

Association of State Democratic Chairs



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Comments of Mark Brewer

On Proposed Regulations Defining Federal Election Activity and on the Proposed Regulation Governing Allocation of Salaries by State and Local Party Committees

On behalf of the Association of State Democratic Chairs, I am submitting comments on the proposed revision of the definition of federal election activity and on the treatment of certain salaries and wages paid by state, district and local party committees. Because these two rulemakings are related and will have substantial impact on operation of political parties at the state and local level, I have combined my comments into one document that I will file separately in each proceeding.

The Commission initiated these rulemakings in response to United States District Court's decision in *Shays v. Federal Election Commission*. The District Court in overturning the Commission's regulation faulted the Commission for various shortcomings in the rulemaking process including failing to provide sufficient notice of the alternatives being considered, to explain the Commission's choice of rules and to demonstrate why the promulgated rules were consistent with the legislative objectives of Bipartisan Campaign Reform Act (BCRA). Each of these failings,



should the appeals court agree that they were failings, is understandable given the compressed time period in which the Commission was required to act, the statute's use of vague undefined terms and the paucity of legislative history on critical aspects of the law. These procedural weaknesses in the promulgation of the Commission rules should not be considered as proof of substantive flaws in the rules themselves.

In fact, the regulations that are now subject to Commission reconsideration are for the most part not only reasonable but in many instances to be preferred to alternatives that the Commission is now considering. The existing rules are easier to understand and take into account the daily practicalities of running a state or local committee. State and local party committees operate in a very complex regulatory environment. No other political committees are asked to manage such Byzantine rules. The proposed alternatives suggested in these rulemakings would impose even more complexity on state and local parties. The consequence of adopting some of these alternatives would be to push to the breaking point the ability of many party committees to comply.

An unfortunate consequence of BCRA is that many state and local party committees are avoiding participating in grassroots political activity because federal law poses compliance challenges that are beyond their ability to meet. If the Commission doubts that this is the case, it need only review how many federal reporting party committees received and spent Levin funds. Levin funds were intended to allow state and local parties to use nonfederal funds to finance grassroots activity. The fact that

very few committees took advantage of Levin funds is testament to the fact that the rules were just too complex for state and local parties to comply. If these committees were able to marshal sufficient federal funds to pay for voter registration, voter identification and get-out-the- vote programs, this consequence of BCRA would be less regrettable. However, this was not the case, particularly at the local level and in states that were not Presidential targets. Instead of running the risk of violating federal law, many committees simply did not engage in federal election activity.

Changing the rules as suggested in these rulemakings will only compound the problem. The thrust of the proposed rules is to subject more grassroots party activity to federal regulation. Subjecting more party activity to the complex allocation and reporting requirements of federal law will only accelerate the flow of these activities out of the party into less accountable political organizations. The changes proposed proceed from a basic misunderstanding of how local parties now operate.

Local parties operate largely autonomously from the state and national committees. Most local committees are small volunteer centered organizations. These committees do not have nor could they afford the lawyers and accountants that have become necessary to comply with complexity of federal law. A common response to BCRA then was to avoid any activity that would trigger federal reporting obligations. These committees were advised to avoid engaging in voter registration, not to undertake any get-out-the-vote activity and to devote all paid staff to local elections. For most local

committees, this was the only available survival strategy. Now some of the Commission's proposals will close off even this avenue. Below the alternatives offered in these rulemakings are explored and their shortcomings noted.

In response to the District Court's concern that limiting the definition of voter registration to assisting voters in the actual act of registering may be too limiting and may "unduly compromise the Act's purposes", the Commission asks whether encouraging someone to register combined with some direction on how one registers should be included in the definition. Expanding the definition in this way would cover a voter calling his local party headquarters and asking where they could register. It would cover placing a stack of voter registration cards at the front desk. Presumably it would cover a party website where registration materials are available. Local committees that no longer register voters because they cannot practically comply with BCRA will be reduced to silence when a voter asks how or where to register. The practical consequence of expanding the definition of voter registration will be to mute core political speech.

The Commission also seeks comments on whether it should reconsider the definition of get-out-the-vote activity. The Commission notes that Congress did not provide a definition. The District Court correctly pointed out that the list of get-out-the-vote activity is not exhaustive and questioned what additional activity might be included. In response to the Court's decision, the Commission should make the list exhaustive.

State and local party committees and groups of state and local candidates that are governed by this regulation are entitled to a clear and full statement of the governing rule.

This regulation substantially impacts the right of state and local candidates to associate in their election efforts. In providing a list of covered activities the Commission should keep the list narrow. A broad reading of what constitutes get-out-the-vote activity will severely impair the ability of local candidates to join in common effort to effect a shared political outcome. For local party committees a broad reading will shrink even further the political playing field. Without additional Congressional direction, the Commission should be chary of extending its jurisdiction over a broader swath of local candidate activity. The fact that the Commission has yet to provide state and local candidates with sufficient instruction and tools to comply with the existing regulation underscores the folly of expanding the range of covered activity.

Again in response to the District Court's decision, the Commission proposes to redefine "voter identification". The proposed definition covers the acquisition "of information about potential voters including, but not limited to, obtaining voter lists and creating or enhancing voter lists by verifying or adding information about the voter's likelihood of voting in an upcoming election or their likelihood of voting for specific candidates." This definition proceeds from a basic misunderstanding of how modern political parties operate. Political committees maintain or purchase access to

large databases of people living in the United States. These databases are constantly sorted using various demographic, economic and personal criteria. New information is regularly appended or employed depending on the purpose that the database is being used.

Because nearly every resident of the country is a potential voter, the proposed regulation would cover any and all uses of a party database. These databases are employed in fundraising, persuasion, volunteer recruitment and for a host of other purposes beyond get-out-the-activity. On the other hand, the term "voter identification" in the general political lexicon is used to refer to those activities, most commonly canvassing, that are undertaken in close proximity to the election to identify specific voters to target in a "get-out-the-vote" effort. Although not defined in BCRA, this is how the statute appears to use the term. The statute defines federal election activity to include "(ii) 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". Clearly the term is used in a restricted manner. It is addressed to activity tied directly to a Federal election and similar to or connected with the other activities cited. There is no statutory justification for giving a broader sweep to the term. There is no reason to expand the definition to cover all uses or additions to a database.

The Association commends the Commission for proposing to redefine the definition of "in connection with an election in which a candidate for federal office appears on the ballot." The new definition recognizes that state and local committees spend much and in some case all their time and money on local elections. In many states, years can pass between true federal contests. The focus of local parties is most often on municipal elections. The proposed regulation recognizes this fact and seeks to limit the federalization of state and local party activity that is directed at municipal elections. The Association urges its adoption.

Lastly the Commission proposes revising the rule governing the allocation of salaries and wages by requiring state and local committees to allocate at least 25% of these costs to a Federal account whenever an employee engages in any Federal election activity or activity in connection with a Federal election. As explained above, most local committees are focused on state and local elections. These committees do not register with the Commission and do not maintain Federal and state accounts. They take care to avoid being subject to the recordkeeping, registration, reporting and allocation requirements of Federal law. The proposed regulation imposes these Federal obligations even where the Federal election activity is minimal. For example, the allocation requirement would be triggered if a staffer for a local committee in a college town spent a single day on campus registering students to vote. It is not enough that to be told that the Commission is unlikely to pursue such a violation.

Party committees are not in the business of instructing their employees to disrespect the law because the committee is likely to escape punishment for violating the law.

The District Court expressed concern that the current regulation opens an opportunity for gross abuse is mere speculation without any support in the legislative or administrative record. First, state and local committees simply do not employ sufficient numbers of staff to cleverly assign them monthly duties to assure that each stays below the 25% threshold. Second, where there is a highly contested Federal election in which a state or local committee is participating, the committee staff assigned to work on that race will devote more than 25% of their time to that race and therefore, will be 100% allocated to the Federal account. The consequence will be over allocation which will more than compensate for any under allocation of other employees. If the Commission needs to be convinced of this fact, it should do a study of state and local committee staffing patterns. It should not proceed to further handicap local parties based on unfounded speculation of undocumented abuse. A review of state and local party activity in the last election will demonstrate that the District Court's concern found no expression in actual party activity.

In closing, the proposed regulations are rooted in a basic misapprehension of the nature of state and local committees. These are not committees flush with resources and staffed with well paid professionals. Rarely is a Federal candidate in a position to control a committee. Federal elections are not their primary focus and as often as not

the Federal election receives minimal, if any attention. The Commission can easily confirm these facts. The Commission's regulations should reflect what state and local committees actually do, rather than unfounded fears of wholesale circumvention of the law. Facts rather than wildly imagined corruptive schemes should guide the Commission. Visit a few local party committees and any fears will be allayed. Add to the complexity of the regulation and there will be fewer to visit.