FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO:	Rosemary Smith Acting Associate General Counsel
FROM:	Office of the Commission Secretary MWD
DATE:	February 17, 2004
SUBJECT:	*Ex Parte* Communication regarding Draft Advisory Opinion 2003-37

Attached is an *ex parte* communication sent to the Commissioners by Nick Nyhart, Executive Director of Public Campaign.

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

"Nyhart, Nicholas" <NNyhart@publicampaign.org> on 02/17/2004 03:22:43 PM

To: mdove@fec.gov, lnorton@fec.gov, commissionersmith@fec.gov, commissionerweintraub@fec.gov, commissionermason@fec.gov, commissionermcdonald@fec.gov, commissionerthomas@fec.gov, commissioner <toner@fec.gov>

cc:

Subject: AOR 2003-37 statement

Dear Ms. Dove, Mr. Norton, and Commission Members,

Please find attached Public Campaign's statement regarding the two draft advisory opinions on AOR 2003-37.

Respectfully submitted,

Nick Nyhart
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Public Campaign Statement regarding FEC Draft Advisory Opinion 2003-37

Public Campaign, an organization that supports comprehensive campaign finance reform, believes that important portions of the Draft Advisory Opinion 2003-37 released by the Federal Election Commission's General Counsel on January 29 are drawn incorrectly and serve neither the purpose of BCRA as passed by Congress and upheld by the Supreme Court nor the broader public interest. The alternative draft submitted by Chairman Smith on February 13 properly construes the law, and we urge the Commission to adopt it.

Since our inception seven years ago, Public Campaign has sought to expose the inadequacies and injustices built into the nation's present system of funding political campaigns. We believe that campaign finance reform should reduce the corruption and perception of corruption inherent in a privately-financed regime of unlimited campaign spending. And further, we believe that the most desirable reform must also reinforce the principles of political equality and freedom that are at the core of American democracy. We have helped develop and built support for alternative systems of campaign finance that support these principles, such as those "Clean Election" laws now implemented in Maine and Arizona. In doing so, we have taken an approach that encourages candidates to accept certain restrictions upon campaign contributions and expenditures and balances those constraints with the use of public funds to expand political speech. While we supported the passage of BCRA, we saw it as an inadequate measure to address the problems of our electoral system: lack of public participation in elections, increasingly expensive campaigns creating insurmountable barriers to nontraditional candidates with new ideas, and the disproportionate influence wielded by moneyed interests over the electoral and legislative processes. Clean elections laws address these concerns by promoting participation and expanding the speech of those without access to personal wealth or networks of wealthy contributors.

The Opinion Oversteps.

The Commission's Draft Advisory Opinion 2003-37, in effect, promulgates new rules that go far beyond the reach of the Bi-Partisan Campaign Reform Act passed by Congress in 2002. BCRA was a product of years of legislative debate, intensive lobbying and public outcry. The measure that ultimately became law was the final version of many previous iterations shaped by the policymaking process. The major provisions of the law banned soft money contributions to political parties and restricted a very carefully described set of election-related communications. These provisions were the precise results of an extended political negotiation. Their specificity was crucial to both their passage and their successful defense when challenged before the Supreme Court.

Yet, the draft opinion extends far beyond the language of the Federal Election Campaign Act ("FECA") or the careful amendments implemented by BCRA to create a new definition of political "expenditure" not rooted in the legislative language the Commission is charged with interpreting. Because of the draft's overly-broad language re-defining this key term, it has the potential to chill the legitimate activities of many

501(c) non-profit organizations as well as limit independent 527 organizations in ways that are not directed by the law.

For issue-oriented 501(c) organizations, the draft opinion raises the specter that the full range of hard money restrictions will be applied to the funding of mass communications that simply mention a federal candidate during the campaign season. This is of particular concern to Public Campaign, because our principal issue, campaign financing, is especially relevant during the campaign season, when candidate fundraising is at its peak and the public's interest in politics is the greatest. IRS regulations governing 501(c)(3) organizations specifically forbid intervention in elections. In order to prevent any use of tax-deductible charitable funds for electoral purposes, the IRS interpretation of this prohibition is extremely broad, and not entirely well-defined.[1] To preserve our tax status, Public Campaign is unable to speak out forcefully about specific practices of candidates and officeholders precisely at the time when to do so would be most relevant. However, like many organizations and as permitted by law we have established a section 501(c)(4) corporation, the Public Campaign Action Fund, which is able to engage in these activities as a part of its operations. Even for a 501(c)(4) this advocacy is limited by tax rules, so the Action Fund has created Campaign Money Watch, a 527 project, as the appropriate vehicle for many public communications about the links between specific candidates' funding and the issue stands they take.

Because its activities are outside the permitted sphere of operations for 501(c)(3) organizations, Campaign Money Watch is considered by the IRS to be operated primarily to influence elections. We therefore are concerned about any possible expansion of FEC rules governing 527 organizations that, like Campaign Money Watch, do not engage in express advocacy.[2] The Action Fund's Project fills a role that contributes to the healthy functioning of a robust democratic process by shining a spotlight on fundraising practices that candidates and parties likely would prefer to avoid discussing. The candidates themselves would likely not want to open up this topic for public scrutiny as each may view the subject as potentially damaging. Thus, independent advocacy vehicles are left in the position of being the most likely source of information for the public on this specific subject, a legitimate topic of public interest, especially at the peak of the political cycle. While such communications may not have the intent or effect of defeating or gaining victory for a particular candidate, by virtue of the fact that they contain positive or negative information, they may be reasonably considered to "promote, support, attack or oppose" a candidate.

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[1] We note that the constitutional objections to the vagueness and breadth of the IRS's definition of regulated political activity are lessened in the context of a 501(c)(3) organization which receives the tremendous government-sponsored tax benefit of receiving deductible contributions. Applying so broad and uncertain a definition outside this context would raise troubling constitutional free speech issues.

[2] Campaign Money Watch is, in this respect, akin to ABC's non-federal accounts, discussed in the draft AO. There are, of course, differences, as the former was established by a 501(c)(4) organization and the latter by a nonconnected Federal PAC. However, we are naturally sensitive about the extent to which a ruling on the allowable use of funds in ABC's nonfederal 527 accounts may affect the operations of Campaign Money Watch.

The Process is Inadequate.

Even if it were plainly limited so as not to affect 501(c) organizations, the draft opinion represents a striking new reinterpretation of core elements of campaign finance law. Not only is this new approach not supported by statute or case law, it is wholly inappropriate to undertake in the context of an Advisory Opinion. It is true, as some other commenters have pointed out, that some language in *Buckley v. Valeo* indicates that the Court's narrowing construction of the broad legislative language of FECA would be constitutionally required to apply the Act's definitions to political committees, as opposed to other groups whose major purpose is not electoral. It is further true that *McConnell v. FEC* affirmed what was stated in *Buckley*, that express advocacy is not the constitutionally mandated outer reach of legislative authority in the arena of campaign finance, but a judicial construction implemented to save a statute that would otherwise be both unconstitutionally vague and overbroad. These two points taken together do not, however, support the conclusion that the Commission has the power to adopt an entirely new definition of regulated expenditures, and to interpret the same statutory term to mean different things when applied to different speakers. Congress may be free to do so, but we do not believe that it has delegated this authority to the FEC.

Indeed, over a quarter century of administrative practice indicates that the FEC has not previously believed it had authority to adopt a different definition of expenditure for political committees despite the existence of that language in *Buckley*. Congress has acted several times in recent years to regulate the activities of non-PAC 527 organizations, clearly assuming this practice to be the current state of the law. Yet even when it addressed serious policy concerns raised by the functioning of these 527s, Congress did not choose to re-define the activities that are classified under FECA as "expenditures." The potential harm of 527 organizations' activity was addressed by Congress through requirements of fairly detailed reporting and disclosure. *McConnell* clearly holds that Congress may adopt an expanded definition of "expenditure," if it is able to define the covered activity with clarity and to demonstrate a sufficiently compelling government interest to justify the regulation. It cannot be read to confer this power in the FEC absent a legislative delegation of authority.

To be sure, the interests of the democracy and the public can be served by carefully implemented regulation of the financing of political communications. Further, the likely scope of 527 organizational activity in the 2004 elections demands examination and, quite probably, new policymaking. But such regulation should not be approached without significant public debate or scrutiny. The Commission's advisory opinion process offers far fewer opportunities for input, debate and deliberation than do either the FEC's formal rulemaking process or the legislative route to making policy. Indeed, it is for that reason that Congress has prohibited the Commission from using the Advisory Opinion process to write new rules of law. We also note grave concerns about the use of this Advisory Opinion Request in particular to establish broad new regulatory definitions because of the widespread public suspicions of the requestor's motives. Not only did the request not contain any legal analysis to support what would presumably be favorable conclusions for the requestor, ABC itself was notably silent when public comments were

filed responding to the draft ruling. If the FEC uses this ruling to foreclose activity by other similarly situated organizations, public confidence in its ability to fairly administer the law will be severely undermined.

This case requires weighing valid constitutional interests in free speech, the public's interest in the healthy functioning of our democracy, and the potential for corruption or the appearance of corruption. An Advisory Opinion is simply not the forum in which to conduct that difficult balancing. The issues presented are far-reaching, and must be considered in a broader context than the facts presented by a single requestor seeking to further its own agenda.

We believe that 527 groups unconnected with a party or candidates raise very different issues from those addressed by BCRA. We recognize that the possible use of unlimited contributions to fund debate on issues within the electoral process raises serious concerns over the ability of wealthy donors' voices to be heard above those of most citizens.[3] Their use of union or corporate funds raises additional issues to consider.[4] On the other hand, 527 organizations may also serve a valuable role of allowing citizens to join together to raise issues within the context of political campaigns. Unlike the use of soft money by parties, we do not have historical data to inform our consideration of the role independent 527s might play in the political process.

It will be a complex process to analyze their role and determine whether and how it promotes or undermines a robust democratic process. To reach the best policy outcome it will likely be necessary to draw some difficult lines. This is a task that would benefit from a full debate that fleshes out the various arguments and potential policy solutions. An Advisory Opinion Request is not the place for this to occur. While a rulemaking procedure would be somewhat preferable the improper use of an advisory opinion, the FEC nonetheless remains constrained to interpret only the law Congress has written. As an administrative agency, it cannot give consideration to a full range of policy options, including the use of public funds. That possibility exists only through the lawmaking reserved to Congress.

In sum, we believe that adoption of the FEC's draft advisory opinion 2003-37 as written might unnecessarily chill issue-based communications. Further, we believe that new regulation of such issue-related speech by organizations independent of candidates and parties is best made via the most open and democratic process available – the conventional avenue of the federal lawmaking.

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[3] We note, as well, that the Clean Money public financing option addresses this inequality by allowing diverse voices to be heard, not by silencing those already engaged in speech.

[4] On the other hand, it would be paradoxical to hold that corporations and labor unions may pay directly for communications that discuss issues and "promote, support, attack, or oppose" a person who happens to be a candidate, but that money from these sources may not be used by other organizations to fund precisely the same speech. The permitted uses of corporate or labor money should not depend on the identity of the speaker.