



Donald F. McGahn II  
General Counsel

October 11, 2002

John C. Vergelli, Esquire  
Acting Assistant General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Re: Comments on Proposed Rulemaking

Dear Mr. Vergelli:

These comments on the Federal Election Commission's Proposed Rules concerning coordinated and independent expenditures in the Federal Election Campaign Act ("FECA"), as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), are submitted on behalf of the National Republican Congressional Committee ("NRCC"). Established in 1866, the NRCC is composed of Republican Members of the U.S. House of Representatives, and seeks the election of Republicans to House as well as other state and local offices.

This particular rulemaking impacts in a fundamental way a variety of daily activities conducted by the political parties. Our written comments are intended to merely begin the dialogue on this issue. We ask that we be permitted to testify before the Commission concerning the proposed rules so that we may expand upon our position. Furthermore, the opportunity to compare and contrast our positions with those of some of the other comments yet to be filed today would allow us to further assist the Commission in its current undertaking.

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### **A. The BCRA Attempts to Undo Supreme Court Precedent**

Prior to 1996, the Commission took the position that a political party committee could not make both coordinated and independent expenditures. Instead, the Commission presumed that the parties coordinated with its candidates, and thus could not act independently.

In 1996, however, the United States Supreme Court found this to be unconstitutional, and held that political party committees could make both coordinated and independent expenditures. Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996). Despite this clear ruling, the Congress has attempted to reverse the U.S. Supreme Court.

Obviously, the Congress cannot do this. One needs look no further than Marbury v. Madison to learn that when it comes to constitutional questions of the sort presented in Colorado Republican, the Court is the final word. Thus, the Commission is once again facing a dilemma – how to promulgate regulations implementing a provision that has already found to be unconstitutional.

### **B. The BCRA Makes Presumptions That Simply Are Not True**

In addition to the presumption regarding party expenditures, the BCRA adds a new twist. The sponsors of the BCRA and their supporting “good government” groups will inevitably assert that the BCRA contains language that seems to treat all political committees of a single political party as one committee for the purposes of making coordinated or independent expenditures. As a practical matter, this is an absurd proposition.

Each party committee, whether it is the RNC, NRCC, NRSC, state parties or local parties, has its own structure and its own leadership. Ultimately, each party committee is unique, and is not subject to the direction or control of the other. The NRCC is distinguishable from the RNC or the state parties because current law does not allow us to make coordinated expenditures, absent an agency designation. We hope to discuss the practical implications of this with the Commission during our testimony.

### **C. Any Regulation Must Respect the First Amendment and Other Constitutional Rights of the Party Committees**

Any discussion of “coordination” or other limitations on the ability of party committees to interact with their candidates and the outside world will inevitably raise constitutional concerns. The First Amendment not only guarantees the right to free speech, but also free association. In other words, people – whether individuals or groups of individuals who join together for a common purpose – cannot be prohibited from associating with one another, simply because their common purpose happens to be American politics.

Equal protection should also be considered. The Supreme Court has repeatedly held that political party committees certainly enjoy the same rights as other groups. In some instances, the courts have found political parties to be unique, and thus enjoy enhanced protection. It is our view that the political parties possess a unique status. We ask that the Commission keep in mind that even though a regulation may on its face appear to treat parties "equally," as a practical matter it could very well have a disparate impact on the parties. Politically parties are not similarly situated in all situations with non-political or issue based groups or individuals. We hope to discuss this in more detail during our testimony.

**D. Political Party Committees Should Not Be Subject to the Same Restriction as Other Persons**

The Commission has asked for comment on standards regulating "coordinated - communications," the ability of party committee employees to seek future employment and the like. We believe such issues are interrelated, and must be considered as a whole. After all, as mentioned above, the First Amendment guarantees the right of free association. Limiting what people can and cannot say, or who they can and cannot speak to, is contrary to the First Amendment.

As a practical matter, it will difficult, if not impossible, to attempt to regulate party contact with its candidates without clear bright lines. After all, the personnel of the NRCC regularly interact with House candidates and their staff several times each day concerning matters that have nothing to do with coordinating political advertisements. The same is true of our contact with state and local parties. Thus, the mere act of speaking with candidates cannot be a sufficient basis for finding that coordination has occurred - mere contact cannot be enough. We are particularly concerned that the Commission may inadvertently chill our ability to work with and assist our candidates.

The same is true for employees of the party committees. Care must be taken to ensure that the future gainful employment of political party employees is not restricted - simply because someone has worked at a party committee does not mean that they are then "tainted," nor would it otherwise create legal "coordination" issues.

We respectfully request that we be afforded the opportunity to testify.

Respectfully submitted,

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National Republican Congressional Committee