FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OFFICE OF THE CHAIRMAN

August 13, 2004

MEMORANDUM

TO: **THE COMMISSION**
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE

FROM: **EVAN RIKHYE, OFFICE OF CHMN. BRADLEY SMITH**

SUBJECT: SENATE QUESTIONS

Subsequent to the recent FEC Oversight Hearing held by the Senate Committee on Rules & Administration, Chairman Smith received several written follow-up questions.

He has answered the questions and asked me to circulate his responses to the Commission on an informational basis.

Questions for the Hearing Record
for FEC Chairman Bradley Smith
Submitted by Senator Dodd

1. Many practitioners and other members of the regulated community are concerned about ensuring the adequate due process steps necessary in the enforcement programs.

   Do you have any guidance on how to identify and increase due process protections into the enforcement process without changing the current Commission composition or having administrative law judges at the FEC?

   What additional due process rights would you recommend?

   What are your recommendations regarding how to accommodate "in-person" access to the FEC before a matter is voted on?

   How would you procedurally accommodate a respondent to "see all the evidence"?

2. In your testimony, you note that the process of closing "stale" cases has virtually disappeared from the Commission's Enforcement Priority System (EPS) as of FY04.

   As a practical matter, what does this mean with respect to final resolution?

   Do these cases become part of the enforcement backlog, or are they considered part of the ADR enforcement process?

3. How do you respond to the criticism that the Commission has created mass frustration within the regulated community by failing to articulate a clearly defined mission with consistent priorities, policies and procedures to achieve the mission?

4. In your testimony, you suggest that regulation of section 527 organizations is not supported by FECA, BCRA, or by any case law including the Supreme Court's decision in *McConnell v. FEC* .

   Some lawyers contend that the legal underpinnings authorizing regulation of 527s are in the law under the FECA, prior to the enactment of BCRA.

   How do you rebut the argument that FECA is the controlling law?

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OFFICE OF THE CHAIRMAN

Response of Bradley A. Smith Chairman of the Federal Election Commission To Questions Submitted by Senator Christopher Dodd (D-CT) Pursuant to the FEC Oversight Hearing Held on Wednesday, July 14, 2004 by the Senate Committee on Rules and Administration

Question One:

The Commission recently modified its internal procedures to allow respondents to see copies of their own depositions. I believe that providing respondents with access to additional documents at the pre-probable cause stage (such as underlying depositions, for example) would be an important enhancement of due process protections in the Federal Election Commission's (FEC's) enforcement process.

From a procedural standpoint, it would not be too difficult for this agency to allow respondents to see the evidence against them. Other government agencies routinely do so in civil matters, by producing documents, providing witness lists, and defending the validity of their subpoenas, for example, without compromising the integrity of their enforcement processes. Indeed, recent changes to our internal procedures have not been antithetical to robust enforcement of the law, and more due process will lead to better enforcement and administration of the law.

In addition, I see no reason why the Commission couldn't provide the opportunity for oral hearings in the enforcement process as we do in the context of public financing for presidential primary candidates. The Presidential Primary Matching Payment Account Act authorizes the Commission to audit all presidential primary candidate committees who receive public funds, and to make repayment determinations if we find that a candidate committee used those funds for statutorily impermissible purposes. *See* 26 U.S.C. §9038(b). Committees have the opportunity to contest the repayment determination in writing and at an oral hearing before the Commission. *See* 11 C.F.R. §9038.2(c)(2)(ii). It has been my experience that these oral hearings are useful and persuasive because they assist Commissioners in getting a comprehensive understanding the respondent's position as to the relevant facts and law at issue. It is important to note that these oral hearings are not mini-trials. They are more akin to oral arguments in court over summary judgment motions, and I think the same model could be an important step towards providing added due process for respondents appearing before the Commission.

I would note that if Administrative Law Judges (ALJ's) were deemed desirable, Congress could alter the Federal Election Campaign Act (FECA) to incorporate them into our enforcement process without changing the current bipartisan composition of the Commission. However, as indicated in my written testimony, I am skeptical that the use of ALJ's would increase the efficiency or perceived fairness of the Commission's enforcement process.

Question Two:

The term "staleness" refers to cases that are dismissed because the Commission did not act upon them within a certain amount of time. Stale cases are not added to the enforcement backlog; rather, they *are* the enforcement backlog. As a practical matter, the fact that the FEC is no longer dismissing complaints because of staleness means that it has become much more efficient about processing cases faster, and making judgments about what action needs to be taken, rather than simply dismissing complaints because we didn't get to them for a period of months or years.

Question Three:

I acknowledge that some in the regulated community raise legitimate complaints about this agency, and I have worked hard over the past four years to address these concerns. As noted in my written testimony, the FEC is taking several steps to address these concerns by increasing the efficiency, consistency, and openness with which we resolve enforcement matters. Moreover, the Commission has a very active public education program to help the regulated community better understand and comply with the FECA. This includes numerous training seminars held in Washington and in cities around the country, as well as formal briefings by Commissioners for members of the House of Representatives.

During my tenure on the Commission and as an academic studying campaign finance law, I have observed that setting priorities at this agency is difficult for two distinct reasons: First, unlike other agencies which are empowered to investigate violations of the law, our enforcement process is complaint driven. As such, our priorities in the enforcement context get determined for us depending upon what kinds of complaints are filed with the Commission. For example, certain organizations file complaints specifically in an effort to have the Commission act on their regulatory agendas. Second, the FEC is unique among government organs because it has statutory responsibility to regulate constitutionally protected speech that lies at the heart of the 1st Amendment. As such, there has been a pervasive pattern of judicial review and interpretation of FECA that has often forced the Commission to change its priorities or approaches.

Question Four:

As alluded to in your question, this is a very complex legal issue that addresses how we define core terms of the Act, such as "political committee," "contribution," and

"expenditure." Attached please find a copy of my opening statement when the FEC launched its Notice of Proposed Rulemaking (NPRM) on Political Committee Status this past March. This document will, I hope, will provide you with a comprehensive understanding of my position.

In brief, I find it interesting that a small group of radical activists now argue that the legal underpinnings authorizing the regulation of groups organized under 26 U.S.C. §527 have existed in FECA since passage of that law in 1974. While this may have been a plausible interpretation of the Supreme Court's decision in *Buckley v. Valeo* 30 years ago, FECA *has never been* interpreted or understood this way by Congress, the Courts, the Commission, the regulated community or academia.

During the Commission's public hearing on the Political Committee NPRM, I noted with some amusement that one of these groups had a statement on their website saying that FECA did not contemplate the regulation §527 groups as political committees, at the same time that their representatives were before the Commission arguing the contrary position. When this inconsistency was pointed out, this group quickly and quietly pulled that statement off their website. The only remaining record now exists on the website of noted campaign finance attorney Robert Bauer at:
http://www.moresoftmoneyhardlaw.com/outside/index.htm

In closing, it has been well-established for decades that non-party, non-candidate organizations only became political committees if they engaged in "express advocacy" as defined by *Buckley v. Valeo* and its progeny. Congress chose to address this in the Bipartisan Campaign Reform Act (BCRA) through the electioneering communications provisions, but did not change the definitions of "political committee" or "expenditure." Absent Congressional action, I believe it would be contrary to law for the FEC to cast aside these well-settled interpretations and understandings of the Act.

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.

Questions from Senator Richard J. Durbin
for witnesses at the
Hearing for FEC Oversight, July 14, 2004
Committee on Rules and Administration

Panel Two

Bradley Smith:

1. You are on record as disagreeing with our current campaign finance system in the most fundamental way possible, including supporting repeal of the FECA and BCRA. Given that the FEC is charged with enforcing that system, how can we take seriously your advice on how to make the FEC more effective?

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OFFICE OF THE CHAIRMAN

Response of Bradley A. Smith Chairman of the Federal Election Commission To Question Submitted by Senator Richard Durbin (D-IL) Pursuant to the FEC Oversight Hearing Held on Wednesday, July 14, 2004 by the Senate Committee on Rules and Administration

Members of Congress are regularly called upon to evaluate the credibility of witnesses and proposals placed before them. It would take a lawyer of modest skill to impeach the credibility of every witness to appear at this hearing. Any statement I might make about my own credibility is inherently self-serving, and therefore unlikely to move those who doubt that integrity. Thus, you must evaluate the testimony given at this hearing on its own terms.

You have before you, in my prepared testimony and that of Vice Chair Weintraub, facts regarding current operations at the Commission. It is not disputed, because it cannot be disputed, that since the United States Senate confirmed my nomination to serve on the Commission in 2000, the number of cases resulting in substantive rulings has increased, the time for processing cases has substantially declined, and fines have risen to record levels. Additionally, the Commission has assessed more penalties in excess of $400,000 over the past four years than in the previous twenty four. Since I joined the Commission, it has imposed it largest settlements on a sitting member of the Senate, a sitting member of the House, with a single respondent, and with multiple respondents in a single Matter Under Review (MUR).

That all of this has occurred even as the Commission has put into place added due process protections for respondents shows that such protections, and general Commission reforms that I have favored, are not antithetical to robust enforcement of the law – indeed, they are necessary to it. As I stated at my confirmation hearing before this Committee in March of 2000:

> I would like to see the FEC work better... I think that some of the cynicism of the public comes when they see what are obviously violations of the law not being enforced, or when they see penalties being levied, three or four or six years after a campaign.

> So, again ... one of my top priorities on the Commission would be to try to improve enforcement... going after 'meat and potatoes' cases, going after them quickly, getting them done.

Hearing Before the Committee on Rules and Administration, Mar. 8, 2000, p. 39.

You have heard the testimony of the witnesses, and you must judge whose testimony is internally consistent, whose testimony relies on anecdotal rather than systematic data, and whose testimony is supported by facts. Beyond that, I cannot tell you how to make those judgments. However, many of my past statements which you now suggest weaken my credibility were made in hearings before Congress. If Congress seeks to have witnesses provide it with candid advice and expertise, it may be a mistake to hold against a witness's credibility that same witness's prior candor when addressing members of Congress.