FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: **The Commission**
Staff Director
General Counsel
Press Office
Public Disclosure

FROM: **Commission Secretary's Office**

DATE: **June 6, 2012**

SUBJECT: **Comment on Draft AO 2012-19**
(American Future Fund)

Transmitted herewith is a timely submitted comment from Jason Torchinsky and Michael Bayes, counsel, on behalf of the American Future Fund.

Draft Advisory Opinion 2012-19 is on the June 7, 2012 open meeting agenda.

Attachment

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June 6, 2012

Commission Secretary
Federal Election Commission
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VIA FACSIMILE: (202) 208-3333 AND (202) 219-3923

Dear Madame Secretary:

The following comments are submitted on behalf of the Requestor in Advisory Opinion Request 2012-19, in response to Drafts A and B. Specifically, we write to address several points advanced by other commenters.

McConnell* v. *FEC

One commenter asserts that Draft A "turns sharply away from the course set by the Supreme Court in *McConnell* v. *FEC*" insofar as *McConnell* allegedly rejected the "literalism" of the "magic words" approach to express advocacy. The commenter notes that the Court went on "uph[o]ld the disclosure requirements for electioneering communications." If the commenter is suggesting that *McConnell* stands for the proposition that the standard rules of statutory and regulatory construction do not apply to the campaign finance rules, and that instead, campaign rules should be interpreted with an eye toward maximizing disclosure, we disagree and respectfully suggest that such a theory is ridiculous on its face.

Requestor is not challenging the underlying constitutionality of the electioneering communications statute. Rather, Requestor simply seeks guidance as to the meaning of one portion of the definition of "electioneering communication." The portion of the definition at issue derives from longstanding statutory language currently located at 2 USC § 431(18) and 11 CFR 100.17 means in practice. The language used in those provisions is subject to the construction provided by the Supreme Court in *Buckley* v. *Valeo*, 424 U.S. 1, 44 n.51.

We note for the record, however, that in rejecting the "magic words" approach to express advocacy as a *constitutional* requirement in *McConnell* v. *FEC*, the Court did not go on to uphold the electioneering communications provisions because precision and clarity are no longer

required. In fact, the Court upheld the definition of electioneering communications because it is sufficiently clear and precise to avoid the constitutional vagueness concerns that led to the development of the express advocacy concept in the first place. *See McConnell* at 194 ("[W]e observe that new FECA § 304(f)(3)'s definition of "electioneering communication" raises none of the vagueness concerns that drove our analysis in Buckley. The term "electioneering communication" applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners. These components are both easily understood and objectively determinable.").

In other words, the Supreme Court upheld the electioneering communications provision *because* it provides a bright line rule that is supposed to be abundantly clear. A Commission interpretation that serves to blur this bright line rule, as Draft B does with its conclusions about what constitutes a reference to a "clearly identified candidate," would be contrary to the *McConnell* Court's expectations.

Romney Video

One commenter misrepresents a YouTube video apparently recently released by the Mitt Romney's presidential campaign. The commenter claims that "A Few More of the 23 Million" "mentions only the 'government' and the 'Administration.'" This is not true. The video specifically references Vice President Joe Biden, orally and in text presented on-screen. And it is not at all the case that "[i]t is unambiguously clear that the reference in this ad is not to thousands of executive branch 'officials who are not candidates for reelection.'"

While not at all relevant to this Request, the references to "the government" and "the Administration" in "A Few More of the 23 Million" actually serve to support the Requestor's position.

The video features two individuals on camera, and they make the following statements:

- "I don't think the current Administration looked upon us as favorable, I think they truly did pick winners and losers in the automotive bailout."

- "It's unjust. When the government is making this choice and then using my own tax money to make this choice, and declare me, you know, not deserving, I feel that they have disdain for us."

The speakers are discussing the federal government's auto industry bailout of General Motors and Chrysler. This bailout was initiated by President Bush in late 2008, approved by Congress through the Auto Industry Financing and Restructuring Act of 2008, and then administered largely by the Presidential Task Force on the Auto Industry beginning in early 2009. The *New York Times* reported in May 2009 that Brian Deese was "The 31-Year-Old in

Charge of Dismantling G.M." The references to "the government" and "the Administration" are clearly not references to President Obama. In fact, both speakers refer to "the current Administration" and "the government" as "they" – which clearly indicates that they are speaking about an entity or organization consisting of more than one person. It is also clear from this discussion of the "the Administration's" and "the government's" auto bailout that the program involved the administrations/governments of two different Presidents of two different political parties along with a series of votes by both the U.S. House of Representatives and the U.S. Senate.

Van Hollen* v. *FEC

Finally, with respect to *Van Hollen v. Federal Election Commission*, 2012 U.S. Dist. LEXIS 44342 (D.D.C. Mar. 30, 2012), Requestors submit that the district court's opinion has no bearing whatsoever on how the Commission must interpret the phrase "refers to a clearly identified candidate for Federal office." The interpretation of this phrase was not at issue in *Van Hollen*.

This request is only about whether certain language and phrases, as used in specific advertisement scripts, contain one or more references to a clearly identified candidate. The answer to this question, in turn, determines whether those advertisements are electioneering communications or not. Congress enacted specific and clear statutory language when it enacted 2 U.S.C. § 431(18), and Requestors are simply asking that the Commission faithfully apply this statutory language, as construed in *Buckley v. Valeo*, to the Requestor's proposed communications. We believe Draft A does so.

Sincerely,

Jason Torchinsky
Michael Bayes
Counsel to American Future Fund