FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

August 27, 2002

MEMORANDUM

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

FROM: Mai T. Dinh MTD by RB
Acting Assistant General Counsel

SUBJECT: Comments on Notice of Proposed Rulemaking for Electioneering Communications

Attached please find the final version of the Claremont Institute's comments we received in response to the above Notice of Proposed Rulemaking, Notice 2002-13, published in the August 7, 2002 Federal Register (67 *Fed. Register* 51131). The Claremont Institute had submitted preliminary comments on August 21, 2002, within the deadline for submission of comments for those who wished to testify at the Commission's hearing, and its representative, Robert D. Alt, is scheduled to testify at the hearing on Wednesday, August 28, 2002, at 1:30 p.m.

Attachment

cc: Deputy General Counsel
Acting Associate General Counsel
Congressional Affairs Officer
Executive Assistants

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August 27, 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:

Enclosed please find a copy of the final version of The Claremont Institute's comments on NPRM 2002-13, which are intended to replace the preliminary comments submitted last week. Thank you for your patience. I look forward to testifying, and to providing the Commission with any assistance possible.

Very Truly Yours,

Robert D. Alt

Enclosure

BEFORE THE FEDERAL ELECTION COMMISSION

Notice 2002-13

Electioneering Communications

Final 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 regarding 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 an independent duty to act pursuant to, and thereby to interpret the Constitution in the course of drafting its regulations--a duty arising from the Commission's position in the Executive branch and the Commissioners' sworn oaths to uphold and defend the Constitution of the United States.

- **Historical Basis for Coordinate Branch Construction**

In contrast to the popular view that constitutional interpretation is the sole and exclusive province of the courts, coordinate branch construction--that is, the understanding that interpretation of the Constitution is a duty shared by all three branches--has been recognized since the earliest days of our Republic. James Madison stated that "each [of the three branches] must in the exercise of its functions be guided by the text of the Constitution according to its own interpretation of it."[1] Thomas Jefferson, exercising this duty, issued pardons and instructed United States Attorneys to cease prosecuting violations of the Sedition Act of 1798 based upon his view that the bill was unconstitutional. In explaining these actions, Jefferson noted:

> [N]othing in the Constitution has given [the judiciary] a right to decide for the Executive, more than to the executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them. . . . [The Constitution] meant that its coordinate branches should be checks on each other. But the opinion which give [sic] to the judges the right to decide what laws are

[1] 4 Letters and Other Writings of James Madison 349 (1865) (letter from James Madison, 1834).

> constitutional, and what are not, not only for themselves in their own sphere of action, but for the Legislature & Executive also, in their spheres, would make the judiciary a despotic branch.[2]

Abraham Lincoln asserted the role of coordinate interpretation by examining the potential limitations of the effect of judicial decisions, which he made clear by distinguishing the binding effect of a direct ruling in a case from the effect of a court's decision as a precedent. Hinting both to the legislative and executive roles in constitutional interpretation, Lincoln offered this pointed review of the theory that the courts are the sole repositories of constitutional interpretation:

> I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration, in all paralel [sic] cases, by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.[3]

Demonstrating that the authority and duty to interpret the Constitution resides not only in the President, but also through the President in the Executive branch, Attorney General Edward Bates issued an advisory opinion stating that the ruling on the lack of citizenship in Dred Scott was limited to the plaintiff, and therefore another "free man of color" born in the United States was in fact a citizen.[4]

More recently, following a string of decisions in the 1970s striking down sex-based distinctions, the Department of Justice instructed the Executive branch not to enforce provisions

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[2] 8 Writings of Thomas Jefferson 310-11 (P. Ford ed. 1897) (letter to Abigail Adams dated Sept. 11, 1804). Jefferson was not alone in this view. Indeed it was commonly held prior to Andrew Jackson that the veto could only be used by the President to thwart unconstitutional legislation, thereby implicitly recognizing the role of the Executive in constitutional interpretation. *See* Frank Easterbrook, Presidential Review, 40 Case W. Res. 905, 907-09 (1990).

[3] Abraham Lincoln, First Inaugural Address, Mar. 4, 1861, available online at <http://www.founding.com/library/lbody.cfm?id=327&parent=63>; *see also* Abraham Lincoln, Speech on the Dred Scott Decision, June 26, 1857, available online at <http://www.founding.com/library/lbody.cfm?id=321&parent=63>.

[4] 10 Op. Atty. Gen. 382 (1862).

similar to, although not expressly involved in those decisions.[5] More controversially, the Reagan Administration declined to enforce certain provisions of the Competition in Contracting Act on the ground that such provisions unconstitutionally vested executive power in the Comptroller General, an officer of the legislative branch. Thus, it is plain that the Executive branch has historically claimed an important and necessary role in interpreting the Constitution.

- **The FEC's Duty in Rulemaking Where the Statute Suffers From Constitutional Deficiencies**

The duty to interpret the Constitution presents a dilemma where, as here, the Commission is asked to promulgate regulations for a statute which suffers from apparent constitutional deficiencies. The FEC must interpret the Constitution, but it must also follow congressional directives.

The first question the Commission must ask in rulemaking is whether there is ambiguity in the terms of the statute. If the text of the statute is clear and unambiguous--even if the Commission believes the text to be unconstitutional--then its job is done. The Commission may not re-write statutes in the course of rulemaking, **even to correct clear constitutional error.** The Commission was directed in BCRA to promulgate rules to carry out the act, and therefore it would be difficult indeed to justify any regulation which contradicts the plain language of the act.

If, however, the statute is silent or ambiguous on a point, then the Commission has greater discretion.[6] As a general matter, when the Commission is faced with the task of defining a term in a statute for which one possible definition more closely corresponds with the purported spirit of the law or supposed 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 must, consistent with its constitutional duties, adopt the latter. Thus, it is not sufficient to reason as follows: (1) the purpose or spirit of BCRA is, *arguendo*, the elimination of "big" money or soft money in politics; (2) a proposed regulation will permit some of this "suspect" money into the system; (3) therefore this regulation is impermissible. Rather, if such a regulation is not inconsistent with the text of the statute, and if the regulatory alternatives raise constitutional doubt, then the Commission should favor the provision permitting funds over those conforming to the purported broader intent.

- **What Deference Is Due Sponsors' or Proponents' Statements and What is the Proper Role of Legislative Intent**

The primary sponsors of BCRA have issued a number of post-enactment statements regarding the meaning of the statute and regarding the Commission's proposed regulations which

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[5] *See* Easterbrook, 40 Case W. Res. at 913 (referencing the internal DOJ action).

[6] *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984) (noting judicial policy of deferring to a "reasonable interpretation made by the administrator of an agency" where a statute is silent or ambiguous).

have received substantial media attention. Notwithstanding the temptation to place substantial weight upon these statements, no reasonable view of legislative intent accords sponsors' post-enactment statements anything but low probative value. Admittedly, the sponsors of BCRA are both knowledgeable and passionate regarding the legislation, having championed it for a number of years. That said, the sponsors are only capable of providing their own respective views regarding the bill, which are no more binding than the view of any other learned commenter.

Even pre-enactment statements may not be capable of fully conveying congressional intent, given that coalitions and individual congressmen may vote for legislation for different reasons, or with different expectations regarding the legislation. Indeed, press reports suggest that even the primary sponsors are aware of the fact that many of the supporters may have different views (or intent) regarding the scope and application of the bill. In an interview after a well-publicized confrontation with Senator Clinton over proposed regulations, Senator Feingold conceded: "'There are a hard-core group of Senators who want to have their cake and eat it too. They pose for a photo [after supporting campaign reform] and then go behind closed doors and align themselves with the Republican commissioners' on the Federal Election Commission. . . ."[7] This gets to the fundamental problem of legislative intent: Senator Feingold may have intended one thing, and Senator Clinton another.[8] Thus, the clear approach is to rely upon the text of the statute itself to determine its meaning.

Finally, for those seeking guidance regarding the meaning or scope of the law from the statements of proponents, BCRA offers another problem: proponents and sponsors issued statements casting doubt upon the bill's constitutionality. For example, when Senator Wellstone first offered his amendment to clarify that 501(c)(4) corporations should be covered by the regulations on electioneering communications, Senator Feingold moved to table the amendment, "both for concerns of its constitutionality and also the practical considerations . . . ."[9] He yielded time to Senator Edwards, who offered a soliloquy eloquently explaining the constitutional deficiency of the restriction on electioneering communications as applied to non-profits:

> The problem with what Senator Wellstone is attempting to do is there is a U.S. Supreme Court case, the FEC v. The Massachusetts Citizens for Life, directly on point, saying that these 501(c)(4)s have a limited constitutional right to engage in electioneering to do campaign ads. There are some limits, but unfortunately if you lump them in with unions and for-profit corporations, you create a very serious constitutional problem because the U.S. Supreme Court has already specifically addressed that issue. [10]

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[7] Ed Henry, Heard on the Hill, Roll Call, July 22, 2002.

[8] For a review of the problem of legislative intent generally, see Kenneth A. Shepsle, Congress Is a "They," Not an "It": Legislative Intent as Oxymoron, 12 Int'l Rev. L. & Econ. 239 (1992).

[9] 107 Cong. Rec. 2882, 2882-84 (Mar. 26, 2001) (Statements by Sen. Feingold).

[10] Id. (Statements by Sen. Edwards).

How then is the Commission to implement the intent of a body, where the primary sponsors of the bill have expressed the belief that relevant provisions are unconstitutional? To apply the intent of these legislators might indeed contradict or require excising the plain language of the statute. This once again mitigates in favor of looking to the text for the statute's meaning.

Specific Comments

- **The FEC Should Promulgate an Alternative Definition for 2 U.S.C. 434(f)(3)(A)(ii) at This Time.**

The Commission seeks comments on whether it should promulgate a definition for 2 U.S.C. 434(f)(3)(A)(ii), which provides an alternative definition of electioneering communication that would take effect if the primary definition is struck down by a "final judicial decision." The Commission intends not to promulgate regulations for the alternative at this time, but rather to wait until it becomes necessary to do so. Because of the constitutionally suspect nature of these provisions, and in the interest of administrative and judicial economy, we recommend issuing the alternative definition now.

The constitutionality of BCRA is currently being litigated before the United States District Court for the District of Columbia.[11] As proponents of BCRA themselves have made 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.[12] In the course of the litigation, however, the proponents of the legislation have offered as an affirmative defense that the matter is not ripe for litigation, which claims may rest in part upon the fact that the Commission has not finished promulgating rules on the subject.[13] Given the admittedly 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.

As for the definition regarding the alternative language, we believe that the terms "support," "promote," "attack," and "oppose" are vague, and cannot be meaningfully defined without reference to terms of express advocacy such as those referenced in Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976). However, 2 U.S.C. 434(f)(3)(B)(ii) clarifies that the term electioneering communications does not include a "communication which constitutes an expenditure or independent expenditure under this Act." Because BCRA defines independent expenditures in terms of express advocacy, these vague words cannot, consistent with the statute, refer to terms of express advocacy. We therefore recommend either (1) reenacting the language

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[11] McConnell v. FEC, Civ. No. 02-252 (D.D.C.).

[12] *See supra,* n. 10 and corresponding text; *see also,* 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).

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

of the statute, or (2) clarifying that under this section, electioneering communication shall be construed as including, but not limited to, words of express advocacy.

- **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 Commission seeks comment on whether proposed 11 CFR 100.29(b)(2) should exempt internet transmissions or web casts from the definition of "broadcast, cable, or satellite communication." The plain language of BCRA, the canon 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."

First, the language of BCRA on this point is clear. Because under Buckley the regulation of political speech is permissible only to address corruption or the appearance of corruption, and because internet transmissions may be achieved for lower cost and without the scarcity concerns that fuel traditional bandwidth regulation, placing additional restrictions upon speech over the internet raises serious constitutional concerns. The Commission should therefore exempt internet communications because BCRA's plain text permits the exemption of internet transmissions, the inclusion of which would raise serious constitutional concerns.

Second, Congress provides a list of types of broadcast communications, but did not include the internet. Even so, Congress is certainly aware of the medium of the internet, for they mentioned it in numerous other places throughout the bill, generally with reference to postings required to be made by the FEC. Given this express listing of broadcasters, and the fact that Congress included the term "internet" elsewhere in the statute, the Commission should adhere to the canon of *expressio unius est exclusio alterius*, a canon of statutory interpretation which holds that the express mention of one thing (in this case the express terms for broadcast) requires the exclusion of another (in this case, the internet).

Finally, providing an exemption for the internet would be consistent with the Commission's soft money regulations, and therefore would contribute a more consistent body of regulations.

- **The Commission Should Recognize a Safe Harbor in 11 CFR 100.29(b)(5) for Those Who Advertise Pursuant to "Potential Recipient" Information Obtained from the FCC Web Site.**

The Commission seeks comment on whether information obtained from the FCC concerning the number of potential recipients of a message should be treated as definitive evidence that the communication is or is not capable of reaching 50,000 persons. For the sake of clarity, and to avoid accidental violations, the FEC should establish a safe harbor for those who advertise pursuant to information obtained from the FCC stating that a station on which they seek to advertise reaches no more than 50,000 persons.

- **Communications Included Within "Electioneering Communications" Should be Limited to Broadcast, Cable, and Satellite.**

The Commission seeks comment regarding the exclusion of other forms of communication, including print and internet, from the definition of "electioneering communications." For the reasons mentioned in relation to 100.29(b)(2) above, restrictions on "electioneering communications" should be limited to the express modes of communication enumerated in the statute, namely broadcast (television and radio), cable, and satellite communications. All other forms of speech should be exempt.

- **Expenditures and Independent Expenditures Are Not Electioneering Communications and Therefore Should Not be Subjected to the Additional Reporting Requirements.**

The Commission seeks comment on alternative proposals for the treatment of expenditures and independent expenditures. On this point, BCRA is clear: 2 U.S.C. 434(f)(3)(B)(ii) states that "electioneering communication" does not include expenditures or independent expenditures. Therefore, the Commission should enact alternative 2-A, which tracks this plain language exception.

- **Exceptions Consistent with the Statute Should be Made that Favor Speech; However It is Not Clear Which, If Any, of the Proposed Exceptions Would Comply with 2 U.S.C. 431(20)(A)(iii).**

The Commission seeks comment about a number of proposed exceptions, which it proposes to offer under the authority granted by Congress in 2 U.S.C. 434(f)(3)(B)(iv). In order to qualify as an exception under this provision, the ad must not constitute a federal election activity under 2 U.S.C. 431(20)(A)(iii), which includes within its definition of federal election activity ads which promote, support, attack or oppose a clearly identified federal candidate. The exceptions offered by the Commission are worthy of free speech protection, including ads promoting tourism, and lobbying in support of legislation. However, it is nearly impossible to determine as a general matter whether these ads will comply with the vague and subjective criteria of 431(20)(A)(iii). While an advertisement could be used to support or oppose a piece of legislation--say, for example, an advertisement supporting McCain-Feingold--it could also be interpreted as promoting Senator Feingold if aired in Wisconsin within 60 days of an election. It therefore appears impossible for the Commission to issue any exceptions without at the very least defining the vague terms in 431(20)(A)(iii).

Furthermore, the Commission seeks advice about carving out exceptions based upon the use of toll-free numbers or other indicia of "genuine" issue ads as described in The Brennan Center's *Buying Time 2000*. Once again, we believe that issues ads are entitled to First Amendment protection, but object to the ill-defined dichotomy between "genuine" and "sham" issue ads. We believe that *Buying Time* is a subjective study, and therefore we would caution against relying upon its conclusions for the purposes of creating categorical distinctions between "genuine" and "sham" issue ads. The methodology of the study is telling: after analyzing the objective express advocacy criteria, college students were asked "[i]n your opinion, is the

primary purpose of this ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate."[14] This fundamental piece in the data set does little more than beg the question, and casts doubt on the objectivity of the study.

- **Proposed 11 CFR 114.2(b) and 114.10 Are Inconsistent with the Wellstone Amendment, and Therefore Should Not be Enacted.**

The Commission seeks comments on 11 CFR 114.2(b) and 114.10, which exempt qualified non-profit corporations from the "electioneering communications" restrictions, in order to comply with the Supreme Court's decision in FEC v. Massachusetts Citizens of Life, Inc., 479 U.S. 238 (1986) ("MCFL"). The Wellstone Amendment plainly sweeps within the ambit of "electioneering communications" 501(c)(4) and 527(e) organizations which run such ads, and therefore the exception for qualified nonprofit corporations contradicts the statute and cannot stand. That said, the Wellstone Amendment is clearly unconstitutional under the standard established in MCFL.[15] Even so, the Commission may not re-write the statute, even where, as here, there is clear constitutional error. Accordingly, as discussed above, we would encourage the Commission to uphold its duty to interpret the Constitution by following a policy of non-enforcement with regard to qualified non-profits.

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

Respectfully Submitted,

Robert D. Alt
Adjunct Fellow
The Claremont Institute

[14] *Buying Time 2000*, 19.

[15] *See, e.g., supra* at n.10 and accompanying text.