Deborah Goldberg <deborah.goldberg@nyu.edu> on 04/08/2004 05:42:21 PM

To: politicalcommitteestatus@fec.gov
cc:

Subject: Comments on NPRM 2004-6

Attached are the comments of the Brennan Center for Justice on Notice of Proposed Rulemaking 2004-6 (Political Committee Status). The full name, electronic e-mail address, and postal service address of the commenter are provided at the end of the comments and are set forth immediately below:

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In addition, any correspondence may be directed to me at the contact information set forth in the electronic signature following this message.

Thank you for your assistance.

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BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW

April 8, 2004

VIA ELECTRONIC MAIL
Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Proposed Rules on Political Committee Status, Notice 2004-6

Dear Ms. Dinh:

The Brennan Center for Justice at NYU School of Law (the "Brennan Center") respectfully submits the following comments in connection with Notice of Proposed Rulemaking, No. 2004-6 regarding Political Committee Status.

Introduction

The Brennan Center unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. Our mission is to develop and implement an innovative, nonpartisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms. The Brennan Center pursues its mission through three programs: Democracy, Poverty, and Criminal Justice. From the beginning, the Democracy Program has concentrated on reform of the campaign financing system as a crucial element of meaningful self-government.

The Brennan Center played a major role in the drafting and enactment of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). We also participated as co-counsel in *McConnell v. FEC,* representing BCRA's congressional sponsors in their defense of the law. Even before the passage of BCRA and the Supreme Court's decision upholding it, we were actively involved in promoting meaningful interpretation and vigorous enforcement of the Federal Election Campaign Act, through representation of parties or *amici* in campaign finance lawsuits and through participation in Federal Election Commission ("FEC" or the "Commission") rulemakings. We now present the following comments in connection with the Commission's first plenary opportunity to consider its regulatory role since the Supreme Court's *McConnell* decision.

The Scope of the Brennan Center's Comments

The 106-page Notice of Proposed Rulemaking issued by the FEC in this proceeding is a catalogue of vexing questions concerning campaign finance regulation, with multiple choice answers to most of the questions. Unfortunately, its very complexity calls into question the effectiveness of this process. With respect, no administrative body could do justice to the multiplicity of issues raised in the Notice. Moreover, despite its comprehensiveness, the Notice fails to raise the single most important issue posed by the current Presidential campaign – the need for effective rules barring coordination between so-called 527 organizations and the Presidential campaigns. Although the issue of effective rules governing coordination is not explicitly raised in the Notice, it is necessarily implicated in the Commission's request for comment on proposed regulations treating 527s as political committees. Accordingly, this comment will address the relationship between effective rules governing coordination and the constitutional status of 527s, especially efforts to place ceilings on individual contributions to 527s.

Unfortunately, the form of the Notice, which couches the issues in the technical language of two complex statutes that were enacted some 30 years apart, is hardly calculated to illuminate the basic policy and constitutional issues that the Commission must confront. Adoption or extension of a particular statutory definition or characterization can have far-reaching, often unanticipated, implications. Before the Commission is in a position to make technical judgments about construing statutory phrases and administrative fine-tuning, attention must be directed to the precise policy and constitutional judgments involved. George Santayana was right to warn against redoubling our efforts when we lose sight of our goals.

Accordingly, rather than couch our comments in the technical language of the existing statutes, where the complexity of the interlocking statutory provisions may obscure the underlying policy choices, this comment discusses the legal status of any effort by the Commission to subject political organizations defined under section 527 of the Internal Revenue Code ("527s") to three types of regulations: (1) public disclosure requirements; (2) restrictions on funding from the treasuries of corporations or labor unions; and (3) limits on the size of contributions from wealthy individuals. In so doing, the Brennan Center emphasizes the distinction between certain 527s that engage primarily in federal electioneering, and the large number of non-profit entities organized under section 501(c) of the Internal Revenue Code ("501(c)s"), which have historically participated in the larger civic culture and must be permitted to speak out vigorously on issues of particular interest to them, even during the campaign season. Under existing law, the Brennan Center believes that the Commission cannot use this rulemaking to impose any additional regulatory burdens on 501(c)s.

Given the important role in the Presidential campaign currently being played by 527s, the Brennan Center believes the Commission should adopt effective rules to prevent 527s from evolving into loopholes that threaten Congress's decision to ban soft money from federal election campaigns. Unfortunately, under existing Supreme Court precedent, closing the loophole is not a simple matter. In light of the constitutional and policy issues raised by the campaign-related activities of 527s, the Brennan Center recommends the Commission take the following specific actions:

(A) 527s engaged primarily in efforts to affect the outcome of federal elections should be registered as political committees for the purposes of immediate and effective disclosure of all contributions to a 527.

(B) 527s engaged primarily in efforts to affect the outcome of federal elections should be registered as political committees for the purposes of enforcing a ban on contributions from corporations or labor unions.

(C) 527s engaged primarily in efforts to affect the outcome of federal elections should be registered as political committees for the purposes of imposing a ceiling on the amount that a single individual may contribute, unless the 527 at issue: (1) cannot be used as a conduit for contributions to federal candidates; and (2) operates with genuine independence. If a 527 satisfies both tests, the Brennan Center believes that, under existing law, individual contributions to such a genuinely independent 527 are entitled to a First Amendment safe harbor, and may not be limited in amount. Such a constitutional safe harbor should not, however, affect disclosure or the ban on corporate or labor union contributions. Moreover, such a constitutional safe harbor is forfeited if a 527 is empowered to make contributions or coordinates its activities with a candidate, campaign or political party.

(D) The Commission should view this rulemaking proceeding as authorizing the adoption of prophylactic anti-coordination regulations designed to assure genuine independence of 527s.

(E) The Commission should revise its allocation rules for non-connected committees, and provide for a minimum federal percentage in the allocation formula.

(F) Under existing law and on this record, the Commission should take no action with respect to 501(c)s.

In the Brennan Center's view, those 527s which are organized and operated primarily to affect the outcome of federal elections should be regulated to assure prompt and full disclosure of all contributions and expenditures, and to prevent the circumvention of other regulatory limits, including bans on the use of corporate or labor union treasury funds to influence federal elections. There is, however, a serious question under existing law concerning the constitutionality of any effort to place a ceiling on individual contributions to a 527 that: (1) does not make, and is not authorized to make, contributions to candidates or political parties; and (2) operates in a genuinely independent manner, without coordinating or otherwise cooperating with a candidate, campaign, or political party.[1] The Brennan Center believes that genuinely independent 527s that cannot serve as conduits for contributions to candidates, campaigns, or parties are almost certainly entitled under current Supreme Court First Amendment precedent to

[1] The views on constitutional law presented in this testimony reflect the Brennan Center's understanding of current law, including fair extrapolations from Supreme Court precedent. Since a rulemaking must unfold under existing law, these comments do not necessarily reflect the Brennan Center's policy preferences, which call for reconsideration of the Supreme Court's refusal in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), to permit equality-based regulation of massive campaign spending by the wealthy, and for public funding of all campaigns.

a constitutional "safe harbor" exempting individual contributions from government-imposed ceilings.

Since the existence of such a constitutional safe harbor turns on the genuine independence of a 527, the Commission's current flawed coordination rules must be strengthened to prevent the emergence of yet another soft money loophole. Whether the recognition of such a constitutional safe harbor risks the development of yet another soft money loophole is a serious question, which is made even more serious by the Commission's current efforts to defend its inadequate rules defining coordination with a candidate or campaign. Instead of wasting resources defending coordination regulations that are plainly inconsistent with congressional intent and the Supreme Court's decision in *McConnell*, the Commission should revise those rules now to ensure the genuine independence of purportedly independent individuals and groups, including 527s.

The Regulatory Challenge Before the Commission

Democracy is an expensive institution. In order to assure fair and informed elections, adequate resources must be made available to election officials, candidates, political parties, and interested third-persons who wish to participate in the electoral debate. But the question of how to provide those resources – and to whom – poses serious challenges to democracy.

If government provides the resources, First Amendment issues arise (under the common interpretation of *Buckley*) with respect to candidates who prefer to run campaigns with unlimited private financing. If subsidies are inadequate to entice candidates to participate in public funding programs, the candidates may decline public funds and deprive the public of the program's benefits. The refusal of both current major Presidential candidates to accept public funds for the Presidential primaries illustrates the problem.

If the resources are provided from private sources, unequal political power linked to wealth threatens the idea of political equality that is at the heart of democracy. Moreover, once candidates and political parties become dependent on private sources of funding, inevitable issues of corruption arise, ranging from crude *quid pro quo* arrangements to more sophisticated financial relationships based on gratitude and the expectation of future support. Even when no actual corruption can be proven, the persistence of financial links between candidates and wealthy supporters gives rise to an inevitable suspicion that financial influence plays a disproportionate role in shaping public policy, resulting in mounting cynicism and a loss of faith in democracy.

While concerns about political equality and the integrity of government cry out for regulation aimed at reinforcing the democratic process, elections are part of a larger civic culture that is constantly shaping and re-shaping the society. Any effort to regulate the electoral process must take great care to avoid undue interference with the larger civic culture, which, under the First Amendment, is entitled to flourish free from government regulation.

As a matter of policy and constitutional law, the Brennan Center believes that the Commission may – and should – regulate the funding of electoral speech by entities, such as

527s, that are primarily concerned with affecting federal electoral outcomes to assure: (1) full public disclosure of the sources of funding; (2) respect for rules prohibiting corporations and labor unions from spending treasury funds to affect the outcome of federal elections; and (3) compliance with ceilings on the amounts that a wealthy donor may contribute to a federal candidate, campaign or political party. The Commission may not, however, regulate the funding of speech in the larger civic culture by organizations like 501(c)s merely because the speech comments on issues of electoral significance.

The line between federal electoral speech and so-called issue advocacy in the larger civic culture is, of course, difficult to draw. As the *McConnell* decision makes clear, Congress and the Commission in seeking to draw the line are not confined to purely formal criteria that invite evasion. Whatever the verbal line, however, the Commission should not – indeed, under the First Amendment, the Commission may not – seek to regulate the funding of speech in the larger civic culture in the absence of a factual record demonstrating a significant danger to the Commission's ability to regulate the funding of electoral speech. Accordingly, while the Brennan Center urges the Commission to impose effective regulations, within constitutional limits, on 527s, the Commission has no basis on the existing record for imposing bureaucratic restrictions on speech by 501(c)s, especially since 501(c)(4)s (the 501(c) organizations most likely to approach the border of electoral speech) are already subject to the regulations on electioneering speech occurring within 60 days of a federal election.

The FEC's Role and Responsibility

As an administrative agency called upon to implement at least two complex Congressional statutes, both of which raise potentially serious First Amendment issues, the Commission must make difficult judgments concerning Congress's intent. Moreover, the Commission must make a range of difficult decisions about how best to implement Congress's wishes in the context of the FEC's own constitutional and statutory limitations. Making those difficult decisions in the midst of a Presidential election campaign heightens the complexity of the FEC's task. The Brennan Center urges three principles to guide the FEC in this process.

First, concern for short-term partisan advantage is lethal to any principled effort to develop campaign rules that will strengthen American democracy. It is impossible to ignore the effect of Commission decisions on the Presidential campaign. But, if enforcement of campaign finance law is to have meaning, it cannot be linked to transitory partisan effects on a given election. The history of this country is enriched by examples of individuals who rose above partisan advantage to act for the common good. Reasonable people will, no doubt, disagree over how best to regulate 527s. The Brennan Center urges each Commissioner to act for the common good and not to be moved by considerations of short-term political advantage.

Second, the Commission's regulatory power derives in large part from its expertise. But expertise is not an abstract idea. It rests upon a factual predicate. One disturbing aspect of FEC rulemaking proceedings is the failure to establish a fact-finding or investigative procedure that will enable the Commission to regulate on the basis of a carefully assembled factual record. If the Supreme Court's recent decision in *McConnell* means anything, it is that the Court is prepared to defer to Congress – and presumably to the FEC – when the regulatory action is

supported by a careful factual record. But, as the debacle in and after *Buckley* makes clear, when campaign finance regulation is not based on a careful factual record, the Supreme Court will not treat it seriously. Accordingly, the Brennan Center urges the Commission to establish serious procedures for the development of factual records upon which thoughtful regulation can be based.

Third, the Commission's final actions must reflect, not only judgments about how best to implement the will of Congress, but how best to navigate the path set by the First Amendment. In crafting regulations, it is not only within the Commission's power – but it is part of the Commission's duty – to promulgate nuanced regulations that permit Congress's will to coexist as closely as possible with the commands of the First Amendment. It is not enough to wait for the Courts to provide guidance. Not only does judicial review take time; it is less suited to making the fine distinctions that permit a statute to function effectively without violating the First Amendment. In short, part of the FEC's role is the recognition and implementation of First Amendment "safe harbors," allowing protected activity to flourish, while the Commission vigorously enforces the remainder of the statute. The power to craft constitutional safe harbors rests within the inherent power of the Commission and may be exercised in the context of any rulemaking proceeding. Of course, the recognition of such a constitutional safe harbor must rest upon a careful reading of existing law and an assessment of the factual basis for potential regulation affecting the contours of the safe harbor.[2]

The Governing Constitutional Law

Pronouncing on the constitutionality of efforts at campaign finance reform has become a cottage industry, fueled, in part, by ideology and partisan advantage. Opponents of campaign finance reform have consistently overstated First Amendment obstacles to reform, arguing that Congress lacks power to interfere with fundraising and spending in elections, except for crude *quid pro quo* arrangements that border on bribery and extortion. Conversely, some have understated the limits imposed by the First Amendment, especially on efforts to regulate the funding of speech in the larger civic culture that may effect an election.

While the Supreme Court has provided important guidance, many unanswered questions remain. Since any Commission regulation concerning 527s must satisfy First Amendment standards, the discussion should begin with an analysis of First Amendment constraints, if any, on the Commission's range of action in three crucial regulatory contexts: disclosure, source restrictions, and contribution limits.

[2] For example, any constitutional safe harbor that precludes the Commission from limiting the size of individual contributions to genuinely independent 527s rests on an extrapolation from the Supreme Court's current views and the lack of a factual record indicating a need to modify or eliminate the First Amendment safe harbor. If either variable were to change, the safe harbor would be subject to modification or elimination.

The First Amendment and Disclosure

The Supreme Court has upheld wide-ranging disclosure regulations in connection with campaign contributions and expenditures.[3] Broad campaign spending disclosure rules are justified both to prevent corruption, and to allow voters to know who is supporting the various candidates. As long as funds are being used intentionally to affect the outcome of a federal election, the First Amendment does not prevent Congress or the FEC from assuring that voters know the identities of contributors. Moreover, there is no constitutional obstacle to regulations assuring that disclosure is timely and broadly available to the public.

The Supreme Court has, however, recognized one important First Amendment safe harbor limiting disclosure of contributions to particularly controversial organizations.[4] If a donee is sufficiently controversial, the First Amendment requires that persons be free to support the donee anonymously, even in the context of an election campaign.

In contrast to candidate and initiative campaign speech, the Supreme Court has carefully protected a general right to anonymity in connection with speech in the larger civic culture.[5] Speech that is not intended to affect the outcome of an election cannot be subjected to disclosure rules.

The First Amendment and Source Restrictions

The First Amendment allows Congress to prohibit corporations and labor unions from using treasury funds to make contributions or expenditures in federal elections, although corporations and unions must be permitted to organize PACs through which affiliated individuals may pool their own funds to influence campaigns. No serious constitutional issue exists that would inhibit the Commission from banning contributions from corporate or labor treasuries to 527s that are primarily engaged in federal electioneering, although corporate and union PACs will remain eligible to contribute to 527s.

The Supreme Court has recognized a First Amendment safe harbor for a narrow category of non-profit corporations that receive no support from corporations or labor unions and operate as grassroots advocacy organizations. Such so-called *MCFL* corporations are generally exempt from restrictions on campaign-related spending.

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[3] *Buckley*, 424 U.S. at 60-68

[4] *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 93-94 (1982).

[5] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-65 (1958) (upholding NAACP's right to refuse to disclose the identities of rank-and-file members).

The First Amendment and Contribution Limits

The Supreme Court's treatment of ceilings on campaign contributions and spending is complex. The Supreme Court has upheld limits on the size of campaign contributions in order to prevent corruption. Ceilings may be placed on the size of contributions by wealthy individuals to candidates, campaigns, political parties, groups that may act as conduits for contributions to a candidate, or groups acting in coordination with a candidate.[6] In each setting, the Court has identified a financial link between a contributor and a candidate, and has recognized that the need to prevent corruption justifies a reasonable ceiling on the size of the financial link. While the Court has not provided a precise definition of corruption, it plainly encompasses considerably more than *quid pro quo* financial arrangements. The Court appears to view any financial link between a contributor and a candidate that is likely to result in undue favoritism to the contributor as a corruption risk, justifying ceilings on the size of the financial link.

But the Supreme Court has not yet viewed campaign spending that does not involve a financial link between a contributor and a candidate as subject to an anti-corruption ceiling. In contrast to its willingness to uphold ceilings on contributions to the candidate, the Supreme Court has upheld the right of wealthy individuals to expend unlimited amounts of their own money independently in support of a candidate, as long as no link exists between the donor and the candidate that could be the vehicle for corruption.[7] Thus far, the Court has rejected the argument that mere gratitude for a wealthy person's massive independent campaign expenditures risks corruption of the democratic process.

The Court has also rejected an equality rationale for spending limits. The Brennan Center believes that restoration of political equality should be the core of the campaign finance debate. In our view, the Supreme Court should reconsider its refusal to permit equality-based electoral spending ceilings, but under existing constitutional ground-rules, public financing of our elections appears to be the most promising way to restore political equality to our system.

Accordingly, although it has not yet explicitly ruled on the issue, the Supreme Court's precedents suggest that a First Amendment safe harbor exists precluding Congress or the Commission from placing ceilings on contributions from wealthy individuals to genuinely independent entities when the donee-entity: (1) may not make contributions to a candidate; and (2) operates independently from a candidate or a campaign.[8] In such a setting, assuming genuine independence, the financial link between a donor and a candidate that the Court has viewed as the *sine quo non* of regulation does not appear to exist. A donor to a genuinely independent entity is seen as more analogous to a wealthy individual spending his own money independently, than as a contributor to a political campaign.

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[6] *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431 (2001); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182 (1981); *Buckley*, 424 U.S. at 23-38.

[7] *Buckley*, 424 U.S. at 45-51.

[8] *Cal. Med. Ass'n*, 453 U.S. at 203 (Blackmun, J., concurring in the judgment).

It is, therefore, highly doubtful that the Commission has power to seek to place ceilings on personal contributions to genuinely independent 527s, however desirable such ceilings might be from the standpoint of political equality. Indeed, if, under existing First Amendment law, a wealthy individual is constitutionally entitled to spend unlimited sums in support of a candidate independently, it is difficult to understand why two or more somewhat less wealthy individuals can be prohibited from pooling their assets to engage in the identical independent activity. Such a constitutional safe harbor is not available to corporations or labor unions, since the Court has upheld bans on the use of corporate or labor treasury funds in federal elections, even when the funds are expended independently.

Recognition of such a constitutional safe harbor for unlimited personal contributions to genuinely independent 527s rests on the Supreme Court's continued rejection of equality as a justification for limiting campaign spending, and the Court's continued refusal to recognize that massive independent campaign spending risks undue influence for the independent supporters, even when no direct financial link to the candidate exists. While the Brennan Center would welcome both changes in Supreme Court doctrine, fidelity to the Court's precedents precludes the Commission from seeking to regulate in the area unless and until the Supreme Court lifts the First Amendment barrier. While dictum in a footnote in *McConnell* suggests that the Court may be prepared to re-think its requirement of a financial link, the Brennan Center does not believe that a fair reading of the Court's precedents provides authority to the Commission to impose ceilings on contributions to genuinely independent 527s in the absence of a financial link between the donor and a candidate.

Under existing First Amendment doctrine, the Brennan Center believes that the key to the so-called *Cal-Med* First Amendment safe harbor is the genuine independence of the donee-entity. If a donee-entity is really an extension of the campaign, a contribution to the donee-entity is a contribution to the campaign, creating precisely the corruption-risking financial link that would justify placing a ceiling on the contribution. Instead of contributing soft money directly to the candidate or the candidate's political party, a wealthy donor would contribute the identical soft money to an ostensibly independent entity, which would function covertly as an extension of the campaign. Many fear that precisely such a loophole is evolving under the Commission's nose because the Commission has refused to adopt meaningful coordination rules.

Thus, under existing law, 527s, if they operate as genuinely independent entities without improper contact or coordination, would appear to qualify for a *Cal-Med* safe harbor, allowing wealthy individuals to contribute unlimited funds to the entity free from existing hard money ceilings. While such a result heightens political inequality by allowing wealthy individuals to exercise political influence over Presidential campaigns far beyond the political influence exercised by an average voter, and while the temptation to use 527s masquerading as independent entities as a loophole to avoid limits on the size of campaign contributions is enormous, under current Supreme Court doctrine, it does not appear that the Commission may, on this record, limit the size of contributions by wealthy individuals to genuinely independent 527s.

Given the tendency of loopholes to emerge in the campaign finance system, and the sophistication of political professionals who can be counted upon to exploit every loophole, the

Brennan Center believes that the key to effective regulatory action is vigorous and effective efforts by the Commission to prevent improper coordination between ostensibly independent 527s and the candidates whom they support. Frankly, nothing in the Commission's past treatment of the coordination area provides a basis for believing the effective regulatory action will be forthcoming. The Commission has twice sought to develop anti-coordination rules, and each time, the Commission's rules permitted political insiders to circumvent the regulatory system. The Brennan Center urges the Commission, in the context of this rulemaking, to impose effective anti-coordination rules on 527s.

The Commission should also revise and strengthen the allocation rules dealing with those 527s that operate in the state and local political arena, as well as seeking to affect the outcome of federal elections. The Commission should provide for a minimum federal percentage in the allocation formula. Where a 527 operates solely in the state or local political arena, the Commission lacks authority to seek to regulate its funding. However, when a 527 operates in a mixed political environment that includes federal, state and local politics, the Brennan Center urges the Commission to recognize that actions on behalf of state and local candidates should be treated as subject to Commission funding regulations if the activities are also likely to confer a material benefit on a federal candidate.

Finally, under existing First Amendment law, the Brennan Center believes that no limits may be placed by the Commission on the size, source or disclosure of contributions to 501(c)s. Unlike 527s, 501(c)s may not have, as a principal purpose, the affecting of elections. Rather, 501(c)s are designed to function as major participants in the broader civic conversation that transcends any election and is beyond the power of government to regulate. On this record and under existing law, no basis exists for a Commission foray into the larger civic conversation conducted by 501(c)s about issues of particular importance to them, especially since 501(c)(4)s, are already subject to restrictions on electioneering speech within 60 days of a federal election.

Respectfully submitted,

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