James Madison

CENTER FOR FREE SPEECH

FAX TRANSMITTAL

TO: Rosemary C. Smith, Assistant General Counsel	**FROM:** James Bopp, Jr. Heidi K. Meyer
FAX NUMBER: 202-219-3923	**DATE:** Jan. 24, 2000
ADDRESS: Federal Election Comm'n	**RE:** Comments on Notice of Proposed Rulemaking regarding coordinated expenditures

COMMENTS: Original will be sent via overnight mail.

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James Madison

CENTER FOR FREE SPEECH

January 24, 2000

BY FACSIMILE AND
OVERNIGHT MAIL
Rosemary C. Smith, Assistant General Counsel
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463
FX: (202) 219-3923

Re: Comments regarding Supplemental Notice of Proposed Rulemaking regarding coordinated expenditures

Dear Ms. Smith:

Attached please find the Comments of the James Madison Center for Free Speech regarding the Federal Election Commission's Supplemental Notice of Proposed Rulemaking addressing coordinated expenditures. Should you have any problems with the receipt of these Comments via facsimile, please call 812-232-2434. A copy of the Comments will also be sent via overnight delivery.

The James Madison Center for Free Speech requests an opportunity to testify before the Commission at its hearing on these proposed rules, scheduled for February 16, 2000.

Sincerely,

JAMES MADISON CENTER
FOR FREE SPEECH

James Bopp, Jr.
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**Comments of the James Madison Center for Free Speech
Regarding Proposed Rules
on Coordinated Expenditures**

**Submitted by James Bopp, Jr., General Counsel
and Heidi K. Meyer, Attorney**

PRELIMINARY STATEMENT

The James Madison Center for Free Speech takes this opportunity to submit its comments in response to the Supplemental Notice of Proposed Rulemaking Re: General Public Political Communications Coordinated With Candidates published by the Federal Election Commission (FEC) at 64 Fed. Reg. 68951 (Dec. 9, 1999), to be codified at 11 C.F.R. Part 100.23. The James Madison Center for Free Speech requests an opportunity to testify before the Commission at its hearing on these proposed rules, scheduled for February 16, 2000.

Important and significant issues were raised in *Federal Election Commission v. The Christian Coalition*, 52 F. Supp.2d 45 (D.D.C. 1999), and the Commission's initiative in attempting to provide guidance to the regulated community is to be commended. Furthermore, the time is ripe for the institution of rulemaking regarding coordinated expenditures. Substantial caselaw exists to support and to inform the Commission's rulemaking, *see Buckley v. Valeo*, 424 U.S. 1 (1976); *Colorado Republican Federal Camp. Comm. v. FEC*, 518 U.S. 604 (1996); *Orloski v. FEC*, 795 F.2d 156 (D.C.Cir. 1986); *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997); *Christian Coalition*, 52 F. Supp.2d 45; *FEC v. Public Citizen*, 64 F. Supp.2d 1327 (N.D. Ga. 1999), thus making it unnecessary to wait for further caselaw development.

Instituting rulemaking is well-founded for two reasons. First, it is legitimate to limit in-kind contributions to the same limits as direct contributions. If an in-kind contribution is a true coordinated (properly defined) expenditure (properly defined), then it may be properly classified as a contribution subject to direct contribution limits. However, because the decision of whether an expenditure is truly coordinated is a difficult and complicated one, almost invariably leading to an uncertain determination, and the FEC's position has been all over the map, the Commission should provide guidance to the regulated community. Such guidance is particularly important and necessary as the November 2000 election approaches.

Second, instituting rulemaking is salutary because the FEC has taken a series of positions on whether a coordinated expenditure has occurred that have been found wanting. In defining the kind of communication subject to being coordinated, the FEC has employed the "electioneering message" standard. However, various Commissioners and Attorney General Janet Reno have publicly expressed the view that the "electioneering message" standard is not a rule of law, nor is it clear or workable, and is perhaps unconstitutional. *See* Statement of Reasons of Vice Chairman Darryl Wold and Commissioners Lee Ann Elliott, David M. Mason and Karl J. Sandstrom on the Audits of Clinton and Dole (dated June 24, 1999); Statement for the Record of Chairman Scott E. Thomas and Commissioner Danny L. McDonald on the Audits of Clinton and Dole at 6; In re William Jefferson Clinton: Notification to the Court Pursuant to 28 U.S.C. § 592(b) of the Results of Preliminary Investigation (CCH) ¶ 9429 at 53701 (Dec. 7, 1998).

Furthermore, the FEC has argued three different positions regarding the proper definition

of coordination, all of which are wanting because they are not rigorous enough. First, the FEC adopted a **presumed** coordination standard for political party expenditures, which was struck down by the Supreme Court in *Colorado Republicans*, 518 U.S. 604. Next, the FEC propounded a **contact** coordination theory, that is that any contact involving voter guides made them coordinated. *See Clifton*, 114 F.3d at 1316 ("the FEC told the district judge at oral argument that prohibited 'coordination' included seeking an explanation from the representative."). The *Clifton* court rejected this theory. *Id.* at 1316-17. Then, the Office of General Counsel ("OGC") argued an **opportunity** for coordination standard, which was also judicially rejected. *Christian Coalition*, 52 F. Supp.2d at 90. Finally, the OGC returned to its **contact** coordination standard in *Public Citizen*, 64 F. Supp.2d 1327, which was once again rejected. *Id.* at 1335.

Uncertainty clouds both determinations required to find a coordinated expenditure. With the demise of the "electioneering message" standard, there is no standard at all regarding what *kind* of communication is subject to being coordinated. And, as briefly discussed above, the FEC's definition of coordination is all over the map. Therefore, a *constitutional* regulation needs to be adopted to provide guidance and to remove the chill on the First Amendment rights of the regulated community.

(1) For Any Rule to Be Constitutional and Remove the Chill on First Amendment Rights, The Rule Must Properly Define What Communications Are Subject to Coordination and What is Coordination.

As this area is "permeated by First Amendment interests," *Buckley*, 424 U.S. at 41, "[p]recision of regulation must be the touchstone." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Precision is necessary to prevent arbitrary and discriminatory application of the law and to

protect, and to prevent a chill on, issue advocacy. Therefore, any new rule adopted must address two crucial definitions. First, it must properly define what communications are subject to coordination. And second, it must properly define coordination.

The definition of what communications are subject to coordination is very important. A proper definition would eliminate the twin *Buckley* concerns of vagueness and overbreadth that have plagued this part of the coordinated expenditure standard for years.[1] In crafting a proper definition, the Commission is not without guidance. Both *Buckley* and *Orloski* support a definition of which communications are subject to coordination as only those containing express advocacy.

Before turning to *Orloski*, it is helpful to review the purposes of the FECA so that adoption of a statutorily and constitutionally overbroad definition is avoided.[2] A purpose of the

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[1]The FEC has had a mistaken idea of its power to regulate disbursements for communications which do not "expressly advocate" the election or defeat of a clearly identified candidate. The FEC cannot regulate them merely by labeling them "contributions" (as opposed to "expenditures"). Rather, under *Buckley*, all disbursements for communications (whether deemed "expenditures" or "contributions") are protected by the "express advocacy" test. This is clear from the fact that the *Buckley* Court developed the "express advocacy" test to obviate the "ambiguity" of the phase "for the purpose of . . . influencing" which appeared in the definitions of both "contributions" and "expenditures." *Buckley*, 424 U.S. at 78-79. Therefore, under *Buckley*, a disbursement for a communication is immune from regulation unless it constitutes "express advocacy." This is so whether or not it is coordinated with a candidate. Indeed, no regulation disbursement for political speech can be regulated in the absence of a compelling government interest. As *Buckley* and its progeny make clear, there is no compelling interest in the regulation of issue advocacy. This follows ineluctably from the fact that issue advocacy does not result in the threat of *quid pro quo* corruption, the prevention of which is the only compelling interest for restricting campaign finances. *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985).

[2]The Commission must endeavor to implement rules consistent with the FECA's underlying, constitutional, statutory purposes and language. Careful consideration of the FECA's purposes are important then, because "'[t]he invocation of disembodied purposes,

FECA is to eliminate the actual or perceived pernicious influence over candidates that wealthy individuals or corporations could achieve by financing "political warchests." *Buckley*, 424 U.S. at 25-26. Although this purpose indicates that Congress intended to regulate campaign financing, it does not directly speak to any limitations on non-campaign financing.

In *Orloski*, the FEC argued that, in order for a communication which is coordinated with a candidate to be deemed an "in-kind" contribution, it must contain express advocacy. In determining whether the disbursements at issue constituted in-kind contributions under § 441b, the FEC first examined whether the event in question was a "political event." The FEC set forth the following test:

> An event is non-political if (1) there is an absence of any communication expressly advocating the nomination or election of the congressman appearing or the defeat of any other candidate, and (2) there is no solicitation, making, or acceptance of a campaign contribution for the congressman in connection with the event.

795 F.2d at 160. The FEC determined that since no express advocacy occurred at the picnic, the event was "non-political," even though there was issue advocacy coordinated with a candidate. As a result, the disbursements in question did not constitute prohibited "in-kind" contributions under § 441b.

In upholding the FEC's interpretation of § 441b, the D.C. Circuit stated:

> [T]he mere fact that corporate donations were made with the consent of the candidate does not mean that a "contribution" within the meaning of the Act has been made. Under the Act this type of "donation" is only a "contribution" if it first qualifies as an "expenditure" and, under the FEC's interpretation, such a donation is not an expenditure

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reasons cut loose from language is a sure way to frustrate rather than to implement the statute.'" *Orloski*, 795 F.2d at 164 (*quoting Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986)).

> unless someone at the funded event *expressly advocates* the reelection of the incumbent or the defeat of an opponent or accepts money to support the incumbent's reelection.

Id. at 162-63 (emphasis added). The court also found significant that no other statutory language directly or indirectly conflicted with this objective test. *Id.* at 163.

The view underlying the FEC's interpretation was that the FECA does not prohibit all corporate donations, but only prohibits corporate "contributions and expenditures." *Id.* at 160. Corporate donations made for non-political purposes were, therefore, permissible. *Id.* Thus, the FEC adopted the express advocacy requirement for coordinated expenditures because "all congressional events have some political ramifications." *Id.* (*citing United States v. Brewster*, 408 U.S. 501 (1972)). Otherwise, corporate donations for non-political purposes would be prohibited because "any corporate funding of congressional events indirectly influences the election." *Id.* at 163.

In determining what definition to adopt, it would be prudent and sound for the Commission to examine whether the reasons articulated by the FEC in *Orloski* for the express advocacy requirement still exist, and if they do not, the Commission should explicitly state why they are not present.[3]

As did the court in *Orloski*, the Commission must look at the proposed rule through the FECA's purposes, and how these purposes are expressed through the statutory language. *Id.* at 163-64. Thus,

> the purposes must be read against the clear statutory language that prohibits some

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[3]Prior to *Orloski*, the FEC had consistently adhered to this bright-line interpretation for at least eight years, adopting it shortly after *Buckley* was handed down. 795 F.2d at 166.

> corporate donations, but, by necessary implication, permits others. It becomes readily apparent upon reading the statute and its purposes in this way that Congress left a large gap between the obviously impermissible and the obviously permissible. This gap creates the potential for a broad range of differing interpretations of the Act, the legitimacy of each being heavily dependent upon the degree to which it undercuts the statutory purposes.

Id. at 164.

As FECA's "purposes do not indicate that Congress disapproves of the FEC's interpretation" set forth in *Orloski*, a definition that requires a communication to contain express advocacy before a coordinated expenditure may be found, is entirely consistent with statutory language.

As noted by the *Orloski* court, requiring a communication to contain express advocacy before it may be subject to coordination, although not constitutionally required, is consistent with *Buckley*, where the Supreme Court held that, under the First Amendment, the phrases "for purposes of influencing any election" and "in connection with any election" must be defined as the "express advoca[cy] [of] the election or defeat of a clearly-identifiable candidate." *Orloski*, 795 F.2d at 166-67. The *Buckley* Court adopted the express advocacy rule to avoid vagueness and remove overbreadth.

With regard to § 608(e)(1) (the $1,000 expenditure limit), the Court found that the phrase "relative to" a clearly-identified candidate was too "indefinite" to "clearly mark the boundary between permissible and impermissible speech." *Buckley*, 424 U.S. at 41. For the "distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.* at 42. This follows from the fact that

> [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.

Id. The close relationship between candidates and issues makes the distinction between issue advocacy and electoral advocacy problematic for the speaker; he is placed in a position of doubt, not knowing whether to censor his own speech.

In order to avoid the constitutional deficiencies of vagueness and overbreadth leading to self-censorship, the Court in *Buckley* held that the statutory expenditure limitations must be "limited to communications that include explicit words of advocacy of election or defeat of a candidate . . . ." *Id.* at 43. In a parallel definition of its "express advocacy" test, the *Buckley* Court stated that § 608(e)(1) "must be construed to apply *only* to expenditures for communications that in *express terms* advocate the election of defeat of a clearly identified candidate for federal office." *Id.* at 44. In order to exemplify what it meant by the terms "express" and "explicit" advocacy, the Court stated that

> [t]his construction would restrict the application of § 608(e)91) to communications containing express words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."

Id. at 44, n.52. The Court characterized the "express advocacy" test as the "exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness . . . ." *Id.* at 45. In this regard, it is noteworthy that the Court of Appeals in *Buckley* had attempted to deal with the vagueness problem concerning § 608(e)(1) by reading the phrase "'relative to' a candidate to be read to mean 'advocating the election or defeat of a candidate.'" 424 U.S. at 42. However, the Supreme Court held that "the Court of Appeals was mistaken in thinking that this

construction eliminates the problem of unconstitutional vagueness altogether." *Id.* Thus, the Supreme Court insisted that mere "advocacy" was not enough to bring a communication within the purview of the statutory limitation; rather, the advocacy must be express or explicit.

In considering § 434 (e) of the FECA, a provision which required persons making "contributions or expenditures" in excess of certain levels to report them, the *Buckley* Court found that the provision defining expenditures as "the use of money or other valuable assets 'for the purpose of . . . influencing' the nomination or election of candidates for federal office" was unconstitutionally vague. Therefore, to obviate the danger that "fear of incurring [criminal] sanctions may deter those who seek to exercise protected First Amendment speech," the Court applied the "express advocacy" test to the phrase "for the purpose of . . . influencing" in the definitions for both "expenditure" and "contribution." For, as the Court noted, that phrase "shares the same potential for encompassing both issue discussion and advocacy of a political result [as did the phrase "relative to" in § 608(e)(1)]." 424 U.S. at 79. However, when limited to "express advocacy," § 434(e) "does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result." *Id.* at 80.

Significantly, in both portions of the opinion in which it applied the "express advocacy" test, the *Buckley* Court noted the importance of precision and specificity where the regulation of speech is concerned. "The test is whether the language of [the statute or regulation] affords 'the precision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms.'" *Id.* at 41. Or, as the Court stated later in the opinion, "[w]here First Amendment rights are involved, an even 'greater degree of specificity' is required." *Id.* at 77.

Thus, it is evident that when it fashioned its definition of "express advocacy," the Court believed itself to be construing the provisions of the FECA precisely, i.e., which the degree of specificity commanded by the First Amendment.

In sum, under the *Buckley* definition of "express advocacy," disbursements for political purposes are accorded full First Amendment protection as long as they remain outside the narrowly-circumscribed category of "express advocacy." As the Supreme Court summarized, "[s]o long as persons and groups eschew expenditures that in *express* terms advocate the election of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." *Id.* at 45.

Thus, the fact that the *Buckley* Court "formulated these definitions for this statutory language demonstrates that the FEC's similar interpretation of the same language is logical, reasonable, and consistent with the overall statutory framework." *Id.* at 167. Adoption of the express advocacy requirement in the definition of communication would "only add[] to its reasonableness for it enhances the consistency and even-handedness with which the FEC ultimately administers the Act." *Id.*

Furthermore, the chill on speech that exists from investigations cannot be removed without a bright-line rule. It is proper to take into account the burdens on First Amendment rights that an overly broad definition would impose on organizations in determining whether Congress intended such a result and whether the Constitution allows it. One of those burdens is the investigation necessary to ferret out the alleged "coordinated expenditure," which a narrow definition would ameliorate.

Without a bright-line rule, the FEC is free to conduct incredibly burdensome and intrusive investigations.[4] The investigative process itself "tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas." *Sweezy v. New Hampshire*, 345 U.S. 234, 245 (1957). This is so, because "[t]he mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of government interference." *Watkins v. United States*, 354 U.S. 178, 196 (1957); *Sweezy*, 354 U.S. at 250. Such disclosures "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64.

The investigation of the Christian Coalition is a dramatic and tragic illustration of the burden and intrusion caused by an investigation that could have been prevented with the simple adoption of the express advocacy requirement. The FEC's investigation of the Christian Coalition spanned six and a half years as the FEC tried to ferret out any evidence of contacts between people associated with the Coalition and various candidates to support its opportunity for coordination standard.

The FEC took 81 separate depositions of 48 different individuals, from the former President and Vice President of the United States and staff members of various campaigns, to

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[4]If the communication did not contain express advocacy, a relatively simple inquiry, no further investigation would be necessary. Thus, in a large number of cases, the inquiry would end there. Only if the communication contained express advocacy would any further investigation be appropriate.

past and present Coalition employees and volunteers.[5] The breadth of the FEC's probe into every aspect, past, present, and even future, of the deponents' political activities was mind-boggling. Irrelevant and personal questions were asked of the deponents, including questions about their spouses', family members' (which includes children and in-laws), fellow volunteers', and other individuals' political and religious affiliations, campaign activities, political party activities, candidacies, private business dealings, and legislative and lobbying activities "[*b*]*ecause it's something that we need to know.*" *See* Christian Coalition's Memorandum in Support of its Motion for Summary Judgment at 60. This bone chilling statement by one of the FEC attorneys is a harbinger of future FEC investigations if a narrow definition of communication is not adopted.[6]

The Coalition was also required to produce tens of thousands of pages of documents, many of them containing sensitive and proprietary information about finances and donor information. In all, the Coalition searched both its offices and warehouse, where millions of pages of documents are stored, in order to produce over 100,000 pages of documents. Third

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[5]Being subject to a deposition can be very burdensome for many of the deponents, especially third parties who do not even know why they are being questioned. For example, one deponent asked, "[b]ut why am I here? I have no connection to the Christian Coalition, none whatsoever, and there is no reason." MUR Deposition of Michael Hamlet at 73. Another deponent stated the practical effects of intrusive investigations upon organizations and unions, "I'll get this thing going for [the Coalition] and that's it. Here I am today before you-all thanks a lot. *Never volunteer for anything.*" MUR Deposition of Patrick Gartland at 86 (emphasis added).

[6]Another target of an FEC investigation into alleged coordinated expenditures echoed these concerns. According to Herman Clark, "once he had lost the primary and then spent four years embroiled in an FEC investigation, he did not have the resources to engage in protracted litigation with the FEC and wanted to put the matter behind him." *Public Citizen*, 64 F. Supp.2d at 1334 (citation omitted).

parties were also required to comply with burdensome FEC document requests and produce irrelevant yet confidential and proprietary information such as polls, surveys, and internal memorandums. The Bush Presidential archivists were required to search through two warehouses full of boxes without the benefit of a catalogue. Such investigations impose substantial burdens on third parties and can have serious adverse consequences.[7] All in all, the investigation was exceedingly burdensome, costing the Coalition hundreds of thousands of dollars in attorneys fees and countless lost hours of work by Coalition employees and volunteers. In Washington, it is often said that "the procedure is the punishment." The *Christian Coalition* case proves that statement correct. Although the Christian Coalition won every allegation of coordination decided by the court,[8] it was still punished by a burdensome and intrusive investigation. Thus, the *Christian Coalition* is case-in-point of what happens when there is no bright-line standard to define what communications are subject to being coordinated.

These irrelevant and personal associations and details, which should remain private and hidden from the government and the public in general, are instead "things that the FEC needs to

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[7]Former Secretary of State, James Baker, a third party deponent, who realized long ago how burdensome and intrusive government investigations can become, remarked, "I don't prepare written summaries because somebody like you will come along and want to subpoena them." Deposition of James Baker at 67-68. Robert Teeter, the chairman of the Bush-Quayle committee, stated that personal notes were no longer routinely kept, not even for historical purposes because of "too many of these sessions." June 17, 1997 Deposition of Robert Teeter at 63-64. "And there's less historical records today than there's ever been . . . . [N]obody keeps any of that stuff." *Id.* at 64.

[8]The Supplemental Notice of Proposed Rulemaking states that the court in *Christian Coalition* "found coordination where the Coalition provided a Senate campaign consultant with a commercially valuable mailing list." Fed. Election Camp. Fin. Guide (CCH) ¶ 9453 at 53,842. However, this contribution was a classic in-kind contribution, not a coordinated expenditure.

know" in the absence of a bright-line express advocacy requirement. The court in *Orloski* cogently noted this when it stated that not only could disgruntled opponents harass by taking advantage of a broad standard, but the FEC would be forced

> 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.

795 F.2d at 165.

Finally, such a bright-line enables corporations and unions "to easily conform their conduct to the law," *id.* at 165, which "would not easily be achieved if the FEC adopted interpretations of the Act that were difficult to understand and apply." *Id.* at 166; *id.* at 167 ("[I]n this politically-charged area, bright-line tests are virtually mandated even though they may occasionally lead to what appears, at first glance, to be somewhat artificial results.").

(2) An Analysis Of The Proposed Definition Of Communication

The proposed rules define which communications are subject to being coordinated as those which are "general public political communication[s]." However, as will be shown below, this term has no content and thus carries no power to limit which communications are subject to coordination.

The proposed definition of "general public political communication" is defined as those communications made through various mediums, including broadcasting stations, newspapers, magazines, mailings and electronic mediums, the Internet or web sites, with an intended audience of over one hundred people. Thus, anytime an organization or labor union mentions a clearly

identified candidate, they become the potential subjects of an investigation into whether the communication was coordinated. The definition does not define what *type* of, or what *kind* of, communications through these mediums are subject to being coordinated. Therefore, any communication distributed through one of the listed mediums that mentions a clearly identified candidate (and is distributed to over 100 people), whether it is non-political or not, falls within the definition of "general public political communication."

The fact that the term "general public political communications" is similar to the term "general public political advertising," which appears in three places in the FECA, does not provide any content to the definition. The term is used in all three places in the FECA to describe the medium of a communication, not its content. *See* 2 U.S.C. Section 441d(a) ("Whenever any person . . . solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or *any other type of general public political advertising*,"). Thus, even assuming a similar meaning, "general public political communications" still does not limit what *kind of communication*, e.g., express advocacy, triggers the application of the coordination standard. In fact, the similarity of the terms suggests that *every* communication in such a medium is subject to an investigation into whether it is coordinated.

That anytime a communication through one of the listed mediums mentions a clearly identified candidate creates a potential investigation is suggested by the Commission's hypothetical number two. This hypothetical provides a good case study of the quagmire into which protected issue advocacy will sink, because questions regarding whether timing or content

matter will always be present.[9]

While it is good to have a narrow definition of coordination, as discussed below, a narrow definition of coordination does not remove the chill from an investigation. A narrow definition of coordination only becomes pertinent *after* an investigation is over and the investigated organization or labor union has been drug over the coals. Put another way, a narrow definition of coordination *only* defines who is guilty; it does not "narrow" the chill by informing the regulated community how to *avoid* investigation and subsequent conviction.

In this respect, Judge Green's opinion in *Christian Coalition* is mistaken. While Judge Green agrees that a restrictive standard of coordination is needed, she states that such a restrictive standard will "limit[] the universe of cases triggering potential enforcement actions to those situations in which the coordination is extensive enough . . . without chilling protected contact between candidates and corporations and unions." *Christian Coalition*, 52 F. Supp.2d at 88-89. But, as we have already seen from the discussion above, a narrow definition of coordination does nothing to "limit the universe of cases" when a definition of communication, which lacks any substantial content, has already brought all but a few of such cases into the universe.[10]

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[9]One needs only to look to the court's decision in *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), and the FEC's expansive definition of "express advocacy" which is purportedly based on this case to see the quicksand in this type of approach.

[10]Judge Green also misconstrued the Christian Coalition's complaint about the extent of discovery in that case. *See Christian Coalition*, 52 F. Supp.2d at 88 n.52. Without a bright-line definition of what kind of communication subject to be coordinated, *any* communication which mentioned a clearly (and in some cases, not so clearly) identified candidate, was required to be produced in discovery. Not disputing the fact that some "fact-intensive" inquiry is inevitable when determining whether there was coordination, the Christian Coalition asserted that it would not have been subject to such a "fact-intensive" inquiry if a bright-line definition of communications subject to coordination had been applied in the first instance.

To properly "limit the universe of cases triggering potential enforcement actions," the Commission should return to its position in *Orloski*. Although Judge Green mischaracterized the "proposed benefit of this allegedly 'bright-line' standard" as "largely illusory," *Christian Coalition*, 52 F. Supp.2d at 88, "bright-line tests are virtually mandated even though they may occasionally lead to what appears, at first glance, to be somewhat artificial results." *Orloski*, 795 F.2d at 167. Only the "express advocacy" test for the communications subject to being coordinated provides these protections.

(3) An Analysis of the Proposed Definition Of Coordination

Regardless of whether issue advocacy, or only express advocacy, is subject to being coordinated, there still remains the need to define coordination in a way that is consistent with the intent of Congress and the demands of the First Amendment. In this regard, the intent of Congress and the principles of the First Amendment coincide. Congress intended, and the First Amendment demands, a narrow view of coordination. Furthermore, there exists a body of law which also suggests that a narrow definition of coordination is required.

(a) Congress intended a narrow definition of in-kind contribution.

In the original 1974 amendments to the FECA, the concept of "coordination" appears only once, in § 608(c)(2)(B). This section provided that expenditures "authorized or requested by the candidate" are to be treated as contributions to the candidate subject to the contribution limits in §608(b) (now 2 U.S.C. § 441a). *See Buckley,* 424 U.S. at 47.

In the revisions of the FECA after *Buckley*, § 441a was amended. The coordination subsection was revised to provide that "(7) [f]or the purposes of this section . . . (B)(i)

expenditures[11] 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."[12] § 441a(a)(7)(B)(i). The legislative history of this section indicates that, consistent with *Buckley*, it was intended to apply to "the use of an individual's resources to aid a candidate in a manner *indistinguishable in substance from the direct payment of cash*," as distinguished from the "independent expression of an individual's views." S.Rep. No. 677, 94th Cong., 2d Sess. 31, 59 (1976), reprinted in 1976 U.S.C.C.A.N. 946, 974. Thus, this Congressional response to *Buckley*, if anything, is an even narrower view of an "in-kind" contribution than the 1974 version and suggests that cash equivalents were intended--a rigorous definition of "coordination."[13]

Furthermore, after the Supreme Court's decision in *Buckley* giving protection to "independent expenditures," Congress also amended the FECA to define the term. Under that definition, an independent expenditure is defined as an

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[11]"Expenditure" is a term of art under the FECA and does not include "any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization." § 431(9)(b)(v). Since *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), interpreted § 441b(b) not to encompass issue advocacy, issue advocacy would also not be subject to the contribution limits of § 441a, even if coordinated, because of this exception to the definition..

[12]Since this coordination language was only for purpose of § 441a, however, it does not apply to § 441b.

[13]The 1974 amendment to the FECA also suggest that Congress intended that a coordinated expenditure include express advocacy. The Senate Report, in discussing coordinated expenditures being subject to contribution limits, gave the example that "a person might purchase billboard advertisements *endorsing* a candidate." S.REP. No. 93 689, p. 18 (1974), U.S.CODE CONG. & ADMIN. NEWS 1974, p. 5604 (emphasis added).

> 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, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of any candidate, or any authorized committee or agent of such candidate.

2 U.S.C. § 431(17). If an independent expenditure of more than $250 takes place, § 434(c) requires it to be reported to the FEC.

It is clear that the statutory definition of "independent expenditure" is highly speech-protective; it comprises only those expenditures which are *themselves* made in coordination with a candidate and excludes expenditures as to which there is no *specific coordination*. As a result, Congress has clearly signaled its acquiescence to the narrow speech-protective view that the Court, in *Buckley*, expressed regarding "coordinated expenditures." Disbursements "indistinguishable in substance from the direct payment of cash" are a long way from a mere contact with a candidate regarding a disbursement.

(b) A narrow construction of the definition of "coordination" is necessary because of the demands of the First Amendment.

Furthermore, whether speech, which is otherwise constitutionally protected issue advocacy, is considered "coordinated" and thereby subject to limit or prohibition as a "contribution," has significant constitutional consequence. The Supreme Court has made it clear that the government "cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963). As a result, "[a]n agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." *Colorado Republican*, 116 S. Ct. 2309, 2319 (1996). Thus, any regulation in this area

must apply a narrow speech-protective and association-protective definition of coordination.

Limiting the contacts and communications between persons, groups and candidates, however narrowly, is a direct impingement on the freedom of association. The right of association is a "basic constitutional freedom," and any "government action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Buckley*, 424 U.S. at 25 (citations omitted). This necessitates a narrow definition of coordination.

Furthermore, *Buckley's* protection of political speech suggests a narrow definition of coordination. The point of departure is the principle that any restriction of the amount of money that can be spent in campaigns is suspect. The *Buckley* Court stated that

> [a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.

424 U.S. at 19. As a result, a regulation which seeks to regulate spending on political speech is subject to a presumption of invalidity.

Contributions, however, were subject to limitation because their regulation "entails only a marginal restriction on the contributor's ability to engage in free communication." *Id.* at 21-22. This follows from the fundamental differences between expenditures and contributions. Whereas "expenditures" entail expressive and articulate communications to the public, a contribution to a candidate merely "serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* at 21. "Contributions" thus are not "political speech," in the same sense as "expenditures," because their communicative effect provides only a "rough index of the contributor's support for the

candidate." *Id.*

Moreover, contributions significantly differ from expenditures in that a limit on contributions does not result in diminishing the quantity of political speech. This is because contributions do not constitute political speech in the same sense as expenditures. As the Court explained,

> [t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.

Id. Therefore, the Court concluded that

> [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, for it permits symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

Id.

Therefore, if a broad definition of coordination is adopted, it would sweep in a very broad category of speech and subject it to the prohibition under § 441b and limits under § 441a. The expressions of corporations and labor unions on issues of public concern would be extensively curtailed. This infringement on a group's "freedom to discuss candidates and issues" necessitates a narrow definition of coordination.

In addition, the *Buckley* Court found that freedom of association was not unduly infringed by such contribution limitations, because

> persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.

Id. at 28. However, the freedom of association is directly undermined by any expansive definition of coordination, since any contact with a candidate could potentially cut off a person's freedom "to engage in independent political expression" or "to associate actively through volunteering their services."

Thus, in stark contrast to direct financial contributions, allegedly coordinated issue advocacy does not satisfy the Supreme Court's criteria for regulation. As the *Clifton* district court recognized:

> [The contributions which could be limited under *Buckley*] specifically [are] not the type of spending, call it expenditure or contribution, at stake here in the MRLC's publication of voting records and voting guides. These publications are the MRLC's direct issue advocacy, not the candidate's. Nor is it the mere third-party billpaying for a candidate's media advertisements or a volunteer's incidental expenses that *Buckley* was talking about when it treated coordinated spending as a contribution under different statutory language. Here, both the disbursements and the speech are *direct political speech by the MRLC*, not by the candidate. They are thus at the heart of the [Supreme] Court's First Amendment concerns.

927 F. Supp. 493, 499 (D.Me. 1996). Furthermore, the *Clifton* district court noted that the

> regulations challenged here prohibit activities far beyond that which could be understood as a de facto payment of cash (*i.e.*, as asserted by the FEC's counsel at the hearing, even telephone calls to clarify the accuracy of a candidate's position for report in a voter guide fall within the literal prohibition).

Id. n.6. As a result, the *Clifton* district court held that, under *Buckley*, the FEC does not have the power to limit corporate spending unless it is (1) actually coordinated with the candidate (as opposed to simply occurring after "contact" with the candidate) and (2) constitutes express advocacy of the election or defeat of the candidate.

Thus, any effort by the Commission to transform an expenditure into a "contribution," so as to afford them lesser protection, totally breaks down when the alleged "in-kind" contribution

is a communication that contains issue advocacy. When the Supreme Court stated in *Buckley* that a contribution limit "entails only a marginal restriction on the contributor's ability to engage in free communication," it is clear that the Court was addressing financial contributions of cash or cash equivalents. *Id.* at 20-21 ("A cash contribution serves as a general expression of support for the candidate and his views, but *does not communicate the underlying basis for the support.*") (emphasis added).

In contrast to a financial contribution, issue advocacy does "communicate the basis" for the speaker's support of a particular *issue* and is thus not symbolic speech, as occurs with a contribution of money or some type of cash equivalent. If viewed as an "in-kind" contribution due to a broad definition of "coordination," issue advocacy would be subject to prohibition. In that event, the speech and association rights of corporations and labor unions would be directly and materially limited. In order to prevent wholesale and unjustified limits on such rights, a narrow view of coordination is necessary.

(c) A disbursement must be actually and specifically coordinated with a candidate to be deemed to be an in-kind expenditure.

The Supreme Court, in *Colorado Republican*, 116 S.Ct. 2309, recognized and applied this speech-protective and association-protective rationale to require a narrow definition of coordination to the Colorado Republican Party's alleged "coordinated expenditures," which were subject to limit under the FECA. 2 U.S.C § 441a(d) (limiting the amount of money that a political party could spend in support of a federal candidate of its party). At issue were certain disbursements made by the Colorado Republican Party for media advertisements to criticize the voting record of the likely Democratic senatorial candidate. One of the pivotal issues in

Colorado Republican was whether disbursements for communications (which in that case was for an "advertising campaign") were "independent" and thus immune from limitation under the principles announced in *Buckley*, or whether they were "coordinated" and thus susceptible to the limitation of § 441a(d) as a coordinated expenditure in support of a candidate.

The *Colorado Republican* Court looked to justifications for allowing limits on contributions, pointing out that "the Court's cases have found a 'fundamental constitutional difference between money spent to advertise one's views independently or the candidate's campaign and money spent on his campaign.'" *Id.* at 2315 (quoting *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (*NCPAC*)). "This difference has been grounded in the observation that restrictions on contributions impose 'only a marginal restriction upon the contributor's ability to engage in free discussion,' . . . and because such limits leave "persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.'" *Id.* (quoting *Buckley*, 424 U.S. at 20-21, 28). "In contrast, the Court has said that restrictions on independent expenditures significantly impair the ability of individuals and groups to engage in direct political advocacy and 'represent substantial . . . restraints on the quantity and diversity of political speech.'" *Id.* (quoting *Buckley*, 424 U.S. at 19).

Based on these principles, Justice Breyer, writing for the plurality, found that "the record shows no actual coordination as a matter of fact." *Id.* at 2317. As a result, the Court "treat[ed] the expenditure, for constitutional purposes, as an 'independent' expenditure, not an indirect

campaign expenditure." *Id.* at 2315. In arriving at this conclusion, the Court's plurality rejected the following factors to demonstrate that "coordination" existed: (1) that it was the party's practice to coordinate "campaign strategy" with the candidate; (2) that the Republican Chairman was "as involved as he could be" with the individuals seeking the Republican nomination; and (3) that the Republican Chairman made available to the candidates "all of the assets of the party." *Id.* The Court held that these factors did not establish that the disbursements "*in fact* are coordinated." *Id.* at 2320 (emphasis in original).

Furthermore, the plurality noted that "[t]hese latter statements, however, are general descriptions of party practice. They do not refer *to the advertising campaign at issue here or to its preparation.*" *Id.* at 2315 (emphasis added). Thus, a second central feature of the analysis of "independence" of an expenditure for constitutional purposes is that the alleged coordination must relate to the specific disbursement in question. Allegations of a general nature that there was "involvement" between the group making the disbursement and the "campaign," and that there was even knowledge of the candidate's strategy, are simply insufficient to transform an independent expenditure into one which is "coordinated."

Thus, as a matter of constitutional law, *Colorado Republican* requires "coordination" to be both actual and specifically related to any disbursement alleged to be an "in-kind" contribution. A lax interpretation of that term treats a group's speech as the candidate's, thereby suppressing it, regardless of whether the alleged "coordination" occurred "in fact" and with reference to the specific disbursement in question.

(d) "Contact" between candidates and speakers cannot constitutionally be deemed "coordination."

In *Clifton,* plaintiff Maine Right to Life Committee (MRLC) brought a pre-enforcement, facial challenge to two FEC regulations which purported to regulate the manner in which corporations were permitted to publish "voter guides" and "voting records" in connection with federal elections. Although the district court had premised its rejection of the regulation on its violation of the "express advocacy" test, the First Circuit held the regulation invalid on broader constitutional grounds. In particular, it held that the provision of the FEC regulation which placed a "limitation on oral contact with candidates" was "patently offensive to the First Amendment," 114 F.3d at 1314, because it

> treads heavily on the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office. As we have explained, the regulations bar non-written contact regarding the *contents*, not merely the distribution, of voter guides and voting records; thus, inquiries to candidates and incumbents about their positions on issues are a precise target of the FEC's rules as applied here.

Id. Indeed, as the First Circuit went on to state,

> the chilling effect of such a restriction would extend well beyond any discussion directed to a particular voter guide; *any* inquiry . . . to a local representative or candidate regarding his or her position on such issues would be vulnerable even if no mention whatever were made of any voter guide.

Id. n.3 (emphasis in original; citation omitted). For this reason,

> we think that it is beyond reasonable belief that, to prevent corruption or illicit coordination, the government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues.

Id. In short, "it is no business of executive branch agencies to dictate the form in which free citizens can confer with their legislative representatives." *Id.*

Thus, in order to advance the speech-protective and association-protective rationales of

the Court in treating contributions differently than expenditures, a narrow definition of coordination is necessary. From *Colorado Republican*, it is clear that coordination must have occurred in fact and must have related specifically to the disbursement in question. Furthermore, mere contact between a corporation or labor union and the candidate regarding the disbursement is not enough. *Bona fide* coordination must have taken place.

The decision in the *Christian Coalition* case supports this conclusion. There, the court noted that "because 'coordination' marks the constitutional dividing line between corporate contributions subject to prohibition and protected issue-oriented expenditures, that line ultimately is drawn by reference to the First Amendment, not the Act." 52 F. Supp.2d at 90. Thus, "the prohibition on such expenditures must be narrowly tailored." *Id.* Rejecting the FEC's "insider trading" or conspiracy approach, the court found that

> [t]he FEC's tidy distinction between discussion of campaign strategy and mere lobbying is cold comfort for those who seek to discuss with a candidate an issue that is at the time dominating the campaign. Indeed, the record in this case demonstrates that a candidate's decision when to take a stand, where to stand, and how to communicate the stand on a policy issue often are integral parts of campaign strategy. The facts further demonstrate that a candidate frequently listens to the concerns of sympathetic constituencies or factions before making those important strategic decisions. While the FEC's approach would certainly address the potential for corruption . . . it would do so only by heavily burdening the common, probably necessary, communications between candidates and constituencies during an election campaign.

Id. Continuing, the court stated that the FEC's broad approach "heavily burden[ed] communications leading up to the expenditure," and more importantly, "it also 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." *Id.* at 91 (*citing Colorado Republican*, 518 U.S. at 638-39 (Thomas, J., dissenting)). Thus, coordinated expenditures "contain the

highly-valued political speech of the spender." *Id.* (*citing Colorado Republican*, 518 U.S. at 624; *Clifton*, 114 F.3d at 1325 (Bownes, J., dissenting)). Consequently, a narrow definition of coordination is required so 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." *Id.*

Also applying a narrow definition of coordination, the court in *Public Citizen* found that providing information as to the candidate's likelihood of remaining in the race through the election and the candidate's stand on campaign finance issues did "not rise to the level of consultation or coordination between the parties" because "it would have been absurd for Public Citizen to expend funds in a campaign to defeat Rep. Gingrich if there were no candidate opposing him." 64 F. Supp.2d at 1335. Coordination, then, "implies 'some measure of collaboration beyond a mere inquiry as to the position taken by a candidate on an issue.'" *Id.* (*quoting Clifton*, 114 F.3d at 1311 (*citing Buckley*, 424 U.S. at 46-47 & n. 53)).

Shortly after the decision in *Public Citizen*, a district court again refused to apply a broad definition of coordination proferred by the FEC. *FEC v. Freedom's Heritage Forum*, No. 3:98CV-549-S, slip op. (W.D. Ky. Sept. 29, 1999). Refusing to find that any coordinated expenditure had been made, the court stated that "[t]he FEC does not allege that Hardy actually informed Dr. Simon of his plans, projects, or needs *with a view toward having an expenditure made*." *Id.* at 4 (emphasis in original). Applying a narrow definition of coordination, the court found that a spender's mere presence at a meeting during which campaign strategy was discussed, and the providing of information about a candidate's plans, projects and needs, was

insufficient to transform independent expenditures into coordinated ones. *Id.*

The conceptual evil to be avoided then is in treating one's own speech as "speech by proxy," thus removing constitutionally mandated protections. It is important, then, to recognize that, in the portions of the *Buckley* opinion discussing the FECA's limits on contributions,[14] the Court is speaking of contributions in the ordinary sense, that is, direct financial donations to candidates. However, the Court recognized that "in-kind" contributions (*i.e.*, "the expenditure of resources at the candidate's direction," *id.* at 36) can implicate the same concern with *quid pro quo* corruption, as do direct financial contributions. For the "ultimate effect" of such in-kind contributions

> is the same as if the person has contributed the dollar amount to the candidate and the candidate had then used the contribution to pay for the fundraising event or the food.

Id. at 36-37. Thus, "in-kind" contributions could be subject to the FECA's limits on contributions, under § 441a, because "treating these expenses as contributions when made to the candidate's campaign . . . forecloses an avenue of abuse," 424 U.S. at 37, and limiting such in-kind contributions do not "limit[] actions voluntarily undertaken by citizens independently of a candidate's campaign." *Id.* Thus, in-kind contributions may be constitutionally limited because they are in substance, if not in form, the equivalent of direct financial contributions.

Therefore, it is very clear from *Buckley* that the Commission may not regulate one's own speech unless it crosses the line and becomes an in-kind contribution. However, without a

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[14] 2 U.S.C. § 441a imposes monetary limits on contributions to candidates, political committees and political parties.

narrow definition of coordination, the Commission is treating someone's own speech as "speech by proxy" when it is clearly not. Even when one's own speech is express advocacy, it is still one's own speech and thus protected. Only by a narrow definition is the Commission justified in treating my speech as that of a candidate's.

(4) Discussion of The Commission's Hypotheticals

It should be apparent from the above discussion that it is our view that neither of the hypotheticals posed by the Commission should be subject to an investigation since neither ad contains express advocacy. The addition to the second hypothetical, "Please support Senator William Moore!," does not introduce express advocacy, since it is not at all clear what "support" refers to, whether it is to "support" Senator's efforts to ensure the safety of deposits or to "support" Senator Moore by voting for him.

Under either part of the hypothetical, however, a coordinated expenditure could arguably be found under the Commission's proposed rule. Both ads in the hypothetical mention a clearly identified candidate and are distributed through television to an audience of over 100 people, a medium defined in "general public political communication." The ads were either done at the request or suggestion of the candidate or involve "collaboration or agreement" as to the ads' timing, location, mode, and intended audience. The exception contained in subsection (d) of the proposed rule does not take these communications outside the definition of a coordinated general public political communication because there is no mere inquiry regarding legislative or public policy issues.

Neither of the hypotheticals posed by the Commission in the Supplemental Notice, however, address the real problems that arise when the proposed regulations are applied to grassroots lobbying. The following two hypotheticals are designed to demonstrate how the application of this proposed regulation will cause protected lobbying and issue advocacy to be deemed coordinated.

(a) Congressman Henry Hyde Hypothetical

Congressman Henry Hyde is running for Senate against an incumbent Democrat who is pro-choice. A vote is scheduled during the general election period in the Senate on the Hyde Amendment (an amendment to the medicaid appropriations bill limiting funds for abortion). A pro-life group wants to do grassroots lobbying in Illinois to encourage individuals to urge an incumbent Democrat Senator to support the Hyde Amendment. Since the early 1970's, this pro-life group has worked hand-in-glove with Congressman Hyde in support of the Hyde Amendment and has coordinated grassroots lobbying with him for the same number of years. However, Congressman Hyde is now running for the Senate against this incumbent Democrat Senator. The pro-life group would like to distribute communications criticizing the Democrat Senator for his prior opposition to the Hyde Amendment and encouraging people to call him and urge him to vote for the Amendment.

(b) President Clinton and the Partial Birth Abortion Act Hypothetical

In 1996, President Clinton vetoed the Partial Birth Abortion Act. The veto had been overridden in the House and a veto override vote is scheduled in the Senate in late September, immediately prior to the general election. Throughout the process, including the effort to sustain

the veto, President Clinton worked closely with pro-choice organizations and their legislative and grassroots lobbying groups.

These pro-choice organizations want to build public support for the veto through grassroots lobbying. Their communications, which praise President Clinton for the veto, are run in various states where Republican incumbent senators are up for reelection. These communications also condemn those Senators for their support of the bill and urge them to change their vote and sustain the veto.

(c) Analysis Of New Hypotheticals Under The Proposed Regulation.

Both of these additional hypotheticals are real world examples of dilemmas that would face a lobby group under any expansive definition of coordinated expenditures. Neither involves some cynical attempt to avoid the FECA and to impermissible influence elections, as the hypotheticals proposed by the Commission could be viewed to be. Because neither of the additional hypothticals contain express advocacy, all of the groups would risk an FEC investigation if they engaged in the proposed grass roots lobbying. However, it is without doubt that each of these groups have a First Amendment right to "petition the government." which protects grass roots lobbying. In the name of "campaign finance reform," this precious right would be undermined.[15]

In the first hypothetical, the pro-life group would be subject to the credible claim that the FEC must investigate whether Congressman Hyde was in "agrement" with this grass roots

[15]And before you know it, Congress would be scheduling all votes during this time and be free of all this pernicious lobbying activity.

lobbying. As to the second hypothetical, there is double coordination — a contribution to President Clinton's re-election campaign because he is praised, and, because President Clinton is the head of the Democratic Party, a contribution to the Democrat Senators running against the Republicans who are being criticized. The only way to get these two hypotheticals out from under the threat of an FEC investigation is by inclusion of the express advocacy standard within the definition of communication. Otherwise, the right to petition the government is swept under the rubric of an in-kind contribution.

The impact of the proposed regulations on issue advocacy, particularly grassroots lobbying, will be increased dramatically as grassroots organizations increase their use of the Internet for their lobbying activities. This medium, which provides almost unlimited opportunities for increased lobbing by individuals, is inexpensive to use and enables organizations to quickly inform others of issues affecting them. For this, and other reasons, *see* Comments of the James Madison Center for Free Speech regarding the Notice of Inquiry Regarding Internet Campaign Activity, filed January 3, 2000, any proposed regulations on coordinated expenditures should except Internet activities.

However, a narrow definition of coordination, without a bright-line definition of communication, is of no guidance to the regulated community because only a few, if any, corporations or labor unions are willing to suffer an investigation as the price of petitioning their government.

(5) Specific Comments on Proposed Rules.

On the basis of the above discussion, the James Madison Center for Free Speech submits

the following specific comments on the proposed rules.

(a) Comments on Alternatives 1-A and 1-B.

The only difference between Alternatives 1-A and 1-B is the addition of a condition on a communication, to be deemed to be coordinated, that it "is distributed primarily in the geographic area in which a candidate is running." The geographic limit, however, does not address any of the problems created with a broad definition of coordination. The geographic limit has nothing to do with coordination itself since the essence of coordination is a meeting of the minds. Furthermore, the problem – the burdening of issue advocacy – still exists even with the geographic limit.

(b) Comments on Alternative 2-A and 2-B.

There are two key elements to a proper definition of coordination. The first is that the coordination is regarding a specific activity in question, because "discussion of campaign strategy and discussion of policy issues are hardly two easily distinguished subjects." *Christian Coalition*, 52 F. Supp.2d at 90. Second, negotiation must result in a change in the spender's activity. There is no coordination if the spender does not do as the candidate suggests, or if the spender is already doing the specific activity requested by the candidate. This element can be defined as a communication that is made as a result of the request or suggestion of the candidate that would not have otherwise been made, or that the timing, content, mode or distribution of the communication was changed or altered as a result of the request or suggestion of a candidate.

While Alternative 2-B for (c)(2) contains the first key element, coordination regarding a specific activity in question, Alternative 2-A does not. "Candidates, especially incumbents, are

intimately tied to public issues involving legislative proposals and governmental actions." *Buckley*, 424 U.S. at 249. Thus, without this element, Alternative 2-A "sweeps in all attempts by corporations and unions to discuss policy matters with the candidate while these groups are contemporaneously funding communications directed at the same policy matters." *Christian Coalition*, 52 F. Supp.2d at 90 (*comparing Clifton*, 114 F.3d at 1313). Thus, Alternative 2-A should be rejected by the Commission.

In addition, although Alternative 2-B has a narrower "candidate affirmative action" requirement[16] than Alternative 2-A, both are too broad. The phrase "collaboration or agreement" in Alternative 2-B does not contain the second key element. "Agree" can "sometimes impl[y] no more than approval (as of a decision reached by others)." Webster's New Collegiate Dictionary at 24 (1975). "Agreement" can be defined as "harmony of opinion, action or character." *Id.* Thus, under Alternative 2-B, a communication is deemed coordinated if an organization simply tells a candidate that it is distributing "x" number of voter guides and the candidate states, "great!" Such a reply by the candidate would be an "agreement."[17] As the *Christin Coalition* case makes clear, simply informing a candidate of a planned communication, and obtaining their "agreement" to it, does not constitute coordination. Thus, the reason for the second element – requiring an organization to change its plans and do something it was not otherwise going to do, or to tailor its activity to the needs or suggestion of a candidate – is readily apparent and is not

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[16]This option for defining coordination requires some affirmative action, a request or suggestion, by the candidate or his agent.

[17]"Collaboration," however, is defined as "the act of working together in a joint project." BLACK'S LAW DICTIONARY 178 (6th ed. 1991). This is much closer conceptually to a proper definition of coordination but it is preferable that coordination be spelled out as suggested above.

present in Alternative 2-B.

(c) Comments on (c)(2).

This definition of coordination is acceptable.

(d) Comments on (c)(3).

Subsection (c)(3) contains two flaws. First, subsection (3) defines coordination to occur if there is "collaboration or agreement." This is the same flaw identified above. Second, the focus of subsection (c)(3) is wrong because it focuses on the amount of "discussion or negotiation," such as how many meetings are had, rather than the *result* that flows from the discussions or negotiations.

The last sentence of subsection (c)(3) confirms the incorrect focus of this option of defining corruption. With this sentence, the Commission is defining what constitutes "substantial discussion or negotiation." However, the problem with this sentence is that the Commission is using "substantial discussion or negotiation" to define coordination as the amount of discussion, rather than the result flowing from a discussion.

Judge Green's opinion does not support such a definition. In examining what was required for coordination, Judge Green used "substantial" to modify the *content* of the discussion; the discussions had to be about the details of the communication, i.e., contents, timing, location, mode, choice of medium, or volume. Otherwise, such an approach "sweeps in all attempts by corporations and unions to discuss policy matters with the candidate while these groups are contemporaneously funding communications directed at the same policy matters." *Christian Coalition*, 52 F. Supp.2d at 90 (*comparing Clifton*, 114 F.3d at 1313). Thus,

"substantial discussion or negotiation" does not relate to the amount of discussion, but whether "the candidate and spender emerge as partners or joint venturers in the expressive expenditure," *id.*, as a result of the content of their discussion(s).

(e) Comments on (d).

Subsection (d), as a matter of policy, is a proper exception. However, it is totally unnecessary because it is obvious from a proper definition of coordination that discussing the position of a candidate on an issue does not give rise to "coordination." But, more importantly, this exception is pernicious because it subtly suggests that just communicating with a candidate regarding an activity *may* result in coordination without more.

(f) Comments on (e).

Subsection (e), the definitions section, suffers from the infirmity discussed above: it only defines the communications, subject to being coordinated, by the mediums in which they appear. There is no definition based on the content of the communication, that is, what the communications actually says. As a result, *any* communication, which might influence an election is subject to an investigation of "coordination." The communications should be limited to those that contain express advocacy.

CONCLUSION

These comments have shown that the Commission has still not pulled the thread that has continued to run through its proposals -- that spending money for communications which comment on issues of public concern is presumptively evil if such communication might influence an election. Without a narrow definition of coordinated expenditure, every political