FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Rosemary Smith
Acting Associate General Counsel

FROM: Office of the Commission Secretary

DATE: February 18, 2004

SUBJECT: *Ex Parte* Communication regarding
Draft Advisory Opinion 2003-37

Attached is an *ex parte* communication sent to the Commissioners by Messrs. Tom Gerety and Chellie Pingree on behalf of the Brennan Center for Justice at NYU School of Law and Common Cause.

Proposed Advisory Opinion 2003-37 is on the agenda for Wednesday, February 18, 2004.

cc: Commissioners
Staff Director
General Counsel
Press Office
Public Disclosure

Attachment

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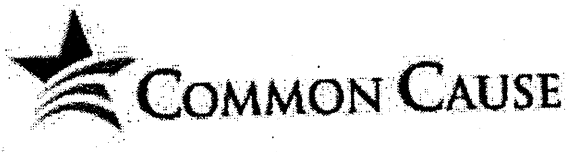

February 17, 2004

VIA FACSIMILE AND
ELECTRONIC MAIL
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 of the Brennan Center for Justice at NYU School of Law and Common Cause on FEC Draft Advisory Opinion 2003-37

Dear Ms. Dove, Mr. Norton, and Members of the Commission:

Common Cause and the Brennan Center for Justice at NYU School of Law respectfully submit these comments on the draft Advisory Opinion submitted to the Commission by FEC General Counsel on January 29, 2004, and amended by Agenda Document 04-11-A (the "Jan. 29 Draft").[1]

I. Interests of the Brennan Center and Common Cause

Common Cause and the Brennan Center have been strong supporters of campaign finance reform, in general, and of the Bipartisan Campaign Reform Act ("BCRA"), in particular. Since its founding in 1970, Common Cause has fought to reduce the power of special interests in the political system, to promote the policies and tools of self-governance that allow the people's voice to be heard by policymakers, and to hold government officials accountable when they have put narrow self- or corporate interest above the public interest. The Brennan Center has also worked since its inception in 1995 to ensure that elected officials are not unduly influenced by donors and that our elections embody the fundamental principle of political equality that underlies the Constitution.

[1] The Commission Chair's alternative draft was filed too late for our careful consideration, and we therefore confine our comments to the Jan. 29 Draft.

The Brennan Center served on the legal team that defended BCRA against constitutional attack, taking principal responsibility for developing the factual record and legal theories that supported the constitutionality of the "electioneering communications" provisions. The Center also helped to draft early versions of those provisions, and the Center's groundbreaking studies of television advertising in federal elections supported both the need for legislation to close the "issue advocacy" loophole in federal law and the assertion by BCRA's proponents that the statute's regulation of electioneering communications was not substantially overbroad. Common Cause led the coalition that successfully advocated for the passage of BCRA, filed an *amicus* brief in defense of the law before the Supreme Court, and has strongly urged the Federal Election Commission ("FEC" or the "Commission") to vigorously enforce the election law.

But Common Cause and the Brennan Center cannot support efforts to enforce BCRA that will shut citizens out of the public debate on issues of deep concern to them. We supported BCRA because its provisions were carefully crafted to promote participatory democracy and to attack the undue influence of big money on federal elections, while respecting fundamental First Amendment interests in the widest possible dissemination of information from diverse and antagonistic sources. We submit this joint statement because we are deeply concerned that, in responding to Request for Advisory Opinion 2003-37, the FEC's enforcement of BCRA may become unmoored from the constitutional principles that sustained the law.

II. Comments on the Draft and Alternative Draft Advisory Opinion 2003-37

Although the Jan. 29 Draft applies on its face only to Americans for a Better Country ("ABC"), which states in its request for an Advisory Opinion that it is in part a "political committee," we share the concerns expressed by many advocacy groups that, if adopted, the Jan. 29 Draft will chill the First Amendment rights of activists and non-profit organizations that seek not to affect elections but to influence public policy. In addition, while we encourage the FEC to enforce the law, the Jan. 29 Draft appears to present conclusions that are regulatory or legislative in nature, rather than advisory, in violation of basic principles of administrative law and the express mandate of the Federal Election Campaign Act ("FECA"). See 4 U.S.C. 437f(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title.").

A. Constitutional Concerns

BCRA is, and was intended to be, a statute of limited scope. Its principal purpose was to close two gaping loopholes in federal campaign finance law. One (the "soft money" loophole) allowed political parties to accept and spend large amounts of unregulated money to influence federal elections, and the second (the "issue advocacy" loophole) allowed unmistakable electioneering ads to escape disclosure and to be funded by otherwise prohibited sources. In *McConnell v. FEC*, 124 S. Ct. 619 (2003), the

Supreme Court ruled that Congress's efforts in BCRA to close those loopholes withstood constitutional scrutiny.

McConnell reaffirmed certain longstanding principles of the First Amendment jurisprudence of campaign finance law. First, the decision recognized the right of Congress to place source and amount restrictions on campaign contributions as a means of protecting the real and perceived integrity of the political process and to impose ancillary restrictions needed to prevent evasion of those restrictions. *Id.* at 656-57. In BCRA, Congress closed the soft money loophole with tighter restrictions on contributions to political parties. In order to prevent circumvention of the ban on soft money to parties and candidates, BCRA further required state and local parties to use hard dollars to fund "federal election activity," including advocacy relating to federal candidates.

Second, *McConnell* acknowledged Congress's compelling interest – dating back almost a century – in addressing "'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" *Id.* at 695 (quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990)). That interest justified BCRA's requirement that corporate electioneering communications, as defined under the statute, be financed from separate segregated funds that operate as PACs. *McConnell*, 124 S. Ct. at 694-96.

The Supreme Court has repeatedly recognized that corporations may be treated differently than individuals and other entities with respect to campaign finance regulation. *Id.* at 644; *FEC v. Beaumont*, 123 S. Ct. 2200, 2207 (2003); *Austin*, 494 U.S. at 660; *FEC v. National Right to Work Comm.*, 459 U.S. 197, 209 (1982); *United States v. Automobile Workers*, 352 U.S. 567, 571 (1957); *Burroughs v. United States*, 290 U.S. 534, 547 (1934). The governmental interests supporting "particularly careful regulation" of corporations, *National Right to Work*, 459 U.S. at 210, justify a ban on contributions from corporate treasury funds to independent political committees, just as they justify a ban on contributions from corporate treasury funds to a corporation's own PAC (except insofar as the funds cover administrative costs). For these reasons, Congress might in the future appropriately consider further limits on the use of corporate treasury funds, directly or through 527s. But this line of case law in no way justifies the sweeping language of the Jan. 29 Draft.

The Jan. 29 Draft loses sight of the constitutional interests that constrained BCRA. Under BCRA, broadcast communications that mention a candidate without expressly advocating the candidate's election or defeat are subject to regulation only immediately before an election. Such communications, according to the statute, could not be paid for with corporate or union treasury money, and would have to be financed through fully disclosed individual contributions within the limits of federal election law. BCRA's sponsors limited the period during which those regulations applied, because they correctly assumed "that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *McConnell*, 124 S. Ct. at 696 n.88. In

periods remote from elections, when speech is less likely to be election-related, this approach allows some campaign spending to escape regulation in deference to First Amendment interests in robust debate about political issues.

The Jan. 29 Draft goes far beyond BCRA by importing portions of the definition of "federal election activity" into the definitions of "contribution" and "expenditure." Because this reinterpretation of the definitions has been undertaken in the context of an Advisory Opinion, which necessarily addresses only the facts presented in a specific request, the Jan. 29 Draft does not make clear how far these expanded definitions apply. If the draft had stated clearly that the definition applied only to ABC, as a 527 political committee that accepts corporate funds, our view on the substance (but not on the process) might be quite different. But interest group fundraising and spending that was plainly left outside the scope of BCRA, because it was for neither express advocacy nor electioneering communications, would be swept within the purview of campaign finance law under the approach taken by the Jan. 29 Draft. Genuine issue advocacy that happens to promote, support, attack, or oppose a candidate – no matter when the advocacy occurs – could be transformed into expenditures for the purpose of influencing federal elections, which can be made only with hard money.

The fact that the Jan. 29 Draft's vastly expanded definitions purport to apply only to ABC, or generally to federal and non-federal political committees, can offer little comfort to nonprofit interest groups that are precluded from engaging in electioneering, because FECA defines political committees in terms of the contributions they receive and the expenditures they make. If "contributions" and "expenditures" are redefined to capture previously unregulated speech, 501(c)(3) and 501(c)(4) organizations will reasonably fear that previously protected issue advocacy will subject them to FEC enforcement proceedings. The chill that the Jan. 29 Draft places on communications made with no electioneering purpose is inconsistent with the basic First Amendment values respected by BCRA.

The Jan. 29 Draft also creates serious questions with respect to the First Amendment rights of individuals. *McConnell* left untouched the rule announced in *Buckley* that independent spending on political speech cannot be constitutionally limited. But the Jan. 29 Draft would create the anomalous situation in which an individual could spend $10,000,000 of his or her own money on speech that promotes, supports, attacks, or opposes a candidate and is not coordinated with candidates or parties, but could not spend $9,999,999 and accept $1 from a friend for precisely the same communications. By importing language from the "federal election activity" regulations into the definitions of "contribution" and "expenditure," the Jan. 29 Draft threatens to preclude individuals from pooling their resources for political speech. Although there may be good reason to place limits on the sources and amounts of contributions pooled by political committees and parties that may serve as conduits for unauthorized contributions to candidates, the Jan. 29 Draft should not prejudge whether those same considerations apply to associations of individuals that engage, and are authorized to engage, only in independent spending for political expression.

In sum, Congress went to great lengths in BCRA to recognize the differences among the various players in the political process and the variation in the communications that they finance. They did so because the state interests that constitutionally justify constraints on certain entities or certain types of speech may not justify comparable constraints on others. The Jan. 29 Draft's cavalier neglect of the serious constitutional questions presented by its analysis is deeply troubling to Common Cause and the Brennan Center.

B. Statutory Construction Concerns

The Jan. 29 Draft's approach to the definitions of "expenditure" and "contribution" not only presents serious constitutional questions but also defies the basic rules of statutory construction. There is a single definition of each term in FECA, and nothing in the plain language of the statute creates a basis for concluding that their meaning varies with the character of the entity that receives contributions or makes expenditures. Had Congress desired to create one definition of "expenditure" for federal and non-federal political committees and another for all other organizations, it had ample opportunity to do so when enacting BCRA's changes to FECA in 2002. There is nothing in FECA or BCRA, as interpreted by *McConnell*, that justifies the Jan. 29 Draft's attempt to redefine "contribution" and "expenditure."

The Jan. 29 Draft inappropriately seizes on a phrase crafted to apply in narrow, specified circumstances, and imports it into a wholly different area of the statute. Not only does this constitute the promulgation of a new rule by advisory opinion, in contravention of FECA's clear strictures, it ignores a well-known precept of statutory construction:

> " '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " Bates v. United States, 522 US 23, 29-30 (1997) (quoting Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972))).

Indeed, not only did BCRA limit the application of "Federal election activity," but it expressly permitted federal candidates and office holders to make general solicitations of funds for 501(c) organizations engaged in public communications that "promote[] or support[] . . or attack[] or oppose[]" a candidate for federal office. In enacting BCRA, Congress was sensitive to the differences between the candidates, officeholders, and political parties governed by restrictions that refer to "federal election activity" and other entities that may not be subject to the same treatment.

C. Process Concerns

The Brennan Center and Common Cause have consistently called for increased and more effective enforcement of the federal election laws by the FEC, and we are

pleased to see what appears to be a new willingness to take that obligation seriously. But we strongly believe that all advisory opinions, rulemaking procedures, and enforcement actions should be done in a manner that is thoughtful, fair, and consistent with the statute and Constitution.

Unfortunately, the Jan. 29 Draft fails in this regard. Although it responds to questions from one non-connected political committee, ABC, it announces new policies and definitions that the agency lacks authority to make in an advisory opinion. In so doing, the FEC denies the public the opportunity for a full and meaningful discussion on these policies either through a formal rulemaking process or a Congressional debate.

This is not simply a technical point of administrative law. BCRA as enacted did not eliminate non-PAC 527 organizations, and it did not restrict their ability to participate in the political process. The Supreme Court, in *McConnell*, also acknowledged the legitimacy of independent interest groups and that their right to function in our democracy was not abrogated by BCRA. 124 S. Ct. at 686 ("Interest groups . . . remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications)."). The Court concluded that "Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation." *Id.*

Including the passage of BCRA, Congress has passed legislation specifically addressing 527s three times since 2000. Common Cause, the Brennan Center, and other reform groups spoke publicly in support of these laws. The approach that has been adopted reflects a considered legislative judgment, the result of a process that required careful compromises between competing interests, that 527s must disclose donors and most expenditures, they cannot serve as a vehicle for corporate or labor money to fund certain broadcast ads, and they must operate independently of parties and candidates. But BCRA did not purport to reduce the resources available to independent issue and interest groups.

We do not mean to suggest that 527s with stated partisan goals should escape examination or further regulation. Both major political parties have long used these entities to pursue narrow agendas. Post-BCRA, there is a legitimate concern that 527s not regulated by the FEC may become conduits for huge soft money donors seeking an indirect way to influence the political process. But it is not clear that 527 political committees offer the same opportunities for corruption of officeholders, or carry the same appearance of corruption, that soft money donations to the political parties demonstrably did. And BCRA's soft money ban already applies to any 527 directly or indirectly established, financed, maintained, or controlled by a political party. Nor have we yet witnessed 527s playing an anti-democratic role in the political process, such as by giving the interests of wealthy donors greater influence than those of other citizens.

Congress rightfully could consider whether independent 527s should be required to register with the FEC and be subject to federal election law limitations and disclosure

requirements. But different concerns should inform regulation of 527s than informed regulation of political parties or corporations. The free speech rights of individuals to come together in voluntary organizations to raise their voices – and indeed influence elections – should be compromised only when compelling public interests will be served.

III. Conclusion

Our response to the Jan. 29 Draft should not be interpreted in any way as a defense of schemes to evade the soft money ban enacted as part of BCRA. But that draft, in its vagueness and overbreadth, may do little to frustrate individuals and groups truly intent on subverting BCRA, while making legitimate issue advocacy groups of all ideological stripes timid and fearful about exercising their First Amendment rights to criticize their government. We care too much about reform to allow BCRA to be interpreted by the FEC in this way.

Respectfully submitted,

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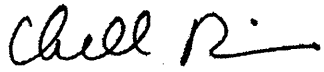
Executive Director
Brennan Center for Justice
at NYU School of Law



Chellie Pingree
President
Common Cause