

May 22, 2006

By Electronic Mail

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

Re: Comments on Notice 2006–7: Interim Final Rule Regarding “Federal Election Activity” Time Periods

Dear Ms. Dinh:

These comments are submitted jointly by the Campaign Legal Center and Democracy 21 in response to the Commission’s solicitation of comments on all aspects of an interim final rule regarding “Federal Election Activity” time periods. Notice 2006–7, published at 71 Fed. Reg. 14357 (March 22, 2006). Specifically, the Commission’s interim final rule amends the regulation defining the phrase “in connection with an election in which a candidate for Federal office appears on the ballot” in such a manner as to reduce the time periods covered by certain BCRA “Federal election activity” restrictions.

For the reasons set forth below, we urge the Commission to repeal in its entirety the interim final rule amending the definition of the phrase “in connection with an election in which a candidate for federal office appears on the ballot” at 11 C.F.R. § 100.24(a).

I. BCRA’s Legislative History, Purpose and Structure Make Clear That the “Federal Election Activity” Restrictions are Critical to Preventing Circumvention of the Soft Money Ban and Should Not Have Been Interpreted Through This Interim Final Rule to Open a New Loophole.

The Federal Election Campaign Act (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), prohibits national party committees from soliciting, receiving, or directing soft money. 2 U.S.C. § 441i(a). Similarly, FECA provides: “[A]n amount that is expended or disbursed for Federal election activity by a state, district, or local committee of a political party . . . shall be made from funds subject to the limitations, prohibitions and reporting requirements of this Act.” 2 U.S.C. § 441i(b)(1). The Act contains a limited exception for certain “Federal election activity” that a state or local party committee may finance with an allocated mixture of hard money and so-called Levin funds. 2 U.S.C. § 441i(b)(2).

The Act defines “Federal election activity” (FEA) to include, *inter alia*, “voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection

with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot)[.]” 2 U.S.C. § 431(20)(A)(ii). These activities are often referred to as “Type II FEA,” whereas voter registration activity within 120 days of a Federal election is referred to as “Type I FEA.” The interim final rule at issue here concerns only Type II FEA.

In crafting BCRA’s definition of “Federal election activity,” Congress took pains to be detailed and comprehensive. Not only is the statutory definition unusually precise, but Congress went a step further and specified what activity was “excluded” from the definition.¹ In short, Congress did not leave any room for this important term to be further restricted in its scope by administrative interpretation. See *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (statute’s “mention of one thing implies the exclusion of another thing”) (internal quotation marks and citations omitted).

Congress’s overriding purpose in enacting the state party soft money restrictions was to avoid further circumvention of the Federal campaign finance laws. One of BCRA’s principal sponsors said that in closing the soft money loophole, Congress took “a balanced approach which addresses the very real danger that Federal contribution limits could be evaded by diverting funds to State and local parties,” while Congress did “not attempt to regulate State and local party spending where this danger is not present, and where State and local parties engage in *purely non-Federal activities*.” 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (emphasis added). Congress carefully crafted the contours of the definition of “Federal election activity” to cover only those activities that “in the judgment of Congress . . . clearly affect Federal elections” and left unregulated “activities that affect purely non-Federal elections.” 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

The legislative history, unmistakable purpose and statutory structure of BCRA make clear that the definition of “Federal election activity” is critical to preventing circumvention of the soft money ban and should not be further narrowed by the Commission’s administrative interpretations.

II. The Supreme Court in *McConnell* Upheld BCRA’s Definition of “Federal Election Activity.”

The BCRA prohibition on state and local party committee use of soft money to fund Federal election activity was upheld by the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003). The Court said the prohibition was a permissible means of preventing “wholesale evasion” of the national party soft money ban “by sharply curbing state committees’ ability to use large soft-money contributions to influence federal elections.” *Id.* at 161. The Court noted:

¹ The activities Congress excluded from the definition of “Federal election activity” are: (1) public communications that refer solely to nonfederal candidates so long as the communication does not constitute voter registration, voter identification, GOTV, or generic campaign activity; (2) contributions to nonfederal candidates that are not earmarked for Federal election activity; (3) state and local political conventions; and (4) the cost of grassroots campaign materials, such as bumper stickers, that refer only to nonfederal candidates. 2 U.S.C. § 431(20)(B).

[I]n addressing the problem of soft-money contributions to state committees, Congress both drew a conclusion and made a prediction. Its conclusion, based on the evidence before it, was that the corrupting influence of soft money does not insinuate itself into the political process solely through national party committees. *Rather, state committees function as an alternative avenue for precisely the same corrupting forces.*

Id. at 164 (emphasis added). The Court continued:

Congress also made a prediction. Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation, Congress knew that soft-money donors would react to [the national party soft money ban] by scrambling to find another way to purchase influence. It was “neither novel nor implausible” for Congress to conclude that political parties would react to [the national party soft money ban] by directing soft-money contributors to the state committees

Id. at 166 (internal citation omitted) (quoting *Nixon v. Shrink*, 528 U.S. 377, 391 (2000)). The *McConnell* Court concluded that “[p]reventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest.” *McConnell*, 540 U.S. at 165–66.

The Court went on to explicitly discuss BCRA’s definition of “Federal election activity,” explaining that BCRA’s ban on state party use of soft money for “Federal election activity” “is narrowly focused on regulating contributions that pose the greatest risk of . . . corruption: those contributions to state and local parties *that can be used to benefit federal candidates directly.*” *Id.* at 167 (emphasis added). The Court continued:

Common sense dictates, and it was “undisputed” below, that a party’s *efforts to register voters sympathetic to that party* directly assist the party’s candidates for federal office. It is equally clear that federal candidates reap substantial rewards from *any efforts that increase the number of like minded registered voters who actually go to the polls.*

Id. at 167–68 (internal citations omitted) (emphasis added).

The Court concluded: “Because voter registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption.” *Id.* at 168. The Court found BCRA’s prohibition on state party soft money expenditures for “Federal election activity” to be “a reasonable response to that risk.” *Id.*

In short, the Supreme Court in *McConnell* recognized that soft money contributions to state political party committees pose a serious threat of real and apparent political corruption where that money is spent *on activities that benefit Federal candidates*, and that BCRA’s prohibition on state political party use of soft money to fund “Federal election activity,” as

defined in BCRA, is a “closely-drawn means of countering both corruption and the appearance of corruption.” *Id.* at 167.

III. Definition of “In Connection With an Election in Which a Candidate for Federal Office Appears on the Ballot.”

As noted above, Type II FEA includes “voter identification, get-out-the-vote activity, or generic campaign activity conducted *in connection with an election in which a candidate for Federal office appears on the ballot* (regardless of whether a candidate for State or local office also appears on the ballot)[.]” 2 U.S.C. § 431(20)(A)(ii) (emphasis added).

Prior to the Commission’s adoption of the interim final rule at issue here, the phrase “in connection with an election in which a candidate for federal office appears on the ballot” was defined by Commission regulations to mean:

- (i) The period of time beginning on the date of the earliest filing deadline for access to the primary election ballot for Federal candidates as determined by State law, or in those States that do not conduct primaries, on January 1 of each even-numbered year and ending on the date of the general election, up to and including the date of any general runoff.
- (ii) In an odd-numbered year, the period beginning on the date on which the date of a special election in which a candidate for Federal office appears on the ballot is set and ending on the date of the special election.

11 C.F.R. § 100.24(a)(1) (2005).

In May 2005, the Commission published Notice of Proposed Rulemaking (NPRM) 2005-13, published at 70 Fed. Reg. 23068 (May 4, 2005), seeking comment on proposed changes to its rules defining various components of the term “Federal election activity” under 11 C.F.R. § 100.24. Through NPRM 2005-13, the Commission specifically sought comment on several proposed changes to its rule defining the phrase “in connection with an election in which a candidate for Federal office appears on the ballot.” 70 Fed. Reg. at 23071. Among the Commission’s various proposals was one to carve out holes in the FEA time periods described above in the event a municipal election is held within the FEA time period, but on a day different than the Federal election.

The Campaign Legal Center and Democracy 21, along with the Center for Responsive Politics, filed comments on NPRM 2005-13 opposing the creation of any such exception to existing “Federal election activity” time periods established by 11 C.F.R. §§ 100.24(a)(1)(i) and (ii). *See* Comments of Campaign Legal Center, Democracy 21 and the Center for Responsive Politics on Notice 2005-13 (June 3, 2005) at 17-18.

Nevertheless, although no municipal election exception was included in the draft final rule² that was considered and approved by the Commission at its Feb. 9, 2006 meeting, the Commission did adopt at that meeting, as an interim final rule, an exception that is even broader in scope than the one proposed in NPRM 2005–13. The interim final rule provides that, with respect to voter identification and get-out-the-vote activity:

[the phrase] *in connection with an election in which a candidate for federal office appears on the ballot* does not include any activity or communication that is in connection with a non-Federal election that is held on a date separate from a date of any Federal election and that refers exclusively to:

- (1) Non-Federal candidates participating in the non-Federal election, provided the non-Federal candidates are not also Federal candidates;
- (2) Ballot referenda or initiatives scheduled for the date of the non-Federal election; or
- (3) The date, polling hours and locations of the non-Federal election.

71 Fed. Reg. at 14360 (emphasis in original).

Unlike the Type II FEA time period exception for *municipal* elections proposed in NPRM 2005–13, the interim final rule exception applies also to *state* elections.

This interim rule exception, which the Commission now proposes to adopt as a permanent final rule, creates potentially large periods of time in which state and local party committees would be authorized to operate free from BCRA rules on “Federal election activity.” During such periods, they would be able to fund voter mobilization activities with soft money, even during periods in close proximity to federal elections. Thus, for instance, if a state or municipality held an election two weeks prior to a federal primary, a state or local party could use soft money for voter mobilization activities for the entire time period from the earliest federal filing date, up to the date of the local election two weeks before the federal primary. Depending on the frequency and dates of local or state elections, this could substantially undercut the purposes of BCRA.

The clear language of BCRA prohibits state, district and local party committees from using soft money to fund “Federal election activity.” The interim final rule exception unduly compromises BCRA’s state party soft money ban established by 2 U.S.C. §§ 441i(b)(1) and 431(20), and undermines Congress’ intent to prevent the circumvention of the national party soft money ban.

As the Supreme Court noted in *McConnell* with regard to the state party soft money ban: “Because voter registration, voter identification, GOTV, and generic campaign activity all confer

² See Federal Election Commission Agenda Document No. 06–05, “Draft Final Rules and Explanation and Justification on the Definition of Federal Election Activity”; *available at* <http://www.fec.gov/agenda/2006/mtgdoc06-05.pdf>.

substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption.” *McConnell*, 540 U.S. at 168. The Court found BCRA’s prohibition on state party soft money expenditures for “Federal election activity” to be “a reasonable response to that risk.” *Id.*

This interim final rule potentially carves several months out of every Federal election year, in which state and local party committees will be permitted by the Commission to freely spend soft money in a manner that undeniably influences Federal elections. For this reason, the interim final rule constitutes an impermissible construction of the statute. Having already had a federal district court reject as contrary to law multiple loopholes drafted by the Commission in its original post-BCRA regulations, *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) *aff’d* 414 F.3d 76 (D.C. Cir. 2005), the Commission should not have used this interim final rule to create an entirely new loophole in violation of the statute. And the Commission should not compound the error by adopting the interim final rule as a permanent final rule.

IV. Conclusion

For the reasons set forth above, we urge the Commission to repeal in its entirety the interim final rule amending the definition of the phrase “in connection with an election in which a candidate for federal office appears on the ballot” at 11 C.F.R. § 100.24(a).

We appreciate the opportunity to submit these comments.

Respectfully,

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