, should not necessarily be regulated. Similarly, mere copying and posting of pre-existing campaign materials by individuals, even if coordinated, should not necessarily be regulated.

61/ 518 U.S. at 614 (emphasis added).

62/ See 2 U.S.C.A. § 441(a)(7)(B)(i) (West 1997) (coordinated expenditures on behalf of a candidate shall be deemed contributions to that candidate).

determined that expenditures made by one Congressman's campaign committee for advertisements endorsing another Congressman's candidacy for President were, in fact, coordinated despite the lack of any discussion between the two committee staffs regarding the actual advertisements.[63] Supporting the FEC's disposition of that matter was the General Counsel's suggestion that "the [FECA] and regulations do not require that the parties specifically discuss the expenditures in question if they have discussed strategy in general."[64]

Thus, as the FEC's own enforcement precedents suggest, the independence of an expenditure on behalf of a candidate will be compromised by the individual or committee having conducted even general strategic communications with the candidate (or the candidate's campaign). Such enforcement actions recognize that it was the character of "total independence" that was integral to the Supreme Court's invalidation of limits on independent expenditures.[65] Similarly, when an expending party transfers information to a candidate, her committee, or her agents regarding the expending party's plans, projects or needs, there has been the requisite coordination necessary to require that the expenditure be viewed as a contribution.

When the Court in Buckley distinguished between independent and coordinated expenditures, it did not differentiate between the two on the basis of who transferred the information to whom. The only issue for the Court was whether there had been coordination. When an expending party transfers information to a candidate, or her committee or agent, the two parties will possess a similar amount of knowledge, as they would have if the transfer of knowledge had been reversed. Once again, there will exist a general understanding between the candidate and the party that distinguishes this type of arrangement from the one in Colorado Republican.[66] Therefore, Common Cause and Democracy 21 urge the Commission not to distinguish between an exchange of such information initiated by the expending party and exchanges initialed by the candidate, her committee or her agents. Rather the Commission should treat both as sufficient to establish coordination as defined in the above definition of coordination.

---

[63] See General Counsel's Report at 13-14, FEC Matter Under Review (MUR) 2841 (June 2, 1992).

[64] Id. at 14; see also General Counsel's Report at 3, FEC MUR 2679 (June 14, 1991) (FEC found reason to believe respondent's advertising expenditure on behalf of congressional candidate was not independent based on several factors, including respondent's discussion of "issues ... of [candidate's] campaign"); Conciliation Agreement at 2, FEC MUR 1484 (June 12, 1985) (independence of respondent-PAC expenditures precluded where, during 8-month period when PAC and candidate's campaign committee shared office space, "conversations between representatives of the two organizations occurred").

[65] See Buckley, 424 U.S. at 47; Colorado Republican, 518 U.S. at 614.

[66] See Colorado Republican, 518 U.S. at 614 (noting that the expenditure in that case was not made "pursuant to any general or particular understanding with a candidate").

## VI. The Definition of Coordination for Political Party Committees Should Include a Rebuttable Presumption of Coordination

The Commission has also requested comments "on whether the standard for coordination proposed in this supplemental NPRM on coordination should be applied to political party expenditures for general public political communications that are coordinated with particular candidates."[67] As was indicated in the letter from Common Cause in response to the Notice of Proposed Rulemaking 1997-8, in order to avoid corruption and the appearance of corruption in the political process, political party committees need to have a special standard when it comes to defining coordinated communications. The details of Common Cause's position on this issue, endorsed by Democracy 21, are discussed more fully in the June 5, 1997 letter in response to the Notice of Proposed Rulemaking 1997-98.[68]

The position taken in the 1997 letter rested on two general policy recommendations: first, that party expenditures related to a specific Congressional race be subjected to a rebuttable presumption that such expenditures are coordinated with a candidate, her committee, or her agent; second, that any party committee wishing to make an expenditure relating to a specific Congressional election be permitted to make either independent expenditures or coordinated expenditures for that campaign, but not both.

In Colorado Republican,[69] the Court rejected a "conclusive presumption that all party expenditures are 'coordinated.'" The plurality specifically limited its opinion to striking the conclusive presumption. Justice Kennedy's opinion, however, concurring in the judgment and dissenting in part, laid the foundation for a rebuttable presumption of coordination, stating that in most cases a party's spending will be "made 'in cooperation, consultation, or concert with' its candidate."[70]

---

[67] General Public Political Communications Coordinated with Candidates, 64 Fed. Reg. 68951, 68955 (1999) (to be codified at 11 C.F.R. pt. 100) (proposed Dec. 9, 1999).

[68] Although political parties were found in Colorado Republican to have the right to make independent expenditures, such expenditures must be funded with hard money. More broadly, Common Cause and Democracy 21 do not believe that, under Buckley, the "express advocacy" test applies to communications by candidates or political parties. All communications by political parties that refer to a federal candidate are, in the view of Common Cause and Democracy 21, for the purpose of influencing a federal election, and therefore must be funded with hard money. Whether such hard money expenditures are subject to the cap on party spending under 2 U.S.C.A. § 441a(d) (West 1997), or can be unlimited in amount as an independent expenditure, depends on whether the party is operating truly independently of its candidate.

[69] See 518 U.S. at 619.

[70] Colorado Republican, 518 U.S. at 628 (Kennedy, J., concurring).

Such a presumption is entirely reasonable because, as the experience from the two most recent federal elections has indicated, campaigns are essentially joint ventures between party committees and their nominees, who appear on the ballot as party representatives. The unique relationship between political party committees and their candidates requires a higher standard -- a rebuttable presumption of coordination for ensuring that independent expenditures retain their "total independence," that was so important to the Supreme Court's invalidation of limits on independent expenditures in Buckley.[11/]

The Commission's establishment of such a rebuttable presumption is clearly permitted "as long as there is a rational nexus between the proven facts and the presumed facts."[12/] No one disputes that one of the primary goals of political party committees is to promote the election of their candidates. Thus, the presumed fact – that party expenditures are coordinated with their candidates – flows from the predicate facts – that candidates and their parties share strategies, hire the same consultants, and raise money for each other. These facts provide the Commission with support for the rational presumption that any election expenditures made by a political party are made in coordination with a candidate.

Finally, Common Cause and Democracy 21 also urge the Commission to prohibit political parties from making both independent expenditures and coordinated expenditures on behalf of the same candidate during the same election cycle. The fact that political party committees communicate with a candidate or his or her campaign regarding strategic matters makes any expenditure by the committee on behalf of that candidate necessarily a coordinated expenditure.

---

11/ See Buckley, 424 U.S. at 47.

12/ Cole v. USDA, 33 F.3d 1263, 1267 (11th Cir. 1994).

Respectfully submitted,

Roger Witten (MOL)

WILMER, CUTLER & PICKERING
Roger M. Witten
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
E-Mail: RWitten@Wilmer.com

Attorneys for Common Cause and Democracy 21

Of Counsel:

Donald J. Simon
General Counsel
Common Cause
Sonosky, Chambers, Sachse and Endreson
Suite 1000
1250 Eye Street, N.W.
Washington, D.C. 20005
E-Mail: DSimon@Sonosky.com

Fred Wertheimer
President
Democracy 21
1825 I Street, N.W.
Suite 400
Washington, D.C. 20006
E-Mail: FWertheimer@Democracy21.org