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August 21, 2002

Via Electronic Mail
Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E St, N.W.
Washington, DC 20463

Re: Notice 2002-13

Dear Ms. Dinh:

I am enclosing the preliminary comments of The Claremont Institute in regard to the Commission's proposed rules implementing the provisions of the Bipartisan Campaign Reform Act of 2002 relating to Electioneering Communications. Pursuant to our phone conversation on August 19, 2002, I will submit a final revised and expanded version of the comments prior to the hearing.

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

Very Truly Yours,

Robert D. Alt

Enclosure

BEFORE THE FEDERAL ELECTION COMMISSION

Notice 2002-13

Electioneering Communications

Preliminary Comments of
The Claremont Institute

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 over campaign finance regulation, providing comments to the Commission's proposed rulemaking regarding soft money in 1998. Most recently, the Institute's Center for Constitutional Jurisprudence, successfully litigated a case challenging a City of Irvine ordinance which was found to unconstitutionally restrict campaign expenditures.

The FEC's Role in the Constitutional Framework

The FEC has a duty to independently interpret the Constitution in the course of issuing its regulations. As a general matter, when the Commission is faced with the task of defining a term in a statute in which one possible definition more closely corresponds with the spirit of the law or perceived congressional intent but nonetheless raises serious constitutional questions, and another definition corresponds with the plain language of the statute while avoiding those constitutional concerns, the FEC should adopt the latter.

Furthermore, when considering proposed rules, the Commission appears to have given great deference to the views of the major proponents of the legislation. Such an approach is inconsistent with common practices in ascertaining legislative intent, which accord sponsors' post-enactment statements relatively low probative value. The sponsors and proponents, while admittedly knowledgeable and passionate about the subject, are only capable of providing their own respective views regarding the bill.

Specific Comments

- **The FEC should promulgate an alternative definition for 2 U.S.C. 434(f)(3)(A)(ii) at this time.**

The constitutionality of BCRA is currently being litigated before the United States District Court for the District of Columbia.[1] As proponents of BCRA themselves have made

[1] McConnell v. FEC, Civ. No. 02-252.

clear, the "electioneering communications" provisions are among the most constitutionally suspect provisions of the bill. Indeed, many proponents concede that these provisions as applied to non-profit corporations are unconstitutional.[2] In the course of the litigation, however, the proponents of the legislation have claimed that the many of the issues are not ripe for litigation, presumably in part because the Commission has not promulgated rules on the subject.[3] Given the constitutionally suspect nature of the provisions, and the claims of ripeness raised by the proponents, the Commission should issue the alternative definition at this time in the interest of administrative and judicial economy.

- **The definition of "broadcast, cable, or satellite communications" in proposed 11 CFR 100.29(b)(2) should not include web casts or original internet transmissions of any kind.**

The plain language of BCRA, the doctrine of *expressio unius,* and the general interest in consistency rules already issued by the Commission mitigate in favor of excluding internet "broadcasts" from the definition of "broadcast, cable, or satellite communications."

- **The Commission should recognize a safe harbor in 11 CFR 100.29(b)(5) for those who advertise pursuant to information regarding the number of people reached by a station obtained on the FCC web site.**

To avoid potential confusion and prevent unintended violations of BCRA, the Commission should make clear that those who obtain verification that the station on which they are placing an advertisement that would otherwise be constrned as an "electioneering communication" reaches less than 50,000 persons will be deemed in compliance with the Act.

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[2] See Craig Gilbert, Senators Reject Groups' Vote Ads; Ban Presents Obstacles for Feingold, McCain, Milwaukee Journal Sentinel, Mar. 27, 2001, at 06A (quoting Senator Feingold for the proposition that the Wellstone Amendment regarding electioneering communication has a "better than even chance" that the courts will reject it).

[3] *See* Answer and Affirmative Defenses of Intervening Defendants at 11, McConnell v. FEC, (filed Apr. 2, 2002) (Civ. No. 02-252).