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January 7, 2005

**By Electronic Mail**

Ms. Mai T. Dinh
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Federal Election Commission
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partytaxexempts@fec.gov

**Re: Comments on Notice 2004-17: Political Party Committees Donating Funds to Certain Tax-Exempt Organizations and Political Committees**

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 2004-17, published at 69 Fed. Reg. 71388 (December 9, 2004), requesting comments on "proposed amendments to . . . rules governing limitations on national, State, district, and local party committees making or directing donations to certain tax-exempt organizations and political organizations." *Id.*

More specifically, the Commission has invited comments on proposed revisions to 11 C.F.R. § 300.37, and the question of whether state, district and local party committees should be allowed to make or direct donations of Levin funds to certain tax-exempt organizations to the extent permitted by state law. 69 Fed. Reg. 71389. We write to urge the Commission *not* to allow such party committees to make or direct donations of Levin funds to tax-exempt organizations.

## I. Introduction

The Federal Election Campaign Act ("FECA"), as amended by BCRA, prohibits any national, state, district or local political party committee from soliciting, directing or making donations to certain tax-exempt organizations. 2 U.S.C. § 441i(d). This prohibition was challenged on constitutional grounds in *McConnell v. FEC*, 124 S. Ct. 619 (2003). The Supreme Court upheld the provision, but conducted its analysis in two parts.

First, the Court analyzed the prohibition on party committees soliciting donations for tax-exempt organizations. It upheld the prohibition, finding it to be "closely drawn to prevent political parties from using tax-exempt organizations as soft-money surrogates." *Id.* at 679.

The Court then turned to the prohibition on party committees making or directing donations to tax-exempt organizations. The Court also upheld this provision generally, recognizing that "[a]bsent such a restriction, state and local party committees could accomplish directly what the antisolicitation restrictions prevent them from doing indirectly—namely, raising large sums of soft money to launder through tax-exempt organizations engaging in federal election activities." *Id.* at 680.

However, the Court continued: "The prohibition does raise overbreadth concerns if read to restrict donations from a party's federal account—*i.e.*, funds that have already been raised in compliance with FECA's source, amount, and disclosure limitations." *Id.* at 681. The Court reasoned that "prohibiting parties from donating funds already raised in compliance with FECA does little to further Congress' goal of preventing corruption or the appearance of corruption of federal candidates and officeholders." *Id.* The Court concluded by narrowly construing this portion of the statute to apply "only to donations of funds not raised in compliance with FECA." *Id.*

Given this, we agree with the changes proposed by the Commission to limit the scope of the regulations implementing section 441i(d) to prohibiting the directing or donating of *non-Federal* funds.

The NPRM, however, raises one important question that we wish to comment on in more detail: whether state, district and local party committees "should be allowed to make or direct donations of Levin funds" to tax exempt organizations. 69 Fed. Reg. 71389. Put somewhat differently, the question is whether Levin funds "have already been raised in compliance with FECA's source, amount, and disclosure limitations," *McConnell*, 124 S. Ct. at 681, and are thus to be treated as "Federal" funds subject to the Court's concern about the statutory overbreadth of section 441i(d), or whether Levin funds are "non-Federal" funds properly subject to the statute's prohibitions.

The statutory language and legislative history of the Levin Amendment establish that Levin funds are most accurately characterized as non-Federal funds which, with regard to the Supreme Court's overbreadth concerns, are not "raised in compliance with FECA's source, amount, and disclosure limitations." *Id.* As such, party committees should *not* be allowed to donate or direct Levin funds to tax-exempt organizations, because to do so would authorize circumvention of important BCRA restrictions on the expenditure of Levin funds.

## II. FECA Levin Funds Provisions

**A. Statutory Language.** Generally, a state, district or local party committee may make expenditures for "Federal election activities"[1] only from funds subject to FECA's limitations,

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[1] Federal election activities are activities that Congress determined have a significant effect on federal elections, including:

- voter registration activity during the 120 days before a federal election;
- voter identification, GOTV activity and generic campaign activity in connection with an election in which a federal candidate is on the ballot;
- public communications that promote, support, attack or oppose a federal candidate; and

prohibitions, and reporting requirements (*i.e.*, "Federal" or "hard" money). 2 U.S.C. § 441i(b)(1). However, BCRA permits state party committees to pay for certain Federal election activities using a combination of hard money and "Levin funds." *Id.* at § 441i(b)(2).

Tellingly, BCRA does not use the term "Levin funds," but instead refers to "amounts which are not subject to the limitations, prohibitions, and reporting requirements of this Act (other than any requirements of this subsection)." *Id.* at § 441i(b)(2)(A)(ii). Thus, Levin funds are *defined by contrast to Federal funds* subject to FECA's limitations, prohibitions and reporting requirements.

This is consistent with the Supreme Court's use of the statutory terms. Early in the *McConnell* opinion, the Court explains that "[u]nder FECA, 'contributions' must be made with funds that are subject to the Act's disclosure requirements and source and amount limitations. Such funds are known as 'federal' or 'hard' money." 124 S. Ct. at 648. The Court thus uses the terms "Federal" money and "hard" money interchangeably.

In narrowly construing section 441i(d), the Court noted that "there is nothing that compels us to conclude that Congress intended 'donations' to include transfers of *federal* money…" *Id.* at 682 (emphasis added). Given the Court's nomenclature, this strongly suggests that the Court was referring to only "hard" money—money raised subject to the basic FECA limitations and prohibitions of sections 441a and 441b—and was not construing section 441i(d) to permit the donation or transfer of the very differently regulated Levin funds. Indeed, in describing Levin funds, the Court noted that "[e]xcept for the $10,000 cap and certain related restrictions . . . § 323(b)(2) leaves regulation of such contributions to the States." *Id.* at 671. It makes no sense, given this description, to interpret the Court's overbreadth holding as encompassing Levin funds within its use of the term "federal" funds.

This reading of *McConnell* is supported by the Court's additional statement that section 441i(d) "does raise overbreadth concerns if read to restrict donations *from a party's federal account—i.e.*, funds that have already been raised in compliance with FECA's source, amount, and disclosure limitations." *Id.* at 681 (emphasis added). Thus, the Court limited its overbreadth concern only to donations made from a party's "federal account." Even if one construed the Court's use of the phrase "funds raised in compliance with FECA" to include Levin funds—an entirely unnatural reading of the Court's language—there is simply no basis to think that the Court was including Levin funds in its reference to funds from a "party's federal account."

Accordingly, a plain reading of BCRA and of *McConnell* establishes that Levin funds are not, for the purposes of the Supreme Court's overbreadth concerns, funds "from a party's federal account" or "raised in compliance with FECA's source, amount, and disclosure limitations." *Id.* As such, Levin funds are not the kind of funds that the Court intended to permit state parties to donate or direct to tax exempt groups.

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- services provided by a state, district or local party committee employee who spends more than a quarter of his/her time on federal election activities.

2 U.S.C. § 431(20).

**B. Legislative History.** The author of the BCRA amendment that created Levin funds. Senator Carl Levin (D-MI), repeatedly referred to the funds permitted by this provision as non-Federal dollars. When introducing his amendment, Senator Levin explained,

> this amendment will allow the use of some *non-Federal dollars* by State parties for voter registration and get out the vote, where the contributions are allowed by State law, where there is no reference to Federal candidates, where limited to $10,000 of the contribution which is allowed by State law, and where the allocation between Federal and non-Federal dollars is set by the Federal Election Commission.

147 Cong. Rec. S3124 (daily ed. Mar. 29, 2001) (statement of Sen. Levin). (emphasis added). Senator Levin continued:

> This amendment provides some fine tuning in an area where State parties are using *non-Federal dollars*, dollars allowed by State law, for some of the most core activities that State parties are involved in; that is, voter registration and get out the vote.
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> [W]e ought to allow State parties using *non-Federal dollars*, under very clear limits, where there is not an identification of a Federal candidate, where there is a limit as to how much of those contributions they can use, and where the contributions are allowed by State law . . . .

*Id.* (emphasis added).

Senator Levin repeatedly emphasized two aspects of his amendment: it dealt only with *non-Federal funds* and it restricted the use of these non-Federal funds to voter registration and get-out-the-vote efforts. This legislative history demonstrates a clear congressional intent that the new category of funds created by Senator Levin's amendment be recognized as *non-Federal funds* with strict limitations on their use.

**C. Commission interpretation.** The Commission's own interpretation of the Levin Amendment supports the conclusion that such funds are not to be considered "Federal" funds raised pursuant to the limitations, prohibitions and reporting requirements of FECA. In the Explanation and Justification 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

The Commission separately defined "Federal funds" in 11 C.F.R. § 300.2(g) to mean "funds that comply with the limitations, prohibitions and reporting requirements of the Act." By contrast, the Commission regulations in 11 C.F.R. § 300.2(h) define "Levin funds" as funds "raised pursuant to 11 CFR 300.31 . . . ." 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.

It is clear from the structure of the regulations that the Commission distinguishes between "Federal funds" and "Levin funds." Only "Federal funds" are considered to be "funds that comply with the limitations, prohibitions and reporting requirements of the Act." Levin funds, by contrast, are treated as "non-Federal" funds that "comply with the laws of the State . . . ."

**D. Anti-circumvention goals of BCRA.** Finally, construing section 441i(d) to allow state parties to donate Levin funds to tax exempt groups would open the door to widespread circumvention of the carefully crafted protections of the Levin Amendment. It is unimaginable that the Supreme Court intended this result in its overbreadth analysis in *McConnell*.

Although Levin funds are not subject to FECA's limitations, prohibitions and reporting requirements, a state party's use of such funds is highly circumscribed. Most importantly, Levin funds may not be used to fund an activity that refers to a clearly identified candidate for federal office, 2 U.S.C. § 441i(b)(2)(B)(i), or to fund any broadcasting, cable, or satellite communication, unless the communication refers solely to a candidate for state or local office. *Id.* at § 441i(b)(2)(B)(ii).

Whereas political party committees must abide by these restrictions in their use of Levin funds, the activities of tax-exempt organizations are not subject to such restrictions. Thus, the restrictions on the parties' spending of Levin funds could be easily evaded by the simple expedient of transferring that money to outside groups which could then spend the funds for, *e.g.*, broadcast ads that refer to federal candidates. Allowing such transfers would defeat the carefully constructed set of fences and prohibitions that Congress established in the Levin Amendment. It would license state parties to raise Levin funds under the more relaxed fundraising rules applicable to such funds, but then transfer those funds to tax exempt groups to be spent for the very purposes for which Congress expressly prohibited the parties from spending this money. In short, it would allow the state parties to do indirectly what they cannot do directly, and thus circumvent the spending restrictions of the Levin Amendment.

Accordingly, the Commission should not allow state, district and local party committees to donate or direct Levin funds to tax-exempt organizations and thereby sanction the circumvention of the BCRA provisions that restrict the expenditure of Levin funds—restrictions fundamental to the very definition of Levin funds.

## III. Conclusion

The overbreadth concerns expressed by the Supreme Court in *McConnell* will be fully remedied by the Commission's adoption of regulations allowing state party committees to make

or direct donations of *federal hard money* to certain tax-exempt organizations. By contrast, allowing party committees to donate or direct Levin funds is not required by *McConnell* and would undermine the language and intent of BCRA. Accordingly, we urge the Commission not to allow state, district and local party committees to donate or direct Levin funds to certain tax-exempt organizations.

We appreciate the opportunity to submit these comments.

Respectfully,

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