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NRA

*Office of the Executive Director*
**CHRIS W. COX**

April 7, 2004

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Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Comments of National Rifle Association, Inc. on the Proposed Expansion of Definition of Political Committee

Dear Ms. Dinh:

The National Rifle Association, Inc. (the "NRA") hereby submits comments on the proposed regulations concerning "political committee status," which were published in the Federal Register on March 11, 2004.

The decision of the United States Supreme Court in *McConnell v. FEC*, 124 S. Ct. 219 (2003), struck an unprecedented and tragic blow at the First Amendment to the Constitution. The decision upheld Congress's decision to regulate the quality and quantity of core political speech, thereby leaving it to government to shape the debate that will be heard across our Nation around election time, and elevating prevailing "campaign finance" vogue about the merits of censoring speech over the contrary and clear command of our written Constitution. Forced to choose between government regulation and free speech, the Court in *McConnell* erred grossly on the side of government regulation, upholding it with vast deference and in wide sweeps.

As bad as was the Court's decision in *McConnell*, however, the proposed regulations now proposed by this agency are much worse, for they sink lower than anything that has hitherto been prescribed by Congress or contemplated by the Court. The remainder of these comments will explain why -- even accepting, for present purposes, *McConnell* as a correct and valid statement of the relevant legal principles -- the proposal currently under consideration is indefensible as a matter of constitutional and statutory law.

## I. The Proposed Regulations Are Unconstitutional

The proposed regulations restrict core political speech and other quintessentially political activities. As such, these regulations are antithetical to the text, history, and underlying values of the First Amendment. Even under the Supreme Court's ruling in *McConnell*, it is clear that any such restrictions must satisfy strict scrutiny. Thus, the restrictions must serve a compelling governmental interest, and they must be narrowly tailored to meet this interest. The Commission's proposal does not come close to satisfying either prong of this analysis.

In upholding the restrictions on electioneering communications, the Supreme Court pointed to the substantial record before Congress indicating that nonprofit groups were spending heavily on such activities in the period immediately prior to elections. Based on this evidence, the Court concluded that there was an appearance of corruption relating to these expenditures. Notably, there is no such record relating to "Federal Election Activities"conducted by voluntary membership organizations such as the NRA. Congress simply never considered any such evidence. And there was absolutely no evidence that any such conduct gave rise to an appearance of corruption.

Indeed, the Commission candidly admitted in its briefs in the *McConnell* case that Congress considered television and radio ads to be the only appropriate conduct of nonprofit corporations to be regulated. Specifically, the NRA and other plaintiffs had complained that BCRA was underinclusive. The Commission justified the reach of BCRA's restrictions on electioneering communications on the ground that

> [d]ue to their particularly powerful impact, television and radio advertisements are capable of creating the greatest distortion. . . . Further, television and radio advertisements typically have a broader reach and higher profile than non-broadcast advertisements, and thus they are more likely to be noticed not only by voters, but by candidates who may feel indebted to the groups sponsoring the ads. . . . Finally, television and radio advertisements are typically much more expensive than non-broadcast advertisements and, thus, constitute a particularly valuable form of political currency. . . . Accordingly, Congress chose to make a priority of addressing these ads in particular, as is its prerogative . . . .

Opposition Brief of the Governmental Defendants at 100-101 in McConnell *v. Federal Election Commission*, Civ. No. 02-0582 (D.D.C.). In short, there is no indication that

Congress sought to impose restrictions on the activities of the NRA and other nonprofit voluntary membership organizations funded by individuals for any conduct other than that which was defined as "electioneering communications."

Even if Congress had intended to impose the restrictions contemplated by the proposed regulations, any such action would be fatally overbroad. The Supreme Court has been careful to allow individuals to retain their political freedoms. The only restrictions on core political speech that have been upheld relate to speech by labor unions and corporations. The Court has recognized the sanctity of individual speech whether uttered alone or as part of an association of like-minded citizens. And even with respect to corporations, the Supreme Court has never suggested that membership communications could be regulated. Put simply, there is no legitimate basis for imposing any restrictions on the NRA or any other voluntary membership organization's ability to communicate with its members. Nothing in the Supreme Court's jurisprudence justifies the sweeping restrictions contemplated by the proposed regulations.

At the very least, the foregoing comments raise a substantial question as to the constitutionality of the proposed regulations. For this reason alone, the regulations should not be adopted. *See, e.g., Edward J. De Bartolo Corp. v. Florida Gulf Building & Construction Trades Council*, 485 U.S. 568, 575 (1988); *Hooper v. California*, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.").

## II. The Proposed Regulations Are Inconsistent With Congressional Intent

In the entire history of this Nation, Congress has never placed such onerous burdens on the freedom of individuals to participate in political activities as those contemplated by the proposed regulations. The Commission should not presume to place such shackles on American citizens without an express mandate from Congress.

The current regulatory régime, which has been in place for several decades, provides individuals and membership organizations such as the NRA with far more political freedom than that envisioned by the proposed regulations. It is a well-established principle of statutory construction that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." *Lorillard v. Pons,* 434 U.S. 575, 580-581 (1978) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975)). In the case of the appropriate scope of the definition of "political committees," there is no indication that Congress intended to modify the current regulatory definition. Indeed, neither BCRA's plain language, its structure, nor its legislative history support such a view.

Congress's intent to leave the current regulatory definition of political committee undisturbed is most clearly evident in its decision to leave the key statutory terms unchanged. Specifically, BCRA did not modify the definition of "contribution," "expenditure," or "political committee." Instead, Congress added a new substantive definition of "electioneering communications" that covered entities such as to the NRA. As noted above, this limitation was limited to television and radio and was not intended to have any impact on the other aspects of the NRA's political and nonpolitical activities. The proposed regulations are flatly inconsistent with the approach formulated by Congress in BCRA.

As a structural matter, the proposed regulations render BCRA internally inconsistent. Chairman Smith has aptly explained the structural concerns as follows:

> [The proposed regulations] will render several parts of BCRA nonsensical. To do so in the manner proposed in these draft rules, I think that we must do violence to the statute. We must eviscerate 2 U.S.C. Section 441i (e) (4) (B) which allows officeholders to solicit up to $20,000 from individuals for groups seeking to conduct Federal Election Activities -- because if spending or receiving money for FEA made a group into a political committee, one could only accept $5,000. Why would Congress pass a law specifically allowing an officeholder to solicit a contribution that cannot be accepted? Hmm. . . . Similarly, we must make superfluous the requirement (2 U.S.C. 441i (b)) that state and local parties use hard dollars for FEA because, if disbursements for FEA were expenditures, hard money would have to be used anyway. We must render nonsensical 2 U.S.C. 441b, which requires that electioneering communications count as "expenditures" for that, but only that, section of the law, because under the interpretation being urged on the Commission, electioneering communications would already be "expenditures." All of these oddities are easily remedied, however, simply by recognizing that the statute does not treat FEA and electioneering communications as "expenditures."

Presentation of Bradley A. Smith, Chairman, Federal Election Commission, March 19, 2004, Republican National Lawyers Association. Obviously,

congressional statutes should not be interpreted in a way that renders provisions inconsistent, superfluous, or implicitly repealed.

Additionally, the legislative history of BCRA is inconsistent with the proposed regulations. The congressional supporters emphasized that BCRA was not intended to regulate the Internet or print activities of nonprofit organizations such as the NRA. The proposed regulations simply ignore these statements and restrict political activities far beyond what Congress intended.

## III. Specific Proposals.

Before turning to the specific proposals and alternatives outlined by the Commission, a word needs to be said about the prospect that the Commission would now, in the middle of 2004, drastically alter the rules by which the 2004 election must be played. By the time this rulemaking has run its course, the 2004 elections will likely be less than six months away. To change the rules applicable to organizations of every stripe that would now stand to be deemed "political committees" at this exceedingly late stage would be contrary to Congress's intent, extremely disruptive, and fundamentally unfair. BCRA, for all of its many flaws, at least was passed in March 2002 – more than two years in advance of the elections it would govern. Moreover, Congress specifically built into BCRA provisions for expedited review and delayed application, thereby ensuring that the relevant rules would be publicized and clarified sufficiently in advance of their application that all relevant players would be properly notified, informed, and able to conform in time for the upcoming election. And the Supreme Court's decision in *McConnell*, for all of *its* many flaws, at least was decided in December 2003, thereby remaining faithful to that design. There simply will not be time for a similar process of notification, clarification, adjudication, and compliance to run its course with respect to the instant proposals before the 2004 federal elections are upon us. Therefore, any alterations the Commission now makes should be interstitial, and, any resulting effects on the 2004 federal elections should be carefully minimized.

Yet the proposed rules governing "political committees" now threaten to profoundly expand the categories of activities that qualify as "expenditures" and to suddenly recharacterize myriad entities as "political committees"; the ultimate effect would be to jury-rig a patchwork of new speech restraints where none hitherto existed. Of course, the organizations affected by this are already well underway in gearing up for the 2004 elections; and it would be enormously impractical, burdensome, disruptive, and, in many instances, impossible for them to bring themselves into compliance with these newly-fashioned regulations while still pursuing the political activities to which they have already devoted themselves (after extensive planning and enormous investment). That is fundamentally unfair and starkly contrary to Congress' design. As such, it is

imperative that implementation of the proposed regulations be delayed until after the 2004 elections are completed, at the earliest.

### A. "The Major Purpose" Test.

The proposal that the regulations should now convert what the Supreme Court in *Buckley* and *MCFL* consistently formulated as a focused inquiry into whether "*the* major purpose" of a particular organization is federal election activity, 424 U.S. at 79; 479 U.S. at 262, into whether an organization has such activity as "*a* major purpose," is fundamentally misconceived in its premises and in all of its particulars. First, it pointedly departs from the Supreme Court's own formulation in *Buckley* and *MCFL*. Surely in this area of precious First Amendment freedoms, any warrant for regulatory encroachment extends no further than the terms by which the Supreme Court has conferred it.

Moreover, existing focus upon "the" major purpose of an organization is the only one that makes sense in this context: it properly respects the associational and speech interests a wide variety of organizations have under the First Amendment in pursuing their various purposes without fear of government interference; only if they devote themselves predominantly to influencing federal elections should they be subjected to the extensive and invasive regulatory framework associated therewith. Under the broad rules now proposed, any organization that potentially touches upon politics in robust pursuit of its purposes could qualify as having federal election activity as "a" major purpose; and it would, as a practical matter, need to either curb its activities or else incur the legal and other expenses associated with navigating this increasingly treacherous area of the law. That is precisely the state of affairs that the First Amendment and "major purpose" test were meant to avoid. Thus, the only sensible approach would be to focus upon "*the* major purpose" of an organization and ask whether the primary purpose of an organization is to influence federal elections. Only if the answer is "yes" might the narrow means and compelling purpose required to justify the regulation possibly be thought to exist.

#### 1. $10,000 or $50,000 Thresholds.

As to the specific tests that are proposed, the first of the four proposed tests, that of 11 C.F.R. § 100.5(a)(2)(i), would effectively pretermit any inquiry into whether federal election activity is in fact a "major" activity of the organization in question. Instead, it would look only to whether the organization spent "more than $10,000 in the current calendar year or any of the previous four calendar years" on the defined categories of activity. That takes no account whatever of where federal election activity fits within the larger purposes of the organization. Instead, this proposal assumes that an organization like the NRA that raises and spends tens of millions of dollars annually in

order to advocate with respect to a particular issue necessarily has "a major purpose" of influencing federal elections merely because it takes out a single television ad, at the cost of $10,000, in one particular year, in order, say, to denounce a candidate who has attacked that organization by name or who has taken an adverse or deceptive position on the issue to which the organization has devoted itself. That assumption is of course utterly bankrupt, both in theory and in practice.

Even worse, this proposal would give determinative effect to activities in prior years (2000-2004), which activities did not then qualify for regulation as federal election activity, for purposes of determining an organization's current status and whether its ongoing activities are, in the absence of corrective measures, criminal. Such retroactive rulemaking is disfavored in the absence of a clear congressional statement, *see Landgraf v. USI FILM Products*, 511 U.S. 244 (1994), and should here be eschewed by either abandoning this approach entirely or else specifying that years prior to adoption of the rule will be categorically excluded from the analysis.

Finally, a threshold of $10,000 is set far too low, particularly if exceeding that threshold in any one year of a particular election cycle (as opposed to exceeding a threshold that is set in reference to *average* annual expenditures) will transform an organization into a "political committee." The reality is that purchase of a single television ad could easily exceed the threshold, and that such a purchase may well be incidental to an organization's overall activities.

**2. 50% Threshold.**

In truth, if any test is to be adopted, it must take account of the overall purposes of a particular organization and ask whether the organization's purpose is "major" as measured against those. Thus, the second proposed test of § 100.5(a)(2)(ii), which requires that "more than 50 percent" of the annual expenditures go to the specified activity for it to qualify as "a major purpose," commends itself as far superior. It offers the requisite bright-line certainty, while quantitatively assessing an organization's overall purposes and readily determining whether federal election activity qualifies as "major" as a percentage thereof. Only this proposal could offer the requisite guidance to regulated parties while remaining faithful to the legal inquiry of "a major purpose" that supposedly animates the regulation. Again, though, the Commission should frame this test as a numerical average for the various years in question, rather than asking whether the test was satisfied in any *one* of the preceding years.

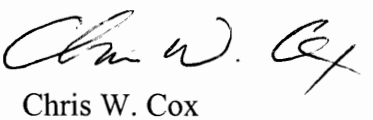
**B. Conversion Of Federal Funds.**

Finally, proposed 11 C.F.R. § 102.54 is objectionable and perverse. Instead of requiring that a donor to an organization opt-in in order to permit use of the relevant donation for a federal fund, the Commission should properly place the burden upon those donors who object to such use to affirmatively opt-out. That alternative approach would best comport with prior federal law, which freely permitted use of the funds on activities that would only now, for the first time, be regulated as federal election activities – prior to this change in law, donors were presumably consenting to use of their donations for those unregulated activities. The proposed section seems especially inconsistent with proposed "major purpose" test 11 C.F.R. § 100.5(a)(2)(i), which would look specifically to the "solicitations, advertising, or other similar written materials, public pronouncements, or any other communication": if the NRA has indeed announced publicly that it is engaging in the very activities that would now qualify as "federal election activity," then surely it follows that its donors were on notice of, and effectively consented to, use of their donations for those activities.

In any event, the arbitrary imposition of a 60-day deadline for donors to exercise their consent would unduly curtail the opportunity for donors to grant consent. No such arbitrary deadline need, or should, be imposed; and if one is imposed, it should be no less than 120 days, which would still provide ample time prior to the upcoming election in which to measure compliance.

For the foregoing reasons, the proposed regulations should not be adopted.

Respectfully Submitted,



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