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AGENDA ITEM
For Meeting of: 2-18-04

MEMORANDUM

DATE: February 5, 2004

TO: The Commission

FROM: Commissioner Michael E. Toner *MT*

RE: Informational Document Relating to Advisory Opinion 2003-37 (Americans for a Better Country) (Open Session of February 18, 2004)

Attached please find floor remarks from Senators McCain and Feingold relating to Advisory Opinion 2003-37.

BIPARTISAN CAMPAIGN REFORM ACT -- (Senate - February 04, 2004)

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Mr. *McCain*. Madam President, I join my friend from Wisconsin on the floor to discuss the entire issue of the Bipartisan Campaign Reform Act and also at a time when the Federal Election Commission is about to make some decisions regarding implementation of this legislation.

I think it is very important that as the Federal Election Commission is considering making these rules, that it be made very clear what the intent of the authors of the legislation was. Because as I will go into in my statement, it was the Federal Election Commission that created the loopholes that caused the explosion of soft money in American politics. It was not court decisions.

It is not accidental that the Senator from Wisconsin and I have proposed legislation to fundamentally restructure the Federal Election Commission. In the meantime, the Federal Election Commission must understand and read the U.S. Supreme Court decision--I quote from the Court's ruling--stating:

The main goal of [the national party soft money ban] is modest. In large part, it simply effects a return to the scheme that was approved in *Buckley* and that was subverted--

Madam President, the words the U.S. Supreme Court used:

subverted by the federal electioneering efforts with a combination of hard and soft money. Under that allocation regime--

That was a decision by the Federal Election Commission--

national parties were able to use vast amounts of soft money in their efforts to elect federal candidates.

Now, I hope the Federal Election Commission gets our message. We do not, and will not, stand for the creation of new loopholes to violate this law.

Senator *Feingold* and I began, in 1995, with our first effort to reform this system. It took us 8 years until the final decision by the U.S. Supreme Court upholding the constitutionality, in a historically ironic decision entitled *McConnell v. FEC*. I hope the irony of those words is not lost on my colleagues. We will not stand for the Federal Election Commission--which they already have--subverting this law. We will not stand for it. We will use every method available to us to be sure that the law is enforced as it is written and intended and declared constitutional by the U.S. Supreme Court.

It is time for the Federal Election Commission, rather than being an enabler to those who want to subvert the laws, to be a true enforcer of the law, a role which they will find strange and intriguing and certainly unusual for that Commission.

I might add, too, we still have two members of the Federal Election Commission who declared their firm conviction that this law was unconstitutional.

If they still hold that belief, as at least one of them has stated recently, they should recuse themselves from further involvement in a law they believe is unconstitutional. In fact, resignation would probably be in order so someone who believes in the constitutionality of this law, as affirmed by the U.S.

Supreme Court, would be empowered to enforce it.

In 1995, my dear friend Senator *Feingold* and I first introduced legislation designed to limit the influence of special interests on Federal campaigns. We began our fight because it had become clear to us that our campaign finance system was broken and this breakdown was having a detrimental effect on our democracy. Seven years, four Congresses, several rewrites, countless hours of debate, amendments, and much hard work by dedicated grassroots activists later, the Bipartisan Campaign Reform Act became law on March 27, 2002.

I know my friend from Wisconsin agrees with me. We could not have done it without the thousands of Americans who made our cause their cause. We could never have achieved this goal. They will have our undying gratitude.

Last month, following an illegal challenge, the Supreme Court ended the 7-year-long battle when it upheld the act, or BCRA, in the case of *McConnell v. FEC*. For me it was one of the Court's most needed and welcomed opinions. In light of this landmark victory, I want to congratulate those who worked so hard to secure it and to talk about the work that remains to be done to strengthen our democracy and to empower all Americans through civic participation.

We can already see some benefits from these years of hard work. No longer can a Member of Congress call the CEO of a corporation or the head of a labor union or a trial lawyer and ask them for a huge soft money donation in exchange for access to high-level Government officials. That cannot happen today. Just last week, *Roll Call* reported that for the first time in many years, the two parties did not hold any high-donor fundraisers at the Super Bowl. The article stated:

With soft money banned, the parties have come to the conclusion that the yield at a Super Bowl fundraiser doesn't justify the expense.

However, let me be clear, this in no way means reform is complete. Our work and the work of thousands of Americans engaged at the grassroots level, the efforts of numerous reform groups, is far from over. While the basis for BCRA, that large, unregulated political contributions cause both the appearance and reality of corruption by elected officials, is self-evident, mustering the evidence needed to prove this to the Court was an extraordinary feat. The mountain of evidence that was compiled, however, provided a solid foundation for the Supreme Court's decision to close loopholes through which were flowing hundreds of millions of dollars in soft money.

The evidence collected included sworn statements from elected officials acknowledging they had been forced to raise large contributions for the political parties, internal memos from political party leaders to elected officials reminding them who gave big contributions prior to key votes, and testimony from business leaders who were provided a "menu of access" by party officials showing how \$50,000 gets you a meeting with an elected official, \$100,000 gets you a 15-minute meeting with another elected official.

The strength of the evidence on the extent of corruption and the appearance of corruption as well as the creativity

with which the campaign finance laws were being evaded led the Supreme Court to uphold BCRA, which sought to close the loopholes that had been opened in the Federal Election Campaign Act.

Significantly, the evidence also led the Supreme Court to find that Congress needed and possessed

broad authority to enact laws to reduce the corrupting influence of unregulated money in politics. The Court also made a powerful statement about the so-called regulators of the corrupting soft money system, the Federal Election Commission. According to the Court, the soft money system was the result of a series of loopholes opened by the FEC and exploited by the party committees. I also quoted what Justices Stevens and O'Connor wrote.

While the Supreme Court in the McConnell case recognized the role the FEC had played over the years in eroding the campaign finance laws, it was not asked to consider the rules the commission adopted just last year to implement BCRA--rules that, true to the FEC's history, undermined the integrity of campaign finance law. The

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Court, however, may soon be asked to do this. Shortly after the FEC took a big bite out of BCRA through its rulemaking process, Representatives SHAYS and MEEHAN filed a lawsuit challenging the regulations. This action is on a fast track in Federal District Court.

Since its inception, BCRA has been reviled by the political party establishments that decried the eminent demise of our two-party system. Yet in the midst of a hotly contested Presidential campaign, evidence suggests the opposite is true. Under BCRA, both the Democratic and Republican national parties are reporting a resurgence of grassroots support and significant increases in new hard money donors. In fact, recent figures show there have been 600,000 new hard money donors to the Democratic Party and 1 million new Republican hard money donors. That is what we intended.

The Court was right to uphold the new reform law. Implemented correctly, it will go a long way to restoring people's faith in our democratic system. That said, reform is not a one-time fight. We must continue the work to strengthen our democracy and reconnect the people to the political process. The adoption and Court sanction of BCRA enables Congress to push forward with important reforms that help improve our system of Government and reduce barriers to political participation.

It is critical that we ensure BCRA is not negated by widespread circumvention of the new law by the FEC and by outside political committees. While we are challenging FEC's implementing regulations, we must also act to restructure the commission so it will not only implement campaign finance laws effectively but actively enforce them.

The American political system needs an agency that will give effect to our campaign laws fairly and free from the partisan influence that currently dominates the commission structure. Without this key reform, no campaign finance reform law can work well.

We must fix the ailing Presidential public funding system. For many years, the system gave Americans a viable opportunity to run for our highest office and increased competition in our Presidential elections, but the system is now outdated and bankrupt. Senator *Feingold* and I have introduced a proposal to fix it, and we are committed to educating the

public about the importance of doing this and to building the coalition needed to make it happen.

Ongoing reform efforts are needed not only at the Federal level but also at the State level. Working at the State level, we can help to restore faith in the political process by improving contribution disclosure laws, promoting clean election programs, and encouraging an independent and noncorrupt campaign finance system.

To break down the barriers to political participation, we must improve ballot access, promote open primaries, and fix the redistricting process.

This is not a partisan issue. It should not advantage one party over the other. What reform does is create transparency, equality, and participation, and inspire confidence in those we represent. The strength and real muscle in this fight lies with the American people. During the long battle in the Senate to pass campaign finance reform, we called on the American public to make their voices heard on Capitol Hill. They answered, and the impact was astounding. The phone calls, e-mails, and letters that flooded into Members' offices had a tremendous impact. Constituent communications translated into votes for reform.

Reform is an ongoing process. It didn't end with Teddy Roosevelt in 1907, and it will not end with **JOHN MCCAIN** and **RUSS FEINGOLD** in the Senate. I am very much a realist. From the beginning of this fight, I have said that as soon as the soft money loopholes addressed in BCRA were closed, there would be very smart people all over Washington trying to find ways around the law. I am sad to report these folks wasted no time in attempting to circumvent it again.

The recent creation of certain new organizations under section 527 of the Internal Revenue Code is the first broad-scale attempt to undermine BCRA.

Let me be clear on one thing. There are many legitimate 527 organizations whose method of operation is not in question here. They are nonpartisan. They work to do the things we want to further the goals of democracy. There are, however, some groups that have recently been set up for the sole purpose of raising or spending tens of millions of dollars in soft money to influence the 2004 Presidential and congressional elections.

Madam President, various groups have been created expressly to spend large sums of soft money on partisan voter mobilization drives and sham "issue advocacy" to influence Federal elections. These groups have as their overriding, if not sole purpose, the influencing of Federal elections.

Federal election law requires such groups to register as political committees with the FEC. Federal political committees may only accept and spend hard money--that is, money limited in amount and source. I will repeat that if a 527 is nonpartisan in nature, we have no problem. If a 527 is engaged in partisan activity, they then fall under the same restrictions that any other political committee does that is engaged in partisan activity. That should be obvious to the Federal Election Commission.

These new groups, however, which have made clear that their purpose is to influence Federal elections--they have not made any bones about it--have purportedly set up "non-Federal" accounts to accept corporate and labor union funds and large contributions from individuals. They plan to use these moneys, we are told, to finance partisan voter drives and run sham issue ads aimed at influencing the 2004 Federal elections. This blatant end run around the campaign finance laws should not be tolerated.

When a political committee has an overriding purpose to influence Federal elections, it cannot be allowed to circumvent campaign finance laws by establishing a "non-Federal account" and claiming that the money being raised and spent to influence Federal elections is not for that purpose. These committees cannot be permitted to transform contributions that are clearly for the purpose of influencing Federal elections into "allowable soft money" simply by depositing those funds into "non-Federal accounts." These groups are clearly political committees that should be registered as such with the FEC and must operate accordingly within the hard money amount and source limitations.

After the success of *McConnell v. FEC*, we cannot sit idly by and allow this potentially massive circumvention of campaign finance laws. BCRA finally closed soft money loopholes and, again, new ones should not and cannot be tolerated. I am pleased to see that the FEC has recognized the immediate need to examine these soft money problems. I hope the Commission will not make the mistakes it has made in the past and will act swiftly and comprehensively to protect the integrity of our campaign finance laws.

Madam President, I also wish to comment on one of the things that happened. We have seen, in the last Presidential campaign, a dramatic reduction in negative campaign ads run by the various candidates. Why is that? It is because of an amendment that was added by the Senator from Maine, Ms. *Collins*, and the Senator from Oregon, Mr. *Wyden*, which was called "stand by your ad," I believe. Guess what. Every time there is a message, the candidate says, I am so and so and I approve of this ad. They would not approve a lot of the trash put in and negative attacks, which has one effect, we all know, and that is drive down voter turnout. It has a very salutary effect.

I have to admit that I never thought of that in the 8 years Senator *Feingold* and I looked at every aspect of campaign finance reform; we had not thought of that amendment. It has a marvelous positive affect, having the candidate say: I am so and so and I approve of this ad.

I also say there was a marvelous team that argued our case before the U.S. Supreme Court. I ask unanimous consent to have a list of names printed in the **RECORD**.

There being no objection, the material was ordered to be printed in the **RECORD**, as follows:

Lawrence H. Norton, Richard B. Bader, Stephen E. Hershkowitz, David Kolker, Theodore B. Olson, Peter D. Keisler, Paul D. Clement, Malcolm L. Stewart, Gregory G.

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Garre, Douglas N. Letter, James J. Gilligan, Michael S. Raab, Dana J. Martin, Terry M. Henry, Rupa Bhattacharyya, Andrea Gacki.

Roger M. Witten, Seth P. Waxman, Randolph D. Moss, Edward C. DuMont, Paul R.Q. Wolfson, Purt Neuborne, Frederick A.O. Schwarz, Jr., Charles G. Curtis, Jr., David J. Harth, Michelle M. Umberger, Bradley S. Phillips, E. Joshua Rosenkranz, Alan B. Morrison, Scott L. Nelson, Eric J. Mogilnicki, Michael D. Leffel, A. Krisan Patterson, Jennifer L. Mueller, Stacy E. Beck, Jerrod C. Patterson, Fred Wertheimer, Alexandra Edsall, Trevor Potter, Glen M. Shor.

Mr. *McCAIN*. Madam President, I particularly thank Mr. Ted Olson, the Solicitor General, who entered into this situation as one who did not agree with campaign finance reform and became a strong advocate. He made compelling arguments to the U.S. Supreme Court. I also thank Seth Waxman and his team of lawyers, who did a marvelous job. There are so many people and so many organizations that continue to work on our behalf.

Finally, I wish to make two closing points. One, the Federal Election Commission cannot be allowed to undermine this law. The U.S. Supreme Court is very clear about the role of the Federal Election Commission. So we cannot let these 8 years of hard work--not because of Senator *Feingold* and me but because of the thousands and thousands of Americans who worked so hard to clean up this system that has either corruption or the appearance of corruption associated with it.

Finally, one of the great pleasures of my life in public service is to have the opportunity to know and appreciate and have the undying and everlasting friendship of my dear friend from Wisconsin, who is one of the most honest and decent Americans with whom I have ever had the privilege of knowing and serving. I would be honored to serve with him under any circumstance.

I thank the Chair and yield the floor.

The PRESIDING OFFICER. The Senator from Wisconsin is recognized.

Mr. FEINGOLD. Madam President, let me say how fitting it is that the Senator from Maine is presiding at this point, who has made a tremendous contribution to our efforts on campaign finance reform. It is a tremendous privilege to come to the floor with my good friend and longtime partner in campaign finance reform, the senior Senator from Arizona, Mr. *McCain*. Everybody knows we fought side by side for nearly 7 years to see our bill enacted into law.

Finally, on December 10, nearly 2 years after President Bush signed the bill, the Supreme Court upheld our work against a constitutional challenge. It has been a long and hard struggle, and, frankly, we could not possibly be happier with the result. The Court's decision in *McConnell v. FEC* is a complete vindication of our effort to help rid politics of the corruption of soft money. We are very proud of and also humbled by the Court's ruling.

We are not here to gloat. It is not polite or useful to do so. But if I had a dollar for every time someone said on this floor or in the media that our bill would never stand up in court, I would actually be a wealthy man. Rather, we are here to thank our colleagues who joined with us to pass this historic reform, to review the Supreme Court landmark decision, and briefly take a look forward, as Senator *McCain* has already done. As we often noted during the debate, the *McCain-Feingold* bill was not intended to be the last word on the topic of campaign finance reform. The Court's decision will serve as a guidepost for future reform initiatives.

First, I thank all of the Members of this body who worked so hard with us to pass the bipartisan Campaign Reform Act.

For many, this was a labor of love. For others, it was a difficult fight because of resistance from their own party or from political or campaign advisers. In the end, as Senator *McCain* said it so well, this bill passed because the American people demanded it and because courageous Senators and Members of the House were willing to stand up to the defenders of the status quo.

I particularly thank the Democratic leader, Senator **TOM DASCHLE**, and his counterpart at the time in the House, Representative **DICK GEPHARDT**. Their leadership and strong support made it possible to get the bill through all the complicated legislative obstacles we faced and onto the President's desk.

Also deserving of special thanks is the core bipartisan group of supporters of reform who worked closely with us to pass the bill. Senators **LEVIN, COLLINS, LIEBERMAN, THOMPSON, SNOWE, SCHUMER, JEFFORDS, COCHRAN, CANTWELL, EDWARDS**, and **KERRY** all made major contributions to the law that the Supreme Court upheld.

I think it is actually hard to imagine a more clear statement from the Supreme Court than the one delivered in December in *McConnell v. FEC*. The margin of the Court was narrow, as it often is in complicated and highly contested cases. But the majority could not have been more emphatic that what we did in *McCain-Feingold* was a constitutional approach to the problems of soft money and also phony

issue advocacy that Congress identified and we tried to address.

I have to tell you, that was enormously gratifying after the hard work we did in this body to pay attention to the Court's previous decisions. It meant a great deal to me personally that we looked at what the Court had said about the first amendment of the Constitution and crafted our legislation with respect to that. That is exactly what we did.

We drafted this bill specifically to be consistent with what the Court had said in the past in analyzing the first amendment implication of campaign finance legislation. We worked hard to shape a legislative record demonstrating the need for the reforms we proposed.

In upholding the law, the Court recognized the difficult and painstaking work we did to stay within the constitutional framework set out in previous cases.

The Court said:

We are mindful that in its lengthy deliberations leading to the enactment of BCRA, Congress properly relied on the recognition of its authority contained in *Buckley* and its progeny.

I was particularly pleased at the deference the Court showed to congressional judgments about the problems with the system and the best way to address them. That deference has often been lacking in recent opinions in other areas, but this time the Court realized that Congress has special expertise in this area and needs to have the authority to actually address real world problems in the way that it believes will be most effective.

This is enormously important for the future of reform. It shows that the Court understands that under our Constitution, Congress is not powerless to address threats to the health of our democratic or political processes.

In no way, of course, did the Court give to Congress unbridled power. It simply upheld a reasonable and measured response to the soft money problem that many on both sides of the aisle had come to believe was extremely harmful.

One aspect of the Court's opinion is worth noting as we look forward to future reform efforts. The Court laid responsibility for the soft money problem squarely where it belongs, and as Senator *McCain* just did again--with the Federal Election Commission. As Senator *McCain* noted, the Court specifically stated that the FEC "subverted" the law by allowing soft money to be used to aid Federal candidates.

The Court said:

[T]he FEC's allocation regime has invited widespread circumvention of FECA's limits on contributions to parties for the purpose of influencing Federal elections.

The Supreme Court agreed with us that soft money was a loophole that Congress could legitimately try to plug, and that the loophole was improperly created by the FEC. With this validation of the position taken by reformers for many years, the Court underlined a cautionary note that we have sounded many times before on this floor. No law in this area can be self-executing. To be successful, campaign finance reform must be implemented and enforced by an agency that is dedicated to carrying out the will of Congress, not to frustrate it.

The new law instructed--instructed--the FEC to act quickly to develop regulations to explain and implement BCRA. Time after time, instead the FEC adopted rules that weakened the law. Senator *McCain* and I participated in those rulemaking proceedings, but our advice on many important issues was ignored.

As currently structured, the FEC seems simply incapable of properly applying the law that this Congress enacted. Virtually every complicated

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issue is approached from a political perspective, and the political parties have extraordinary sway over the Commission's actions.

Senator *McCain* and I viewed the BCRA rulemaking process as a test, if you will, a final chance for the FEC to change its approach and to finally begin to faithfully enforce the law in a nonpartisan fashion. We were very disappointed in the result. We have, therefore, concluded that the FEC, as currently constituted, cannot provide the strong and consistent enforcement of the Federal election laws that this country needs. So together we have proposed to replace the agency with a new body, the Federal Election Administration.

We need to have an agency led by people who are respected by both sides of the aisle and will carry out their responsibilities in a nonpartisan manner rather than simply having representatives from each of the parties canceling each other out with a partisan approach to their jobs. Our bill makes individuals who have worked for or served as counsel to parties or candidates ineligible to serve as administrators.

We have no illusions that this reform will be easy to pass. Those who opposed our bill will undoubtedly oppose replacing the agency that is responsible for the rulings that made our bill necessary and that continue to undermine the new law. But reform of the FEC is essential if the will of Congress and BCRA is to be carried out.

I am also pleased to join Senator *McCain* in introducing a bill to reform the Presidential public funding system. That system did actually work well for seven consecutive Presidential elections from 1976 to 2000. In those elections, Republicans were elected four times and Democrats three times and challengers actually defeated incumbents in three out of the five races where an incumbent was a candidate.

This year, unfortunately, candidates from both parties have opted out of the public funding system for the primaries. Everyone knows the system needs to be updated to keep it functioning in future elections.

I happen to come from a State that had a very good public funding system for State elections for many years. In fact, I won my first race for the Wisconsin Senate, frankly, only because of that system. But the legislature in my State failed to update and revise that system to keep pace with the changing realities and costs of political campaigns, and now hardly anyone uses it. We can't let that happen to the Presidential public funding system.

Again, when I look at the Presiding Officer, I know these kinds of systems can work because they have made them work in her State of Maine. The bill we have introduced is a starting point only, much like the first McCain-Feingold bill in 1995. We want to work with our colleagues on both sides of the aisle to come up with a bill that this Senate can support to preserve the public funding system that has served the country so well since the excesses of the Watergate era demonstrated that private financing of

Presidential elections is really not a very good thing for our democracy.

I hope our colleagues will work with us over this year to perfect a bill that can be quickly passed in the next Congress after this Presidential election has been held.

Senator *McCain* and I have also introduced a bill to provide free air time to congressional candidates. The cost of television advertising has skyrocketed, and we believe the Nation's broadcasters, who make great profits from a public resource--the airwaves--should contribute to improving the democratic process. I look forward to continuing to discuss this bill with our colleagues as well.

We do not expect any one of these three major reform bills will be considered on the Senate floor this year. But there is one bill that can and should be enacted very quickly. That is a bill we have introduced to require electronic filing of Senate campaign finance reports. Right now, the Senate lags way behind the House in providing current and complete disclosure of contributions to and expenditures on our campaigns. This is really an embarrassment. It is

possible the Rules Committee can quickly correct this problem, but if not, Senator *McCain* and I have introduced a bill to bring the Senate into the 21st century, and we should enact it promptly.

Again, I thank all my colleagues who supported the McCain-Feingold bill. I hope they are as proud of their accomplishment as I am of them. I am convinced we have begun to change this system for the better. Senator *McCain* discussed there is already evidence of that. I think as the 2004 campaign heats up, we will see plenty more examples of how the system has improved, but we cannot rest on our laurels. We saw what happened when Congress essentially left the field for 20 years after passing the post-Watergate reforms. We must be vigilant to protect what we did in BCRA, and we must look ahead and continue to fight for a campaign finance system that enhances, rather than suffocates, the power of individual citizens and voters in our democracy.

Finally, I again express my admiration and appreciation for all Senator *McCain* has done on this issue. For one final time I thank him for calling me in late 1994 and saying he wanted to work with me on this project. Next time tell me it is going to take 8 years. I am more than grateful for this terrific opportunity to not only work with a great American hero, but to have my name associated with him to the point where Senator *McCain* has said that some people think my first name is **MCCAIN**.

Madam President, I yield the floor.

The PRESIDING OFFICER. The Senator from Virginia.

END