WILLIAM J. OLSON, P.C.
ATTORNEYS AT LAW
8180 GREENSBORO DRIVE, SUITE 1070
McLEAN, VIRGINIA 22102-3860
TELEPHONE (703) 356-5070
FAX (703) 356-5085
E-MAIL: wjo@mindspring.com
http://www.lawandfreedom.com

WILLIAM J. OLSON
(D.C., VA)
JOHN S. MILES
(D.C., MD., VA., OF COUNSEL)
HERBERT W. TITUS
(VA., OF COUNSEL)

600 PENNSYLVANIA AVE., S.E.
SUITE 410
WASHINGTON, D.C. 20003-4303
TELEPHONE (202) 488-5493

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By e-mail to Electioneering@fec.gov,
by fax to (202) 219-3923, and by mail

Mai T. Dinh, Esquire
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Comments in Response to Notice of Proposed Rulemaking on Electioneering Communications

Dear Ms. Dinh:

In response to the Notice of Proposed Rulemaking on Electioneering Communications (Notice 2002-13) published by the Federal Election Commission in the *Federal Register* on August 7, 2002 (Vol. 67, No. 152, pp. 51131-47), I hereby submit the following comments.

1. Proposed New 11 CFR 100.29(c) Regarding Communications Not Included in the Definition of "Electioneering Communication"

The proposed new 11 CFR 100.29(a) defines "electioneering communication" and the proposed new 11 CFR 100.29(c) lists examples of communications that would not fit within the definition of an "electioneering communication." The proposed new 11 CFR 100.29(c)(1) states:

> (c) *Electioneering communication* does not include any communication that: (1) is publicly distributed through a means of communication other than a broadcast, cable, or satellite television or radio station. For example, electioneering communication does not include communications appearing in print media, including a newspaper or magazine, handbill, brochure, yard sign, billboard, and other written materials, including mailings; communications over the Internet, including electronic mail; or telephone communications;.... (Notice 2002-13, Proposed new 11 CFR 100.29(c)(1).)

Comments:

The list of examples of communications that are not included in "electioneering communication" in 11 CFR 100.29(c)(1) should specify that (i) web sites on the Internet and (ii) facsimile transmissions are expressly excluded from the definition of "electioneering communication." Suggested additions to the text of 11 CFR 100.29(c)(1) are as follows:

> For example, electioneering communication does not include communications appearing in print media, including a newspaper or magazine, handbill, brochure, yard sign, billboard, and other written materials, including mailings; communications over the Internet, including electronic mail **and web sites**; or telephone communications, **including facsimile transmissions**;.... [Suggested additions in bold.]

2. Obligation of FEC Commissioners to Support and Defend the Constitution of the United States

When signing the Bipartisan Campaign Reform Act of 2002 ("BCRA") into law, in a March 27, 2002, statement, President George W. Bush said, "[h]owever, the bill does have flaws. Certain provisions present serious constitutional concerns.... I expect that the courts will resolve these legitimate legal questions as appropriate under the law."[1] The concerns that he expressed specifically included the section on "electioneering communications" before the Commission in this rulemaking. Although he apparently believed that portions of BCRA were unconstitutional, President Bush signed the entire BCRA into law.

Many believe that many provisions of the BCRA, including the provisions regarding "electioneering communications," violate the Constitution of the United States. The 11 pending lawsuits in the United States District Court for the District of Columbia challenge the constitutionality of that law, and in due time the three-judge district court panel, and thereafter the U.S. Supreme Court, will hear and decide that challenge.

Particularly since this rulemaking will occur before the decisions by the courts, it is necessary that each Commissioner, as a Presidentially-appointed, Senatorially-confirmed officer of the United States, exercise his duty to the U.S. Constitution, and not just routinely implement this law through regulations. Rather, each of the Commissioners, as an officer sworn to defend the Constitution, must decide, independent of speculation about what the courts might do, to issue only constitutional regulations. After all, each Commissioner has sworn an oath to defend the Constitution as he understands the Constitution to be.[2] As

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[1] "Statement on Signing the Bipartisan Campaign Reform Act of 2002," Weekly Compilation of Presidential Documents, week ending March 29, 2002, p. 518.

[2] The complete oath is as follows: "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental

President Andrew Jackson put it in his 1832 message supporting his veto of a bill modifying and continuing the Bank of the United States:

> [T]he opinion of the Supreme Court ... ought not control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, **not** as it is understood by others. [Andrew Jackson, Veto Message, July 10, 1832, 2 *Messages and Papers of the Presidents* 576-89 (Richardson ed. 1897) (emphasis added).]

We submit, then, that to be true to one's oath of office, one cannot simply rely upon debatable court precedent, such as Buckley v. Valeo, 424 U.S. 1, 46 L.Ed. 2d 659 (1976), which three of the nine justices now sitting on the Supreme Court have stated should be overruled.[3] But even assuming that Buckley v. Valeo would continue to stand, it is not necessarily controlling on the issues now confronting the commissioners. Again, as President Jackson wrote in his 1832 veto message:

> Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered well settled.

If a Commissioner feels duty-bound to issue regulations that he believes, as President Bush apparently believed with respect to the BCRA, would be unconstitutional, we submit that, at a minimum, like President Bush, he should state his reasons that the law is, or may be, unconstitutional. In that way, his vote could not be construed by anyone, including the courts, as an endorsement of the constitutionality of the law.

Sincerely yours,

William J. Olson

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reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." 5 U.S.C. §3331.

[3] On June 25, 2001, Justice Clarence Thomas, in an opinion joined by Justices Antonin Scalia and Anthony Kennedy, stated "that *Buckley v. Valeo* ... should be overruled." FEC v. Colorado Republican Comm., 533 U.S. 431, 465, 150 L.Ed. 2d 461, 488 (2001). Further, only one of the Justices on the Court at the time of the Buckley decision, Chief Justice Rehnquist, is still on the Court, and he dissented, in important part, in Buckley.