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October 11, 2002

Via Electronic Mail
Mr. John Vergelli
Acting Assistant General Counsel
Federal Election Commission
999 E St, N.W.
Washington, DC 20463

Re: Notice 2002-16

Dear Mr. Vergelli:

I am enclosing the comments of The Claremont Institute regarding the Commission's proposed rules implementing the provisions of the Bipartisan Campaign Reform Act of 2002 relating to Coordinated and Independent Expenditures.

As indicated in the enclosed comments, The Claremont Institute respectfully requests the opportunity to testify at the Commission's hearing on these proposed regulations.

Very Truly Yours,

Robert D. Alt
Fellow, The Center for Constitutional Jurisprudence
The Claremont Institute

Enclosure

BEFORE THE FEDERAL ELECTION COMMISSION

Notice 2002-16

Coordinated and Independent Expenditures

Comments of
The Claremont Institute

Request to Testify

The Claremont Institute respectfully requests the opportunity for Robert Alt to testify on its behalf at the hearing scheduled for October 23-24, 2002.

Statement of Interest

The Claremont Institute is a non-profit educational organization, founded in 1979 and based in Claremont, California. The programs of the Institute aim to elucidate and to strengthen the American principles of limited, constitutional government. These programs include seminars, conferences, publications, submission of expert testimony in public hearings, and public interest litigation. The Claremont Institute has taken an active role in the debate regarding campaign finance regulation, providing comments to the Commission's proposed rulemaking regarding soft money in 1998 and again this year. Most recently the Institute's Center for Constitutional Jurisprudence successfully litigated a case challenging a City of Irvine ordinance which was found to restrict campaign expenditures unconstitutionally.

"Coordination," Free Speech, and Association

Any discussion of coordinated expenditures limitations must begin with an analysis of the constitutional rights of free speech and free association--rights which are potentially in friction with such limitations. "Coordinated" expenditures are generally expenditures which would otherwise be considered "independent," but are redesignated because of the collaboration between the speaker and the candidate. Given the close relationship between coordinated and independent expenditures, it is important to remember that independent expenditures cannot constitutionally be limited, even to satisfy the state's interest in preventing corruption or the appearance of corruption.[1]

The Buckley Court found that restrictions on independent expenditures "heavily burden[] core First Amendment expression," and noted further that "[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation."[2] Even so, the Court upheld restrictions on coordinated expenditures--expenditures made with the "prearrangement" or "coordination" of the candidate or his agent.[3] Given this dichotomy, in

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[1] Buckley v. Valeo, 424 U.S. 1, 45 (1976).

[2] Id. at 47-48.

[3] Id. at 46-47.

which independent expenditures may not be limited, and coordinated expenditures may be subjected to reasonable limitations, this Commission should define coordination narrowly in order to prevent the suppression of protected speech.

In crafting regulations, the Commission must also be mindful that the First Amendment protects the freedom to associate.[4] The Supreme Court has noted that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, [ ] state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[5] Even so, provisions of BCRA, if interpreted too broadly through regulations, could present those seeking to engage in political speech with a "pick your right" kind of choice: either associate with a candidate and give up your ability to speak through independent expenditures, or speak through independent expenditures and give up your ability to associate.[6] This raises the specter of an unconstitutional condition--a requirement that an individual abandon a constitutionally protected right in exchange for a governmentally conferred benefit.[7] Applying the well-established doctrine of unconstitutional conditions, the Supreme Court has grown increasingly skeptical about government requirements which force parties to give up a constitutional right in exchange for a government "benefit."[8] The Commission should therefore choose narrow language to define coordination in order to avoid creating a situation in which a speaker must choose between her right to associate and her right to free speech.[9]

Republication and "Fair Use"

While republishing an entire ad certainly raises coordination issues, the Institute would advocate a "fair use" exception for partial republication which should be extended to non-media speakers and media speakers alike. Without such a fair use exception, a speaker could run afoul

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[4] N.A.A.C.P. v. Alabama, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.").

[5] Id. at 460-61.

[6] Typical of this is BCRA language prohibiting parties from making both coordinated and independent expenditures after nomination. See 2 U.S.C. § 441a(d)(4). This provision in particular raises grave questions about the total impairment of a party's recognized right to make independent expenditures unless they abandon their right to make coordinated expenditures.

[7] Here the choice would seem to be even more troublesome, for it is not a choice between the exercise of a constitutional right and a discretionary benefit, but a trade-off between constitutional rights. For a thorough treatment of the doctrine of unconstitutional conditions, see Richard A. Epstein, Unconstitutional Conditions, State Power, and the Limits of Consent 102 Harv. L. Rev. 4 (1987).

[8] See Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).

[9] Such a narrow reading may seem contrary to the "wink or nod" understanding of coordination suggested in Federal Election Commission v. Colorado Republican Federal Campaign Committee, 121 S.Ct. 2351, 2359 (1991). It should be remembered, however, that while the much relied upon language regarding a "wink or nod" to support coordination is dicta—the Court's statements regarding the close judicial scrutiny afforded independent expenditures and rights of association are not.

of the coordination rules by simply quoting from a candidate's published speech, or by analyzing a series of campaign slogans. Such a regulation would have a chilling effect on issue advocacy, as well as speech directed toward initiative, referenda, and the promotion of non-federal candidates--all of which would potentially be swept up under federal contribution limits.

While proposed § 100.57(b)(2) would permit the reasonable or fair use of campaign material by those opposing a candidate, it does not provide a similar exemption for those who seek to promote a candidate or a candidate's views, or even those who are neutral as to a candidate but wish to make a point using the campaign material. Thus, if candidate Gore publishes a campaign ad describing the great hazard to civilization from global warming, candidate Nader could consistent with the proposed regulation criticize the ad for not suggesting specific reforms, but the Sierra Club could not quote from the same ad to support a state initiative or referenda to limit the production of greenhouse gases—and this is so even if their candidate of choice was Nader. Because such a one-sided exemption raises genuine questions about viewpoint-based discrimination, the Commission should consider a non-viewpoint-based distinction, such as fair use.

Content Standard

In order to understand what a coordinated expenditure is, it is first necessary to define "expenditure." In Buckley, to prevent an impermissibly broad application of FECA, the Court interpreted "expenditure" to mean "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."[10] The Institute believes that the same principle of avoiding overbreadth applies here, and that therefore the Commission should moor its definition of coordinated expenditure to the "express advocacy" definition of expenditure found in Buckley. Therefore, we support the conduct standard found in § 109.21(c)(3).

By contrast, § 109.21(c)(1)'s reliance on the electioneering communication standard (§ 100.29) for content is overbroad. Utilizing the electioneering communication conduct standard, a speaker who runs an ad which mentions a clearly identified federal candidate proximate to an election and uses a common vendor could be found to violate the coordinated expenditure provision, even if the advertisement was intended to promote a piece of legislation, a state or local candidate, or an initiative. This clearly sweeps in speech which is wholly beyond the intended or permissible bounds of the legislation. The alternative definitions for § 109.21(c)(4) each raise similar concerns by covering broad categories of speech which may involve issue advocacy or speech not directed to federal campaigns. These definitions should therefore be rejected in favor of the express advocacy standard.

Conduct Standard

While BCRA prohibits the Commission from limiting coordinated expenditures to "formal" collaboration, the Commission's assertion that the statutory definition is properly modified by "formal" is important to the development of any conduct standard, and should be maintained. To read BCRA more broadly would be to permit not merely informal but also

[10] Buckley, 424 U.S. at 80.

incidental collaboration, such as may occur or be inferred to have occurred when candidates and potential speakers have frequent meetings or conversations. The restrictions on coordinated expenditures should not create a situation in which parties, committees, or individuals need to stop associating with candidates during campaigns to avoid the possibility that they will somehow be found to have coordinated with the candidate.

In closing, the Supreme Court in Buckley permitted limitations upon coordinated expenditures because of the greater potential value of such expenditures to the candidate, and because of the greater risk of quid pro quo corruption which may be achieved through prearrangement.[11] By contrast, the Court recognized that independent expenditures may actually carry a negative value to the campaign,[12] presumptively because of the importance of crafting the message, in terms of audience, word selection, and tone, to name but a few factors. Given the high level of protection afforded to independent expenditures, and the potential that less coordinated speech may in fact actually hurt candidates, the Commission should avoid drawing the coordination line in such a way as to capture more speech than is absolutely necessary to comply with BCRA.

We thank you for the opportunity to comment, and appreciate your consideration of these matters.

Respectfully Submitted,

Robert D. Alt
Fellow, The Center for Constitutional Jurisprudence
The Claremont Institute

[11] Id. at 47.

[12] Id.