February 4, 2004

**VIA FACSIMILE**

Mr. Lawrence H. Norton
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

**Re: ABC AOR 2003-37**

Dear Mr. Norton:

The undersigned respectfully submit these comments on the draft opinion that your office produced in connection with the Commission's consideration of Advisory Opinion Request 2003-37 (Americans for a Better Country, or "ABC"). We are writing on behalf of America Coming Together, an unincorporated political entity consisting of a federal account registered with and reporting to the Federal Election Commission (FEC) under sections 433 and 434 of the Federal Election Campaign Act (FECA), and a non-federal account registered with the Internal Revenue Service under section 527 of the Internal Revenue Code.

Below, we note the points of agreement with the conclusions reached in the OGC Draft. We address at length the points of disagreement, most significantly over the draft's concoction of unprecedented and extreme restrictions on communications that refer to a federal candidate and "support, promote, attack or oppose" that candidate. The draft proposes similar restrictions for fundraising communications that refer to a specific federal candidate. These proposed new rules go beyond the Commission's statutory authority; ignore the lines recently drawn by Congress in its revision of the FECA in BCRA; misconstrue and misapply the Supreme Court's recent ruling in *McConnell v. Federal Election Commission*; and in any event, in articulating a wholly novel theory of regulated "expenditures," range far beyond the permissible boundaries of an advisory opinion.

**Mistaken Premise: A New Theory of Regulated "Expenditures"**

The General Counsel explicitly premises much of the draft advisory opinion on the Supreme Court's decision in *McConnell v. Federal Election Commission*, 124 S. Ct. 619 (2003). In the General Counsel's view, the opinion somehow authorizes the Commission to define, by advisory opinion, the term "expenditure" under 2 U.S.C. § 431(9) to include all "public communications that promote, support, attack or oppose a federal candidate." *See* OGC Draft at 2, 12-15, 16-18, 23.

This interpretation is patently incorrect, as can be demonstrated by the application of recognized canons of statutory construction and legal analysis. In this section of our comments, we address the flaw construction of the OGC theory of "expenditures."

***The Definition of "Expenditure"***

Section 431(9) of the Act defines "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money, or anything of value, made by any person for the purpose of influencing any election for federal office." *Id.*; *see also* 11 C.F.R. pt. 100, subpt. D (2003). As the *McConnell* Court related in detail, over the years the Court had construed this term to be confined to communications that "in express terms advocate the election or defeat of a clearly identified federal candidate," so as to avoid unconstitutional vagueness and overbreadth. 124 S. Ct. at 647, 687-88 (quoting *Buckley v. Valeo*, 424 U.S. 1, 42-44 (1976)). The *McConnell* Court characterized its opinion in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248 (1986), as both reaffirming this construction of "expenditure" and applying the same construction to the prohibition of union and corporate "expenditures...in connection with any [federal] election" in 2 U.S.C. § 441b. *See* 124 S. Ct. at 688 n.76.

While the *McConnell* Court concluded, "the express advocacy limitation, in both the expenditure and disclosure contexts, was the product of statutory interpretation rather than a constitutional command," *id.* at 688, it made absolutely clear that FECA did indeed contain that "limitation." Congress, in enacting BCRA, modified this limitation only insofar as it added "electioneering communications" to the scope of proscribed union and corporate treasury spending:

> Since our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates has been firmly embedded in our law .... Section 203 of BCRA amends [§ 441b(b)(2)] to extend this rule, which previously applied only to express advocacy, to all "electioneering communications" covered by the definition of that term in amended FECA §[441b(b)(2)].

*Id.* at 694.[1] BCRA did *not* amend § 431(9). To the contrary, BCRA specifies that electioneering communications are not "expenditures" under the Act. *See* 2 U.S.C. § 434 (f)(3) (treating electioneering communications as "disbursements"). Congress in BCRA simply identified and restricted "electioneering communications" as a new class of regulated independent expression.

Moreover, the Commission promulgated detailed rules to implement BCRA, and to otherwise modify existing rules in the light of its enactment, and those rules preclude the reading offered by the General Counsel. The "expenditures" prohibited by corporations and unions, for example, are specified, 11 C.F.R. § 114.2(b)(2), and they do not include "public communications" referring to federal candidates that "promote, support, attack or oppose" that candidate. Nowhere in the recent Commission rulemaking conducted pursuant to BCRA does there appear even a proposal to read the term "expenditure" as the OGC now proposes to do.[2]

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[1] The Court rejected the constitutional challenge to the regulation of "electioneering communications" on the grounds that (1) "the Government has a compelling interest in regulating advertisements that expressly advocate the election or defeat of a candidate for federal office," *McConnell*, 124 S. Ct. at 696; (2) "electioneering communications" is neither a vague term nor encompasses an overbroad realm of expression, *id.* at 675, 697; and (3) "electioneering communications" comprise "the functional equivalent of express advocacy," *id.* at 696. If FECA were to be amended further by Congress to compel federal political committee underwriting of additional forms of communication, that amendment would have to satisfy the second and third steps of this analysis.

[2] In fashioning new rules governing nonparty committees like ABC, the OGC draft engages in a highly selective use of legal terms and concepts drawn from the provisions governing political parties and state candidates. It uses the "promote, support, oppose and attack" language, in one instance, but then expressly rejects other importations from the party context, such as the focus on "public communications" or the application of the new rules on party phone banks. OGC draft at pp.17, 18 n.16. The rationale for the OGC's acceptance of some but not others of these party-related provisions seems only to be this: that OGC seeks to limit more rather than less of the nonparty committee's financing options. This is an odd policy choice, made pursuant to a statute that was concerned principally with restricting party soft money, and only narrowly restricting (through the electioneering communication provision) the activities of nonparty committees.

***Misapplication of the McConnell Decision***

Contrary to the suggestions in the OGC Draft, the *McConnell* decision provides no basis for a different reading. It did not address, let alone suggest, either any modification of the FECA term "expenditure" or any new restriction on communications by unions, corporations, unincorporated associations, non-federal section 527 political organizations or non-party, non-candidate political committees, except for "electioneering communications." Indeed, in rejecting plaintiffs' under-inclusiveness argument – that the proscription of BCRA section 203 did not apply to "print media or the Internet" – the Court noted that the definition leaves all "advertising 61 days in advance of an election entirely unregulated" and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Id.* at 697 (quoting *Buckley*, 424 U.S. at 105); *see also* 124 S. Ct. at 702 ("[E]xpress advocacy represents only a tiny fraction of the political communications made for the purpose of electing or defeating candidates during a campaign.").

Congress further accepted in BCRA that tax-exempt Section 501(a) and non-federal Section 527 organizations could continue to engage in what BCRA newly defined as "Federal election activity" under 2 U.S.C. § 431(20). Eschewing limitations on those groups' ability to engage in that activity, it instead restricted fundraising for them by federal candidates and officeholders precisely because they *do* engage in that activity. *See* 2 U.S.C. § 441i(e)(1) & (4). BCRA imposed similar restrictions on state and local party fundraising for section 501(a) organizations that engage in Federal election activity, and completely barred them from raising non-federal funds for most non-federal Section 527 organizations. *See* 2 U.S.C. § 441i(e)(d); 11 C.F.R. § 300.37(a)(3)(iv); *see also McConnell*, 124 S. Ct. at 680 n.69.

In upholding these fundraising restrictions, the *McConnell* Court explicitly and extensively discussed facts in the record reflecting that Section 501(c) and non-federal Section 527 organizations engage in "Federal election activity" with non-federal funds, such as "sophisticated and effective electioneering activities for the purpose of influencing federal elections, including waging broadcast campaigns promoting or attacking particular candidates and conducting large-scale voter registration and GOTV drives." 124 S. Ct. at 678 n.68. The Court upheld BCRA's restrictions on the ability of federal candidates and officeholders and state and local party committees "to mobilize their formidable fundraising apparatuses, including the peddling of access to federal officeholders, into the service of like-minded tax-exempt organizations that conduct activities benefiting their candidates." *Id.* at 678. The Court could not have evidenced more clearly that these organizations would operate under rules very different from those applied to party committees and federal candidates and

officeholders. For this reason, while describing non-federal Section 527 organizations as inherently "partisan," the Court distinguished them in legal status from "federal" political committees. *See id.* at 678-79. Indeed, Congress in BCRA explicitly referred to non-federal Section 527 organizations in Sections 323 and 203, and nowhere else; so, as with other tax-exempt organizations, Congress made explicit choices as to them, which, of course, did not include anything remotely like what the OGC draft proposes.

Yet the OGC analysis would effectively eliminate that distinction. In doing so, it would ignore the policy basis upon which the distinction was based in the first instance. BCRA was enacted to sever the financial links between officeholders, candidates and parties, on the one hand, and tax-exempt groups on the other; BCRA did *not* prohibit tax-exempt groups *themselves* from either engaging in Federal election activity or – independently from officeholders, candidates and parties – raising non-federal funds in order to do so. *See id.* at 678-680, 682-83. Instead, BCRA required state and local party committees – and *only* those committees – to spend federally permissible funds for any "public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." 2 U.S.C. §§ 431(20)(A)(iii); *see also id.* 441i(b)(1). Yet the OGC Draft would override BCRA's text and underlying rationale to substitute policy choices of the Commission that plainly contradict the ones made by Congress.

It is striking, in this context, that *McConnell* plaintiff Republican National Committee and other political parties challenged this and Title I's other "unique speech disabilities" for political parties on equal protection grounds *precisely because* BCRA imposed *no* comparable limitations on "corporations, unions, trade associations, and other interest groups." Brief of the Political Parties at 91-98, *McConnell v. FEC*, 124 S. Ct. 619 (2003) (No. 02-1674).[3]

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[3] The RNC emphatically argued to the Court that BCRA "singles political parties out" because, "[i]n contrast, corporations, unions, trade associations, and other interest groups not only avoid the collateral restrictions, but are largely unrestricted in raising and spending unlimited, unregulated and undisclosed money from any source to pay for such activities as: voter registration; GOTV; phone banks, mail, and leafleting *at any time*; any broadcast advertising except for 'electioneering communications;' and communications in any form on any subject – including endorsements of federal candidates – to their officers, shareholders, and members." Brief of the Political Parties at 92, *McConnell*, 124 S. Ct. (emphasis in original). The RNC referred to reported efforts already underway by such groups to

And, of course, the Court fully agreed with the RNC's description of BCRA's disparate application as between parties and other groups, confirming that, unlike parties, "[i]nterest groups...remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications)." 124 S. Ct. at 686. But the Court found no constitutional violation because "Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation," including that "[p]olitical parties have influence and power in the legislature that vastly exceeds that of any interest group." *Id.* The pervasive premise of BCRA's new restrictions on political parties was that they – unlike independent groups – are vehicles for contributors to secure influence over and elicit obligations from officeholders and candidates, who maintain close relationships with the parties and whose elections the parties are dedicated to securing. *See id.* at 661.

Nonetheless, the OGC Draft reasons that communications that "promote, support, attack or oppose" federal candidates are "expenditures," payable only with federally regulated funds, because, like party committees, non-federal section 527 and section 501(c)(3) groups[4] "are focused on the influencing of Federal elections" and their communications "have no less a 'dramatic effect' on Federal elections." OGC Draft at 3. OGC's premises are incorrect, but even if they were not, the judgment offered here is not one for the Commission to make. Congress made its choices, and as the Court made clear, it chose not to disturb the rules in place for 527s that avoided express advocacy and coordination with federal candidates. Only an amendment to BCRA could appropriate statutory language restricting how state and local parties can finance certain communications, engraft it on another, preexisting FECA statutory term ("expenditure"), and enforce the resulting restriction on other, non-party entities.

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undertake voter outreach that BCRA did not restrict, emphasizing that "BCRA will merely shift nonfederal funds away from political parties to interest groups...." *Id.* at 25.

In their comments now on AOR 2003-37, however, the RNC, without explaining whether or how its portrayal of BCRA to the Court changed by *McConnell* or some other intervening legal event, urges that "it will be important that the same standard for what constitutes 'Federal election activity' under the BCRA be applied across the board, whether to political parties or Section 527 organizations." *RNC Comments* at 1 (January 13, 2004).

[4] The draft here cites *McConnell*'s description of communications and conduct by the NAACP's National Voter Fund, NARAL, and "many . . . tax-exempt organizations." 124 S. Ct. at 678 n.68.

***Failure to Consider the Legislative History***

In sum, BCRA – the most sweeping reconsideration and revision of FECA since the 1974 amendments – was thoroughly considered and debated, by Congress and neither its text nor its legislative history reflect a trace of a suggestion that FECA could be read as the General Counsel now proposes.

Moreover, this analysis is confirmed by the explicit positions asserted throughout the *McConnell* litigation by the Commission and BCRA's congressional sponsors as they outlined BCRA's history and stressed its limited reach in the realm of speech by non-party, non-candidate entities. As the Commission explained to the district court, Senators McCain and Feingold first introduced legislation to block the use of corporate and union general treasury funds for "unregulated electioneering disguised as 'issue ads.' *See* 143 Cong. Rec. S159 (Jan. 21, 1999); 143 Cong. Rec. S10106-12 (Sep. 29, 1997)." Brief for Defendants at 50, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (Civ. No. 02-582). Notably, as the Commission related, this early version of the McCain-Feingold bill "addressed electioneering issue advocacy by redefining 'expenditures' subject to FECA's strictures to include public communications at any time of year, and in any medium, whether broadcast, print, direct mail, or otherwise, that a reasonable person would understand as advocating the election or defeat of a candidate for federal office. See 143 Cong. Rec. S10107, 10108." *Id.* at 50.

Redefining "expenditure" is, of course, precisely the course recommended now in the OGC Draft. But BCRA's sponsors *abandoned* that approach after their initial legislative proposals, and instead proposed the distinct and "narrow[er]" regulation of "electioneering communications," "in contrast to the earlier provisions of the...bill." *Id.* (quoting 144 Cong. Rec. H3801, H3802 (June 28, 2001)). As the sponsors explained to the Court, "Congress self-consciously evaluated ways to limit the reach of the law without sacrificing its purpose, so as to leave unregulated as many avenues of speech as possible." Opposition Brief for Defendants at I-84, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (Civ. No. 02-582).

The Commission also repeatedly confirmed that FECA as then written did not limit advertisements that did not contain words of express advocacy. "[C]orporations and labor unions can spend unlimited general treasury funds on electoral advocacy outside FECA's regulatory framework, and now do so routinely, through the simple expedient of avoiding express advocacy." Brief for Defendants at 147, *McConnell*, 251 F. Supp. 2d. "Because [election-proximate] advertisements do not include words of express advocacy, the corporate

or union disbursements used to finance them have entirely escaped regulation under FECA." Brief for Appellees at 15, *McConnell v. FEC*, 124 S. Ct. 619 (2003) (No. 02-1674).

The Commission further explained that FECA did not limit interest groups that used corporate and union funds for non-express advocacy ads. "While the air wars between business and labor constituted the largest and most direct influx of corporate and union money into the 2000 elections, corporate money also helped fund ads run by various interest groups, who, by virtue of avoiding express advocacy, could solicit corporate contributions to pay for their electioneering activities." Brief for Defendants at 46, *McConnell*, 251 F. Supp. 2d. The Commission concluded that "by 2000, corporations, unions, and interest groups fully recognized that, through the trivial effort of avoiding express advocacy, they could make unrestricted and undisclosed expenditures to influence the outcome of federal elections while avoiding the reach of federal election law." *Id.* at 48.

Before the Supreme Court, the Commission characterized BCRA as "a refinement of pre-existing campaign-finance rules" rather than a "repudiation of the prior legal regime," because BCRA merely extended the reach of federal election law from express advocacy to "electioneering communications" paid for with corporate or labor union general treasury funds. Brief for Appellees at 27, *McConnell v. FEC*, 124 S. Ct. 619 (2003) (No. 02-1674). BCRA's sponsors made the same argument to the Court, contending that "[Congress] made another 'cautious advance' in the long history of 'careful legislative adjustment of the federal electoral laws' to reflect ongoing experience.... It drew new lines that respond directly to the demonstrated problem, in a way that honors First Amendment values of clarity and objectivity, and does not 'unnecessarily circumscribe protected expression.'" Brief for Defendants at 43, *McConnell v. FEC*, 124 S. Ct. 619 (2003) (No. 02-1674).

The Commission was explicit that BCRA left unregulated all public communications other than express advocacy and "electioneering communications" with enumerated examples. "[B]ecause of the exceptional clarity of the lines drawn by BCRA's primary definition, any entity truly not interested in airing electioneering communications may easily avoid the source limitation on such communications by simply not referring to a candidate for federal office, running the advertisement outside the 30- or 60-day window, or running the advertisement outside the candidate's district." Brief for Appellees at 92, *McConnell*, 124 S. Ct. And, the Commission asserted, interest groups could still "run print advertisements, send direct mail, or use phone banks to target a particular candidate in the days before an election in his district without even having to take the minimal step of using a separate segregated fund." *Id.* at 95 n.40. BCRA's sponsors agreed:

> [T]he electioneering communications definition only applies to TV and radio broadcasts, leaving similar communications in alternative media unregulated. Newspaper and magazine advertising, mass mailings, internet mail, public speeches billboards, yard signs, phone banks, and door-to-door campaign all fall outside its narrow scope, as do internal communications between a corporation or union and its stockholders or members.

Brief for Intervenor-Defendants at 158, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (Civ. No. 02-582).

When Congress revises a statute, its decision to leave certain sections unamended constitutes at least acceptance, if not explicit endorsement, of the preexisting construction and application of the unamended terms. *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003); *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 562 (1991); *Asarco, Inc. v. Kadish*, 490 U.S. 605, 632 (1988). And the administrative agency that interprets and enforces the law has no authority to effectuate "amendments" that Congress might have adopted but did not. Rather, post-*McConnell*, only a legislature may seek to expand government regulation beyond express advocacy and "electioneering communications," and in order to do so it would have to demonstrate that the additional restriction is not unconstitutionally vague and is narrowly tailored to serve the requisite governmental interest, as *McConnell* so found regarding "electioneering communications." *See Anderson v. Spear*, No. 02-5529, slip op. at 22 (6th Cir. Jan. 16, 2004).

In this respect, it is very much to the point that the *McConnell* majority opinion concluded with its observation that BCRA was unlikely to be "the last congressional statement on the matter" and "[w]hat problems will arise, and how Congress will respond, are concerns for another day." 124 S. Ct. at 232. At oral argument, the BCRA sponsors' counsel responded to a question posing the prospect that more money would be contributed to "independent, sometimes highly ideological groups" in place of now-banned soft money donations to the political parties, that if that occurred and "it turns out to be a phenomenon that creates corruption as this Court [has] defined it...Congress can take care of the problem." Transcript at 88-89, *McConnell v. FEC*, 124 S. Ct. 619 (2003) (No. 02-1674) (Sept. 8, 2003). While we hasten to say that independent groups' political activity and advocacy are not "problems" but essential aspects of a vigorous democracy, the point is clear that only the Congress has authority, subject to constitutional review, to restrict those endeavors further.

Furthermore, the Commission cannot define "expenditure" one way for a non-federal Section 527 account and another way for other organizations that are not political committees under

the Act. Since *Buckley*, as confirmed by *MCFL* and now *McConnell*, the scope of that term with respect to communications by *all* groups other than political committees has been express advocacy, so unions, corporations and incorporated Section 501(c) and non-federal 527 organizations have been compelled to undertake such communications only through connected federal political committees, if at all; and they have been able to use non-federal funds for other public communications referring to federal candidates – in the case of corporations and non-federal Section 527 organizations, with their regular treasuries, and in the case of unions and other Section 501(c) organizations, either their regular treasuries or, where Internal Revenue Code standards indicated that an adverse tax consequence could attach to regular treasury spending, with non-federal Section 527 separate segregated funds. Indeed, most recently, the IRS issued Rev. Rul. 2004-06 to describe various communications fact patterns in order to guide that choice for Section 501(c)(4), (5) and (6) organizations; but under the OGC draft, as to any such communication that could be said to Apromote, support, attack or oppose" a federal candidate (and many apparently could, given the OGC=s disposition of ABC=s proposed communications), the non-federal Section 527 separate segregated fund could *not* fund it, contrary to that revenue ruling, and the Section 501(c) organization could only make the expenditure" through a federal political committee. Even if this were properly subject to the Commission's regulatory process, it would be constrained at least to Aconsult and work together [with the IRS] to promulgate rules [and] regulations...that are mutually consistent." *See* 2 U.S.C. ' 438(f).

***Improper Reliance on Advisory Opinion Process***

Finally, even if the Commission did have the statutory authority to redefine "expenditure" as the OGC Draft proposes, it could not do so in an advisory opinion. Such a "rule of law" could be adopted "only as a rule or regulation pursuant to procedures established in section 438(d)," 2 U.S.C. § 437f(b), including "submission of the rule or regulation to the Congress" for its review and opportunity to intervene before it becomes effective. *See United States Defense Comm. v. FEC*, 861 F.2d 765, 771 (2d Cir. 1988). "General statements of tests and standards (other than those included in the FECA and our regulations) are inappropriate to the advisory opinion process because (1) this process is limited to specific events or transactions and (2) the Commission may enunciate rules of law which bind the regulated community only through regulations, not through advisory opinions." FEC Advisory Opinion 1999-11 (May 21, 1999) (Concurrence by Vice Chairman Wold and Commissioners Elliott and Mason). "Rulemaking is not simply the preferred method for filling in gaps in the FECA. It is the required method." FEC Audits of Dole for President Committee (June 24, 1999) (Statement of Reasons of Vice Chairman Wold and Commissioners Elliott, Mason and Sandstrom). As

we have shown, such a rulemaking here would be an *ultra vires* act; so much more so if as an advisory opinion.

**Communications: Promoting, Supporting, Attacking or Opposing Clearly Identified Candidates**

In response to Questions 3 through 7, the OGC Draft concludes that various communications referring to a clearly identified federal candidate must be paid with all federal funds, no matter how or when the communication is made and even though the communication does not contain words of express advocacy.[5] Again, this would be a significant change in the law – an extension of the regulation of communications way beyond the actual change in the law made in BCRA.

Congress manifestly did not change the law affecting the financing of "issue ads" by non-party and non-candidate committees with federal and non-federal accounts. Only express advocacy communications and certain communications coordinated with a Federal candidate or party committee must be paid for exclusively with Federal funds. "Electioneering communications" must be paid for with Federal funds *or* with non-Federal funds, provided by individuals, if the entity is an unincorporated section 527 political organization and maintains those funds in a segregated account.

For political committees (as ABC purports to be), the rules in place prior to BCRA remain effective. The Court clearly recognized this to be the case, stating:

> As a practical matter, BCRA merely codifies the principles of the FEC allocation scheme while at the same time justifiably adjusting

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[5] The AOR poses these questions only on behalf of a political committee with both a federal and a non-federal account. It is troubling that the analysis leading to the conclusion that all Federal funds must be used is based on a re-write of the definition of "expenditure." If this same analysis is used to apply to organizations that are not Federal political committees, it would be a radical departure from the existing law and could lead to the conclusion that any organization that makes uncoordinated disbursements for communications that promote, support, attack or oppose a clearly identified Federal candidate even outside the time periods applicable to public communications and electioneering communications. If these disbursements are defined as "expenditures," then such an organization could become a Federal political committee once the amount of those disbursements reaches $1,000. This would be an extension of the law that can only be done by Congress.

> the formulas applicable to these activities in order to restore the efficacy of the FECA's longtime statutory restrictions – approved by the Court and eroded by the FEC's allocation regime – on contributions to state and local party committees for the purpose of influencing federal elections.

124 S. Ct. at 673-74. Here the Court referred to BCRA's prohibition on allocation altogether for certain Federal election activity, and also its revision of allocation procedures for state and local parties that raise and spend Levin monies for Federal election activity. Congress did not mandate any such prohibition or revision for non-express advocacy by non-party political committees and non-federal political organizations, except where such advertising would be coordinated with the candidate within the meaning of the Commission's revised coordination rules. Indeed, the Commission revised all of its rules pursuant to the statute on allocation, coordination and other issues affected by the new law, and nowhere did it seek to make the change that OGC advocates in its draft.

As discussed above, the *McConnell* Court did not authorize a change on the basis of its discussion of the inapposite case of state and local parties. The "promote, support, attack or oppose" standard was adopted for those specific entities alone, and when engaged in specific activities: for example, the language from the opinion cited by the OGC Draft at 2-3 – that the standard recognizes the federal election "influence" of certain activities – appears in *McConnell* only as an explanation of the restrictions on state and local party "public communications." *See* 124 S. Ct. at 675 n.64. Again, Congress chose to regulate advertising of this kind by state and local party committees and candidates, in the belief that it would otherwise become the natural focus of efforts by parties and federal candidates to circumvent the anti-corruption measures of the law targeted at them. There is no basis for an *ad hoc* extension of this analysis to nonparty committees, without regard to statutory construction or Congressional intent.

ABC is an unincorporated nonconnected political entity with a federal and a non-federal account. Other than the new rules applicable to "electioneering communications," none of the requirements and allowances of this committee's financing of public communications and generic voter drives, including the allocation rules, have changed in the wake of BCRA. Thus, the correct analysis of the questions posed by ABC regarding its proposed communications is as follows:

(1) Communications that refer to a clearly identified Federal candidate and either contain express advocacy or are coordinated with a Federal candidate or party committee within the meaning of 11 C.F.R. pt. 109 must be paid for by the ABC federal account.

(2) Broadcast communications that refer to a clearly identified Federal candidate that do not contain words of express advocacy and are not coordinated with a Federal candidate or party committee, made more than 30 days before a primary or 60 days before a general election, may be paid with funds from the ABC non-federal account (including corporate and labor funds).

(3) Broadcast communications that refer to a clearly identified Federal candidate that do not contain words of express advocacy and are not coordinated with a Federal candidate or party committee, made within 30 days of a primary or 60 days of a general election, must be paid for by the ABC federal account or from funds donated by individuals and maintained in segregated account containing only funds donated by individuals and not funds from corporations or labor organizations.

*Communications: Express Advocacy*

The OGC Draft concludes that communications that constitute "express advocacy" of a single federal candidate must be paid exclusively with federal funds, and that if such communications expressly advocate the election or defeat of more than one federal candidate, the costs must also be paid from federal funds only. We agree that this is a correct reading of the law. In addition, we agree with the General Counsel that a communication expressly advocating the election or defeat of a clearly identified federal candidate along with clearly identified nonfederal candidates, may be paid on an allocated basis pursuant to 11 C.F.R. § 106.1.

The General Counsel also advances the theory that a communication that expressly advocates the election of a clearly identified candidate, but also includes a ticketwide appeal for support of the "entire Republican team" must be paid only with federal funds. The OGC Draft does not clearly state the legal basis for this conclusion. In any event, this reading of the law does not follow from 11 C.F.R. § 106.1. That section requires "attribution" to clearly identified federal candidates, "according to the benefit reasonably expected to be derived." 11 C.F.R. § 106.1(a). While the regulation proceeds to provide examples where the benefit is apportioned among a number of clearly identified candidates, it does not specifically address the case under review here: support for a clearly identified candidate, together with a generic party appeal. By its terms, however, the rule focuses on the "benefit reasonably expected to be derived," which cannot be said to be the same in two different cases – that is, both where the candidate is the exclusive focus of the communication, and where the communication promotes both the candidate and the party on a ticket-wide basis. The OGC, by its interpretation, is precluding allocation of even a portion of the ad committed to a generic party appeal.

Neither Commission precedent nor Congress's choices in BCRA support this reading of section 106.1, and in particular the intent to exclude the use of an allocation for a portion of the ad that appeals for generic party support. As noted, the Supreme Court "codified" the pre-BCRA allocation scheme, except where it was specifically amended in the case of specific entities engaged in specific communications. There is suggestion in BCRA or the legislative history that Congress intended to amend section 106.1 to support the reading adopted by OGC here, or even manifested an expectation that the section as it is currently written would be read as OGC proposes.

***Communications: Fundraising***

The OGC Draft addresses different types of fundraising communications, and as discussed below, accurately states the law in response to some questions, and inaccurately in response to others.

(1) Answers to Questions 15, 16, 17, 18 & 19, 20 & 21

The positions taken by the OGC Draft on all of these questions are clearly correct, in view of Advisory Opinions 2003-3 and 2003-36. Those advisory opinions made clear that, while a federal candidate or officeholder cannot solicit funds that are outside the limitations and prohibitions of the Act, 2 U.S.C. §441i(e)(1), a federal candidate or officeholder *may* attend and speak at fundraising events for a political committee's non-federal account, even though the event raises funds outside the limitations and prohibitions of the Act. Advisory Opinions 2003-3 and 2003-36 further stated that, if a federal candidate or officeholder actually makes a solicitation in connection with such an event, such a solicitation must include or be accompanied by a clear and conspicuous message indicating that the solicitor is only asking for funds that comply with the limitations and prohibitions of the Act. The answers provided in the OGC Draft are consistent with the rulings in these prior advisory opinions.

(2) Answer to Question 22

Question 22 raises the possibility that ABC will solicit funds for its non-federal account by "using the names of specific Federal candidates in solicitations that will convey ABC's support for or opposition to specific Federal candidates." OGC Draft at 28. Solicitations would be undertaken through a variety of means, using messages like those presented in Question 21, including, for example, "ABC supports President Bush's tax cuts to stimulate the economy. Give to ABC so that we can support President Bush's agenda." *Id.*

The OGC Draft concludes that ABC could not solicit non-federal funds using such messages, on the grounds that if ABC solicits funds "by using the names of specific Federal candidates in a manner that will convey ABC's support for or opposition to specific Federal candidates, the funds raised will be contributions to ABC subject to the Act's contribution limits and source prohibitions." OGC Draft at 29. That conclusion is incorrect, for two reasons.

First, the draft's reliance on *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995), is entirely misplaced. Contrary to the suggestion in the draft, the court in that case actually held that contributions solicited for a non-profit organization were *not* subject to regulation under the Act *unless* they were earmarked for activities or communications that *expressly advocate* the election or defeat of a clearly identified candidate.

In *Survival Education Fund*, a non-profit organization had mailed a solicitation for contributions, specifically referencing the 1984 elections, and including an issues survey. The cover letter stated, among other things, that "Your views on the enclosed survey will help us understand and articulate the deep fears of the American people that a second Reagan term will bring new and unchecked nuclear arms escalation . . . an all-out U.S. war in Central America . . . and even more life threatening cuts in human services." 65 F.3d at 288. The Court held that the non-profit organization was an MCFL-type organization and therefore that, even if the solicitation language constituted express advocacy, the organization could spend funds outside the Act's prohibitions and limitations for this communication. The Court then held that this solicitation could be made subject to the disclaimer requirement of 2 U.S.C. §441d(a)(3) precisely *because* the contributions raised were indeed "targeted to the election or defeat of a clearly identified candidate for federal office." *Id.* at 295. The court explained that, in *Buckley*, the Supreme Court had held that a contribution "made for the purpose of influencing" a federal election would include, among other things, a contribution "earmarked for political purposes." *Id.* at 294 (quoting *Buckley*, 424 U.S. at 78). The court then explained what "earmarked for political purposes" would mean with reference to a solicitation for contributions:

> The only contributions "earmarked for political purposes" with which the *Buckley* court appears to have been concerned are those that will be converted to expenditures subject to regulation under FECA. Thus, *Buckley*'s definition of independent expenditures that are properly within the purview of FECA provides a limiting principle for the definition of contributions in §431(8)(A)(i), as applied to groups acting independently of any candidate or his agents and which are not "political committees".... Accordingly, *disclosure is only required* under §441d(a)(3) *for solicitations of contributions that are earmarked*

> *for activities or "communications that expressly advocate the election or defeat of a clearly identified candidate,'....*

*Survival Educ. Fund*, 65 F.3d at 295 (quoting *Buckley*, 424 U.S. at 80) (emphasis added).

ABC's hypothetical language, "give so that we can support President Bush's agenda," does not remotely suggest that the contributions will be earmarked for communications expressly advocating President Bush's re-election. Therefore, such language could clearly be used by ABC in a solicitation of funds, not subject to the limits or prohibitions of the Act, to be deposited in ABC's non-federal account.

Second, it would be entirely inconsistent with the Commission's regulations even to permit, let alone require, ABC to deposit into its federal account funds resulting from the solicitation proposed by ABC. Under 11 C.F.R. §102.5(a)(2), a non-connected committee with federal and non-federal accounts cannot treat any contribution as federally-permissible unless it has been specifically designated for the federal account; results from a solicitation "which expressly states that the contribution will be used in connection with a federal election"; or is received from contributors who are informed that all contributions are subject to the limits and prohibitions of the Act. Significantly, in revising this regulation after the enactment of BCRA, the Commission specifically *eliminated* the provision creating a presumption that any solicitation by a party committee referencing a federal candidate or a federal election "shall be presumed to be for the purpose of influencing a federal election," such that resulting contributions would be automatically subject to the limits and prohibitions of the Act. *See* 11 C.F.R. §102.5(a)(3).[6]

The solicitation language proposed by ABC – "give so that we can support President Bush's agenda" – would actually be insufficient to allow ABC to deposit any resulting contributions

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[6] The OGC's reasoning on this point is also inconsistent with the advisory opinions recently issued to the Republican Governors Association (RGA), among others, that expressly allow federal candidates to appear, speak and be featured guests at fundraising events held to raise nonfederal funds. While the candidates are not allow to specifically "ask" that donors contribute such funds, they are otherwise allowed to support these events with their personal appearance and their remarks. These opinions demonstrate that there is simply no precedent for the statement that federal candidates cannot be featured in the solicitation of nonfederal, as well as federal, funds. Moreover, unlike in the case addressed by the OGC Draft, the candidates participating in the events sanctioned by the RGA and other opinions have expressly consented to the use of their appearance to raise soft money

in its federal account, because that language clearly does *not* expressly state "that the contribution will be used in connection with a federal election." *Id.* §102.5(a) (2)(ii). The purpose of this regulation is to ensure that contributors whose funds are place in the federal account "know the intended use of their contributions." Final Rule, Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49073 (July 28, 2002). If language like that proposed by ABC – earmarking for issue advocacy but not express advocacy – is, under the Commission's rules, by definition insufficient to *inform* donors that their contributions will be used "for the purpose of influencing" a federal election, 11 C.F.R. §100.52(a), then it makes no sense to conclude that such mere issue-advocacy language *earmarks* the contribution for that purpose. Thus the Commission cannot rationally hold that such issue-advocacy language, referencing a federal candidate, automatically makes any resulting contributions subject to the Act's limitations and prohibitions.

For these reasons, the Commission should reject the OGC Draft's answer to Question 22 and hold that the proposed solicitation language *may* be used by ABC to solicit funds, not meeting the Act's prohibitions and limitations, to be deposited into ABC's non-federal account.

Generic Voter Drives and Other Activities Conducted Pursuant to 11 C.F.R. 106.6

The General Counsel, on pages 5-6 of the draft, correctly concludes that the allocation rules the Commission has promulgated in Part 106 of its regulations are still good law. The draft more specifically confirms, correctly, that messages that do not mention a clearly identified federal candidate may be paid on an allocated basis, even where those message are used in connection with a voter registration or GOTV drive conducted by a non-party political committee with a focus on issue or party identification.

In the wake of the *McConnell* decision, several commentators have argued that the Commission's allocation provisions are no longer valid. But it is not correct to say that Congress rejected allocation, or that the Supreme Court condemned such provisions as a means of "circumventing" the federal campaign laws. To the contrary, BCRA set forth a wholly new allocation scheme – applicable to the use of Levin funds for state and local party committee Federal election activity – while not addressing the FEC's existing allocation provisions. Moreover, as noted above, the Supreme Court was aware that the allocation rules in place prior to BCRA remained applicable to voter registration and GOTV activities before the Federal election activity period is triggered. *See* 124 S. Ct. at 696. Even if Congress could constitutionally overturn the FEC's allocation rules (with respect, for example, to political party advertising), Congress did not do so, and they cannot simply be read out of the Commission's regulations.

Coordination Among Non-Party Non-Candidate Organizations

The OGC Draft correctly notes that "neither the Act nor Commission regulations expressly address coordination [by a political committee] with a political committee and 527 political organization or 501(c)(3) organization." The conclusion that "ABC is not categorically prohibited from consulting with, or acting in concert with these other organizations" is consistent with the law.

Furthermore, there does not appear to be any basis for an attempt to restrict or otherwise limit such interactions. The FEC's coordination regulations apply to candidates and party committees, on the basis that their activities, if funded with soft money, present unique and constitutionally compelling dangers of corruption or its appearance. These considerations simply have no bearing on political organizations that do not coordinate with a candidate or political party. Where there is no coordination, there can be no corrupting influence. A prohibition or limitation on interactions between groups, regardless of their legal status, that are not coordinating their efforts with candidates or parties, is neither necessary nor constitutionally supportable.

Effect of Prior Contribution on "Coordination"

The General Counsel's draft concludes that a political committee's prior contribution to a federal candidate does not affect the analysis of coordination as it would apply to its subsequent activities, such as GOTV and voter registration. Similarly, a solicitation for funds for a voter registration or GOTV drive that also references a federal candidate does not require that all subsequent voter registration or GOTV efforts messages be paid with federal funds, where such subsequent messages do not reference a federal candidate.

This position is consistent with the position the Commission has taken with respect to independent expenditures – that the mere making of a contribution does not constitute coordination with a candidate. It is also consistent with the detailed provisions of the coordination regulations. Those rules do not support a conclusion that the making of a contribution alone satisfies any prong of the test for coordination.

This view is supported, by analogy, by the *McConnell* decision's striking as unconstitutional the requirement that party committees must choose in the general election between independent activity and coordinated activity. The Court made clear that a party may conduct both types of activity at the same time. *See* 124 S. Ct. at 700-01.

Criminal Penalties

The draft correctly notes that the Commission does not have the authority to impose criminal penalties, and, as a result, it properly declines to identify conduct that might be subject to them.

Foreign National Contributions

As noted in the draft, nothing in the Act or Commission regulations in any way creates an exception for political organizations such as ABC to solicit or receive contributions from foreign nationals. This broad prohibition clearly applies to political organizations that operate both federally and nonfederally.

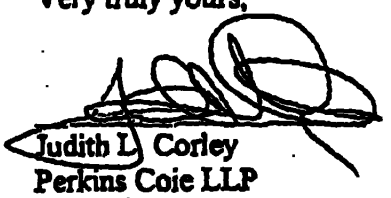
Hypothetical Questions or Inadequate Information

The OGC Draft properly refuses to address certain speculative questions that cannot be accurately analyzed without specific facts. For example, the draft declines to address issues of coordination between ABC and candidates for Federal office or political party committees The draft's approach in this respect is the correct one.

Similarly, the Commission declines to address the activities of donors of nonfederal funds. As the General Counsel's draft notes, ABC's request "could implicate many third parties, who may find themselves in a wide variety of circumstances." Again, the application of the Commission regulations to hypothetical or speculative situations, which could result in severe results, should not be done lightly without an adequate basis in fact. The draft properly puts such questions aside until an appropriate request is received.

For these same reasons, the General Counsel's draft also correctly defers any analysis of the application of its agency regulations to various hypothetical questions posed by ABC. As cited in the draft, the Commission had earlier noted in its Explanation and Justification that its agency regulations would be difficult to apply "in the abstract." The consequences of a finding that someone is operating as an agent are severe and should not be addressed in an advisory opinion without clear, definitive facts that establish the grant of such agency.

Very truly yours,



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