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February 16, 2004

**Mary W. Dove, Commission Secretary**  
**Lawrence H. Norton, General Counsel**  
**Federal Election Commission**  
Room 905  
999 E Street, N.W.  
Washington, DC 20463-0002

Re: **Comments on FEC General Counsel's Draft Advisory Opinion on AOR 2003-37 (Americans for a Better Country)**

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RECEIVED  
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Dear Ms. Dove, Mr. Norton & Commission Members:

These comments are prepared on behalf of the National Right to Life Committee, Inc. (a § 501(c)(4) corporation), National Right to Life Educational Trust Fund (a § 501(c)(3) separate segregated fund), Priests for Life (a § 501(c)(3) corporation), America21, Inc. (a § 501(c)(4) corporation), Americans for Tax Reform, Inc. (a § 501(c)(4) corporation), and Club for Growth, Inc. (a § 527 corporation). These organizations engage in a wide variety of democracy-promoting activities, including communications that refer to federal officeholders that could be interpreted as promoting, supporting, attacking, or opposing candidates; voter registration; and get-out-the-vote activity. Under the General Counsel's draft opinion in response to AOR 2003-37 (Americans for a Better Country), however, these activities would be regulated as "expenditures," requiring them to be funded with so-called hard money (i.e., funds raised under federal source, amount, and reporting requirements). As a result, these organizations would be prohibited from engaging in these activities using their general treasury funds and could only engage in such activities through a connected political action committee, for those allowed by the Internal Revenue Code to have connected PACs.

These organizations are the vehicles by which people of ordinary means pool their resources to participate effectively in our democratic system of government. A federal money requirement would greatly reduce their ability to participate in the robust exchange of ideas that is supposed to typify America. Indeed, because of their tax status under § 501(c)(3), many of these organizations are prohibited by the Internal Revenue Code from having a connected PAC, and, thus, would be totally banned from engaging in these traditional activities of non-profit organiza-

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tions. Consequently, these organizations, and those individuals they represent, are deeply concerned about the broad scope of the draft response and how it would impact their activities.

But, of course, the effect is even broader, affecting all incorporated advocacy groups under § 501(c)(4), educational groups, charities, and churches under § 501(c)(3), and political organizations under § 527, as well as labor unions. If these activities were sufficiently extensive, they could be deemed to be a PAC under federal election law, whether they are incorporated or not.

Unfortunately, the casual observer could get the impression that this is a partisan dispute – the liberal community<sup>1</sup> defending themselves against efforts by the Republicans<sup>2</sup> to apply legal restrictions on them. See James Bopp, *527 Rules: Tempting But Not Needed*, Roll Call at 4 (Feb. 2, 2004). This is simply not the case. The application of limits on political parties to non-party groups would have effects throughout the political process on liberal, conservative, and nonpartisan groups alike – dramatically limiting the activities of all unincorporated organizations, corporations, and labor unions. Advocacy groups under § 501(c)(4); educational groups, charities, and churches under § 501(c)(3); and political organizations under § 527 would all be equally subject to the draconian limits on “federal election activities.”

Thus, the issue is democracy, not political or ideological advantage. As a matter of principle, all voices should be heard and not reduced to silence by overly burdensome restrictions on association, speech, participation in the core activities of our system of government, and criticizing incumbent politicians who happen to be candidates.

Some excellent comments have already been submitted noting serious problems with the General Counsel's draft, some of which elaborate on the legal points we note below. The present comments will focus on three issues: (1) the continued viability of the express advocacy test out-

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<sup>1</sup>Until the comments submitted herein, the objectors to the General Counsel draft have come only from liberal and some nonpartisan groups and their Democrat allies in Congress. The groups herein are generally associated with the fiscally conservative, pro-life and/or pro-family point of view. While many of them are scrupulously nonpartisan, at least one has already endorsed President George W. Bush for re-election.

<sup>2</sup>The RNC has filed two comments on this pending Advisory Opinion request, both supporting the General Counsel's legal theory that BCRA's “federal election activity” should be used as a benchmark in determining whether non-party organizations are engaging in activities to “influence” federal elections.

Furthermore, the General Counsel's legal theory is supported by several “reform” groups. Of note, however, is the fact that the only “reform” groups to weigh in are inside-the-beltway groups that serve as alter egos to a few “reform” leaders and are funded by multimillion dollar gifts from the wealthiest individuals and foundations in our country. Of the “reform” groups with any constituency outside the beltway, Common Cause and the League of Women Voter are silent and Public Citizen is opposed.

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side the narrow exception recognized in *McConnell v. FEC*, (2) the lack of legal authority for the expansionist approach taken in the draft response to AOR 2003-37, and (3) the adverse effect of the draft advisory opinion's approach on the pro-democracy activities of organizations, especially religious groups and churches.<sup>3</sup>

### **Buckley's Express Advocacy Test Is Alive and Well With a McConnell Exception**

In *McConnell v. FEC*, 124 S. Ct. 619 (2003), the Supreme Court upheld the ban on corporate and labor expenditures for "electioneering communications." In *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. Massachusetts Citizens for Life ("MCFL")*, 479 U.S. 238 (1986), the Court had construed provisions of the Federal Election Campaign Act (FECA) in a way that led to wide-spread recognition by other courts that, where speech restrictions bordered on issue advocacy, issue advocacy must be protected by an "express words of advocacy" test that focused on whether the restricted communication employed explicit words expressly advocating the election or defeat of a clearly identified candidate for public office. *Buckley*, 424 U.S. at 44 & n.52. Many thought those decisions would govern the Court's ruling on BCRA's "electioneering communication" ban, but a 5-4 *McConnell* majority found that the record indicated that broadcast ads that named federal candidates within close proximity to elections were the "functional equivalent" of express advocacy.<sup>4</sup>

The most important analytical point about *McConnell's* treatment of the electioneering communication ban is that it did so under the *Buckley/MCFL* rubric. The fact that *McConnell* was decided within the framework of *Buckley* and *MCFL* was in keeping with the legal strategy of BCRA's advocates and defenders. That analysis has significant implications that limit the applicability of the *McConnell* decision and some of its seemingly broad language.

*McConnell's* electioneering communication analysis required the restriction to be non-vague and targeted at express advocacy or its proven equivalent. The Court thereby reaffirmed *Buckley's* general rule protecting issue advocacy against encroachment from vague and overbroad restrictions by means of the express advocacy test and created a narrow exception for non-vague statutes where sufficient evidence demonstrates that the targeted communication is the "functional equivalent" of express advocacy. Vague and overbroad statutes impinging on issue advocacy still are subject to the express advocacy test to be constitutional.

Consequently, *McConnell* recognized an exception to the *Buckley* general rule on express advocacy. *McConnell* declared that the express advocacy analysis was necessary to prevent vagueness or overbreadth in statutes, but it did not apply where a statute is (1) not vague, (2) is not overbroad because the government has proved that targeted activity is the "functional equivalent"

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<sup>3</sup>An alternate draft response to this Advisory Opinion request has been filed by Chairman Smith. The analysis contained therein is consistent with the comments herein.

<sup>4</sup>Thus, as explained below, the Court believed that the Plaintiffs in *McConnell* were in error when they argued that only express advocacy communications could be constitutionally regulated. The *McConnell* Court found that "functional equivalents" could also be regulated.

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lent" of express advocacy, and (3) regulating the activity is necessary to advance the relevant governmental interests.

This analysis has already been applied by the United States Court of Appeals for the Sixth Circuit in *Anderson v. Spear*, No. 02-5992, Slip Op. (6th Cir. Jan. 16, 2004). A unanimous panel decided in *Anderson* that a ban on "electioneering" within a 500-foot buffer zone around polls was vague and overbroad and did not fit the *McConnell* exception. Consequently, *Buckley*'s express advocacy general rule was applied. Plaintiff Anderson argued that "electioneering" swept in issue advocacy as well as express advocacy, including specifically his distribution of instructions to voters on how to cast a write-in vote. The *Anderson* opinion discussed both *Buckley* and *McConnell* and held that "the *McConnell* Court . . . left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest." The court then "appl[ie]d a narrowing construction to the term 'electioneering' and f[ou]nd that it may permissibly apply only to speech which expressly advocates the election or defeat of a clearly identified candidate or ballot measure." Slip Op. at 10.

The *Anderson* court noted that the "electioneering" prohibition had to be narrowed to protect the "displaying of signs or distributing of leaflets which fall into core issue advocacy: that is, promoting issues rather than specific candidates." The court gave an example of a sign declaring "support our schools." The court also decided that the evidence advanced did not show that the overbroad statute was necessary to further the two recognized state interests, preventing voter intimidation and election fraud. In fact, the evidence seemed to show illegitimate motives, i.e., that legislators thought voters just didn't want to be bothered on the way into the polls and poll workers didn't like the clutter of literature dropped by voters after accepting it from candidate advocates. Slip. Op. at 10-11.

But particularly pertinent to this matter is that the Court's express advocacy construction still governs key definitions in the Federal Election Campaign Act (FECA). *Buckley* and *MCFL* construed three provisions of the FECA to require express advocacy that are now woven into the fabric of federal election law. As the Court said in *McConnell*:

In *Buckley* we began by examining 11 U.S.C. § 608(e)(1) (1970 ed. Supp. IV), which restricted expenditures "'relative to a clearly identified candidate,'" and we found that the phrase "'relative to' was impermissibly vague." 424 U.S., at 40-42, 96 S.Ct. 612. We concluded that the vagueness deficiencies could "be avoided only by reading § 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate." *Id.* at 43, 96 S. Ct. 612. We provided examples of words of express advocacy, such as "'vote for,' 'elect,' 'support,' . . . 'defeat,' [and] 'reject,'" *id.* at 44 n. 52, 96 S.Ct. 612, and those examples eventually gave rise to what is now known as the "magic words" requirement.

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We then considered FECA's disclosure provisions, including 2 U.S.C. § 431(9) (1979 ed. Supp. IV), which defined "'expenditur[e]'" to include the use of money or other assets 'for the purpose of . . . influencing' a federal election." *Buckley*, 424 U.S., at 77, 96 S.Ct. 612. Finding that the "ambiguity of this phrase" posed "constitutional problems," *ibid*, we noted our "obligation to construe the statute, if that can be done consistent with the legislature's purpose, to avoid the shoals of vagueness," *id.* at 77-78, 96 S. Ct. 612 (citations omitted). "To insure that the reach" of the disclosure requirement was "not impermissibly broad, we construe[d] 'expenditure' for the purposes of that section in the same way we construed the terms of § 608(e) – to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80, 96 S. Ct. 612 (footnote omitted).

*McConnell*, 124 S. Ct. at 688 (footnote omitted). *MCFL* applied the same construction to the ban, at 2 U.S.C. § 441b, on any corporate or labor union "'expenditure in connection with any [federal] election.'" 479 U.S. at 249. *See McConnell*, 124 S. Ct. at 688 n. 76.

These constructions are now a permanent gloss on the phrases "relative to," "for the purpose of influencing," and "in connection with" when used in reference to elections and candidates. Congress and the FEC responded by incorporating the express advocacy requirement in the definition of "independent expenditure." 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.

The BCRA did not disturb this construction. The campaign finance "reform" community's approach in drafting the BCRA was not to incorporate "electioneering communication" into the definition of "expenditure." In fact, that approach was considered and abandoned. *See ACT Comments* at 7 (Feb. 4, 2004). Rather, electioneering communication was tacked on to FECA's prohibition on corporate and labor union contributions and independent expenditures. 2 U.S.C. § 441b.<sup>5</sup> So the express advocacy test continues to govern the FECA's provisions on allowable corporate and labor union expenditures under § 441b and the activities that will be considered "expenditures," under § 431(9), in determining if a group is a federal PAC pursuant to § 431(4).

Further, the Senate and House sponsors, in defending the BCRA, were careful to argue that the express advocacy test should not be overruled, but to interpret it as a statutory construction tool designed to avoid vagueness and overbreadth and provide guidelines into which they said the electioneering communication restriction nicely fit: "It was, after all, principally a concern for clarity that first led this Court to adopt the 'express advocacy' test as a gloss on FECA's language." Brief for Intervenor-Defendants John McCain et al. at 59, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (Civ. No. 02-582) (citing *Buckley*, 424 U.S. at 40-44, 79-80). The

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<sup>5</sup>The FEC itself argued to the *McConnell* Court that BCRA was not a "repudiation of the prior legal regime," but rather "a refinement" of existing laws by adding "electioneering communications" to the proscription on corporate and union express advocacy. Brief for Appellees at 27, *McConnell*, 124 S. Ct. 619.

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Intervenors asserted that the express advocacy analysis was a "roadmap" with two principle concerns: (1) eliminating vagueness and (2) assuring that restrictions were not overbroad since they were "directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* at 62 (quoting *Buckley*, 424 U.S. at 80). "Those are precisely the precepts to which Congress adhered in framing (the electioneering communication provision)," the Intervenors proclaimed. *Id.*

So the express advocacy test is alive and well. As applied to AOR 2003-37, this means that, where the test has been applied to construe statutes, those statutes retain that construction and, except where Congress has added an "electioneering communication" restriction, the express advocacy test governs as before. The BCRA only tacked the electioneering communication provision on to the prohibition found in § 441b; it did not weave it into the meaning of contribution and expenditure at § 441b or in the definitions at § 431. Therefore, existing law remains otherwise unchanged in this area.

**There Is No Legal Authority for the Expansionist Approach of the General Counsel's Draft**

The approach taken in the General Counsel's draft ignores the limited nature of what Congress did in the BCRA and what the Supreme Court said in *McConnell*. Instead, he proposes to dramatically expand the prohibitions in law on the basis of erroneous premises. Basically, the draft argues that the political party "federal election activity" restrictions should be applied beyond their narrow statutory context of political parties to 527s that are *not* political parties, and by logical extension to 501(c)s that are *neither* political parties *nor* 527s. Neither extension is justified.

Insightful comments have been provided on the draft response already, including the comments of Public Citizen, which supports the apparent goal of the draft opinion but questions the means chosen and notes that incorporating "federal election activity" within the definition of "expenditure" cannot be limited to 527s, and the excellent comments on behalf of America Coming Together ("ACT"), prepared by Judith L. Corley and Laurence E. Gold, which contains twenty pages of analysis. Especially in the light of the extensive analysis of the ACT Comments, there is no need to restate many of the flaws of the draft response. Rather, a few concise points will be made.

As to non-party federal PACs, the draft opinion argues that federal PACs are similar to political party committees because they "are focused on the influencing of federal elections" and because their "communications have no less a 'dramatic effect' on Federal elections. Draft Opinion at 3. As a result, the General Counsel argues that (1) it would be "equally appropriate" to use "federal election activities" "as a benchmark for determining whether communications made by

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"Federal election activity" includes (1) voter registration within 120 days of any federal election, (2) voter identification and get-out-the-vote activity, (3) generic campaign activity (promoting a political party), and (4) issuing any public communications that promote/support or attack/oppose a referenced federal candidate ("whether or not the communication expressly advocates a vote for or against a Federal candidate"). 11 C.F.R. § 100.24.

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political committees must be paid for with Federal funds," *id.*, and (2) they should automatically have the expertise (as *McConnell* said regarding political parties) to know what the seemingly vague phrase "promotes or supports, or attacks or opposes" means as applied to a referenced federal candidate. 11 C.F.R. § 100.24. Consequently, federal PACs may not allocate "federal election activity" to non-federal accounts, but must pay for it all with so-called hard money.

The draft opinion's approach is erroneous because it extends BCRA provisions applicable only to political parties to 527s that are not political parties and do not share the critical characteristics of political parties that the *McConnell* Court said justified the more severe limitations on them, as discussed below. And by logical extension, because the General Counsel would incorporate "federal election activities" into "expenditures," the draft response's analysis would be equally applicable to § 501(c) groups, whose major purpose is not political activity. This would mean that not only federal PACs, but 527s, 501(c)s groups and labor unions, would be prohibited from nonpartisan voter registration and get-out-the-vote activities and from publicly referring to a public officials in ways that might be considered attacking, opposing, promoting, or supporting the candidate throughout the year and by communications through any means.

It is no response to say that the draft is only about federal PACs, since there is nothing to keep the inclusion of "federal election activity" in the meaning of "expenditure" from extending to all other groups through the prohibitions of § 441b and the political committee definition of § 431(4). As Public Citizen pointed out in its comments, "the draft opinion focuses its ruling on the activity subject to regulation – communications that 'promote or support, or attack or oppose a clearly identified federal candidate' – rather than the class of groups subject to regulation." Public Citizen Comments at 3 (Feb. 4, 2004) (emphasis in original).

It is also no response to argue that voter mobilization activity could be excluded from the incorporation of "federal election activities" into "expenditures," which the General Counsel's draft appears to do. Draft Opinion at 15. "Federal election activity" is a statutorily defined package, providing no authority for FEC subdivision. 11 U.S.C. § 431(20). Likewise, all these activities affect elections, without differentiation. See *McConnell*, 124 S. Ct. at 674. This application to all parts of "federal election activity," like the application to all groups governed by "expenditure," is an all-or-nothing package.

Furthermore, the BCRA expressly contemplates that nonprofits would be able to engage in "federal election activity," because it referred to them doing just such activity in 2 U.S.C. § 441i(e)(4), wherein it provided rules governing the solicitation by federal officials of funds for 501(c)s that engage in "federal election activities," including those whose "principal purpose is to conduct" voter registration, voter identification, get out the vote, or promoting political parties. See *McConnell*, 124 S. Ct. at 682. If hard-money was required to conduct "federal election activities," it would be illegal for incorporated 501(c)s to engage in these activities under § 441b, and incorporated and unincorporated 501(c)s would be considered federal PACs if these activities were considered their major purpose. Congress would not write solicitation rules for activities that it would be illegal for groups to conduct and for groups that would not exist.

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The Supreme Court in *McConnell* also recognized that 501(c)s and 527s would continue to be involved in "federal election activity." "Interest groups, however, remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications)," 124 S. Ct. at 676, indicating that these organizations would operate under rules different from those governing political parties. The Court even rejected an equal protection challenge by political parties that political parties could not do "federal election activities," while other groups were able to do so. *Id.*

Furthermore, § 527 organizations, and certainly 501(c) organizations, do not share the characteristic of political parties that the *McConnell* Court found decisive in upholding the "federal election activities" restrictions on political parties.

Interest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses. Political parties have influence and power in the legislature that vastly exceeds that of any interest group. As a result, it is hardly surprising that party affiliation is the primary way by which voters identify candidates, or that parties in turn have special access to and relationships with federal officeholders. Congress' efforts at campaign finance regulation may account for these salient differences.

*McConnell*, 124 S. Ct. at 686.

Finally, it is certainly true that such an earthshaking change as incorporating "federal election activity" into "expenditure" cannot be done through an advisory opinion. It would certainly require a rulemaking, but even that must fail as ultra vires, as discussed *supra*.<sup>7</sup>

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<sup>7</sup>In their comments of February 4, Democracy 21, the Campaign Legal Center, and the Center for Responsive Politics, at 8-9, attempt to make use of 11 U.S.C. § 441b(b)(2)'s "indirect payment" statement to take the draft opinion to task for permitting allocation of "partisan generic voter mobilization activities" to non-federal funds accounts. The specific language of the GOTV communications proposed by ABC was generic, not referring to any federal candidate. Draft Opinion at 21-22. These three groups insist that the General Counsel has ignored the cited "indirect" language by permitting 527 organizations to raise "corporate (or union) money to fund indirectly what such money cannot be used to fund directly, in direct contravention of 441b." Comments at 9.

Section 441b(b)(2) says that the "contribution or expenditure" that corporations and labor unions may not make includes the definition of those terms at § 431 "and also includes any direct or indirect payment . . . to any candidate, campaign committee, or political party or organization in connection with any election . . ." (emphasis added)). The "in connection with" language used earlier in § 441b was, of course, construed in *MCFL* to require that communications contain express advocacy. "Contribution" has a well-defined meaning under FECA (including coordinated expenditures). Applying the "indirect payment" language as proposed would vastly expand the concept of "contribution" and make all expenditures into contributions.



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**The Proposed Approach Burdens the Promotion of Citizen Participation in Democracy**

As noted at the beginning, the groups submitting these comments are involved in various democracy-promoting activities. Several are involved in nonpartisan voter registration and get-out-the-vote activities. For example, Priests for Life has an active voter registration plan that extends from now until well past the 120-day "federal election activity" cut-off.

Further, many of the commentators herein engage in public discussion of public issues, legislative proposals and the actions of public officials while in office. These activities are likely to be viewed as attacking, opposing, supporting or opposing federal candidates. Treating them as "federal election activities" would impose a year-round, not 30/60 day, ban on such communications, which would apply to all forms of communication, including print and telephonic, not just broadcast ads. This is a draconian expansion of BCRA's limits on speech.

Voter mobilization and criticizing public officials are not minor activities. They are the core of our democratic system and are traditional activities of non-profit groups. And they need to be done by organizations because that is the most effective way. People rely on organizations with which they identify for ideological reasons to track the issues, provide the public policy expertise the individuals lack, and advocate for their chosen issues in the arena of public opinion. People of ordinary means can only participate effectively in public policy debates by pooling their resources in advocacy groups. To deny them this right is to empower wealthy individuals and media corporations at the expense of ordinary folks.

Somehow we have reached the point where some people think that a church doing non-partisan voter registration in September before an election is wrong – or there is something sinister and corrupting to democracy about a religious organization publicly lobbying public officials on their positions on gay marriage, war in Iraq, cloning, abortion, the environment, and other hot issues. These groups play a vital role in our public life and ought to be lauded, not gagged.

Respectfully submitted,

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