

**Comments in Support of an Alternative Draft in
Advisory Opinion 2003-37 Americans for a Better Country**

**Chairman Bradley A. Smith
February 18, 2004 Open Meeting**

I have offered this alternative to Advisory Opinion 2003-37 [www.fec.gov/agenda/mtgdoc04-11g.pdf] because I think it is the proper reading of the law.

Simply put, nothing in BCRA indicates that Congress revised, or intended to revise, the manner in which independent committees manage their mixed federal and non-federal activities.

While the law is complex, BCRA focused on the raising and spending of “soft money” by officeholders and political parties (in Title I) and addressed concerns about non-party groups through the electioneering communications provisions (of Title II). Congress did not revise the manner in which entities already registering and reporting under the Act manage their mixed Federal and non-Federal activities. The Commission has in place a pre-BCRA framework to allocate mixed activities of non-party federal committees with non-Federal accounts, and this general framework was not changed by the passage of BCRA.

For instance, BCRA defines a new term, “Federal Election Activity.” FEA is voter registration within 120 days of a Federal election, voter identification, get-out-the-vote or generic activity in connection with an election with a Federal candidate on the ballot, public communications referring to a clearly identified candidate that promote, support, attack or oppose a candidate, and the salaries of employees of parties that spend over 25% of their time on activity in connection with a Federal election. FEA is applied in two parts of the Act. It appears in the sections regulating state, district and local committees of political parties, requiring such committees to use federal hard dollars for FEA, and it appears in the Act in relation to solicitation of funds by federal officeholders.

FEA also appears in the Act in relation to solicitation restrictions on parties and Federal candidates and officeholders. Parties are prohibited from soliciting or directing funds to a 501(c) organization that makes expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for FEA). Federal candidates and officeholders are prohibited from soliciting or directing funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the Act.

BCRA does not regulate political entities outside those specifically named in its provisions. Accordingly, there is no basis for importing FEA into other parts of the Act, in particular to the definition of “expenditure” at Section 431(9). A plain reading of the Act shows that FEA is something different from “expenditure.” For instance, the

“specific solicitation” exception in 441i(e)(4)(B) permits candidate solicitation of funds in excess of the Federal limit for “contributions” for particular types of FEA, and in amounts up to \$20,000 -- well over the \$1,000 trigger for political committee status or the \$5,000 contribution limit applicable to political committees. If disbursements for FEA were expenditures, they would trigger committee status and the committee could not receive contributions in excess of \$5,000, rendering section 441i(e)(4)(B) nonsensical. Likewise, if FEA were “expenditures,” it would be unnecessary to state that party committees need to use hard dollars to pay for them (*see* 441i(b)(1)) since that is already required under the Act.

Similarly, there is no statutory basis to apply restrictions for “electioneering communications” more broadly. Section 441b(b)(2) of BCRA added language to prohibit corporations and labor organizations from making any “direct or indirect payment . . . to any candidate, campaign committee, or political party organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication.”

If electioneering communications were to be generally restricted as “expenditures” then the construction in section 441b(b)(2) is incoherent, as the statute would not need to specify a separate rule for electioneering communications. Also, these expenditures would be reportable anyway, and the separate reporting regime at 434f would be unnecessary. Finally, if electioneering communications are “expenditures” then corporations and labor organizations are already barred from using general treasury funds to pay for them. As with FEA, “electioneering communication” is a term applied to discrete entities – corporations and labor organizations at section 441b(b)(2), or in a particular context – disclosure in section 434f.

BCRA’s sponsors had reasons for selecting party committees for special treatment. As explained in the Brief of Intervenors (Senators McCain and Feingold and Representatives Shays and Meehan) before the District Court, “[u]nlike interest groups, which pursue an issue-based agenda that transcends the election of candidates, parties are primarily and continuously concerned with acquiring power through electoral victory. Parties never engage in public communication without regard to electoral consequences.”

Accordingly, BCRA’s sponsors selected party committees for special regulation, writing in their Brief: “BCRA’s state party provisions are carefully tailored to strike a balance between Congress’s anti-corruption and anti-circumvention interests and the states’ interest in controlling their own elections. That balance is reflected in the definition of “federal election activity” which confines the effect of BCRA to those state party activities that most clearly affect federal elections”

These goals were re-affirmed in the following comments submitted to the Commission by eight Members of the Senate, all of whom supported BCRA:

We are writing to say for the record that, whatever decisions the Commission chooses to make, BCRA reflects in very clear and specific terms the

choices that Congress made in reforming our federal campaign finance laws. Our principal concern was the soft money solicited, received, directed and spent by parties and federal elected officials – money that presents the clearest danger of conflict of interest, in fact or appearance. With the exception of “electioneering communications,” the law did not aim similar restrictions at political organizations or tax-exempt groups that are neither controlled by, nor coordinated with, parties or candidates.

Similar comments were received from 58 Members of the House.

Nor does the Supreme Court’s recent decision in *McConnell v. FEC* require that the Commission revise its treatment of Federal political committees with non-Federal accounts. The Court in *McConnell v. FEC* left undisturbed the legal reasoning applicable to entities not specifically covered by the FEA and electioneering restrictions. The *McConnell* decision applied FEA and electioneering communications only in the specific circumstances addressed in the statute. The Court discussed FEA as applying only to state and local party committees to prevent them from becoming “conduit[s] for soft money donations . . . to influence Federal elections” It also noted that FEA restrictions on state and local parties were “reasonably tailored” to apply to parties and “designed to focus the regulations on the important anti-corruption interests to be served.”

The Court also explicitly recognized that Congress could treat some groups differently from others without running afoul of constitutional equal protection guarantees. In doing so, the Court stated:

BCRA imposes numerous restrictions on the fundraising abilities of political parties, of which the soft money ban is only the most prominent. *Interest groups, however, remain free to raise money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications).*

(Emphasis added). Further, as the Commission discussed in its brief before the District Court, earlier versions of McCain-Feingold would have explicitly redefined “expenditure” to include the types of activity we now seek to regulate here. But these earlier versions were rejected by Congress, and BCRA as actually passed only regulates such activities on more narrow, specific grounds.

Indeed, only within the last two months has anyone seriously suggested that BCRA requires, or even permits, a reinterpretation of our rules. Let me give you just a few examples.

Shortly after BCRA took effect, various groups filed a complaint in what we numbered MUR 5338, with the primary respondents being a GOP-oriented group called the Leadership Forum, and a Democratic-oriented group called the Democratic State Party Organizations. These two groups had announced intentions to raise large sums to support the election of Republican and Democratic candidates, respectively, in the 2004 elections. The complainants included the Campaign Legal Center and Democracy 21,

and the Center for Responsive Politics. All three of those groups now argue that the General Counsel's approach to ABC is the correct one.

Yet in November of 2002, this theory appears nowhere in their complaint against the DSPO and Leadership Forum. The Complainants alleged that the DSPO and Leadership Forum would, "raise and spend soft money on federal election activities." In fact, they allege that the Respondents in MUR 5338 were proposing to undertake activities nearly identical to those now proposed by ABC. Yet at no point did they argue that the Respondents could not generally undertake such activities. Rather, their argument hinged entirely on the theory that these groups were, in fact, "established, financed, maintained, or controlled" by political parties, and only for that reason should they be limited in their activities.

The Complainants in MUR 5338 are not known for being shy about filing charges with the FEC in the broadest possible terms. Surely, had they thought the activities of these groups violated BCRA regardless of whether or not they were established, financed, maintained or controlled by the parties, they would have so alleged. We can assume that they did not, I think, because that is not how they understood the law.

Here is another example: this is what Common Cause said in comments to the Commission during the FEC's BCRA rulemaking in the spring of 2002, speaking about the allocation system where not specifically addressed by BCRA's provisions regarding FEA: "Nothing in BCRA changes the requirement under current law that such activities are allocable... [and] must be paid for with an allocated mixture of Federal and non-Federal funds as required by current law."

Or Common Cause again: "[T]he Commission's task is to faithfully carry forward the work of the sponsors of the BCRA, and to implement by regulation their goal to ensure that money unregulated by federal law cannot continue to be used *by federal candidates and officeholders, or by the national party committees, or by their officers and agents, or by entities established by any of them.*" (emphasis added). Not a word about non-party entities.

Here is Tom Mann, a longtime supporter of the law and an expert witness for the Defendant-Intervenors in the litigation, during his deposition:

Q. Do you have any reason to believe that interest groups, recognizing other opportunities [besides electioneering communications] that will remain available to them under BCRA, the ground war within 60 days of the election, will not engage in the same sort of growth in using resources there that they have used in issue advocacy?

A. No. I anticipate more, I should say yes. I anticipate more groundwar activities from the interest groups.

And again:

Q. You are reported as saying, I think it [the ban on electioneering communications] is going to produce a tremendous shift in resources from television to get out the vote. Yes, some of this will be by interest groups, and you know something, I think that's a good thing.

A. Yes, I see that.

Q. Is that an accurate transcription of at least part of your answer there?

A. I certainly, certainly, assume so, and it's plausible that I would have said that.

Q. And it's consistent with your current view?

A. Sure.

I could go on, but I think this is enough. Let me say that I think that the case is fairly clear: Congress, in BCRA, sought to sever the link between officeholders and large contributions. For many years, contributions directly to candidate campaigns have been limited. In BCRA, contributions to national parties were also limited, in the belief that such contributions possessed equal, or nearly equal, potential for corruption. But there was concern, then, that soft money would merely flow to state and local party committees. So limits were placed on the ability of such committees to engage in FEA.

Then, it was argued, won't the funds simply flow to independent groups? And here the supporters of the Act took a three-pronged approach: First, they limited the ability of federal officeholders to solicit funds for such groups, thereby cutting the direct link between large contributions and candidates; Second, they extended the soft money prohibitions to groups "established, financed, maintained or controlled" by a party, and required the FEC to adopt a new, broader standard for coordination, to prevent such independent groups from working in tandem with parties and officeholders; and finally, they included the Snowe-Jeffords provision, and later the Wellstone provision, restricting broadcast issue ads within 30 days of a primary or 60 days of a general election. At no time during the debates on passage was it suggested that independent groups could not continue to use soft money for traditional GOTV, voter registration, and other FEA activities that were not expenditures or electioneering communications.

I know that the press is reporting that action along the lines I have proposed will benefit Democrats in 2004. But it's not our place to measure the

law on partisanship. I have searched 5 pages of comments from the RNC in vain for a legal argument that suggest that these activities should be regulated. While any partisan ramifications as to what we do will be difficult to predict and in any case beside the point, I am disappointed that my party seems afraid to debate ideas. I think Republicans should welcome that debate, and would win it. But if Republicans think they can win simply by trying to silence their opponents, they are wrong, and they will lose.

I also know that action along the lines I have proposed runs counter to the general ideological leanings of some of my colleagues. Over the past four years, I have often been asked, “will you enforce the law as it is written, and not as you wish it to be?” I think my colleagues know that I have often cast votes with which I was ideologically uncomfortable, but were what the law required. Now that question is before my colleagues who have long preferred a more regulatory approach than I. I recognize that they may simply disagree in good faith with my analysis. But I think my analysis is strong. I note that it is supported by 330 non-profits organizations, conservative, liberal, and non-ideological, in comments. As I noted earlier, we have received comments supportive of that analysis from eight members of the Senate and 58 from the House, all of whom supported McCain-Feingold, and no comments to the contrary from any member of Congress. Though we know that two Senate members recently made floor statements supporting additional regulation in this area, I’ll take a 66-2 margin. My approach was endorsed today by the editorial pages of the conservative Wall Street Journal, the liberal Washington Post, and the middle-of-the-road Chicago Tribune. So it is a strong analysis. And if you agree with that analysis, then our duty is clear. The obligation to uphold the law runs both ways.

I appreciate the due consideration that all of my colleagues have given to my proposal, and I urge you all to vote for it.

Thank you for your patience with a very long statement.