March 28, 2005

By Electronic Mail

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

Re: Comments on Notice 2005-6: Candidate Solicitation at State, District, and Local Party Fundraising Events

Dear Ms. Dinh:

These comments are submitted jointly by the Campaign Legal Center, Democracy 21, and the Center for Responsive Politics in response to the Commission's Notice of Proposed Rulemaking 2005-6, published at 70 Fed. Reg. 9013 (February 24, 2005), seeking comment on proposed changes to its rule regarding appearances by federal officeholders and candidates at state, district and local party fundraising events under 2 U.S.C. § 441i(e)(3) and 11 C.F.R. § 300.64. Specifically, the Commission seeks comment on whether to merely revise the Explanation and Justification ("E&J") for current 11 C.F.R. § 300.64, or to replace the current rule with a new rule barring federal candidates and officeholders from soliciting, receiving, directing, transferring, or spending any non-federal funds, including Levin funds, when speaking at state party fundraising events.

For the reasons set forth below, we oppose the option of retaining existing section 300.64 and simply revising the E&J for it. Instead, we strongly support replacing the current rule with the proposed new rule. If the Commission decides to hold a hearing on this matter, all three commenters request the opportunity to testify.

I. Introduction

The Federal Election Campaign Act (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), prohibits federal candidates and officeholders from soliciting, receiving, directing, transferring, or spending soft money (*i.e.*, funds not in compliance with FECA contribution limits and source prohibitions). 2 U.S.C. § 441i(e)(1).

In *McConnell v. FEC*, 540 U.S. 93, 182 (2003), the Supreme Court upheld this prohibition as a "valid anticircumvention measure." Insofar as the prohibition applies to the receipt of nonfederal funds by federal candidates, the Court noted that "[n]o party seriously questions the constitutionality" of the ban. "By severing the most direct link between the soft

money donor and the federal candidate, § 323(e)'s ban on donations of soft money is closely drawn to prevent the corruption or appearance of corruption of federal candidates and officeholders." *Id.*

"Notwithstanding" this broad statutory prohibition, BCRA provides that a candidate or officeholder "may attend, speak, or be a featured guest" at a fundraising event for a State, district, or local committee of a political party. 2 U.S.C. § 441i(e)(3) ["state party fundraiser provision"]. This provision, however, does not state that a candidate or officeholder can *solicit* funds at a fundraiser.

In May 2002, the Commission published NPRM 2002-7, seeking comment on proposed rules to implement the soft money provisions of BCRA, including the state party fundraiser provision. 67 Fed. Reg. 35654, 35672 (May 20, 2002). The rule proposed in that NPRM, 11 C.F.R. § 300.64 (proposed), explicitly stated that a federal candidate or officeholder "shall not solicit, receive, direct, transfer, or spend funds or participate in any other fundraising aspect of" a state party fundraising event. 67 Fed. Reg. 35688. The NPRM did, however, raise a question as to whether section 441i(e)(3) should alternatively be construed as a "total exemption from the general solicitation ban..." 67 Fed.Reg. 35672.

In written comments submitted in response to NPRM 2002-7, Democracy 21 supported the proposed rule, and unequivocally opposed the alternative construction suggested in the commentary. *See* Comments of Democracy 21 on Notice 2002-7 (May 29, 2002) at 52. The Democracy 21 comments stated that section 441i(e)(3) "is not an exemption at all. It is simply a clarification that while candidates and officeholders may <u>not</u> solicit non-Federal funds, they may nonetheless attend, speak or be a guest at a fundraising event where such funds are solicited by others." *Id.*

On June 17, 2002, the Commission's general counsel issued a proposed final rule that provided, in part, that federal candidates and officeholders attending state, district or local party committee fundraising events must not "[a]ctively solicit funds at the event" or "[d]irect contributions or donations to others." *See* Agenda Document No. 02-44 at 313. The general counsel explained that the Commission had received a range of comments on the issue, some advocating "a strict approach, consistent with the statutory language[,]" and others advocating a more "expansive interpretation" of the BCRA provision, so as to allow "indirect fundraising." *Id.* at 184. The general counsel noted, however, that even the commenters "who favored an expansive interpretation agreed that Federal candidates and officeholders could not actively fundraise (specifically solicit contributions) at a covered event." *Id.*

The Commission, however, materially altered the rule as proposed by the general counsel. The final rule it adopted in section 300.64 permits federal candidates and officeholders to speak at state, district and local party fundraising events "without restriction or regulation." 67 Fed. Reg. 49096, 49131 (July 29, 2002). Thus, contrary to both the rule as proposed in the original NPRM, and to the final rule recommended by its counsel, the rule adopted by the Commission explicitly authorizes federal candidates and officeholders to solicit soft money donations at state party committee fundraising events.

This rule, among many others, was challenged in *Shays and Meehan v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) *appeal pending* No. 04-5352 (D.C. Cir). The district court was "not satisfied, based on the FEC's E & J and briefing in this case, that the Commission has 'articulated an explanation for its decision that demonstrates its reliance on a variety of relevant factors and represents a reasonable accommodation in light of the facts before the agency.'" *Id.* at 92 (quoting *Arent v. Shalala*, 70 F.3d 610, 617 (D.C. Cir. 1995)). Consequently, the court found 11 C.F.R. § 300.64 to be "arbitrary and capricious" in violation of the Administrative Procedures Act ("APA"). *Shays*, 337 F. Supp. 2d at 92-93.

Although the court upheld the Commission's rule on so-called "*Chevron*" grounds, *id.* at 90-92, this should not be construed as an endorsement of the rule. At best, the court found only that the statutory provision "is ambiguous in that it can be read in more than one way[,]" *id.* at 89, and that the Commission's rule would not on its face "unduly compromise" the law, or create the potential for "gross" abuse. *Id.* at 91.

The court specifically noted, on the other hand, that viewing section 441i(e)(3) in the context of BCRA's other soft money provisions suggests that it "was not meant to be read as a complete carve-out" from the general prohibition of soft money solicitation. *Shays*, 337 F. Supp. 2d at 90. The district court stated further: "To be sure, the Commission's interpretation likely contravenes what Congress intended when it enacted the provision, as well as what the Court views to be the more natural reading of the statute," and that "there can be little doubt that this provision creates the potential for abuse . . . ." *Id.* at 91.

This rulemaking follows the district court's invalidation on APA grounds of 11 C.F.R. § 300.64, and the court's remand to the Commission for further action consistent with the court's opinion. The NPRM for this rulemaking proposes two alternatives to comply with the district court's order. First, the Commission proposes to maintain the current rule and merely revise the E&J in an attempt to satisfy the "reasoned analysis" requirement of the APA. Alternatively, the NPRM proposes to replace current section 300.64 with a rule barring federal candidates and officeholders from soliciting, receiving, directing, transferring, or spending and non-federal funds when speaking at state party fundraising events.

We strongly oppose the first option and support the second. Current section 300.64 should be replaced with a rule barring candidates from soliciting or directing soft money at state party fundraising events.

II. BCRA's Language and Structure Require a Rule Barring Candidates From Soliciting Soft Money at Party Fundraisers

The relevant statutory provision, 2 U.S.C. § 441i(e), imposes a flat prohibition on federal candidates soliciting, receiving, directing, transferring or spending non-federal funds. "Notwithstanding" this prohibition, however, a candidate or officeholder "may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party." 2 U.S.C. § 441i(e)(3).

The Commission interpreted this language as authorizing a "total exemption" from the BCRA's prohibition against solicitation or direction of soft money. 67 Fed. Reg. 49108. The regulation allows federal candidates to speak at state party fundraisers "without restriction or regulation." 11 C.F.R. § 300.64(b). One Commissioner referred to this as "a total carve out" from the general ban on solicitation.[1]

Thus, despite a statute that contains an explicit and across-the-board *prohibition* on soft money solicitations by federal candidates and officeholders, the Commission issued a rule *permitting* federal candidates and officeholders to engage in overt and blatant solicitation of soft money, so long as they do so in the context of a party fundraising event. As the district court found in *Shays*, this is contrary to the "natural reading" of the statute. 337 F.Supp.2d at 91.

In generally prohibiting a candidate from "solicit[ing]," but in allowing a candidate to "attend" or "speak" at a state party fundraiser, Congress provided a clearly delimited safe harbor for federal candidates to be present at, and to speak at, a state party fundraiser. But it plainly stopped short of authorizing the federal candidate to engage in solicitation of non-federal funds at the fundraiser. To "speak" and to "solicit" are very different terms. The statutory language authorizes the former, but prohibits the latter. The Commission's current regulation conflates the two, and is based on the erroneous assumption that in authorizing a candidate to *speak* at a fundraiser, the statute necessarily authorizes the candidate to *solicit* as well. There is no basis in the language of the law or its legislative history to support this reading. Congress is familiar with the term "solicit" and knows how to use it, as is evident elsewhere in BCRA. It chose not to use that term in the state party fundraiser provision.

Indeed, BCRA states that a federal candidate or officeholder may "speak" at a state party fundraiser, not that such a person may "speak without restriction or regulation." Accordingly, the "natural reading" of section 441i(e)(3) is that, while federal candidates can attend, speak or be a featured guest at a state party event, they may not solicit, receive, direct, transfer or spend non-federal funds in connection with that event.

BCRA's structure reinforces this conclusion. The section immediately following the state party fundraiser provision *explicitly* sets forth circumstances in which federal candidates and officeholders are permitted to make solicitations for soft money. *Compare* 2 U.S.C. § 441i(e)(3) (entitled "Fundraising Events") *with* 2 U.S.C. § 441i(e)(4) (entitled "Permitting Certain Solicitations"). The latter section expressly allows solicitations by federal candidates and officeholders on behalf of nonprofit organizations, pursuant to specified conditions and restrictions. The juxtaposition of these two provisions, and the different ways in which they are drafted, indicates that while Section 441i(e)(4) is a limited exception to the general ban on soft money solicitation, Section 441i(e)(3) – the state party fundraiser provision – is not such an exception, and accordingly, does not permit solicitations under any circumstances.[2]

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[1] June 20, 2002 FEC Open Meeting Tr. at 107 (statement of Commissioner Toner).

[2] To the same effect is the provision immediately preceding the state party fundraising provision, section 441i(e)(2), which allows "solicitation" by a federal officeholder or candidate who is also a candidate for state office, subject to various restrictions. Again, this illustrates that when

III. The Legislative History and the *McConnell* Decision Support a Rule Barring Candidates From Soliciting Soft Money at Party Fundraisers

BCRA's legislative history and Congress' evident purpose in section 441i(e) similarly confirm that Congress neither intended nor authorized the Commission's "total carve out" from BCRA's prohibition of soft money solicitation. As its congressional sponsors repeatedly emphasized, BCRA was intended to eliminate the corruption and appearance of corruption resulting from federal officeholders and candidates raising soft money for themselves or for party organizations.

To this end, BCRA established a rule that is both clear and "simple: Federal candidates and officeholders cannot solicit soft money funds, funds that do not comply with Federal contribution limits and source prohibitions, for any party committee—national, State, or local." 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). *See also* NPRM 2002-7, 67 Fed. Reg. 35672 (quoting Sen. McCain's statement). The Commission's initial proposed rule correctly relied on this legislative history, and cautioned that, "while [federal candidates or officeholders] may attend, speak, or be a featured guest at a State or local party fundraising event, they cannot solicit funds at any such event." 67 Fed. Reg. 35672.

More generally, as the Supreme Court recognized in *McConnell*, BCRA was designed to "plug the soft-money loophole," through which "parties have *sold* access to federal candidates and officeholders . . . giv[ing] rise to the appearance of undue influence." *McConnell*, 540 U.S. at 133, 153-54 (emphasis in original). The Court explained further:

> Large soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself. Without some restriction on solicitations, federal candidates and officeholders could easily avoid FECA's contribution limits by soliciting funds from large donors and restricted sources to like-minded organizations engaging in federal election activities.

Id. at 182-83.

The Court in *McConnell* recognized that Congress had carved out a *single exception* to the general ban on soft money solicitation, permitting certain "limited solicitations of soft money" for 501(c) nonprofit organizations. *Id.* at 183. *See also* 2 U.S.C. § 441i(e)(4). After recognizing this exception to the solicitation ban, the Court noted that the provision which allows federal candidates and officeholders to attend and speak at state party fundraisers,

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Congress intended to allow federal candidates or officeholders to engage in solicitations for non-federal funds, it said so directly and explicitly. And it did not do so in reference to state party fundraising events.

along with the provision that allows them to solicit hard money contributions in connection with nonfederal elections, together "preserve the traditional fundraising role of federal officeholders by providing *limited* opportunities for federal candidates and officeholders to associate with their state and local colleagues through joint fundraising activities." *McConnell*, 540 U.S. at 183 (emphasis added). *See also* 2 U.S.C. §§ 441i(e)(1)(B) and 441i(e)(3).

This discussion, and the Court's juxtaposition of section 441i(e)(3) with section 441i(e)(1)(B), makes clear that the Court did not interpret section 441i(e)(3) to permit federal candidates to solicit *soft* money at state party events, but rather to attend and speak at party fundraisers, but to solicit only those funds permitted by section 441i(e)(1)(B) – amounts in compliance with federal contribution limits and source prohibitions.

It is untenable to conclude that in a law designed to close loopholes, Congress *sub silentio* authorized the opening of a new loophole by allowing federal candidates and officeholders to solicit and direct unlimited amounts of soft money at any state party fundraising event.[3] Had Congress intended that result, it surely would have said so expressly – as it very easily could have done by adding "solicit" and "direct" to the permitted activities listed in the state party fundraiser provision.

The Commission has justified its "total exemption" from the solicitation ban on the ground that any other construction would "raise serious constitutional concerns," requiring "the Commission to regulate and potentially restrict what candidates and officeholders say at political events." 67 Fed. Reg. 49108. The Commission, however, has offered no explanation as to why monitoring the speech of candidates and officeholders is more difficult or intrusive at state party fundraising events than it is in other settings not controlled by the "total exemption."[4] Nor has the Commission distinguished other federal laws that permit speaking, but prohibit "solicit[ing]."[5] And as *McConnell* makes clear in any event, there is no constitutional infirmity in restricting candidate and officeholder solicitations of soft money – in any kind of setting. *See McConnell*, 540 U.S. at 181-84.

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[3] The opportunity for abuse of this loophole is exacerbated by the lack of any definition of what constitutes a "fundraising event for a State, district, or local committee of a political party." 2 U.S.C. § 441i(e)(3). Thus, nothing prevents a federal candidate or officeholder from calling together a group of wealthy donors, labeling the gathering a "fundraising event for a State, district, or local committee of a political party," and conducting unrestricted solicitation of soft money at such an event. The district court in *Shays* noted that it "shares Plaintiffs' concern" that this scenario "could lead to widespread abuse... ." 337 F.Supp.2d at 91, n. 60.

[4] The district court in *Shays* made the same point, noting that the Commission has not stated why its constitutional concerns "are in any way more vexing in the context of state political party fundraisers than they are outside of such venues where nonfederal money solicitation is almost completely barred." 337 F.Supp.2d at 92.

[5] *See, e.g.*, 5 U.S.C. § 7323(a)(2); 5 C.F.R. § 734.208, Example 2 (interpreting federal Hatch Act as providing that a federal employee "may give a speech or keynote address at a political fundraiser when he is not on duty, as long as the employee does not solicit political contributions").

The Commission's proposed replacement regulation makes clear that federal candidates and officeholders may not solicit, receive, direct, transfer, or spend non-federal funds at party fundraising events, and thus comports with the statutory language and intent of 2 U.S.C. § 441i(e). For this reason, we strongly urge the Commission to adopt the new regulation, and to forego the futile effort of trying to cobble together a rational justification for an existing rule which opens obvious loopholes in the law.

IV. BCRA Prohibits Federal Candidates and Officeholders From Soliciting Levin Funds.

The NPRM raises an additional issue regarding interpretation of BCRA's Levin fund provisions. The Commission seeks comment on how it should interpret 2 U.S.C. §§ 441i(b)(2), (e)(1), and (e)(3), in light of a passage in the district court *Shays* opinion stating: "the plain reading of [BCRA] makes clear that Levin funds are funds subject to [FECA's] limitations, prohibitions, and reporting requirements." *Shays*, 337 F. Supp. 2d at 118. Specifically, the Commission asks whether "the cross references between subsection (e)(3) and subparagraph (b)(2)(C) create an exception permitting State party committees to treat funds solicited by covered persons at fundraising events as Levin Funds." 70 Fed. Reg. 9016.

In short, the question is whether federal candidates and officeholders may solicit Levin funds at state, district and local party fundraising events. The answer is no – federal candidates and officeholders are not permitted by BCRA to solicit Levin fund donations at state party fundraising events. BCRA explicitly prohibits state party committees from treating funds "solicited" or "directed" by federal candidates and officeholders as Levin funds. 2 U.S.C. § 441i(b)(2)(C)(i). The statutory reference in section 441i(b)(2)(C) to subsection (e)(3) exists to make clear that "attend[ing], speak[ing], or be[ing] a featured guest" at a state party fundraising event does not *in itself* constitute solicitation or direction.

The Commission has consistently and correctly interpreted Levin funds to be non-federal funds. In the E&J for the regulations implementing the Levin Amendment, the Commission recognized the non-Federal character of these funds:

> BCRA's Levin Amendment provides that State, district and local political party committees may spend certain *non-Federal funds* for Federal election activities if those funds comply with certain requirements. 2 U.S.C. § 441i(b)(2)(A)(ii). *Thus, these funds are unlike Federal funds, which are fully subject to the Act's requirements* . . . .

67 Fed. Reg. 49085 (emphasis added). The Commission defined "Federal funds" to mean "funds that comply with the limitations, prohibitions and reporting requirements of the Act." 11 C.F.R. § 300.2(g). By contrast, the Commission defined "Levin funds" as funds "raised pursuant to 11 CFR 300.31 . . . ." 11 C.F.R. § 300.2(h). That provision, in turn, provides that Levin funds "must be raised from donations that comply with the laws of the State in which the State, district or local party committee is organized." 67 Fed. Reg. 49094.

Most recently, the Commission adopted final rules to prohibit political party donation of Levin funds to tax-exempt organizations and explicitly characterized "Levin funds as a type of non-Federal funds." *See* 70 Fed.Reg. 12787, 12788 (March 16, 2005).

The Commission has consistently recognized "federal funds" to be "funds that comply with the limitations, prohibitions and reporting requirements of the Act," 11 C.F.R. § 300.2(g), and Levin funds, by contrast, to be "non-Federal" funds that "comply with the laws of the State . . . ." 11 C.F.R. § 300.2(h). Accordingly, the Commission should not allow federal candidates and officeholders to solicit Levin funds at state, district and local party committee fundraising events. To allow Levin fund solicitation by federal candidates and officeholders would be to sanction violation of BCRA's strict prohibition against solicitation of non-federal funds by federal candidates and officeholders, 2 U.S.C. § 441i(e)(1), and to violate the terms of the Levin amendment itself, which forbids the solicitation of such funds by federal candidates and officeholders. 2 U.S.C. § 441i(b)(2)(C)(i).

V. Conclusion

For the reasons set forth above, we urge the Commission to adopt proposed replacement rule 11 C.F.R. § 300.64, and to reject the alternative proposal, which would merely revise the E&J for a current rule deemed by the district court in *Shays* to "likely contravene[] what Congress intended when it enacted the provision, as well as what the Court views to be the more natural reading of the statute . . . ." *Shays*, 337 F. Supp. 2d at 91.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Fred Wertheimer	*/s/ J. Gerald Hebert*	*/s/ Lawrence M. Noble*
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