February 4, 2004

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

Re: Comments on Draft Advisory Opinion 2003-37

Dear Mr. Norton:

Democracy 21, the Campaign Legal Center and the Center for Responsive Politics hereby provide comments on the general counsel's draft of Advisory Opinion 2003-37, requested by Americans for a Better Country (ABC). The organizations submitting these comments also filed initial comments, dated December 17, 2003, on the same advisory opinion request.

1. The draft advisory opinion correctly concludes that "expenditures" by a "political committee" are not limited to "express advocacy" or "electioneering communications" for purposes of FECA. The general counsel's draft opinion correctly determines that public communications by ABC that promote, support, attack or oppose a federal candidate are accordingly "for the purpose of influencing" a federal election, and are therefore "expenditures" under the Act that must be funded with hard money.

In so holding, the general counsel correctly rejects the argument that an "express advocacy" test applies as a limiting construction to determine when spending by a political committee constitutes an "expenditure." This conclusion is compelled by the reasoning of the Supreme Court in both *Buckley v.* Valeo, 424 U.S. 1 (1976), and in *McConnell v. FEC,* 540 U.S. __, 124 S.Ct. 619 (2003). The draft correctly states that in *McConnell,* "the Supreme Court clarified that the so-called 'express advocacy' test is not a constitutional barrier limiting the interpretation of what is 'for the purpose of influencing any Federal election,' which is the operative term used in the definition of 'expenditure' in 2 U.S.C. 431(9)." Draft AO at 2.

This is incontestably correct. Moreover, the Court made clear as early as the *Buckley* decision that the "express advocacy" standard does not apply in the case of spending by a political committee, which the Court defined as a group whose "major purpose" is to influence candidate elections. Such entities are not subject to the concerns

of vagueness in drawing a line between pure issue discussion and electioneering activities, because these groups are in the business of influencing candidate elections. Accordingly, their expenditures "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Buckley, supra* at 79. The Court reaffirmed this position in *McConnell*, 124 S.Ct. at 675 n.64.

Indeed, the same reasoning applies not just to federal political committees, but to any section 527 organization. Groups that are organized under section 527 of the Internal Revenue Code are "political organizations" that, by IRS definition, are operated "primarily" for the purpose of influencing candidate elections. The tax code defines "political organizations" to mean any group "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. § 527(e)(1). An "exempt function" in turn means the "function of influencing or attempting to influence" the election of an individual to public office. *Id.* at (e)(2).

Thus, any section 527 organization is a group whose "major purpose" is to influence candidate elections, as the Supreme Court has used that term in making clear that such organizations are not subject to the "express advocacy" standard. This means that the "express advocacy" standard is not applicable in determining whether expenditures by a section 527 organization are "for the purpose of influencing" federal elections and covered by federal campaign finance laws.

As the Supreme Court noted in *McConnell*, "Section 527 'political organizations' are, unlike § 501(c) groups, organized for the express purpose of engaging in partisan political activity." 124 S.Ct. at 678, n.67. The Court said that they "by definition engage in partisan political activity." *Id.* at 679.

For this reason, the Court's explanation in *Buckley* and *McConnell* that the campaign finance laws are not limited by the "express advocacy" test when applied to groups which "are, by definition, campaign related" encompasses all section 527 organizations, not just federal political committees.[1]

Thus, for organizations that have a major purpose to influence candidate elections – including ABC and any other "political committee" or section 527 organization – the concerns about vagueness which require a bright line test to separate electioneering from non-electioneering activity simply do not apply.

In such cases, the statutory standard to define an "expenditure" is spending "for the purpose of influencing an election," without any narrowing "express advocacy" construction to address vagueness concerns.

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[1] On the other hand, this analysis is not applicable to entities which are not under the control of a candidate or which do not have a major purpose to influence candidate elections. *See infra* at Section 6.

The Commission has in the past construed this standard by reference to whether a communication contained an "electioneering message." *See, e.g.*, Advisory Opinions 1984-15, 1985-14, 1995-25. The Commission mistakenly abandoned that test in its review of the 1996 presidential campaign activities, and erroneously replaced it, as a practical matter, with an "express advocacy" standard.[2]

Although BCRA adopted the "promote, support, attack or oppose" standard in the specific context of determining whether public communications by state parties are "federal election activities," 2 U.S.C. § 431(20)(A)(iii), the same standard is, as the draft advisory opinion notes, "equally appropriate as the benchmark for determining whether communications made by political committees must be paid for with Federal funds. By their very nature, all political committees, not just political party committees, are focused on the influencing of Federal elections." Draft AO at 3.

Just as the Commission previously had employed the "electioneering message" test as a means of construing and applying the statutory standard of "expenditure," the "promote, support, attack or oppose" test appropriately serves the same purpose. As the draft notes, the Court found this test sufficiently clear and explicit for purposes of regulating the activities of political organizations with a major purpose of influencing candidate elections. *See McConnell*, 124 S.Ct. at 675, n.64 ("The words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision."). The general counsel correctly identifies, and applies, this test to the activities of ABC in the draft advisory opinion.[3]

2. The draft advisory opinion incorrectly fails to conclude that ABC is a federal political committee in its entirety. The draft advisory opinion fails to address an important issue presented by the facts of the request as to whether ABC in its entirety, including both its federal account and non-federal accounts, should be deemed to be a federal political committee, thus subject to the contribution limits, source prohibitions and reporting requirements of the law.[4]

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[2] *See* Statement of Reasons of Vice Chairman Wold and Commissioners Elliott, Mason and Sandstrom on the Audits of Dole for President, *et al.* (June 24, 1999).

[3] For reasons we discuss below, a section 527 organization such as ABC whose overriding purpose is to influence federal elections is required to pay for its disbursements solely with hard money, and cannot be permitted to allocate its expenditures between hard and soft money, a system that in the past allowed the unfettered flow of soft money into federal elections.

[4] Although our initial comments on this AOR did not address this "political committee" issue, the question has now been brought to the foreground by the Commission's recent decision to issue a Notice of Proposed Rulemaking on the definition of "political committees" under FECA.

ABC states in its request letter that it is "an unincorporated, independent political committee organized under Section 527 of the Internal Revenue Code." Advisory Op. Request Letter of November 18, 2003 at 1. The request further notes, however, that ABC "maintains a federal account and several non-federal accounts in which it segregates large individual contributions from contributions from corporations, unions and trade associations." *Id.*

Thus, the request makes clear that ABC has both a federally registered political committee which raises hard money, as well as one or more non-federal accounts which raise soft money.

The request also makes clear, however, that ABC as a whole has a major purpose, indeed an overriding purpose, to influence federal elections. The request states unmistakably the central purpose of ABC: "For both fundraising and political purposes, ABC wishes to state in a press release announcing its launch that its purpose is to reelect President Bush and defeat the Democratic nominee." *Id.* (emphasis added). ABC subsequently restates its central purpose as one to influence federal elections:

> Aimed at the general public, ABC will conduct an independent massive get-out-the-vote operation with non-federal "soft" dollars that it wishes to aid President Bush's re-election, the defeat of the eventual Democratic Presidential nominee, and the election of Republican candidates to the United States Senate and House...
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> ABC plans to concentrate its activities in 17 or 18 states which are likely to be battleground states in the 2004 presidential election as well as a number of states and congressional districts to be determined as they become battlegrounds for control of the U.S. Senate and House.
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> *Id.* at 5 (emphasis added)

The analysis in the general counsel's draft response proceeds on the basis of assuming that a political organization registered under section 527 of the Internal Revenue Code, such as ABC, can maintain both federal and non-federal accounts, and can allocate its expenditures for certain activities between those accounts, even when the overriding purpose of the organization is to influence federal elections. This premise is fundamentally flawed.

ABC has made clear that its purpose as a whole is to elect or defeat particular federal candidates. This is as true of the ABC's "non-federal" accounts as it is of its federal "political committee" account.[5] Thus, the purportedly "nonfederal" accounts of

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[5] Thus, for instance, ABC asks whether "non-federal soft dollar donors to the massive voter mobilization effort directed at the general public with the stated purpose...of defeating a named federal candidate" are in violation of the Act. Request

ABC must themselves be treated as federal political committees and must comply with the contribution limits, source prohibitions and reporting requirements of the law.

In other words, money being raised and spent for the purpose of influencing a federal election cannot evade federal law simply by being funneled through an account that is denominated as "nonfederal."

The FEC has the responsibility to look at the reality of a section 527 organization's purpose and operations. Where the facts and circumstances make clear that a section 527 organization is raising and spending money, as a whole, for the overriding purpose of influencing federal elections, the 527 organization as a whole must be treated as a federal political committee. The fiction of allocation must not be allowed for such a group. Otherwise, the FEC will be repeating its mistakes of the past and, in the words of the Supreme Court, "subvert[ing]" the federal campaign finance laws,. *McConnell,* 124 S.Ct. at 660.

The Federal Election Campaign Act defines a "political committee" to mean "any committee, club, association or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4). In *Buckley*, the Supreme Court construed this term "to only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79. In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986), the Court again invoked this test, and stated that when a group's independent spending activities "become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee."

In *FEC v. GOPAC,* 917 F.Supp. 851, 859 (D.D.C. 1996), a single district court narrowed this "major purpose" test by restricting it to organizations whose "major purpose" is "the nomination or election of a particular candidate or candidates for federal office." Although we believe this decision was erroneous – and that the Commission was wrong not to appeal the decision[6] – even under its ruling, ABC as a whole should be deemed to be a political committee.

The request letter makes clear that ABC's overriding purpose is to influence the election or defeat of particular federal candidates, principally the election of President Bush and the defeat of the Democratic nominee for president. As noted above, ABC frankly states that "its purpose is to re-elect President Bush and defeat the Democratic

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Letter at 9. This makes clear that ABC's voter mobilization efforts, and the soft money raised for those efforts, are principally intended to influence federal elections.

[6] *See* Statement for the Record of Vice Chairman McGarry and Commissioners McDonald and Thomas in *FEC v. GOPAC* (March 21, 1996).

nominee." This statement of its overriding purpose could not be plainer. Given this purpose, and given the incontestable fact that ABC has spent or will spend $1,000 in "expenditures," ABC as a whole meets even the most restrictive definition of a "political committee." Accordingly, ABC should be required to register all of its section 527 accounts with the Commission as political committees, and to abide by the contribution limits and source prohibitions applicable to federal political committees. We believe this result is the proper interpretation of the statute.[7]

3. The draft advisory opinion incorrectly allows ABC to allocate expenditures between its federal and non-federal accounts. In failing to analyze whether ABC is a federal "political committee" as a whole, the draft advisory opinion incorrectly assumes that ABC may maintain one or more non-federal accounts, and may allocate expenditures between the federal and non-federal accounts for certain activities which, in the general counsel's opinion, influence both federal and non-federal elections.

Such allocation is the same approach which, when applied to party committees, allowed a massive flow of soft money into federal elections, and which was sharply criticized by the Supreme Court in *McConnell* as the means to "subvert" the law.

The virtually unrestricted flow of soft money through the political parties into federal elections was made possible by the Commission's allocation rules, which the Supreme Court described as "FEC regulations [that] permitted more than Congress, in enacting FECA, had ever intended." *McConnell*, 124 S.Ct. at 660, n. 44. The Court found that the FECA "was subverted by the creation of the FEC's allocation regime," *id.*, which allowed the parties "to use vast amounts of soft money in their efforts to elect federal candidates." *Id.* at 660. The Court flatly stated that the Commission's allocation rules "invited widespread circumvention" of the law. *Id.* at 661.

There is no legitimate justification for applying allocation rules to a section 527 organization, such as ABC, which has an overriding purpose of influencing federal elections. Such an approach would fundamentally undermine the contribution limitations and source prohibitions of federal campaign finance law and make a mockery of the Supreme Court's stern critique of allocation in *McConnell*.

For this reason, the draft is incorrect in applying the 11 CFR Part 106 allocation regulations to ABC's activities, including both its public communications that support or oppose both federal and non-federal candidates, and its disbursements for generic voter drive activities.

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[7] While ABC should be treated as a federal political committee as a whole, and thus all of its receipts should be "contributions" under FECA, we also agree with the conclusion of the general counsel that the funds raised in response to solicitations by a section 527 organization that convey support for or opposition to a federal candidate are "contributions" subject to the contribution limits and source prohibitions of the law. Draft AO at 28-29.

4. The Commission's current allocation rules for non-connected committees, including section 527 organizations, are wrong, can lead to absurd results and if left in place will once again invite widespread circumvention of the law. For the reasons set forth above, a section 527 organization which has an overriding purpose of influencing federal elections should not be permitted to allocate expenditures.

The draft opinion states that the allocation formula at 11 C.F.R. § 106.6 would apply "[w]here specific candidates are not clearly identified and the communication is part of a generic voter drive." AO Draft at 5.[8]

According to 11 C.F.R. § 106.6(c)(1), the allocation ratio for generic voter drive activity by a non-connected organization is based on the ratio of the committee's expenditures on behalf of specific federal candidates to its total disbursements for specific federal and non-federal candidates (not including overhead or other generic costs) during the two-year federal election cycle.

This allocation approach can readily be "gamed" in order to work absurd results that will, for instance, allow funding of generic partisan voter mobilization activity to influence federal elections with *entirely* soft money.

Under the existing regulations, if a non-connected political committee made a single small disbursement on behalf of a specific nonfederal candidate, but does not undertake *any* expenditures on behalf of specific federal candidates, this allocation formula would permit the committee to pay for unlimited generic voter drive activity *entirely* with soft money since it will have no expenditures "on behalf of specific federal candidates." This is true even if the explicit purpose of the of the committee and its donors is to elect or defeat federal candidates.

That a political organization whose overriding purpose is to influence federal elections could use exclusively soft money to finance voter mobilization drives urging voters to "Get out and vote Republican on Election Day" is an absurd result. In *McConnell*, the Supreme Court emphasized that generic campaign activity confers "substantial benefits on federal candidates." 124 S.Ct. at 675. These activities *should* be funded entirely with federal funds. But the Part 106 regulations potentially allow them instead to be funded entirely with non-federal funds, thereby turning the intent of the law upside-down.[9]

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[8] Under 11 C.F.R. § 106.6(b)(2)(iii), "[g]eneric voter drives" include "voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote, or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate."

[9] A different allocation formula under 11 C.F.R. § 106.1 would apply to public communications that promote both specific federal and specific non-federal candidates. This regulation would require allocation between ABC's federal and non-federal accounts according to the "benefit reasonably expected to be derived" by the clearly

If the Commission sanctions the approach followed by the general counsel and allows non-connected committees to allocate partisan generic voter drive activities to influence federal elections under the fundamentally flawed section 106.6 formulae, it will be licensing an egregious variant of the allocation fiction that was at the heart of the soft money loophole, and was fully discredited by the Supreme Court in *McConnell*. It will be re-creating the soft money system in federal elections.

As a result, it is essential in the forthcoming rulemaking on the definition of "political committee" that the Commission address the closely related issue of allocation for non-connected committees. The Commission must determine whether such allocation is permissible at all, and to the extent any allocation is allowed by Commission, the Commission must ensure that the allocation is not a vehicle for authorizing the free flow of soft money back into federal elections.

5. The draft advisory opinion fails to disapprove ABC's scheme to serve as a conduit for the indirect use of corporate funds to finance partisan voter drive activity. In our initial comments on this AOR, we pointed out that FECA prohibits "any direct or indirect payment" by a corporation (or labor union) in connection with any federal election. 2 U.S.C. § 441b(b)(2) (emphasis added). Corporations (and unions) are barred from using their treasury funds to conduct partisan voter mobilization activities aimed at the general public and in connection with a federal election. *E.g.* 11 C.F.R. § 114.4(d).

The advisory opinion request makes clear that ABC will raise corporate funds for its nonfederal accounts, and it seeks permission to spend those funds on an allocated basis for such partisan generic voter mobilization activities. In approving such allocation under the Part 106 regulations, the general counsel's draft has incorrectly ignored the

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identified federal and non-federal candidates. *Id.* at § 106.1(a). For example, the draft indicates that in the case of a communication expressly advocating the election of three clearly identified candidates, two federal and one non-federal, "a reasonable allocation would require that two-thirds of the cost be paid with funds from the federal account." AO Draft at 17.

In so doing, the draft AO misapplies section 106.1 to this communication. The time-space allocation method of section 106.1 for a printed communication requires the Commission to examine the entire communication, and attribute the space used to the respective candidates. The message in paragraph 5 would state: "George Bush and the Republican team have made the United States safer. On November 2, vote for George W. Bush for President, X for U.S. Senate, and Y for Governor." Consistent with the draft opinion's conclusion regarding paragraph 57 (p. 17, lines 7-9), the first sentence of this communication must be attributed entirely to the only named candidate – President Bush – and must be included in determining the allocation ratio for the communication. Allocating the entire communications using the two-thirds to one-third ratio completely and erroneously disregards the first sentence.

statutory prohibition on the "indirect" use of corporate funds to influence federal elections.

To allow section 527 organizations to raise corporate (or union) funds and then spend those funds for partisan voter drive activity aimed at the general public simply allows the use of corporate (or union) money to fund indirectly what such money cannot be used to fund directly, in direct contravention of section 441b. The general counsel's draft fails to address this point, much less provide any justification for the proposed spending under the law.

6. The draft advisory opinion applies the "promote, support" test only to section 527 organizations, including political committees. The test is not intended to and does not apply to section 501(c) non-profit groups. It is our understanding that a number of section 501(c) nonprofit organizations will argue to the Commission that it should reject the general counsel's draft because it purports to apply the "promote, support, attack or oppose" test to determining when a nonprofit corporation is making a prohibited "expenditure" under section 441b of FECA.

This argument is wrong and should be rejected.

The general counsel's discussion of the "promote, support" test is explicitly limited to the communications by political committees:

> Nevertheless the promote, support, attack or oppose standard is equally appropriate as the benchmark for determining whether communications made by political committees must be paid for with Federal funds. By their very nature, all political committees, not just political party committees, are focused on the influencing of Federal elections.
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> Draft AO at 3 (emphasis added)

Nothing in the opinion purports to apply this standard to section 501(c) nonprofit corporations. The opinion makes no reference at all to such groups, and provides no basis for concluding that it would be applicable to such groups.

Public communications by 501(c) groups are subject to federal hard money rules under section 441b if they meet the "electioneering communications" provisions of BCRA (i.e., they are broadcast ads that refer to a federal candidate and are aired within 30 days of a primary or 60 days of a general election),[10] if they contain "express advocacy" outside of those pre-election periods, or if they are coordinated with federal candidates or political parties.

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[10] This is subject to the exemption from the definition of "electioneering communications" for section 501(c)(3) groups, wrongly established by a Commission rule. 11 C.F.R. § 100.29(c)(6).

There is nothing in the draft advisory opinion to indicate that any effort is being made to change these rules.

The "promote, support, attack or oppose" standard proposed in the advisory opinion draft for determining when federal political committees make "expenditures" is not intended to apply, and does not apply, to section 501(c) groups.

The general counsel never claims that the opinion's application of a "promote, support" standard to construe the term "expenditure" should apply to any primarily non-political organization, including section 501(c)(3), (c)(4), (c)(5) or (c)(6) groups – none of which can, under the tax laws, have a "major purpose" to influence federal elections. All such groups have long been subject to the "express advocacy" test, and now under BCRA, they are subject to the "electioneering communication" rules as well. There is no effort being made in the advisory opinion to extend this coverage.

To say that the draft advisory opinion may mean that *any* communication by a section 501c group that mentions a federal candidate supportively or critically must be funded out of a PAC is wrong as a matter of law and an incorrect interpretation of the draft opinion.

We appreciate the opportunity to submit these comments.

Respectfully,

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