FEDERAL ELECTION COMMISSION
Washington, DC 20463

February 2, 2000

MEMORANDUM

TO: The Commission
General Counsel
Staff Director
Public Information
Press
Public Records

FROM: Rosemary C. Smith RCS
Assistant General Counsel

SUBJECT: Late Comment Received on the Supplemental Notice of Proposed Rulemaking on General Public Political Communications Coordinated with Candidates

Attached is a copy of a late comment received in response to the Supplemental Notice of Proposed Rulemaking on General Public Political Communications Coordinated with Candidates, that was published in the *Federal Register* on December 9, 1999. 64 FR 68951 (Dec.9, 1999). The deadline for public comments was January 24, 2000. Please note that on February 1 we contacted the commenter regarding testifying at the February 16 hearing. The commenter stated that they will advise us as soon as possible as to whether a representative wishes to testify on that date.

Attachments

cc: Associate General Counsel for Policy
Congressional Affairs Officer
Executive Assistants

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

WASHINGTON, DC
NEW YORK
LONDON
BRUSSELS
SAN FRANCISCO

BOBBY R. BURCHFIELD
TEL 202.662.5350
FAX 202.778.5350
BBURCHFIELD@COV.COM

January 28, 2000

BY HAND

Rosemary C. Smith, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Dear Ms. Smith:

On behalf of the National Republican Senatorial Committee, we are submitting comments in response to the Supplemental Notice of Proposed Rulemaking entitled "General Public Political Communications Coordinated with Candidates," 64 Fed. Reg. 68951 (Dec. 9, 1999). Pursuant to a conversation between Craig M. Engle, General Counsel of the NRSC, and the staff, these comments are being submitted after the requested date for submission of January 24, 2000.

We appreciate the Commission's consideration of these comments, and would be delighted to provide additional information, including oral testimony.

Sincerely,

Bobby Burchfield /kws

Bobby R. Burchfield

Encl.

COMMENTS OF NATIONAL REPUBLICAN SENATORIAL COMMITTEE IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING ON GENERAL PUBLIC POLITICAL COMMUNICATIONS COORDINATED WITH CANDIDATES

The National Republican Senatorial Committee submits these comments in response to the Federal Election Commission's request for comment on proposed rules addressing "general public political communications coordinated with candidates." 64 Fed. Reg. 68951 (Dec. 9, 1999). These comments supplement the NRSC's comments submitted on May 30, 1997, in response to an earlier notice of proposed rulemaking. *See* 62 Fed. Reg. 24367 (May 5, 1997). Those earlier comments are incorporated herein by reference, and a copy is attached hereto as Exhibit A.

These comments are submitted after the published date for submission of comments as a result of the NRSC's discussions with the staff, who stated no objection to a submission by today. See Part IV below.

These supplemental comments are divided into four sections: (1) the improvidence of formulating coordination regulations in this rulemaking that purport to be binding on political party committees, such as the NRSC; (2) the adverse effect of the proposed regulations on First Amendment rights; (3) specific comments on proposed regulations; and (4) a request to present oral testimony.

As a political party committee comprising all sitting Republican United States Senators, the National Republican Senatorial Committee has a dual interest in this rulemaking. First, it has an institutional interest as a political party committee to assure that all Commission regulations that affect its operations as a political party committee are rational and not contrary to law, including the First Amendment. Second, it has an interest in rules that impact the ability of Republican Senators, and Republican candidates running for the United States Senate, to campaign effectively and fully exercise their First Amendment rights.

The Commission also seeks comments on whether the standards proposed for determining coordination between candidates and other individuals and groups should also apply to political parties. The NRSC respectfully suggests that the answer is "no."

I. IMPROVIDENCE OF REGULATIONS AFFECTING POLITICAL PARTY COMMITTEES.

A. Coordinated Expenditures by Party Committees.

The Federal Election Campaign Act allows party committees to make coordinated expenditures on behalf of Republican candidates for Senate. These expenditures are subject to a dollar ceiling pursuant to 2 U.S.C. § 441a(d)(3). In *Colorado Republican Federal Campaign Committee v. FEC*, 518

U.S. 604 (1996), the Supreme Court held that party committees may also make unlimited independent expenditures on the same terms as other entities.

The coordinated expenditure limitation, however, is under constitutional attack, and has been struck down by the United States District Court in Denver. *See Colorado Republican Federal Campaign Committee v. FEC*, 41 F. Supp. 2d 1197 (D. Colo. 1999). Further, in the United States Supreme Court's earlier decision in that same case, four justices expressed the view that the coordinated expenditure limit violates the First Amendment. *See Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. at 630-31 (opinion of Kennedy, J., joined by the Chief Justice and Scalia, J.); *id.* at 644-45 (Thomas, J., joined by the Chief Justice and Scalia, J.). Earlier this month, the Tenth Circuit heard the Commission's appeal from the District Court's decision striking down the coordinated expenditure limit.

In view of the imminent likelihood that the Tenth Circuit, and perhaps the Supreme Court, will shed light on the constitutionality of Section 441a(d)(3), the NRSC respectfully submits that it is premature for the Commission to issue rules regarding coordinated party expenditures.

B. Coordination by Political Party Committees with Non-Candidate Individuals and Groups.

The proposed regulations seek improperly to rewrite Congress's definition of "independent expenditures" to include expenditures made in coordination with party committees, even if the party committee is not coordinating with the affected candidate. The term "independent expenditure" is defined by statute to include expenditures "made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate . . ." 2 U.S.C. § 431(17) (emphasis added). The proposed regulations add "party committees" to this statutory litany of "candidate, . . . authorized committee, or agent of such candidate." By adding party committees to this litany, the proposed regulations ignore the statutory definition.

The addition of party committees also violates the First Amendment. As the Supreme Court held in *Colorado Republican*, political party committees do not necessarily act as agents or authorized committees of candidates. Thus, expenditures made in full cooperation and consultation with party committees -- but not with the affected candidate -- are "independent expenditures." *Id.*

The Supreme Court also made clear that the Commission cannot use its regulatory authority to label speech as

"coordinated" when it is not. *See id.* at 621-22 ("An agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one."). Rather, if political parties may make independent expenditures entitled to strict First Amendment protection, then independent expenditures made by others in coordination with political parties cannot lose their independent character merely because the political party is involved. To hold otherwise would return to the Commission's rejected view that all party expenditures are irrebuttably presumed to be coordinated with the candidate. *See id.* at 617.

Accordingly, all references to political party committees must be removed from the proposed regulations.

II. THE ADVERSE EFFECT OF THE PROPOSED REGULATIONS ON FIRST AMENDMENT RIGHTS OF CANDIDATES AND COMMITTEES.

Even if all references to party committees were removed, the proposed regulations would have a serious adverse effect on the First Amendment rights of candidates.

First, the Commission's formulation of "general public political communications" is unconstitutionally vague. This term is the axis around which the entire regulation turns. If the Commission's effort to regulate "general public political communications" offends the First Amendment, then the entire

proposed regulation, regardless of which alternative is chosen, cannot stand.

Presumably, the Commission has chosen the phrase "general public political communications" in an effort to pose a broad description of all speech that might be useful to a particular candidate if coordinated with that candidate. Yet this phrase is so expansive as to encompass potentially all public dialogue. Indeed, it is difficult to imagine any discussion that names an incumbent Senator or federal official during an election year -- whether that discussion focuses on pending legislation (e.g., "the McCain-Feingold Bill,"), a law named after its sponsor (e.g., "the Roth IRA"), a Senator's vote on prior legislation, or even a Senator's stated position on an issue -- that would not be swept within this regulation. Even commentary on a candidate's qualifications or performance in office would presumably be regulated as a "general public political communication."

To evaluate the First Amendment implications of such a broad-based regulation, we ask the Commission to consider the following hypothetical situation: Let's assume that a candidate for Senate appears at a conference with a tax reform group to advocate elimination of the estate tax or a reduction in capital gains votes. Subsequently, the group requests and obtains authorization from the candidate to quote the candidate's remark

in the group's newsletter and also includes an editorial praising or criticizing his position. This speech is the very essence of enlightened public policy discourse, yet would most likely be swept up in and deterred by the proposed regulation as a coordinated "general public political communication."

As another example, please assume that a candidate meets with the editorial board of *The New York Times*, in anticipation of and leading to a favorable story or editorial on the candidate's position on an important issue. Is that story an in-kind contribution to the candidate? The NRSC notes that media news reports are excepted from the definition of "expenditure," 2 U.S.C. § 431(9)(B)(i), but they are not excepted from the definition of "contribution." While we are confident this Commission would respect the First Amendment protection accorded the newspaper and the candidate in this situation, the regulation at issue, coupled with the absence of a media exception in the definition of "contribution," might authorize an unenlightened Commission to find an "in-kind contribution" in this situation, or deter protected speech.

Thus, the term "general public political communications" is overly broad, unconstitutionally vague, and infringes the First Amendment. To survive, the regulation must at a minimum be limited to speech that expressly advocates the election or defeat of a clearly identified federal candidate.

Second, to the degree that the proposed regulation purports to incorporate Judge Green's explication of the standards for finding coordination in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), it fails. Reasoning that "expressive expenditures" lie at the heart of First Amendment-protected discourse, Judge Green reasoned that any attempt to regulate such discourse pursuant to a coordination theory must take account of the important First Amendment values at stake. She explained:

> "In the absence of a request or suggestion from the campaign, an expressive expenditure becomes 'coordinated' where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) 'volume' (e.g., numbers of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners. This standard limits Section 441b's contribution prohibition on expressive coordinated expenditures to those in which the candidate has taken a sufficient interest to demonstrate that the expenditure is perceived as valuable for meeting the campaign's needs or wants." *Id.* at 92 (emphasis added).

The proposed regulation picks and chooses among this language to achieve a result utterly inconsistent with the court's holding.

III. SPECIFIC ISSUES.

A. Comments on Proposed Regulations.

The NRSC offers the following comments on specific proposals advanced by the Commission.

Section 100.23(a). As shown (Part II above), the term "general public political communications" infringes the First Amendment because it is overbroad and vague.

Section 100.23(b). The proposed subsection would treat as both an "expenditure" and as an "in-kind contribution" "[a]ny general public political communication that includes a clearly identified candidate and is coordinated with that candidate, an opposing candidate or a party committee supporting or opposing that candidate." Quite apart from its use of the objectionable phrase "general public political communications," this subsection is objectionable for two reasons.

First, as shown (Part I.B. above), this section seeks to override Congress's definition of "independent expenditure."

Second, the Commission has omitted a critical component of the "express advocacy" test formulated by *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the Supreme Court determined as a constitutional minimum that expenditures under the Act were not regulable unless the communications "in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44. Yet, the Commission

here seeks to regulate communications that merely mention a political candidate, but do not advocate that candidate's election or defeat. Courts have repeatedly rebuffed the Commission's decades-long effort to attack the "express advocacy" test. *See* NRSC's May 30, 1997, Comments at pp. 10-11. Even if (as we doubt) it would be constitutionally permissible to deem a coordinated "general public political communication" an in-kind "contribution," these decisions make clear that it is not an "expenditure" unless it expressly advocates the election or defeat of a clearly identified federal candidate. *See, e.g., Buckley v. Valeo*, 424 U.S. at 42-44.

Section 100.23(c). The NPRM proposes two alternatives for the introductory text of paragraph (c). In both alternatives, party committees are treated as identical to candidates and candidates' authorized committees. The NRSC incorporates its prior comments regarding proposed section 100.23(b) by reference. Furthermore, the NRSC incorporates its May 30, 1997, Comments.

Section 100.23(c)(1). The NPRM proposes two alternative versions for paragraph (c)(1). Both inaccurately state settled law by broadening the meaning of "coordinated expenditures" beyond constitutional bounds. Further, both inexplicably attempt to override Congress's definition of "independent expenditures" by including party committees in the

group of those with whom collaboration is limited. To that extent, the above comments regarding proposed section 100.23(b) are incorporated by reference.

Moreover, neither alternative accurately incorporates the test for coordination set forth in the *Christian Coalition* decision. (See p.8 above.)

Another glaring problem found in both alternatives is that they would consider "coordinated" minor and even unwanted discussions. For example, an entity adverse to the views of a particular candidate might prepare a communication designed to defeat the candidate and announce that fact to the candidate prior to airing the communication publicly. If the candidate successfully suggests to the adverse entity that it delay the communication or alter it in any minor respect, that adverse entity's communication -- which should be fully protected under the strict scrutiny of the First Amendment -- could conceivably be redefined as a "coordinated communication." Likewise, if a candidate's public pleas for support were followed by independent advertising in her favor, or if her announcement that she was having difficulty raising money for television advertising were followed by a television advertising campaign of an independent group extolling the virtues of her candidacy, the proposed regulations might define the truly independent expenditures as "coordinated."

Proof of "coordination" under well-settled law, however, requires evidence showing a meeting of the minds between the candidate's authorized representative and the spender that such an expenditure will be made in support of the candidate's campaign, or in opposition to her opponent. It would be a classic post hoc fallacy to conclude, as the proposals appear to allow, that a candidate's plea for support, followed by an independent expenditure by a person or entity that heard the plea, constituted a "coordinated expenditure." As the Supreme Court made clear in *Buckley*, it is "[t]he absence of prearrangement and coordination that defines an independent expenditure." *Buckley*, 424 U.S. at 47 (emphasis added).

Of the two alternatives, Alternative 2-B is more limited, but still too broad. It at least adds the element of "collaboration or agreement" and describes the subject matter of the necessary collaboration or agreement. However, it still falls short of the mark set in *Christian Coalition*. In that case, the court strictly defined "coordination" with reference to the limiting terms of actual "control" by the candidate and of "substantial" discussions or negotiations involving the candidate. *Christian Coalition*, 52 F. Supp. 2d at 92. As the court determined, "any less restrictive interpretation of coordination would impermissibly chill protected expression." *Id.* at 93. The result, in the court's estimation, was a

standard that limits contribution restrictions on coordinated expenditures "to those in which the candidate has taken a sufficient interest to demonstrate that the expenditure is perceived as valuable for meeting the campaign's needs or wants." *Id.* at 92. The candidate must become a "partner or joint venturer" in the communication. *Id.*

When a campaign makes a request or suggestion, expenditures made in line with the request or suggestion are not necessarily coordinated. At minimum, the request must be particularized, focused, and directed toward a certain individual with the specific intent that the "spender engage in certain speech." *Id.* By sweeping general requests and suggestions not focused on a particular speaker and a particular instrument of speech into the definition of "coordinated expenditures," these alternatives would regulate speech that is not of sufficient value to the candidate that it absorbs "contribution-like qualities." *Id.*

For these reasons, the NRSC opposes all versions of the proposed regulation.

Section 100.23(c)(2). This subsection partially tracks the standard for coordination set forth in the *Christian Coalition* decision. It weakens that standard in certain respects, however, and should incorporate the full standard. Moreover, this subsection is posed as but one alternative,

meaning that the Commission could ignore that standard by invoking another subsection.

Section 100.23(c)(3). This subsection appears to track the *Christian Coalition* court's definition, but certain subtle alterations render it objectionable. The Commission has proposed that expenditures are coordinated if they are made "after substantial discussion or negotiation between ... the person paying for the communication and the candidate regarding [certain aspects] of that communication, the result of which is collaboration or agreement."

The subsection further indicates that "[s]ubstantial discussion or negotiation may be evidenced by one or more meetings, conversations or conferences regarding the value or importance of that communication for a particular election."

The subsection significantly understates the degree of interaction and the solidity of agreement that must take place between the candidate and the speaker before the speaker's communications may be characterized as "coordinated." Most notably, it eliminates the critical language from the *Christian Coalition* decision that "[s]ubstantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure. . . ." *Id.* at 92.

Again, proof of "coordination" requires evidence showing a meeting of the minds between the candidate's authorized representative and the spender that such an expenditure will be made in support of the candidate's campaign, or in opposition to her opponent.

Section 100.23(d). This subsection purports to carve out an exception to the regulation. It provides that "[a] candidate's or political party's response to an inquiry regarding the candidate's or party's position on legislative or public policy issues does not alone make the communication coordinated." Because the so-called exception falls so squarely within the "core" of constitutionally protected speech, the NRSC fails to understand how the section actually provides an "exception." Further, the fact that the proposed regulation necessitated the inclusion of this section as an "exception" is further evidence that the regulation is an overbroad attempt to regulate that which the Constitution shields from such attempts.

Section 100.23(e). The NRSC objects to this section for the reasons set forth in Part I above.

B. Comments on Specific Questions.

The Commission has requested comments on a number of specific questions and on two hypotheticals. In response, the NRSC incorporates its comments contained herein by reference.

IV. REQUEST TO PRESENT ORAL COMMENTS

The NRSC notified Commission staff on Monday afternoon, January 24, 2000, that it would be submitting these comments several days after the January 24, 2000, deadline. The staff appropriately said that although these comments would be marked as "submitted late," they would be included in the record put before the Commission as long as they were received before the Commission's Agenda Document was prepared.

The NRSC also inquired as to whether it could make a request to testify in these comments, and whether any other or additional hearing dates were being contemplated, due to an irreconcilable scheduling conflict the NRSC's General Counsel has with the proposed February 16, 2000, hearing date. The NRSC was informed that requests to testify would be entertained only from persons who submitted comments by January 24. Second, the NRSC was told that the Commission's schedule could not accommodate rescheduling the hearing date or an additional day of hearings.

The NRSC regrets this development, and believes its oral presentation would make a substantial contribution to this rulemaking, as the NRSC has voluntarily done in other rulemakings, by answering the Commissioners' and General Counsel's questions.

The Commission made a similar adjustment to its hearing schedule during its proposed soft money rulemaking to accommodate the NRSC's schedule. The NRSC believes that oral presentation and interaction with the Commission truly improved everyone's understanding of the effect those rules would have had on existing law and party operations. Several Commissioners, as well, seemed to encourage party participation in this rulemaking in the comments they directed to several party committee lawyers who attended the Open Session meeting when these proposed rules were approved for publication. Accordingly, the NRSC hopes an agreement can be reached on this very important matter.

Respectfully submitted,

Bobby Burchfield /RWS

Bobby R. Burchfield
Richard W. Smith
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 662-6000

OF COUNSEL:
Craig M. Engle
General Counsel
National Republican
Senatorial Committee

Dated: January 27, 2000