MEMORANDUM

To: The Commission
From: Chairman Bradley A. Smith
Date: May 10, 2004
Re: Senator McCain’s Comments from the Congressional Record

Senator McCain requested that his comments from the Senate floor on April 28, 2004 regarding the FEC’s hearing on § 527 groups be added to the record for the Rulemaking on Political Committee Status. However, the request was denied because the period for comments had closed on April 9, 2004. As a courtesy to Senator McCain, I would like to submit his comments for the record.
Mr. President, I stand on the record today to correct a number of mistakes that were made back in 1994 by the Senate and the Congress. On the Republican side of the aisle, we were all opposed to permanent tax cuts for the wealthy, which is what we did back then. Every time we had the opportunity to cut taxes, we did it. It was not for the good of the country, it was for the good of the Republican Party. We were always looking for a way to cut taxes, but we never had the guts to do it. We never had the nerve to do it. We never had the courage to do it.

The great Contract with America was a failure. We were the party on this side of the aisle of mandates. That was our mistake. We had a big movement in the country, and we got people fired up. We had a lot of people out there, and we had a lot of people who were willing to listen. But we never had the guts to do it. We never had the nerve to do it. We never had the courage to do it.

I know with America was mandates. I remember when he was running for the Senate, the first act on the agenda of the Senate was no more unfunded mandates. In that mandate, the statement itself is so large that according to us, they cannot calculate how much they know it is an unfunded Federal mandate.

Why would we do that? Why don't we do the Texas did a very direct thing. They said the last year to pay every penny of the deficit from State and local taxes should be $35, or $40. Then we won't have any argument about definition. We would not have to worry about whether we were subsidizing companies instead of consumers. We would all be treated equally at the individual American who would have $100 million of high-speed Internet access and we say no State and local taxes at all, none on your annual income. The States have and we have not done that, I don't know why. That also is a Federal mandate, but it is no way we are doing it is a lot of money. It is at least hundreds of millions of dollars a year, and the way this latest bill is written, it would be billions of dollars, and local revenue.

I thought the National Governors Association letter was thoughtful and acknowledged the hard work all sides have done on this issue. That is why it is so important. We have to get it right, we have to get it right. We have to get it right.

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The National Governors Association yesterday suggested the proposal by the Senators from Arizona and California is a good one. They hope to balance the interests of State sovereignty and State responsibility with the desire for keeping high-speed Internet access free of excessive taxation. They talked about the specific issues suggested by the chairman this week and the need for amendments that would address the needs of the people.

One, the definition. Instead of using the definition of the original moratorium in 1998, they have all agreed to in 1998, and 2000, instead of saying let's do that permanently, they have fixed the definition that runs the risk of costing State and local governments so much. That is one.

Second, the definition of the time of this may be inadvertent and if it is, maybe I can ask the Senator from Arizona if it is true. If there is a way to run the Internet, then we ought to be able to get the issue off the table. And surely we can find an individual who can write in a sentence to which we can all agree.

Then there is the term. I applaud the leadership of those Senators on the Commerce Committee who want to address this issue. I think if we go 4 years, which is better than permanent, but if we go 3 or 4 years, we run the risk of freezing into the law provisions that would be hard to change in the full Senate. Then there is the question of the so-called grandfather clause which states that States already collecting taxes to keep doing that.

Those are the taxes we have here. One is definition, one is telephone, one is telephone, one is telephone, one is telephone, one is telephone, one is telephone, one is telephone, one is telephone, one is telephone...

That is the language, we believe, in the draft and one is telephone, one is telephone, one is telephone, one is telephone, one is telephone, one is telephone, one is telephone, one is telephone...

That is the one that runs the risk of over time costs of States up to $10 billion a year in sales taxes, and the House bill another $7 billion in business taxes now collected on telephone services. I do not want to overload the state that point. That is going to happen tomorrow. It is going to gradually happen as telephone calls are made over the Internet.

So that would be my hope since we have narrowed it down to that, and one is telephone, one is telephone, one is telephone, one is telephone, one is telephone, one is telephone, one is telephone, one is telephone...

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CONGRESSIONAL RECORD—SENATE
April 28, 2004

Once in a while, we have a public debate in Washington that serves as a perfect metaphor for the real world in which we live. One such was sometimes done here. The argument over whether and when the Federal Election Commission should regulate new soft money fundraising groups provides us with one of those moments. In the Senate, as elsewhere, how the battle over election watchdog has served the public and the urgent need to fix it.

The Chairman of the Federal Election Commission, Bradley Smith, claims apparently somewhat superciliously that the issue of soft money is now the last word on the constitutionality of campaign law, and that it is his job to make sure the Federal Election Commission carries out its mandate, not thwart, the Supreme Court’s mandate.

I do not deny that Mr. Smith is entitled to his personal views on the issue of regulating soft money. I am saying, however, that he is failing to fulfill his duties as the chairman of a Federal agency and one who is sworn to uphold and enforce the law. Just as we would not tolerate the appointment of a pacifist as chief of staff or the Director of the FBI who believes the whole Penal Code should be null and void, so we should not accept a Chairman of the FEC who opposes campaign finance law as constitutional by the U.S. Supreme Court.

Knowing of his opposition to the laws he was sworn to uphold, I cannot fathom why Mr. Smith would have even accepted his current position in the first place. In all, I believe that the Supreme Court has proven him wrong and upheld the constitutionality of a law that he stated was “clearly unconstitutional.” It makes no sense. It makes no sense for him to be charged with enacting a law he so publicly opposes on policy and legal grounds.

I do not have a better example of the Supreme Court than Mr. Smith’s opposition to soften the law. It is a case where the Supreme Court has ruled and we are supposed to respect the decision.

Further evidence of Mr. Smith’s predilection can be found in an article in the May 3 edition of National Review in which he writes:

Congress, if ever there was a threat to democracy, has been threatened. In 1860, with the threat of civil war looming, Congress was urged by the Supreme Court to uphold the law. Because groups hostile to freedmen spent hundreds of millions of dollars to create an intellectual climate in which to push the amendment was viewed as a threat to democracy.

This is perhaps the most inflammatory and inappropriate comment I have ever seen by an individual who is supposed to be independent and unaffiliated with his existing law position. Mr. Smith cannot be independent if he has so clearly conflicted with the Supreme Court.

By the way, this treatment of Mr. Nobel, a witness before the FEC, as being bullying and as cowardly as I have ever seen anyone conduct themselves in our Nation’s Capital, clearly was an abuse of authority as Chairman of the Commission.

Mr. Smith’s views on the constitutionality of the Nation’s campaign finance laws have been repeatedly rejected by the Supreme Court. Mr. Smith was dead wrong in his views that the Federal Election Campaign Act, and its restrictions on contributions, were unconstitutional, and Mr. Smith was dead wrong in his view that BCAA was unconstitutional. Mr. Smith insists on being incapable of accepting the fact that the Supreme Court of the United States, not Mr. Smith, is the last word on the constitutionality of campaign laws and that it is his job for an FEC commissioner to carry out, not thwart, the Supreme Court’s mandate.

I do not deny that Mr. Smith is entitled to his personal views on the issue of regulating soft money. I am saying, however, that he is failing to fulfill his duties as the chairman of a Federal agency and one who is sworn to uphold and enforce the law. Just as we would not tolerate the appointment of a pacifist as chief of staff or the Director of the FBI who believes the whole Penal Code should be null and void, so we should not accept a Chairman of the FEC who opposes campaign finance law as constitutional by the U.S. Supreme Court.

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I know if I were in Mr. Smith’s shoes, I would do the honorable thing and resign. If I were in his shoes, I would not carry on a crusade against Federal regulation of campaign finance. I would leave the FEC position to be filled by someone who believed in the job.

If any of you still think I am exaggerating about these FEC hearings, by the way, they should get a tape from C-SPAN and look at it themselves. It was shocking.

One very troubling aspect of the hearings was the way in which some Commissioners and anti-finance witnesses joined in a chorus of complaint that “no one knew what Congress intended to do” when it passed BCAA in 1974, and proclaimed that the FEC’s “express advocacy is required by the Constitution” rationale for failing to regulate political activity by the 527 political organizations. As a result, these organizations remain busy soliciting and spending millions for the supposed purpose of influencing Federal elections.

That the FEC’s lack of action undermines the law is just my opinion. The Supreme Court confirmed this in its recent decision upholding the soft money ban. In McConnell v. FEC, the Supreme Court stated, in no uncertain terms, how we are in the midst of a money crisis to begin with. The justices placed the blame squarely at the
April 28, 2004

We know systemic campaign finance abuses have usually begun when one political party has come to the FBC to push the envelopes and the FBC declines to act, leading the other party to adopt the same illegal tactics. In 1996, one party invented the use of soft money to promote their Presidential campaign finance rules. The Commission let them get away with this. This is well documented. The other party followed.

In 1996, the soft money scheme was raised to an art form and the Commission did nothing. You have to ask whether the Commission has learned anything about the consequences of its failure to properly enforce the law. History proves it is imperative that the Commission act now. If it does not, we can rest assured both parties will soon be trying to out-raise each other in this venue, and a whole new soft money scheme will have blossomed.

By the same token, if these soft-money 527's are allowed to stand—they are now, we know, largely funded by Democrats. Who in the world doesn't understand if you allow this to stand, then the Republicans will do the same. Who doesn't understand so? Just as in 1988 one party was allowed to do it, so the other party was able to do as well.

Much of the controversy at the Commission has been given up by an artfully crafted misinformation campaign designed to persuade the nonprofit community—the 501(c)s—that any FBC action to rein in 527's would have the unintended consequence of limiting their own advocacy efforts. It is true certain campaign finance rules for spending by nonprofits are different than they are for political groups like 527's. There is no immediate campaign finance regulatory problem with the 501(c) groups. I repeat, there is no immediate campaign finance regulatory problem with the 501(c) groups. I repeat, there is no immediate campaign finance regulatory problem with the 501(c) groups as there is with the 527 groups, and no need to address 501(c) groups in this rulemaking.

Some have suggested the agency do what Congress did when it passed BCRA: Issue a ruling but make the change effective after the election. What these critics fail to recognize, however, is that Congress was creating an entirely new set of election rules in BCRA. All that is required now is for the FBC to properly enforce the law that has been the books for 30 years, and to abandon its wrong interpretations of the law as made clear in the McConnell decision. To issue new regulations now and make them effective for the 2004 election would be for the FBC to say that "we know the law has been wrongly interpreted for years but we are going to allow that to continue for the rest of this year, and then next year we will start enforcing that law correctly." That is simply not rational and it is an abdication of their responsibilities.

Finally, it is essential that the FBC act quickly to fix its absurd allocation rules, which govern the mix of soft and hard money a political committee can spend when it is supporting both State and Federal candidates. It is clear that a number of the current crop of 527's exist only to defeat President Bush. But through the FBC allocation formulas, if these same entities also claim to be working in state elections, they could use soft money for 98 percent of their expenditures—a complete end-run around the soft money ban in Federal races.

Despite all the evidence, I am still hopeful the Commissioners will summon the political will to do the right thing now. There are some commissioners who want to do the right thing. I want them to step forward and do it. But even if they do, the agency's structural problems will be the same as they ever were. By unfortunate custom, three Republicans and three Democrats are chosen by their party leadership, usually with the express purpose of protecting their party's interests, rather than enforcing the law. It takes four of the Commission to take action—a requirement that has been a recipe for deadlock and bipartisan collusion and gave birth to the soft money problem we're trying to fix. Last month I testified before the Senate Rules Committee on the issue of 527's. During my testimony I stated that one of the problems the FEC faces today is that one Commissioner, and in particular Chairman Smith, refuses to accept the Supreme Court's conclusions in the areas of campaign financing. A decision by the FEC to abdicate its responsibility at this politically inconvenient moment will only provide further evidence that it is time to start over. If the Commission has become too hopelessly politicized to do its job, then we must replace it with an agency that serves the public interest.

The FEC's current difficulty in dealing with an issue as straightforward as these 527 organizations spending soft money to support Federal candidates and the S-3 ties at the Commission when it recently considered an advisory opinion on this issue, are only the most recent examples of the need for fundamental FEC reform. With my fellow BCRA sponsors, I have introduced legislation that would scrap the FEC and start over, using a new organizational structure and administrative law judges to avoid deadlocks and influence the politics out of the process. Whether we adopt this or some other basic reform, it is time for a watchdog with some bite.

I thank the President for his patience as I ran over the previously agreed-to time.

This is a very serious issue. We are not going to give up on it. We didn't work for 7 years to get campaign finance reform upheld by the U.S. Supreme Court to have a group of six people down there who are so politicized that they refuse to enforce a law which was passed by this Congress in an overwhelming, final, and clear decision by the U.S. Supreme Court.
I want to tell them and all of those other people I watched on C-SPAN who are trying to undermine this law that we will not let you get away with it. American politics and the political process is too sacred for us to allow the Congress to be used as an instrument of special interests around this town to prevail and prevent us from restoring faith and confidence in the American people and their electoral system.

Again, I appreciate the patience of the Presiding Officer. I yield the floor.

RECESS
The PRESIDING OFFICER. Under the previous order, the Senate stands in recess until 4 p.m. Thereupon, the Senate, at 3:04 p.m., recessed until 4 p.m. and reassembled when called to order by the Presiding Officer (Mr. CORKIN).

INTERNET TAX NONDISCRIMINATION ACT
The PRESIDING OFFICER. The Senate will resume consideration of S. 150. Mr. REID. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll. The assistant legislative clerk proceeded to call the roll. Mr. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

ANOTHER WEEK, ANOTHER CLOUSER VOTE
Mr. BYRD. Mr. President, our country is facing record budget and trade deficits. We are in a war of our President’s choosing that is not, to put it mildly, going as well as had been expected. Millions of Americans are without health insurance, millions more worry about the security of their jobs.

These are troubled times and many issues clamor for the attention of the Senate. Yet what is the response of the Senate? The Senate’s greatest deliberative body? Are we debating strategies to quell the violence in our soldiers’ home? No. Are we considering Social Security and Medicare? No. Is the Senate debating ways to get our workforce more competitive? No. Is the Senate grappling with welfare reform or the highway bill? No.

This great deliberative body which was forged by the Founding Fathers in the Great Compromise of July 16, 1787, has become a factory that manufactures sound-bite votes for fodder for 30-second political ads but which do very little to address the challenges facing this country.

In this respect, I feel that the Senate will be little more than an insignificant arm of the political parties, and we may as well wave the white flag of surrender in its place.

Have we lost the will to legislate? Is the current leadership afraid to allow the Senate to work on its will? The Republican leadership seems to feel that their slim majority gives them the check to impose their exclusive agenda. Let me be clear. It does not. The Senate, by its very existence, embodies a core tenet in American democracy—namely, the principle that the minority—the minority has rights.

The Republican leadership is fast making the committee process a thing of the past. Furthermore, the leadership has done everything in its power to prevent Democratic Senators from getting votes on their amendments.

The United States is faced with a trade deficit that has mushroomed to an all-time high for the third year in a row. Adding to that unfortunate situation, in August 2002, the World Trade Organization authorized the European Union to impose up to $4 billion in trade sanctions against the United States if provisions of the Tax Code were not repealed. How about that?

The distinguished Republican leader brought up the Foreign Sales Corporation legislation to address this situation only after the sanctions were in place. After votes on only two amendments, the majority leader wanted to shut down the amendment process—shut it down. Many reasons were given, but the truth is that they did not want to vote on an amendment dealing with overtime for African workers. Yet, the American workers. While American companies are losing their competitive edge in the "my way or the highway" approach of the leadership, has delayed a final resolution on this bill.

In the past, cloture was a rarely used procedural tool. When I came to this Senate, it was rarely used—only once in a while. Not so today. Cloture is the order of the day. It is routine. It is the norm. And it is the norm because of the germany amendments. Instead of the phrase, "another day, another dollar," the Senate operates in an atmosphere of "another week, another cloture vote."

Last November, we had three cloture votes in one day. What great hopes the leadership must have had for the first two votes to schedule three in a row.

How can such a move be seen as anything but political scorekeeping?

This Senate has spent an extraordinary amount of time and energy and effort on the Bush’s judicial nominees. In fact, last November the Senate set aside the VA-HUD appropriations bill to hold an all-night marathon stunt—something to watch indeed, something to watch. What a sham.

The majority leader wanted to set aside the regular session to conduct a circus—a circus on the floor of the Senate.

The VA-HUD appropriations bill was never completed. Instead, it was wed into the Omnibus appropriations bill, as has become the unfortunate custom in recent years. We have had 17 cloture votes on 6 controversial and problematic nominees. The response of the Republican leadership and the administration has not been to address the fundamental underlying concerns raised by various Senators. Oh, no, no negotiation. Instead, they choose the course of holding cloture vote after cloture vote and then block Democratic Senators as obstructionist. And just for good measure, the President, who has had 96 percent of his judges confirmed, moved two of these divisive nominees on to the bench in recess appointments.

Now, I do not pretend that the conflict over judicial nominees began in this Senate or with the President, but I will state that this Senate leadership and this President have worked in concert to further politicize the process by which we select members of the judiciary.

And it is not just with judicial nominees that the Republican leadership is doing the White House’s bidding. The Republican leadership is controlled by this White House—controlled by this White House. Rather than have a legitimate branch which handles and sends it to the President to sign or veto, this Republican leadership in the Senate and in the House has allowed this President to control both of them.

During the conference on the Omnibus appropriations bill, the Republican majority allowed the White House to assert itself and put in provisions that had been rejected by one or both Houses. Specifically, the provision to allow increased concentration of media ownership had been rejected by both the House and the Senate. However, it was included in the bill at the behest of the White House. Shameful. Yes, shameful.

The House and the Senate were both on record as opposing overtime regulation as negotiated by the Department of Labor. Nevertheless, at the urging of the Bush White House, language to block implementation of these regulations was dropped from the conference report—dropped from the conference report.

Another example of allowing the Bush White House to dictate the legislation produced by the Congress is the highway bill. Here again it is important to every State and every person in the Union. Every Senator’s State will benefit from this bill. The transportation bills passed the House and the Senate by wide bipartisan majorities, majorities that could easily override a veto. Yet we are stalled because the Bush White House is demanding that the cost of the highway bill be significantly lower than what was passed by both Houses of Congress.

This White House, under the Bush administration, has threatened a veto if the cost of the bill is over its chosen number. What is mean and wrong about this number? Big—daddy—down at the White House, big daddy.