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Mark Brewer
President

**Comments of Mark Brewer, President
On Proposed Changes in the Rules Governing
Candidate Participation in State Party Fundraising Events**

On behalf of the Association of State Democratic Chairs (ASDC), I am submitting the following comments in response to Commission's notice of proposed rulemaking relating to candidate solicitations at State, district, and local party fundraising events. This rulemaking stands to have substantial impact on the State party committees represented by the ASDC. The ASDC understands that this rulemaking is in response to the District Court's opinion in *Shays v. Federal Election Commission*¹ which invalidated the current regulation for failure to comply with the Administrative Procedures Act. In the notice the Commission asks for comments on whether it should retain the current regulation or amend it to limit what candidates and officeholders who speak at State and local party fundraising event may say at those events.

430 SOUTH CAPITOL STREET, S.E. • WASHINGTON, DC 20003



The ASDC supports retaining the current exemption that allows Federal candidates and officeholders to speak at State and local party fundraisers without restriction or regulation. Consequently, the ASDC believes that the best course for the Commission to take is to revise the explanation and justification for current 11 CFR 300.64(b) to provide a more complete exposition of its reasons for adopting this particular regulation. This approach would remedy the deficiency in Commission's administrative procedures that the District Court identified. The proposed revision in the notice is consistent with the ASDC's comments below.

The ASDC would concede that the current regulation might be unnecessary if the Commission amended its solicitation regulations. If a speakers at a State or local party fundraiser could confidently make a general request for support without worrying that the request might run afoul of the prohibition on the solicitation of nonfederal funds then a narrowing of the exemption could be defended. The ASDC would find, as an acceptable alternative to the current regulation, an exclusion from the definition of "solicit" for requests for support that are non-specific as to source and amount. However, Commission decisions during the last election cycle clearly suggest that the Commission is not prepared to take that regulatory approach.

¹ 37 F. Supp. 2d 28 (D.D.C. 2004)

The current regulation is a narrow exemption. It does not apply to mail, phone or personal solicitations. It applies only to the speeches that a federal officeholder or candidate may give at a State or local party event. It reflects the practical realities of these events. As a featured speaker, an officeholder is expected to thank the attendees for their past and continued support of the party. Without the current exemption, this common courtesy might well be treated as a violation of the ban on the solicitation of non-federal funds. The Commission would then be placed in the position of determining whether a normal and expected expression of gratitude or request for support crosses some indeterminate line and violates the law. Without the exemption, the Commission might well find itself through enforcement actions and advisory opinions compiling a compendium of proper and improper expressions of thanks and requests for support. Using a phrase from the proscribed list would subject the speaker to Commission sanction. An offhanded departure from prepared text could prove costly to an errant speaker.

Congress allowed officeholders to participate in State and local party non-federal fundraising events for good reason. Congress knew that most State and local party activity is directed at local elections. The number of federal races that are competitive in any given year pales in comparison to the number of State and local races that are being contested. Consequently, State and local party fundraising is usually directed at raising funds for those races. At the same time, State and local

party committees rely on their officeholders and candidates to demonstrate their commitment to the party by speaking at party events even though there may be no direct benefit to the candidate or officeholder.

Almost all party conventions, conferences and meetings provide opportunities for officeholders to speak. These events invariably have a fundraising component if only to pay for the costs of the event. The frequency of these occasions put the officeholder speaker, absent an exemption, at constant risk that her remarks to a group of known contributors may be construed as a solicitation. It would be detrimental to our political party system if those risks are elevated and deter officeholders from participating in political party activity. Consequently, the current regulation serves an important purpose in reassuring candidates and officeholders that speaking at such events does not expose them to potential liability.

The possibility that the current regulation can be employed effectively to circumvent the ban on non-federal fundraising is small. Bearing in mind that the statute allows a candidate to be advertised as the featured speaker at State party non-federal fundraising events, it is difficult to identify any regulatory benefit to be derived by additional restrictions on what a candidate might say to an audience that already has chosen to attend and contribute. Without any overt solicitation, the candidate's appearance at the event already makes clear the importance that she attaches to the party's overall campaign efforts. If the speaker herself is involved in a

highly contested election, the speaker would need only stress the importance of the State party to her election to underscore the reasons that the listener may want to continue to contribute.

It is also unclear why a subsequent contribution by a member of the audience takes on the appearance of corruption based solely on the particular words of the speech. Any sophisticated big dollar contributor's decision to contribute is highly unlikely to turn on whether the candidate speaker has expressly solicited continued support for the party committee. If the candidate's objective is to encourage non-federal contributions, speaking favorably of the importance of a State party to her election achieves that objective. A candidate is unlikely to raise more money because she reduces her endorsement of the State party activity to an express request for additional financial support. No appreciable regulatory benefit is to be derived from the Commission closely policing the precise words the candidate utters at a party event.

Congress was certainly aware that allowing a candidate to be the featured speaker at a major nonfederal fundraising event would allow a State party to increase the amount of nonfederal funds raised. Congress also knew that these events play a crucial role in financing party committees and in forging positive relationships between a party and its candidates. It struck the balance that it did knowing that these events provided a limited opportunity for candidate participation in non-federal

fundraising. Congress knew that State and local party committee request officeholders speak at party events to increase attendance and the party's yield from the event. It was also aware that speeches at these events are unlikely of themselves to foster the *quid pro quo* contributions that the law seeks to curb. Consequently, Congress passed an exemption that expressly permits candidate participation in these events. For the Commission to try to rewrite that exemption and expose candidates to greater liability for what they might say inadvertently will serve to diminish candidate participation in party activities that the exemption was intended to foster.

State and local party committees, unlike most political organizations, are deeply involved in elections at both the federal and state level. They are comprehensively regulated by state and federal law. These committees do not have the choice, practically or legally, of operating just as federal political committees. In the real world of politics, party conventions, conferences and meetings are the prime opportunities for the party to hold major fundraising events. Those events will be tied to raising money for elections where it is needed. Consequently, the events, most often, will be held to raise funds for nonfederal election activity. Of foremost importance to the committee then is compliance with state law and any federal rules that apply to raising nonfederal funds. State and federal officeholders are expected participants at those events. What distinguishes party fundraising from fundraising for other political organizations is that candidates and officeholders are expected to

support the party's efforts even when the candidate or officeholder derives no direct benefit.

In closing the ASDC urges the Commission to retain the current regulation. The regulation is a narrow exemption that takes into account the practical aspects of State and local party fundraising. As the District Court acknowledged, the existing regulation is consistent with the statute. It will not deter candidate and officeholder participation in party events that the statutory exemption was intended to promote. To adopt the alternative approach will compel the Commission to police and parse core political speech. This is a responsibility that the Commission should shun absent a clear Congressional directive. The cases that the alternative will present to the Commission will be difficult and their resolution will be unsatisfactory. The distinctions between cases that the Commission will attempt to draw will turn on criteria that have no practical fundraising consequences. The Commission will have rules then that achieve nothing other than to punish the uninstructed or exuberant speaker.