"Svoboda, Brian-WDC" <BSvoboda@perkinscoie.com> on 04/09/2004 11:26:31 AM

To: "'politicalcommitteestatus@fec.gov'" <politicalcommitteestatus@fec.gov>
cc: "'davies@dlcc.org'" <davies@dlcc.org>

Subject: Political Committee Status

Dear Ms. Dinh,

I am counsel to the Democratic Legislative Campaign Committee. Attached please find comments on the above-referenced rulemaking submitted by Democratic state legislators and by Michael Davies, the executive director of the DLCC.

Please contact me at the address or e-mail address below if you have questions or concerns.

Very truly yours,

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April 9, 2004

**VIA ELECTRONIC MAIL**

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Dear Ms. Dinh:

As state legislators, legislative candidates, and members of state legislative caucuses and committees from across the nation, we write to comment on the rules recently proposed by the Federal Election Commission on the subject of political committee status.

While offering no facts to suggest why such a change is necessary, the Commission signaled openness to wholly regulating the financing of campaigns for state legislative office. It asked:

- "Is it consistent with Congressional intent for the Commission to categorize voter registration, voter identification, get-out-the-vote and generic campaign activities by a State or local candidate committee as 'for the purpose of influencing any election to Federal office?'" *Notice of Proposed Rulemaking,* 69 Fed. Reg. 11,736, 11,738 (Mar. 11, 2004).

- "Should the Commission treat funds raised by a State or local candidate committee through solicitations advocating their own election, as well as incidentally expressly advocating the election or defeat of a clearly identified candidate . . . as funds contributed 'for the purpose of influencing any election for Federal office?'" *Id.* at 11,739.

It is remarkable that the Commission would ask such questions at all. Congress has repeatedly – and even very recently – respected the rights of state candidates and the committees that exclusively support them to conduct their campaigns under state law prohibitions and restrictions:

- In 2000, when Congress first required disclosure by entities organizing under § 527 of the Internal Revenue Code, it exempted state and local candidate committees from the bulk of those requirements. Act of July 1,

2000, Pub. L. No. 106-230, § 2(a), 114 Stat. 477 (codified as amended at 26 U.S.C. § 527(j)(5)(B) (2004)).

- In 2002, when amending the 527 disclosure requirements, Congress loosened the strictures on state and local organizations. It exempted state and local political committees from reporting requirements, and exempted state and local candidates from initial notification requirements. Act of Nov. 2, 2002, Pub. L. No. 107-276 §§ 1(a), 2(a), 116 Stat. 1929, 1929 (codified at 26 U.S.C. § 527(i)(5)(C), (j)(5)(C)).

- When it passed the Bipartisan Campaign Reform Act of 2002, Congress preserved the prerogative of state and local candidates to conduct their campaigns subject to state law. For example, it created exemptions from the definition of "Federal election activity" specifically for state and local candidates. *See* Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, § 101(b), 116 Stat. 81, 86 (codified at 2 U.S.C. § 431(20)(B)).

When the Commission wrote rules to implement the "soft money" ban at BCRA's heart, it professed fidelity to this congressional design, and said that it did not want to "federalize" the conduct of state and local elections. For example, when it limited the definition of Federal election activity to exclude voter identification conducted by associations of state candidates and referring solely to state candidates, the Commission wrote:

> The Commission included this exclusion because ***it finds it implausible that Congress intended to federalize State and local election activity to such an extent without any mention of the issue during the floor debate for BCRA.*** BCRA makes voter identification a subset of Federal election activity, and the regulatory implications of engaging in Federal election activity are significant. ***For the Commission to exercise its discretion so as to sweep within Federal regulation candidates for city council, or the local school board, who join together to identify potential voters for their own candidacies, the Commission would require more explicit instruction from Congress.***

*Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 Fed. Reg. 49,064, 49070 (2002). *See also id.* at 49,067 ("if GOTV is defined too broadly, the effect of the regulations would be to federalize a vast percentage of ordinary campaign activity").

What the Commission could not do then, it nonetheless proposes to do today, even having heard nothing further from Congress. This is not the "reasoned policy making" in which agencies are supposed to engage, but rather the sign "of an agency

that is rudderless and adrift." *Bush-Quayle '92 Primary Committee, Inc., v. Federal Election Commission,* 104 F.3d 448, 454 (D.C. Cir. 1997). It calls the validity of this entire rulemaking into question.

The Commission cannot address this problem simply by carving out an exemption for state and local candidates. A hastily crafted exemption is likely to be both over- and underinclusive, and would cause further administrative hurdles for small and poorly-funded state and local candidate committees. The only appropriate course is to defer this rulemaking until the Commission has considered thoughtfully the intent of Congress, and the boundaries under which it may act.

Sincerely,

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