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# ARTICLES

## *McConnell v. FEC* Jurisprudence and Its Future Impact on Campaign Finance

TREVOR POTTER\*

### I. THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002

In March 2002, Congress passed the Bipartisan Campaign Reform Act of 2002 (“BCRA”).<sup>1</sup> BCRA has two primary components. First, it bans soft-money donations (*i.e.*, donations not in compliance with amount limits, source prohibitions, and reporting requirements) to national political party committees (*e.g.*, the Democratic National Committee (“DNC”), Republican National Committee (“RNC”), and the Senatorial and Congressional Campaign Committees).<sup>2</sup> Prior to the passage of BCRA, parties raised unlimited amounts of soft money, which they used not only for party-building activities such as get-out-the-vote efforts, candidate recruitment, and administrative expenses, but also increasingly for candidate-specific activities, including broadcast advertising.

The second primary component of BCRA prohibits corporations, trade associations, and labor organizations from financing “electioneering communications” using treasury funds.<sup>3</sup> An electioneering communication is any broadcast, cable, or satellite communication which refers to a clearly identified federal candidate, is made within thirty days of a primary election or sixty days of a general election, and is targeted to the candidate’s state or district.<sup>4</sup> A corporation, trade association, or labor union political action committee (“PAC”) may, however, finance

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1. Pub. L. No. 107-155, 116 Stat. 81.

2. See 2 U.S.C. § 441i(a) (Supp. II 2002).

3. See *id.* § 441b(a), (b)(2) (2000 & Supp. II 2002).

4. See *id.* § 434(f)(3) (Supp. II 2002).

electioneering communications using limited, disclosed “hard-money” contributions from certain employees or members.<sup>5</sup> BCRA also requires any person who spends in excess of \$10,000 on electioneering communications during a calendar year to file disclosure reports listing the person(s) making or controlling the disbursements, all contributors who gave more than \$1,000 to finance the communications, and those to whom disbursements of more than \$200 have been made.<sup>6</sup>

Prior to BCRA, despite the long-standing federal ban on corporate or union spending in federal elections,<sup>7</sup> ads attacking federal candidates, paid for with corporate or labor union money, were broadcast without restriction on the theory that ads which did not “expressly endorse” a federal candidate could not be regulated by the campaign finance laws.<sup>8</sup>

## II. *McCONNELL v. FEC*: DISTRICT COURT PROCEEDINGS

Plaintiffs immediately began filing lawsuits challenging the constitutionality of BCRA after it was signed into law by President George W. Bush on March 27, 2002.<sup>9</sup> More than eighty plaintiffs were party to ten different lawsuits challenging virtually every provision of the law.<sup>10</sup>

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5. A corporation, trade association, or labor organization may establish a separate segregated fund PAC to make political contributions, expenditures, and payments for electioneering communications, for which the entity may solicit voluntary contributions from certain employees or members. *See id.* § 441b(b)(2)(C) (2000 & Supp. II 2002).

6. *See id.* § 434(f)(1)-(2) (Supp. II 2002).

7. Restrictions on the use of corporate treasury funds to influence elections date back to 1907, when Congress adopted a law prohibiting corporations from contributing directly to candidates for federal office. *See* Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864. In 1947, Congress augmented the federal prohibition of corporate contributions with a prohibition of corporate expenditures in connection with federal elections. At the same time, Congress extended the prohibition of federal election contributions and expenditures to labor unions. *See* Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, § 304, 61 Stat. 136.

8. The U.S. Supreme Court, in its landmark *Buckley v. Valeo* decision, narrowly construed two vague statutory phrases—“relative to a clearly identified candidate” and “for the purpose of . . . influencing” a federal election—both of which underlie the statutory term “expenditure,” to be limited to communications that include explicit words of advocacy of election or defeat of a candidate. 424 U.S. 1, 13, 42-44, 63 (1976).

9. Statement by President George W. Bush upon Signing H.R. 2356, 38 WEEKLY COMP. PRES. DOC. 517 (Mar. 27, 2002).

10. *See* *McConnell v. FEC*, 540 U.S. 93 (2003). The lead plaintiffs in these lawsuits included: ACLU, Victoria Jackson Gray Adams, et al., AFL-CIO, Chamber of Commerce, Emily Echols, et al., National Rifle Association, National Right to Life Committee, Congressman Ron Paul, select national and state political parties, and Senator Mitch McConnell (R-KY). *See id.* Provisions that were challenged in court included: the national party soft-money ban, state party soft-money spending restrictions, hard-money financing requirements for corporate and labor electioneering communications, coordination provisions, prohibition on political contributions by minors, hard-money limit increases, and fundraising allowances for candidates facing wealthy self-financing opponents. *Id.* Three websites assisted in following the *McConnell* litigation. *See generally* The Campaign Legal Center, <http://www.campaignlegalcenter.org> (last visited Sept. 28, 2005); Campaign Finance Materials, Stanford Law School, Robert Crown Law Library,

The plaintiffs in these actions, consolidated into *McConnell v. FEC*,<sup>11</sup> encompassed the political range from the RNC and the Christian Coalition to the California Democratic Party and the U.S. Public Interest Research Group. The Department of Justice and the FEC were the defendants, with Senators McCain and Feingold and Congressmen Shays and Meehan, the Act's principal congressional sponsors, as "intervenor-defendants" in the suit.<sup>12</sup>

*McConnell* followed an unusual litigation path because of a provision in BCRA that established an expedited process for judicial review.<sup>13</sup> The case was heard by a three-judge panel of the United States District Court for the District of Columbia, which included Circuit Court Judge Karen LeCraft Henderson, a George H.W. Bush appointee, who presided; District Court Judge Colleen Kollar-Kotelly, a Clinton appointee; and District Court Judge Richard J. Leon, a George W. Bush appointee.<sup>14</sup>

The case was heard within eight months of filing, in keeping with the expedited judicial review provision in the law, and included a paper trail of deposition transcripts, written expert reports, and fact witness affidavits, rather than live testimony in open court. Oral arguments were held on December 4 and 5, 2002.<sup>15</sup> On May 1, 2003, the district court issued its decision.<sup>16</sup> The opinion was complex and splintered, and at 1,638 pages,<sup>17</sup> was the longest decision ever issued in the court's history. The court upheld major provisions of BCRA while striking down and/or modifying the soft-money and issue advertising provisions.<sup>18</sup>

After the district panel issued its decision, parties on both sides filed notices of appeal with the U.S. Supreme Court and, pending review by the Supreme Court, the defendants and many of the plaintiffs asked the district court to stay all or part of its decision.<sup>19</sup> On May 19, 2003, three weeks after the release of its lengthy decision, the district court stayed its entire decision in *McConnell*, holding that BCRA's original

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[www.law.stanford.edu/library/campaignfinance/](http://www.law.stanford.edu/library/campaignfinance/) (last visited Sept. 28, 2005); GS Campaign Finance Reform, A Project at the Brookings Institution, [http://www.brookings.edu/gs/cf/cf\\_hp.htm](http://www.brookings.edu/gs/cf/cf_hp.htm) (last visited Sept. 28, 2005).

11. *McConnell v. FEC*, Civ. No. 02-582 (D.D.C. Apr. 24, 2002) (order consolidating cases), available at <http://www.campaignlegalcenter.org/attachments/9.pdf>.

12. See *McConnell*, 540 U.S. at 93, 112.

13. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403, 116 Stat. 81, 113-14.

14. *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003).

15. See *McConnell v. FEC*, Civ. No. 02-582 (D.D.C. Nov. 15, 2002) (order scheduling oral argument), available at <http://www.campaignlegalcenter.org/attachments/365.pdf>.

16. *McConnell*, 251 F. Supp. 2d at 176.

17. *Id.*

18. *Id.*

19. *McConnell v. FEC*, 253 F. Supp. 2d 18 (D.D.C. 2003).

campaign rules should remain in place until the U.S. Supreme Court rendered a judgment in the case.<sup>20</sup> A two-judge majority (Judge Henderson and Judge Kollar-Kotelly) imposed the stay because of a “desire to prevent the litigants from facing potentially three different regulatory regimes in a very short time span, and the Court’s recognition of the divisions among the panel about the constitutionality of the challenged provisions,” as defendants in the case had urged.<sup>21</sup>

### III. *McCONNELL v. FEC*: SUPREME COURT PROCEEDINGS

Both defendants and many of the plaintiffs in *McConnell* appealed the case to the U.S. Supreme Court and urged the Court to set a swift case schedule.<sup>22</sup> The parties expressed a desire to have the nation’s campaign finance rules settled before the 2004 election cycle was in full swing.<sup>23</sup> The Supreme Court agreed with an expedited briefing schedule.<sup>24</sup> Under the Court’s order, plaintiffs in the district court proceedings, who continued as parties before the Supreme Court, filed their main briefs on July 8, 2003.<sup>25</sup> Seven amicus briefs were also filed by current members of Congress, ten state Attorneys General, think tanks, and individual citizens.<sup>26</sup> The defendants filed their primary briefs one month later,<sup>27</sup> at which time 15 amicus briefs were also filed, including briefs by state Attorneys General, current and former Members of Congress, political scientists, advocacy organizations, civil rights organizations, and business leaders.<sup>28</sup> Final “reply” briefs by the plaintiffs were due on August 21, 2003.<sup>29</sup>

The Court heard the case in an unusually long four-hour oral argument on the morning of September 8, 2003.<sup>30</sup> Two hours were given to

20. *Id.*

21. *See id.* at 21.

22. On May 23, 2003 the U.S. Solicitor General, along with the other government defendants and the congressional sponsors of McCain-Feingold, filed a motion with the U.S. Supreme Court to recommend several potential schedules for expedited briefing of *McConnell v. FEC*. A response was filed by the *McConnell* plaintiffs on May 27, 2003. Both of these motions are available at <http://www.campaignlegalcenter.org/McConnell-89.html>.

23. *Id.*

24. *McConnell v. FEC*, No. 02–1674–ATX (June 5, 2003) (Supreme Court order noting probable jurisdiction), available at <http://www.campaignlegalcenter.org/attachments/665.pdf>.

25. *Id.*

26. A complete listing of amicus briefs filed in support of both the defendants and plaintiffs in *McConnell* at the Supreme Court is available at <http://www.campaignlegalcenter.org/McConnell-100.html>.

27. *See McConnell*, No. 02–1674–ATX (Supreme Court order noting probable jurisdiction).

28. *See supra* note 26.

29. *See McConnell*, No. 02–1674–ATX (Supreme Court order noting probable jurisdiction).

30. Counsel of record for the *McConnell* plaintiffs who presented oral argument before the Supreme Court included: Kenneth Starr, former U.S. Solicitor General, representing Senator Mitch McConnell; Bobby Burchfield, attorney at Covington & Burling, representing the political

the plaintiffs and two hours were accorded to the defendants, just as in the landmark 1976 Supreme Court case *Buckley v. Valeo*.<sup>31</sup> On December 10, 2003, the Supreme Court of the United States issued its opinion in *McConnell*.<sup>32</sup>

#### IV. THE SUPREME COURT'S DECISION IN *McCONNELL v. FEC*<sup>33</sup>

The Supreme Court's decision in *McConnell* was the most important Supreme Court campaign finance decision in a generation. The Court upheld the constitutionality of BCRA with a few minor exceptions. The *McConnell* Court addressed at least three fundamental campaign finance issues. First, the Court reaffirmed its position that preventing real and apparent corruption is a constitutionally permissible rationale for congressional regulation in this area. Second, the Court held that the electioneering communications provisions of BCRA are neither constitutionally vague nor overbroad; but, instead, create a clear standard for regulation, and that the "express advocacy" test it partially replaced was "functionally meaningless" and not constitutionally required. Finally, the Court upheld the authority of Congress to prevent circumvention of core campaign finance restrictions through enactment of prophylactic measures aimed at abuses likely to occur in the future.

##### A. *Corruption and the Appearance of Corruption*

The majority of the Court, consisting of Justices Stevens, O'Connor, Breyer, Ginsburg, and Souter, upheld BCRA's ban on national political party soft-money fundraising and spending, as well as state party soft-money spending in connection with federal elections.<sup>34</sup> It ruled that preventing corruption and the appearance of corruption

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party plaintiffs; Floyd Abrams of Cahill, Gordon & Reindel, representing Senator Mitch McConnell; Laurence E. Gold of the AFL-CIO, representing the AFL-CIO; and Jay Sekulow of the Southeastern Legal Foundation, representing the minor plaintiffs. See Transcript of Oral Argument at 1-2, *McConnell v. FEC*, 540 U.S. 93 (2003) (No. 02-1674), available at <http://www.campaignlegalcenter.org/attachments/922.pdf>. Counsel of record for the defense who presented oral argument before the Supreme Court included: Theodore Olsen, current U.S. Solicitor General, representing the federal government defendants; Seth Waxman, former U.S. Solicitor General representing the Congressional Intervenor defendants; and Paul Clement, deputy U.S. Solicitor General, representing Federal Government Defendants.

31. 424 U.S. 1 (1976).

32. 540 U.S. 93 (2003).

33. Author relied on an analysis of the Supreme Court's decision produced by attorneys at Wilmer, Cutler & Pickering, members of the defendants' legal team, in *McConnell v. FEC*. See Democracy 21, *Analysis of Supreme Court Decision Upholding Constitutionality of New Campaign Finance Law* (Dec. 11, 2003), available at [http://www.democracy21.org/index.asp?Type=B\\_PR&SEC={0AD86D15-CC6E-478D-AB7D-E351E4DB1B38}&DE={E662FE41-E8E1-406B-B803-F9CCD34CBD8A}](http://www.democracy21.org/index.asp?Type=B_PR&SEC={0AD86D15-CC6E-478D-AB7D-E351E4DB1B38}&DE={E662FE41-E8E1-406B-B803-F9CCD34CBD8A}).

34. *McConnell*, 540 U.S. at 154, 173.

remains a legitimate basis for congressional regulation of political contributions and spending, and does not necessarily impermissibly restrict the constitutionally-guaranteed right to free speech.<sup>35</sup>

The Court cited the substantial record set before it, which had been compiled for the district court proceeding.<sup>36</sup> This record included findings from a Senate investigation into allegations of wrongdoing in the 1996 federal elections (known as the Thompson Committee Report),<sup>37</sup> discovery documents from the national political parties, and other sources.<sup>38</sup> The Court had an enormous record that convincingly demonstrated that the political parties (and their corporate and labor donors) had circumvented federal election regulations by using soft money for get-out-the-vote efforts, generic party advertising, and so-called broadcast “issue ads” that were all designed to influence the outcome of federal elections.

The Court stated, “[t]he question for present purposes is whether large *soft-money* contributions to national party committees have a corrupting influence or give rise to the appearance of corruption. Both common sense and the ample record in these cases confirm Congress’ belief that they do.”<sup>39</sup>

Additional records cited by the Court, provided by several former and current members of Congress, gave tremendous detail on how the soft-money fundraising system worked—including which parties solicited and what the donors thought they were receiving in exchange for their contributions.<sup>40</sup> The Court concluded, “[t]he evidence connects soft money to manipulations of the legislative calendar, leading to Congress’ failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation.”<sup>41</sup>

Beyond this direct evidence, the Court also found that some corruption cannot be “easily detected nor practical to criminalize,” but that the “best means of prevention is to identify and to remove the temptation. The evidence set forth above, which is but a sampling of the reams of disquieting evidence contained in the record, convincingly demonstrates that soft-money contributions to political parties carry with them just such temptation.”<sup>42</sup>

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35. *Id.* at 143-44.

36. *Id.* at 132-33.

37. STAFF OF S. COMM ON HOMELAND SEC. & GOV’T AFFAIRS, 105TH CONG., FINAL REPORT ON THE 1997 SPECIAL INVESTIGATION IN CONNECTION WITH 1996 FEDERAL ELECTION CAMPAIGNS (1997), available at [http://www.senate.gov/~gov\\_affairs/sireport.htm](http://www.senate.gov/~gov_affairs/sireport.htm).

38. See *McConnell*, 540 U.S. at 128-29, 146, 150-52.

39. *Id.* at 145.

40. *Id.* at 149-52.

41. *Id.* at 150.

42. *Id.* at 153.

The majority also acknowledged “important governmental interests”<sup>43</sup> in limiting the appearance of corruption and protecting “public confidence in the electoral process,”<sup>44</sup> stating that “common sense and the ample record”<sup>45</sup> substantiate Congress’s judgment that soft money gives rise to corruption or the appearance of corruption. Chief Justice Rehnquist and Justice Kennedy joined in upholding the portion of BCRA that prevents federal officeholders from raising or spending soft money as a valid anti-circumvention measure that was narrowly drawn to prevent corruption or the appearance of corruption of federal officeholders and candidates.<sup>46</sup>

### B. *Electioneering Communications*

The majority of the Court also upheld the electioneering communications provisions of BCRA, which prohibit corporate and labor funding of certain candidate-specific advertisements that are run via broadcast, cable, or satellite within thirty days of a primary or sixty days of a general election, and are targeted to the candidate’s electorate.<sup>47</sup>

Dating back to the Tillman Act of 1907,<sup>48</sup> the Taft-Hartley Act of 1947,<sup>49</sup> and the Federal Election Campaign Act of 1971 (“FECA”),<sup>50</sup> the law has limited the rights of labor unions and corporations to participate in federal elections. Corporations and labor unions are not permitted to contribute to federal candidate campaigns or political party committees, or to advocate the election or defeat of a federal candidate to the general public.<sup>51</sup>

In 1976, the Supreme Court in *Buckley v. Valeo*<sup>52</sup> reviewed the broad contribution limitations on these non-political actors and decided that the broad limitations did not meet the constitutional mandate that there be adequate notice of what speech is or is not prohibited.<sup>53</sup> Accordingly, the Court chose to save the broad language by narrowly construing it to mean expressly advocating the election or defeat of a federal candidate.<sup>54</sup> The now-famous footnote fifty-two of *Buckley*

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43. *Id.* at 169.

44. *Id.* at 136 (quoting *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 208 (1982)).

45. *Id.* at 145.

46. *Id.* at 286, 308, 314.

47. *Id.* at 189-94.

48. Pub. L. No. 59-36, 34 Stat. 864.

49. Pub. L. No. 80-101, § 304, 61 Stat. 136.

50. Pub. L. No. 92-225, § 205, 86 Stat. 3, 10 (current version at 2 U.S.C. § 441b (2000 & Supp. II 2000)).

51. *See* 2 U.S.C. § 441b.

52. 424 U.S. 1 (1976).

53. *Id.* at 39-51.

54. *Id.* at 43-44.

listed words that *could* mean expressly advocating the election or defeat of a federal candidate: “‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”<sup>55</sup>

The Court in *Buckley* also explained why a clear test is useful:

[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.<sup>56</sup>

The result, post-*Buckley*, was a legal dispute about whether or not an entity had to use the so-called “magic words,” as detailed in *Buckley*, in a communication in order for a court or enforcement agency to determine that the communication advocated the election or defeat of a candidate.

A voluminous record introduced to the district court three-judge panel as part of the *McConnell* proceedings reflected that by the end of the 2000 federal election cycle, corporate and labor union funding, either directly or through front groups established for election-influencing purposes, supported advertisements that expressly advocated for or against specific federal candidates.<sup>57</sup> This activity was not covered by pre-BCRA law (FECA) because the advertisements did so without using the so-called “magic words.”<sup>58</sup>

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55. *Id.* at 44. These have become known as the “magic words,” although *Buckley* and subsequent cases indicate that they do not comprise an exhaustive list of terms that meet the “express advocacy” definition. *Id.*; *FEC v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 249 (1986) (“The fact that this message is marginally less direct than ‘Vote for Smith’ does not change its essential nature. The Edition goes beyond issue discussion to express electoral advocacy.”); *FEC v. Furgatch*, 807 F.2d 857, 861 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987) (concluding that the express advocacy test in *Buckley* “does not draw a bright and unambiguous line”).

56. *Buckley*, 424 U.S. at 42 (emphasis added).

57. See *McConnell v. FEC*, 251 F. Supp. 2d 176, 283 (D.D.C. 2003). Written testimonies submitted to the U.S. District Court which addressed this matter included testimony by David B. Magleby, Kenneth Goldstein, Jonathan Krasno, Frank Sorauf, and Douglas Bailey. For excerpts of these testimonies see *INSIDE THE CAMPAIGN FINANCE BATTLE* (Anthony Corrado, Thomas Mann & Trevor Potter eds., 2003).

58. A 1999–2000 study conducted by the Annenberg Public Policy Center at the University of Pennsylvania estimated that more than \$500 million was spent on issue advocacy in the 2000 election cycle. See ANNENBERG PUB. POLICY CTR. OF THE UNIV. OF PENN., *ISSUE ADVERTISING IN THE 1999–2000 ELECTION CYCLE I* (2001), available at [http://www.annenbergpublicpolicycenter.org/03\\_political\\_communication/issueeads/2001\\_1999-2000issueadvocacy.pdf](http://www.annenbergpublicpolicycenter.org/03_political_communication/issueeads/2001_1999-2000issueadvocacy.pdf). The Annenberg report also indicated that the national party organizations were responsible for nearly \$162 million (32%) of the total spending. *Id.* at 4. While some advertisements and mailings were intended to shape general public opinion on issues, most advertisements during the 2000 election were targeted at supporting or opposing specific federal candidates. Professor David B. Magleby at

The question before the Supreme Court on this matter became whether the *Buckley* decision identified a constitutional standard that speech could not be regulated, at least by non-political entities, without express advocacy. The *McConnell* Court answered this question “no.” “The major premise of plaintiffs’ challenge . . . [wa]s that *Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an inviolable First Amendment right to engage in the latter category of speech.”<sup>59</sup> The Supreme Court unequivocally rejected that argument:

That position misapprehends our prior decisions, for the express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law. In *Buckley* we . . . provided examples of words of express advocacy, such as “‘vote for,’” “‘elect,’” “‘support,’” . . . “‘defeat,’” [and] “‘reject,’” and those examples eventually gave rise to what is now known as the “magic words” requirement.

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. . . [But] our decisions in *Buckley* and *MCFL* were specific to the statutory language before us; they in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech.

Nor are we persuaded, independent of our precedents, that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad. Indeed, the unmistakable lesson from the record in this litigation . . . is that *Buckley*’s magic-words requirement is functionally meaningless. Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in

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Brigham Young University analyzed the impact of issue advocacy campaigns in the 2000 presidential primaries. He summarized his study by stating that:

The idea that most issue advocacy is not election-related is disproved by the data we collected. Less than one-tenth (8.9 percent) of all communications we intercepted were pure issue advocacy (had no reference to a candidate or the election). Rather issue advocacy provides a powerful tool for agenda setting and candidate definition.

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[W]hen issues are discussed in the context of an election and candidates’ positions are presented, compared, and judged, much of this communication is intended to influence a vote. Although some groups legitimately present nonpartisan information about candidates up for reelection, usually these communications are thinly veiled advocacy.

DAVID B. MAGLEBY, *GETTING INSIDE THE OUTSIDE CAMPAIGN* 4, 26 (2000).

59. *McConnell v. FEC*, 540 U.S. 93, 190 (2003).

so many words, they are no less clearly intended to influence the election.<sup>60</sup>

The Court concluded that the “unmistakable lesson from the record” was that the “magic-words requirement is functionally meaningless,”<sup>61</sup> and that “corporations and unions used soft money to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections, and that remedial legislation was needed to staunch that flow of money.”<sup>62</sup> The Court held that BCRA implemented a clear standard in regards to electioneering communications that was neither vague nor overbroad and would not encroach on other forms of speech.<sup>63</sup>

### C. *McConnell Court's Approval of Attempts by Congress to Prevent Circumvention of the Law*

Another important aspect of the majority opinion of the Supreme Court in *McConnell* is the Court's holding that Congress has adequate constitutional authority (consistent with the First Amendment) to prevent circumvention of federal election laws and to protect the process from the corrosive influence of large unregulated contributions from corporations, labor unions, and wealthy individuals. The Court concluded its opinion by stating:

Many years ago we observed that “[t]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny the nation in a vital particular the power of self-protection.” We abide by the conviction in considering Congress' most recent effort to confine the ill effects of aggregated wealth on our political system.<sup>64</sup>

The *McConnell* Court acknowledged that it is not only permissible, but important, that Congress counter attempts at circumvention of campaign finance laws. The majority of the Court wrote that Congress needs to respond to changes in the practices of campaign finance and that the jurisprudence is flexible enough to have Congress continue to draft regulation as it deems necessary:

The less rigorous standard of review we have applied to contribution limits . . . shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise. It also provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations

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60. *Id.* at 190-93 (citations and footnote omitted).

61. *Id.* at 193.

62. *Id.* at 207.

63. *Id.* at 184.

64. *Id.* at 223-24 (citation omitted).

designed to protect the integrity of the political process.<sup>65</sup>

The Supreme Court's *McConnell* decision makes clear that Congress may and should legislate in the future to close any loopholes in, and to prevent circumvention of, federal campaign finance law.

#### V. THE REACTION TO *McCONNELL* AND THE RISE OF 527S IN THE 2004 ELECTION

As a result of congressional passage of BCRA, upheld by the Supreme Court in *McConnell*, individuals are now limited in what they can donate to national party committees, and labor unions and corporations are prohibited from donating. But during the 2004 election cycle immediately following the Court's decision in *McConnell*, a number of pseudo-party committees and organizations were created for the sole purpose of influencing the presidential election. Some groups were created with the active approval and participation of party officials. Four of the most prominent new organizations were America Coming Together ("ACT") and The Media Fund on the Democratic side, and Swift Boat Veterans for Truth and Progress for America on the Republican side. The President of ACT, Ellen Malcolm, also head of EMILY's List, stated that ACT intended to conduct a "massive get-out-the-vote operation that we think will defeat George W. Bush in 2004."<sup>66</sup> The Media Fund was lead by Harold Ickes, formerly of the Clinton White House and then a member of the executive committee of the DNC.<sup>67</sup> The Swift Boat Veterans exclusively targeted Senator Kerry and were advised by Bush re-election campaign counsel Benjamin Ginsberg.<sup>68</sup> Ginsberg resigned from his service to the Bush-Cheney 2004 campaign once it was made public that he worked for both the campaign and Swift Boat Veterans.<sup>69</sup> Ginsberg also served as counsel to Progress for America, a conservative advocacy group.<sup>70</sup> Progress for America was headed by Tony Feather, one of President Bush's leading "Pioneer" fundraisers and political director for his first presidential campaign.<sup>71</sup>

One important aspect of the 2004 election cycle was the amount of money raised by these groups that was donated by a very limited number

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65. *Id.* at 137.

66. Thomas B. Edsall, *Liberals Form Fund to Defeat President*, WASH. POST, Aug. 8, 2003, at A3.

67. Eliza Newlin Carney, Peter H. Stone & James A. Barnes, *New Rules of the Game*, 35 NAT'L J. 3800 (2003).

68. Glen Justice & Jim Rutenberg, *Advocacy Groups and Campaigns: An Uneasy Shuttle*, N.Y. TIMES, Sept. 8, 2004, at A1.

69. *Id.*

70. Lisa Getter, *GOP Can't Beat '3rd Party' Groups, So It Forms Them*, L.A. TIMES, June 6, 2004, at A20.

71. Peter H. Stone, *Republican 527s: Full Steam Ahead*, 36 NAT'L J. 1719 (2004).

of wealthy individuals. Forty-four percent (nearly \$106 million) of the funding of the top Democratic-leaning 527 organizations active in the federal election came from only fourteen wealthy individuals.<sup>72</sup> Forty-four percent (\$40.45 million) of the receipts of Republican-leaning organizations active in the federal election came from only eleven wealthy individuals.<sup>73</sup>

These groups and others formed during the 2004 election are often referred to as “527 organizations,” named for the section of the Internal Revenue Code that governs tax treatment of certain political organizations.<sup>74</sup> Section 527 of the tax code creates tax-exempt status for organizations “organized and operated primarily” for the purpose of influencing the selection or election of individuals to public office.<sup>75</sup> Virtually all political committees—candidate committees, party committees, or PACs—are registered with the IRS under section 527 and have a “major purpose” to engage in election-related activity.<sup>76</sup>

The congressional sponsors of BCRA and many campaign finance reform organizations believe that pre-BCRA federal campaign finance law requires any political organization with a major purpose to influence specific federal elections, and which spends more than \$1,000 doing so, to register as a political committee with the FEC and only use federal funds for its election-related activities.<sup>77</sup> The congressional sponsors of BCRA urged the FEC to write regulations to enforce this law,<sup>78</sup> but the Commission failed to do so during the 2004 election cycle.

#### A. FECA, Buckley, McConnell, and the “Major Purpose” Test

Regulation of “political committees” by campaign finance law began with the passage of FECA.<sup>79</sup> According to FECA, a “political

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72. Campaign Legal Center: New 2004 Party and 527 Numbers, <http://www.campaignlegalcenter.org/attachments/1300.pdf> (last visited Aug. 29, 2005).

73. *Id.*

74. 26 U.S.C. § 527 (2000 & Supp. II 2002).

75. *Id.*

76. *See id.* § 527(e)(2). Section 527 of the Internal Revenue Code governs the tax treatment of “political organizations” organized and operated primarily for the purpose of influencing the selection of candidates to elected or appointed office. Virtually all political committees—candidate committees, party committees, and PACs—are registered with the IRS under § 527. By comparison, lobbying organizations and state ballot measure committees operated primarily to influence public debate on issues and not candidates are typically operated under § 501(c)(4) of the tax code.

77. *See* Letter from Sen. John McCain, Sen. Russell D. Feingold, Rep. Christopher Shays, & Rep. Marty Meehan, to Mai T. Dinh (Apr. 9, 2004), available at <http://www.campaignlegalcenter.org/attachments/1113.pdf> [hereinafter Letter from Sen. John McCain] (formal comments filed with the FEC regarding 527 regulations).

78. *Id.*

79. The FECA of 1971 defined the term “political committee” for the first time. Pub. L. No. 92-225, § 301(d), 86 Stat. 3, 11 (1972) (current version at 2 U.S.C. § 431(4) (2000 & Supp. II

committee” is any group that receives “contributions” or makes “expenditures” exceeding \$1,000 per year.<sup>80</sup> A “contribution” or “expenditure” is any gift or payment made “for the purpose of influencing any election for Federal office.”<sup>81</sup>

The Supreme Court later added in *Buckley* that a group is not a “political committee” unless its “major purpose” is to influence federal elections.<sup>82</sup> This construction of the term “political committee,” as applied to non-candidate organizations, has come to be known as the “major purpose” test, but has never been incorporated into the statutory definition of “political committee” by Congress.<sup>83</sup> The Court held that Congress may constitutionally require disclosure of all payments made by political committees for the purpose of influencing federal elections—*i.e.*, “expenditures”—because such expenditures are “by definition, campaign related.”<sup>84</sup>

Although the Court in *Buckley* held that all payments by political committees for the purpose of influencing a federal election are subject to FECA disclosure requirements, the *Buckley* Court construed the term “expenditure” more narrowly as it applies to groups *without* the major purpose of influencing federal elections, so as to include only expenditures for communication that expressly advocates a candidate’s election or defeat.<sup>85</sup>

Thus, according to FECA as interpreted by the Supreme Court in *Buckley*, any group that spends more than \$1,000 in a year and has as its major purpose the influencing of a federal election should be considered a political committee. As a political committee, the group is required to: register with the FEC;<sup>86</sup> accept only limited hard-money contributions;<sup>87</sup> not accept contributions from corporations and labor unions;<sup>88</sup> and follow stringent reporting requirements.<sup>89</sup>

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2002)). The political contribution and expenditure reporting requirements applicable to political committees, established by the FECA of 1971, constitute the first regulation of political committee activity. §§ 302–09, 86 Stat. 3, 12–19 (current version at 2 U.S.C. §§ 432–34). Federal regulation of political committee activity has expanded over the past thirty-five years, to include contribution limits, solicitation restrictions, advertising disclaimers, and various other restrictions. The term “political committee” is now referenced throughout federal campaign finance statutes and regulations hundreds, if not thousands, of times.

80. 2 U.S.C. § 431(4)(A) (2000).

81. *Id.* § 431(8)–(9) (2000 & Supp. II 2002).

82. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

83. *See* 2 U.S.C. § 431(4).

84. *Buckley*, 424 U.S. at 79.

85. *See id.* at 79–80.

86. 2 U.S.C. § 433 (2000).

87. *Id.* § 441a(a)(1) (Supp. II 2002).

88. *Id.* § 441b (2000 & Supp. II 2002).

89. *Id.* § 434 (2000 & Supp. II 2002).

Many 527 organizations active in the past few election cycles qualify as political committees under this two-part test. First, nearly all 527s receive contributions or make expenditures far in excess of \$1,000. Second, many 527 organizations clearly have as a “major purpose” to influence a federal election. 527 organizations, like America Coming Together, Moveon.org, and the Swift Boat Veterans, were openly focused on defeating or electing a presidential candidate in 2004.<sup>90</sup>

Thus, it is the long-standing FECA definition of “political committee,” as construed by the Supreme Court in *Buckley* using the “major purpose” test, that reformers argue should be enforced by the FEC so as to regulate 527 organization activity. Congressional enactment of BCRA in 2002 did not alter the definition of “political committee” or the “major purpose” test. Furthermore, the Supreme Court in *McConnell* implicitly affirmed the continuing applicability of the “major purpose” test when it referred to the “major purpose” language in the *Buckley* opinion.<sup>91</sup>

#### B. *FEC Inaction and the Potential for Congressional Regulation or Court Rulings*

In part due to the multi-million-dollar donations by wealthy individuals to select 527 organizations campaigning in the 2004 federal election, the congressional sponsors of BCRA urged the FEC to draft regulations to enforce the law in regards to section 527 groups with a “major purpose” to impact federal elections.<sup>92</sup> The FEC reopened an inactive rulemaking, asked for public comment, and held public hearings on the matter.<sup>93</sup> After a postponement of 90 days (by this time it was too late in the 2004 election cycle for any rules to be applied to the ongoing activity), the FEC finally rejected its own General Counsel’s recommendation on the regulation of 527 organizations and took no action to bring section 527s into compliance with campaign finance laws.<sup>94</sup> It

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90. See, e.g., Kate Biber, *George Soros Sell-Outs*, REC., Nov. 20, 2003, <http://www.hlrecord.org/media/paper609/news/2003/11/20/Opinion/George.oros.SellOuts-564380.shtml> (stating that ACT affirmed that it “will conduct a massive voter contact program, mobilizing voters to defeat George W. Bush”); Moveon.org, *Bush in 30 Seconds*, <http://www.moveon.org/bushin30seconds/aboutus.html> (last visited June 29, 2005) (explaining that Moveon.org’s mission is to “create and run powerful political ads in swing states to challenge President Bush’s policies and his administration”).

91. See *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003) (quoting *Buckley v. Valeo*, 424 U.S. 1, 79 (1976)).

92. Letter from Sen. John McCain, *supra* note 77.

93. See Political Committee Status, Notice of Proposed Rulemaking 2004–6, 69 Fed. Reg. 11,736 (Mar. 11, 2004).

94. See FEC Draft Final Rules for Political Committee Status, Agenda Document 04–75 (Aug. 19, 2004), available at <http://www.fec.gov/agenda/2004/mtgdoc04-75.pdf>; see also Minutes

deadlocked in a 3-3 vote on whether to continue to look at the issue in August 2004, but the Commission did adopt a rule specifying hard and soft-money allocation ratios for 527 organizations that took effect on January 1, 2005.<sup>95</sup>

The FEC's inaction spurred two lawsuits against the Commission for its failure to draft new rules to regulate 527 organizations and bring them under compliance with existing campaign finance law. One suit was brought by U.S. Representatives Marty Meehan (D-MA) and Christopher Shays (R-CT).<sup>96</sup> Another was filed by President Bush.<sup>97</sup> These cases were merged<sup>98</sup> and are still pending before the court; oral argument was held December 13, 2005.

Congress has also turned its attention to regulation of 527 committees in light of the FEC's unwillingness to regulate them. Two opposing bills have been presented in the House and one companion bill has been introduced in the Senate.<sup>99</sup>

Representatives Shays and Meehan and Senators McCain (R-AZ) and Feingold (D-WI) have introduced the 527 Reform Act, which would require all 527 organizations to register as federal political committees with the FEC unless they fall under a group of specified exceptions.<sup>100</sup> The exceptions include small groups and groups exclusively involved in state rather than federal election activity.<sup>101</sup> Once an organization registers as a federal political committee, activities such as the broadcast of advertisements mentioning only federal candidates would need to be paid for exclusively with hard money.<sup>102</sup> The proposed legislation also sets new allocation rules to ensure that activities affecting both federal and state or local elections are funded by at least fifty percent federal hard money.<sup>103</sup> Lastly, the legislation limits contributions acceptable for nonfederal accounts to \$25,000 per year, and prohibits union or corporate funds from being contributed to those nonfederal accounts of sec-

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of an Open Meeting of the Federal Election Commission, at 7-10 (Aug. 19, 2004) (minutes approved Sept. 9, 2004), available at <http://www.fec.gov/agenda/2004/approve04-77.pdf>.

95. See Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056 (Nov. 23, 2004) (to be codified at 11 C.F.R. pts. 100, 102, 104, and 106).

96. Shays v. FEC, No. 04-1597 (D.D.C. 2004).

97. Bush-Cheney '04, Inc. v. FEC, No. 04-1612 (D.D.C. Sept. 17, 2004).

98. Shays v. FEC, No. 04-1597, Bush-Cheney '04, Inc. v. FEC, No. 04-1612 (D.D.C. Feb. 22, 2005) (order consolidating cases).

99. 527 Fairness Act of 2005, H.R. 1316, 109th Cong. (2005); 527 Reform Act of 2005, H.R. 513, 109th Cong. (2005); 527 Reform Act of 2005, S. 271, 109th Cong. (2005).

100. S. 271 § 2.

101. *Id.*

102. *Id.* § 3.

103. *Id.*

tion 527 organizations.<sup>104</sup> The bill exclusively applies to organizations that claim tax exemption under section 527 of the IRC.<sup>105</sup>

The Pence-Wynn proposal, called the 527 Fairness Act, does not directly address regulation of 527 organizations as its title implies, but rather, would repeal many long-standing provisions of campaign finance law, including significant portions of BCRA's soft-money ban. Specifically, it would authorize federal candidates and office holders to solicit and directly control the spending of these unlimited contributions to their political parties to support their campaigns.<sup>106</sup> The Pence-Wynn bill also proposes a six-fold increase in the amount an individual can contribute to a party committee and federal candidate.<sup>107</sup>

The question now is will the Congress, the FEC, or the courts be first to address this issue and others that continue to arise in this ever-evolving section of law.

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104. *Id.*

105. *Id.* at § 2.

106. H.R. 1316, § 3.

107. *Id.* at §§ 4 (donations to political committees), 5 (donations to federal candidates).