FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Public Hearing on Political Committee Status NPRM
Vice Chair Ellen L. Weintraub
Opening Statement
April 14, 2004

Recently, I had the opportunity to participate in a conference addressing global political corruption. Thirty-four countries were represented, many of them emerging democracies struggling to establish democratic institutions. Corruption has a bolder, uglier face in some of these places than that we see in this country. One gentleman spoke of the many times he had been jailed for speaking out when his government did not want to hear. A woman told of the assassination of her husband, a journalist, who had dared to write critically about his government's policies. She and her children had to be spirited out of the country to save their own lives.

Their stories were a dramatic reminder that the first condition for democracy is ensuring the right of the people to speak truth to the government. Without this right, one cannot have free elections, because potential candidates cannot effectively challenge those in power. Without this right, one cannot require disclosure of political activity, because people will be afraid to be identified as supporters of the opposition.

I am grateful to live in a country where the right to criticize the government without fear of reprisal is guaranteed in the very first amendment to our Constitution. Whenever we contemplate restricting that right, we must tread with extreme care.

The proposals under consideration here today will influence citizens' willingness and ability to support or oppose not only candidates, but also issues and policies. In the midst of an election year, it is easy to forget that not every criticism of the government has an electioneering purpose. I want to thank the commenters who tried to bring that point home to the Commission. I was particularly moved by the example provided by Housing Works, Inc., a non-profit organization that helps homeless New Yorkers living with AIDS and HIV, and people living with HIV/AIDS all over the world. This witness wrote:

> Over the course of the AIDS epidemic, one of the most persistent truths has been that democracy and free speech have saved lives. Advocacy has saved lives. Criticism of elected officials for their inaction on HIV/AIDS has spurred remarkable public and private responses to the epidemic. These responses have literally saved millions of lives all over the world.[1]

[1] Comments of Housing Works, Inc. (dated April 2, 2004) at 1.

It is not just our privilege in a democracy to challenge our government to do the right thing; it is our obligation. I thank everyone who has tried to do that in this proceeding.

This rulemaking was prompted by concerns about the activities of two or three organizations. We are now proposing to regulate thousands. The Commission has received over 150,000 comments. That is 100 times the number of comments this agency has ever received before. Our staff has not had time to analyze all those comments, a project that will take at least another couple of weeks to complete. Yet, driven by the unrealistic schedule the Commission has set for itself, before the staff had read the comments or heard the testimony, they had already begun to draft the final rules. We are putting the cart way before the horse here. In any rational world, we would read the comments first and draft the rules second.

I strongly objected to proceeding with an NPRM so full of complicated, convoluted questions on such a fast track, especially in the middle of an election year. Some have misread my concern as an unwillingness to enforce the law in an election year. Nothing could be further from the truth. I am fully prepared to enforce the law in an election year or any other time. What I am not prepared to do is to change the basic definitions of who gets regulated and who doesn't in the middle of an election year. To those who say we would not be changing the rules, merely affirming the law already on the books, I say, we would not have needed a rulemaking, particularly one requiring 108-pages of alternatives and questions, to affirm the existing law. It has obviously become a lot more complicated than that.

I have always been an advocate for rules that are simple, clearly written, and easy both to understand and administer. The proposed rules do not come close. We must also acknowledge that we are dealing with complicated legal terrain here. In the quest for simplicity, our answers must not become simplistic.

There has been a lot of confusion about whether any of the proposed rules are required by, or supported by, BCRA, or by those who voted for BCRA. Some have argued that the fact that BCRA did not amend the statutory definitions of "political committee" or "expenditure" is dispositive; others say it is irrelevant. The latter group argues that the 1974 law provides authority for the Commission to regulate additional activities by independent groups. There is irony in using a law that was passed in response to the excesses of President Nixon to justify regulations that could stifle criticism of the government year-round. But putting that aside, I question whether any of the proposed rules approach the narrow tailoring of the BCRA provisions that withstood constitutional challenge in *McConnell v. FEC*.

I take very seriously my responsibility to administer the law that Congress wrote, as Congress intended it to be interpreted. Thus, I cannot ignore the view of 128 House Members and 19 Senators that "the proposed rules before the Commission would expand the reach of BCRA's limitations to independent organizations in a manner wholly

unsupported by BCRA or the record of our deliberations on the new law."[2] Moreover, I am reluctant to impede the important voter education and mobilization work discussed in separate comments submitted by the Congressional Black Caucus Political Education & Leadership Institute and 15 Members of the Congressional Hispanic Caucus.

In upholding BCRA, the Supreme Court emphasized the corruption or appearance of corruption that stemmed from the direct involvement of officeholders in raising and spending soft money. That link has been broken, appropriately, by BCRA. The Court said: "To be sure, mere political favoritism or opportunity for influence alone is insufficient to justify regulation. . . . As the record demonstrates, it is the manner in which parties have *sold* access to federal candidates and officeholders that has given rise to the appearance of undue influence."[3] Independent groups cannot sell access to officeholders. You can call a group a "shadow party organization," but that doesn't mean it gets to "select slates of candidates for election[,] . . . determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses,"[4] all factors that the Supreme Court found significant in upholding greater regulation of party organizations than other groups.

I am very pleased with the diversity of experiences and viewpoints that our witnesses will bring to this hearing. You have the opportunity to make a real contribution to our understanding, and while it may not make for scintillating TV drama, I encourage you to wade into the details of specific proposals. Given the wide panoply of options offered in the NPRM, I have attached to this statement a list of questions that are under active consideration in the hope that the witnesses can help the Commission evaluate the pros and cons of these particular ideas. I am not endorsing these proposals, but I think it will help witnesses to know what's on the table.

Finally, I would like to thank all of the commenters for expressing their views to the Commission. You have all made an extraordinary effort to alert the Commission to possible pitfalls of the proposed rules, from both a legal and a practical standpoint. It has unfortunately been impossible to read all of the comments before the hearing, but I did want to note that these were not just form letters. A lot of people took time and care to voice their concerns and offer the benefit of their common sense.

We heard from teachers and students, social workers and mail carriers, not to mention Fat Mike (Burkett) of Punk Voter, "a coalition of punk bands, musicians and record labels, . . . which aims to educate and energize the nation's youth about the political process, and inspire them to become involved in that process to change this society and shape the future of our nation."

Wayne Clark from Durham, Maine asked us to "[p]lease remember what Robert Kennedy said: 'We must not only tolerate dissent, we must encourage it.'"

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[2] Comments of 19 Senators (dated April 7, 2004) at 1. Comments of 128 House Members (dated April 7, 2004) at 1.
[3] *McConnell v. FEC*, 124 S.Ct. 619, 666 (Stevens, J. and O'Connor, J., Opinion for the Court).
[4] *Id.* at 686.

Pamela Cook of Spencer, Indiana wrote of her daughter's work with Rock the Vote to register other high school students. The notion of reclassifying this kind of grassroots voter registration effort as a political committee, Ms. Cook writes, "sounds pretty fishy to me. I am against it." Ms. Cook, I'm with you.

Perhaps one good thing to come out of this whole process is to remind us of the vital role that citizens can play in participating in their own government. So, to all the witnesses and commenters, I say: Thank you. Keep on speaking truth to government. And don't forget to vote.

Questions for Witnesses

1. Can the "major purpose" test be used as a broadening construction for determining when an entity qualifies as a political committee, i.e., can the Commission look first to the purpose of the organization (e.g., to promote, support, attack or oppose candidates) and secondarily, to whether the entity has spent $1,000 for that purpose?
2. Is a definition of expenditure based on the "promote, support, attack or oppose" standard sufficiently tailored if it applies to all 527 organizations but to no other group?
3. Should the major purpose test include groups whose purpose is to promote, support, attack or oppose federal **or** nonfederal candidates?
4. Should the definition of expenditure include a public communication that promotes, supports, attacks or opposes a candidate and that contains one of the following: (1) reference in the communication to a candidate *as a candidate*; (2) reference to the election or to the voting process; (3) reference to the clearly identified candidate's opponent; or (4) reference to the character or fitness for office of the clearly identified candidate? *See* NPRM at 11741.
5. Should all voter drive activity conducted at any time that promotes or opposes a party be defined as an expenditure?
6. What would be the effect of adopting proposed section 100.133(c), which would exclude voter drive activity from the definition of expenditure only if "[i]nformation concerning likely party or candidate preference has not been used to determine which individuals to encourage to register to vote or to vote?"
7. Should the Commission adopt allocation regulations for non-party committees that would require a greater federal percentage (e.g., 50%) than the current allocation regulations for party committees?
8. Should a political committee be required to report "[a]ll contributions, expenditures, independent expenditures and allocable expenditures" it made going back to January 1 of the calendar year before it triggered political committee status? *See* proposed section 102.56.