FEDERAL ELECTION COMMISSION

Chairman Bradley A. Smith
Remarks: Notice of Proposed Rulemaking on Political Committee Status
March 4, 2004

A short while back I met with a foreign delegation visiting the U.S. to discuss aspects of our election law. We were speaking through an interpreter, and as I spoke about our law, with its distinctions between "generic campaigning," activity "for the purpose of influencing an election for Federal Office," "federal election activity," "activity in connection with an election in which a federal candidate appears on the ballot," and "electioneering communications," the interpreter ran out of words that carried any distinction for my guests. Yet all these terms have different meanings under our law, and political actors in the United States must contend with these nuances daily.

My first concern today, then, is the complexity of some of the proposals before us. This concern is epitomized in a single line on page 15 of the narrative portion of the proposed rule. We ask, "Should the Commission create by regulation a third definition of 'expenditure' for determining political committee status?" As if two definitions might not be enough!

Some of that complexity is a result of an effort to restrict slightly the reach of the admittedly far-reaching proposed rules. But while I may be sympathetic to those goals, I am not certain that the game is worth the candle. We start with a very complex statute, the Federal Election Campaign Act as amended in 1974, to which, over the years, had accrued a very complex set of regulatory rules. To this was added yet another very complex statute, the Bipartisan Campaign Reform Act of 2002, and many more rules. As I read some of the proposed rules before us today, I thought, "My gosh, how will the

average lawyer or average accountant, not a specialist in this field, even begin to understand this – let alone the average citizen." I would prefer to see us simplify.

To that end, I hope for comment on the notion that the entire allocation system created by the FEC is wrong. The statute is not complex on this point – 2 U.S.C. §441a(a)(1)(C) rather clearly states that an individual may not give a federal political committee more than $5,000, while §441b prohibits corporate and union contributions. I think a strong argument could be made, therefore, that there is no basis for a federal political committee to have a non-federal account, but, conversely, that non-federal committees remain free to use non-federal funds except where specifically prohibited by the Act. So far as I can tell, dual accounts have been a longstanding practice, specifically sanctioned by Commission regulations, but this seems to have evolved out of piecemeal regulation of existing organizations rather than a holistic approach.

I think that much of the confusion that this rulemaking is generating comes from the debate of the so-called "major purpose" test. This debate over "major purpose" is, I think, serving to mystify as much as to clarify. For example, earlier this week one Senator claimed that since 1974, groups with a major purpose to influence federal elections must register as federal political committees. But that is not quite right.

The phrase "major purpose" does not appear anywhere in the statute, either pre-BCRA or post-BCRA. For example, an ambitious member of the House may have as a major purpose becoming a member of the Senate, but until he spends or receives $5,000 for that campaign, the law does not consider him to be a "candidate." Similarly a group becomes a federal political committee for purposes of the FECA only when it has received contributions or made expenditures in excess of $1,000. Its "major purpose" is

irrelevant to that trigger. And both "contribution" and "expenditure" are defined terms under the Act. "Major purpose" comes into play as a minor judicial gloss on the Act, found in *Buckley* and *Massachusetts Citizens for Life,* that limits the scope of the statute. It is not a separate basis for regulation.

In *Buckley v. Valeo*, the Supreme Court was concerned about vagueness and overbreath in the statute. To save the statute's constitutionality, therefore, the Court narrowly interpreted "expenditure," (and by implication, "contribution") as applying only to activities that included explicit advocacy of election or defeat of a clearly identified candidate, or what we have come to call "express advocacy."

BCRA, as I understand it, built on these concepts, but did not change them. It was written, I think, with the specific intention of avoiding such overbreadth and vagueness concerns. It did not rewrite the definition of "expenditure" or "contribution," but rather added new, specific prohibitions on what it defined as "electioneering communications" and "federal election activity." "Electioneering communications" were narrowly defined as broadcast ads that named a federal candidate within 60 days of a general election or 30 days of a primary, caucus, or convention. Limits on "federal election activity," or "FEA," were applied only to state and local political parties, and in certain circumstances to officeholders soliciting funds for groups. A plain reading of BCRA does not show that it applies any new restrictions on FEA to independent political committees.

As far as I can tell, nothing in *McConnell v. FEC* changes this, either. The Supreme Court does not expand the scope of the statute beyond what Congress passed and the President signed. And because BCRA does not change the definition of

contribution or expenditure, the Supreme Court had no reason to reconsider the narrow construction it gave to the meaning of those terms in *Buckley.*

Nevertheless, I agree that the reasoning of the Court's opinion does strongly suggest an argument by which Congress could broaden the definition of expenditure to include at least some of the activities it has defined as FEA or electioneering communications.

The question, then, is whether we may, and if we may, whether we should, do what Congress might have, but did not, do – change the definition of expenditure to encompass much more political activity than in the past.

To do so in the manner proposed in these draft rules, I think that we must do violence to the statute. We must eviscerate 2 U.S.C. §441i(e)(4)(B) which allows officeholders to solicit up to $20,000 from individuals for groups seeking to conduct Federal Election Activities – because if spending or receiving money for FEA made one a political committee, one could not accept that $20,000 contribution. We must make superfluous the requirement that state and local parties use hard dollars for FEA, since, if disbursements for FEA were expenditures, hard money would have to be used anyway. We must render somewhat nonsensical 2 U.S.C. §441b, which requires that electioneering communications count as expenditures for that, but only that, section of the law.

Most of all, I think we would have to go well beyond the Supreme Court's understanding of the Act, given that the Court wrote, "Interest groups, however, remain free to raise and spend money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications.)" When we discussed

Advisory Opinion 2003-37 Americans for a Better Country last month, the Office of General Counsel suggested that the Court's view was not contradicted in the approach adopted by the Commission, because the Court may have been referring only to groups that were not political committees. But that line of reasoning, even if correct in that context (which I think it is not), has no applicability here, since we would be using those very activities mentioned by the Court as the basis for limiting the ability of these groups to participate freely in the system.

I must also note the shift in the rationale being offered by those reform groups now pressing for these rules – a shift that may bring back into play constitutional considerations.

The purpose of BCRA, we have so often been told, is to sever the link between officeholders and large contributions. But that link does not exist in the activity which we propose to regulate today. There is no claim that the groups in question are contributing soft money directly to candidates or parties. There is no claim that they are selling access to officeholders, or that officeholders are soliciting the funds for them. There is no claim that they are coordinating their activities with officeholders. There is no claim that these groups are established, financed, maintained or controlled by officeholders or parties. Any of these facts would render their activity illegal regardless of this rulemaking.

Rather, the argument being made now is simply that they must be regulated because they are spending money to influence an election, and that they should have to operate under the same rules as candidates and parties. I believe that that argument was specifically rejected in *McConnell*, in the passage I just read.

BCRA was not intended to get all money out of politics, as longtime supporters of the legislation such as Thomas Mann and Norman Ornstein reminded us in an op-ed in the Washington Post earlier this week. "Reformers did not want to drain money out of politics – and they didn't," they wrote. "The new rules… simply apply to outside groups and parties the same standards that apply to candidates and political action committees *when it comes to a narrow group of electioneering broadcast ads."* (emphasis added). [1]

Our obligation in this rulemaking is, as it always is, to enforce the law. It is not to enforce the law as we wish Congress had written it, or think that they ought to have written it. Thus, I will be looking, in the comments, for legal arguments. I am not particularly interested in claims that some person or group may spend a lot of money if we fail to act. When I hear someone claim that something is a "loophole" in the law, I am reminded that it is legal. If it were not legal, it would not be a "loophole" but a "violation."

Finally, I am concerned about our analysis under the Regulatory Flexibility Act. Twenty-five years ago, as a young analyst with a small business group, this was the type of regulatory reform for which we lobbied at both the state and federal level. Over the years, it has become, admittedly, something of a pro forma certification. But it remains a legal requirement. I am concerned that we have not adequately addressed the impact of these proposed rules on small entities. My experience is that non-federal political committees, especially smaller state and local organizations, are already having a great deal of difficulty complying with BCRA, and these rules, I think, could add to that considerably by making many more groups into federal political committees. While I am

[1] Thomas E. Mann and Norman Ornstein, *So Far, So Good on Campaign Finance Reform*, Wash. Post,

prepared to make the certification required under the Regulatory Flexibility Act for now, I am not entirely convinced that we have properly resolved that issue, which will be before us again when we publish a final rule.

With those thoughts, I am prepared to support this NPRM today, and await the public's comments.

Mar. 1, 2004, p. A19.