Republican
National
Committee

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**OF:** General Counsel, FEC

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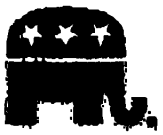

**Republican National Committee**

**Counsel's Office**

February 17, 2004

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

VIA FACSIMILE: (202) 219-3923

RE: **AOR 2003-37**
**Americans for a Better Country**
**Chairman Smith Alternative Draft**

Dear Mr. Norton:

On behalf of the Republican National Committee ("RNC"), we wish that the campaign finance world articulated by Chairman Smith in Agenda Document 04-11-C, an alternative draft response to Advisory Opinion Request 2003-37, was consistent with the Bipartisan Campaign Finance Reform Act ("BCRA") and the Supreme Court's opinion upholding the law in *McConnell v. FEC*, 124 S.Ct. 619 (2003). But it is not.

Given the plain language of BCRA and *McConnell*, the RNC believes the Commission, no matter the philosophical or political wishes of its members, is bound to follow the draft Advisory Opinion submitted by its General Counsel.

The RNC understands that, as a matter of legal principle, the draft submitted by Chairman Smith represents a more faithful understanding of the First Amendment. Regrettably, however, until such time as the Supreme Court reinterprets the application of the First Amendment to BCRA or Congress takes action to amend BCRA, Chairman Smith's approach is contrary to the current state of the law and the political reality of what these so-called "527" political committees will do and how they will operate.

The objective of BCRA was to separate federal office holders from large donations by individuals, corporations and unions not regulated by the Federal Election Campaign Act either directly or indirectly. The Congress and the Supreme Court have concluded that BCRA is both constitutional and supports this goal.

Ironically, we also note the comments filed by Democrats in the Senate on February 13, 2004 and Democrats in the House on February 10, 2004. While these Democrats once supported BCRA, political realities land them in the same place as Chairman Smith, although for different reasons. The reasons for the Democrats now turning their backs on the "principled" law they once supported[1] is explained clearly in the February 23, 2004 Time Magazine article, "Bring on the Cash!":

> The irony is that in anticipation of these circumstances, Democrats have spent the past year searching for exemptions in the McCain-Feingold campaign-finance-reform law that they themselves had long championed. One method they are banking on: a network of new organizations known as 527s (after the section of the IRS code that gives them tax-exempt status), which can raise unlimited money for advertising and voter-registration efforts, as long as they don't coordinate with the candidate. But that strategy faces a crucial test this week at the Federal Election Commission (FEC).
>
> The FEC is about to define what kinds of political activities these 527s will be allowed to perform. **If the commission's decision goes the Democrats' way, Kerry will be able to count on tens of millions of dollars of indirect assistance from Democratic-leaning groups.** (emphasis added)

Congressional Democrats are banking on the same help from soft money 527 groups for their campaigns. As reported in the Washington Post on February 16, 2004, Chairman Smith's interpretation of *McConnell* would allow "pro-Democratic groups with multimillion-dollar budgets [to] become significant forces in the 2004 election and become what amounts to a 'shadow' Democratic Party."

The approach suggested in Chairman Smith's alternative draft would essentially allow these "shadow" groups to be headed by political operatives from both parties who could be separated from federal officeholders and political parties by a thin veil to raise and spend the unregulated, unlimited money BCRA seeks to remove from the political process.

The evidence of just how thin this veil is abounds. Indeed, "Exhibit A" that federal officeholders are desperately trying to cling to the soft money help of shadow soft money groups comes directly in the comments submitted by Democrat members of the U.S. House and Senate. These members of Congress, along with other commenters sympathetic to the Democrats, ask that the Commission once again allow a soft money "loophole" to be used to promote, support, elect or defeat candidates for federal office by a cadre of former party operatives. Can anyone really believe, after public comments like these from the Democratic members, that federal officeholders will not know who is

[1] Disagreeing with these Democrats are the sponsors of the law, Senator McCain and Senator Feingold, who argue that the General Counsel's draft is faithful to BCRA.

donating to Section 527 organizations to support the election of themselves and their colleagues, precisely the special interest influence BCRA and the *McConnell* court sought to stop?

These groups, including requestor ABC, have explicit partisan objectives that including promoting, supporting, electing or defeating federal officeholders of a particular party. The RNC, of course, supports ABC's goal of reelecting President Bush. The reality, however, is that as long as BCRA remains valid law, the Commission does not have the statutory authority to, of its own accord, now allow federal officeholders to rely upon "shadow" groups to promote, support, elect or defeat them or their opponents using the very soft-money funding that BCRA sought to remove from the political process. Chairman Smith's alternative draft summarily (and mistakenly) dismisses the "promote, support, elect or defeat" standard of BCRA that *McConnell* and the FEC's General Counsel's draft plainly endorsed. *McConnell*, 124 S.Ct at 675 fn. 64. ("The words 'promote,' 'oppose,' 'attack,' and 'support'...provide explicit standards for those who apply them and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." (internal quotations omitted)).

If the suggested approach in the Smith alternative is followed, then BCRA's prohibition on special interest influences, as defined by the *McConnell* Court, is gutted. It would permit wealthy individuals to drive the campaign debate – as George Soros, Peter Lewis and other former DNC soft money donors, working in coordination with former Clinton Deputy Chief of Staff Harold Ickes, have pledged to do. In fact, yesterday The Miami Herald reported that the anti-Bush group "Americans Coming Together" has just hired a strategist from the DCCC to direct its campaign in Florida. *See* Peter Wallsten, *Interest Groups Hoping Cash Can Top Bush*, The Miami Herald, Feb. 16, 2004. On the Republican side, ABC has said that it will do the same thing using veteran Republican operatives and still unnamed donors.

In addition, any approach that allows the use of unlimited contributions from wealthy individuals in excess of federal limits is not only contrary to BCRA and *McConnell* – it contains a fundamental inconsistency. For example, contrary to law, the Smith alternative would allow unlimited contributions from wealthy individuals to be permissible "hard dollars" for the purposes of television and broadcast advertisements that are "electioneering communications." Yet the alternative draft recognizes, correctly, that these unlimited individual contributions are non-federal soft dollars for the purposes of "GOTV" and other similar activities. It cannot be both ways.

While the Supreme Court has recognized that individuals have a First Amendment right to run independent expenditures on their own, the vehicle of a 527 political committee changes the nature of the contribution. As this Commission and federal election law have long recognized, this aggregation of wealth changes the regulatory scheme to which contributions are subjected. See 2 U.S.C. § 431(4) and 11 CFR §§ 100.5 and 102.1(d). In short, once a 527 political committee raises or spends more than $1,000 to "influence a federal election," such as ABC has done when it

declared its intent to re-elect President Bush, it becomes a federal political committee subject to the prohibitions and limitations of the Federal Election Campaign Act.

The RNC believes that the draft advisory opinion put forward by the General Counsel of the Commission is a faithful and accurate interpretation of the unfortunate current state of the law.

Respectfully,

Charles R. Spies
Election Law Counsel

CC: The Commissioners
VIA FACSIMILE: (202) 208-3333