

Article

**\*235 OUTSIDE GROUPS IN THE NEW CAMPAIGN FINANCE ENVIRONMENT:  
THE MEANING OF  
BCRA AND THE MCCONNELL DECISION**

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The Bipartisan Campaign Reform Act of 2002 (BCRA) represents a major change in federal campaign finance law, preserving the integrity of existing contribution limits by placing limits on "soft money" in federal elections. The BCRA, and *McConnell v. Federal Election Commission*, which upheld it, will have significant effects on the role of non-profit organizations in federal elections. As the BCRA now limits the use of soft money by state and national political parties, much of this money will be channeled to such non-profit groups.

This Policy Essay examines this aftermath of the BCRA and argues that the renewed role of non-profit organizations in federal elections undermines the goals of the BCRA. If soft money that would otherwise go to political parties is instead directed to non-profit political advocacy groups, then its corrupting influence may continue despite the efforts of the BCRA. But this Policy Essay argues that *McConnell* provides constitutional guidelines for how to limit this loophole and recognize the promise of campaign finance reform.

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*\*237 "We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day."*

--[McConnell v. Federal Election Commission, 124 S. Ct. 619, 706 \(2003\)](#)

## I. Introduction

The Bipartisan Campaign Reform Act of 2002 (BCRA) [\[FN1\]](#) represents the most sweeping federal campaign finance legislation since the mid-1970s. The law, sponsored by Senators John McCain (R-Ariz.) and Russell Feingold (D-Wis.) and Representatives Christopher Shays (R-Conn.) and Marty Meehan (D-Mass.), was the culmination of seven years' worth of legislative fighting to close gaping loopholes in the federal campaign finance law.

The primary purpose of the law is to preserve the integrity of existing contribution limits in federal campaigns--limits that had been rendered meaningless over the last decade in the real world of politics. On the books, federal campaign finance law had prohibited--and still prohibits--contributions from corporate and union treasuries and had limited the size of contributions to \$1,000 per individual per election. [\[FN2\]](#) In reality, however, corporations, unions, and wealthy individuals pumped about \$500 million in "soft money" into federal elections in the 2000 election cycle--on top of the "legal" campaign funds raised within the contribution and source limitations. [\[FN3\]](#)

Immediately after the law was signed into effect by President George W. Bush on March 27, 2002, BCRA was challenged in court by eighty-four plaintiffs filing eleven separate lawsuits. All the lawsuits were consolidated into one case, *McConnell v. FEC*, which was named after the lead congressional opponent. [\[FN4\]](#)

*\*238* Together, BCRA and the *McConnell* decision have fundamentally transformed the campaign finance environment in federal (and soon, state [\[FN5\]](#)) elections. Among the most significant impacts of the law and its constitutional precedent is on the role of non-profit organizations in the election arena. Non-profit groups have suddenly become willing conduits for continuing the flow of "soft money"--funds received directly from corporate or union treasuries in excess of the contribution limits--that had previously gone to the national and state parties.

This Policy Essay examines to what extent the newly energized role of Section 527s and 501(c) non-profit organizations [\[FN6\]](#) in federal elections has undermined the objectives of BCRA, particularly the law's attempt to curtail the corrupting influence of soft money.

Part I of this Policy Essay describes the old campaign finance regime under the Federal Election Campaign Act (FECA) and documents how the rise of soft money and electioneering issue advocacy rendered the law virtually moot. The second Part provides a brief synopsis of BCRA and discusses the significance of the *McConnell* decision. Part III then notes the legal structures and limitations of non-profit groups in federal elections and charts the extent to which these groups have benefited from and are using the new campaign finance environment. Finally, the Policy Essay concludes by assessing the evolving role of

non-profit groups in elections and their significance for campaign finance reform, arguing that non-profit groups may well become the lead soft money players in federal elections, but that there are constitutional opportunities to rein in this new potential loophole in the campaign finance regime.

## **II. The Rise of Electioneering Issue Advocacy and the "Magic Words" Test**

After decades of lax enforcement of federal campaign financing laws, \*239 Congress renewed its determination to regulate money in politics in the early 1970s. Suspicions of financial abuses broke into outright criminal charges against President Richard Nixon with the Watergate scandal which, in turn, prompted Congress to strengthen campaign finance regulations by passing the Federal Election Campaign Act of 1971 (FECA) and its 1974 amendments. [FN7] The law imposed a variety of disclosure requirements, contribution limits and spending ceilings on all candidates, parties, and groups. [FN8]

When the Supreme Court considered FECA and its amendments in *Buckley v. Valeo*, [FN9] it found several of the Act's provisions regulating expenditures unconstitutional. Specifically, the Court found Congress's language, which regulated all expenditures by parties and groups relative to a "clearly identified candidate" and for the purpose of influencing an election, to be overly broad, threatening to chill the speech of these groups. [FN10] In an attempt to salvage the disclosure provisions and source limitations for election advertising, the Court narrowed FECA's broad language regulating party and group expenditures relative to a "clearly identified candidate" to apply only to those expenditures that expressly advocate the election or defeat of a candidate. [FN11]

Without the benefit of empirical evidence or experience in actual campaign practices, the Court opined that the distinction between "campaign advertising," which is subject to regulation, and "issue advocacy," which is not, can logically be drawn by assessing whether the ad "in express terms advocate[s] the election or defeat of a clearly identified candidate for federal office." [FN12] In the now-famous footnote 52 of the *Buckley* opinion, the Court named eight examples that constituted "express words of advocacy." These were: "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." [FN13] Without these words of express advocacy or something comparable, [FN14] ads by parties and groups would \*240 be viewed as educational rather than electioneering in nature, and thus would not be subject to regulation. This distinction between educational and campaign advertising, established in practice since the Anti-Saloon League's reluctance to disclose its financial activities in the 1920s, had now received the Court's legal sanction. [FN15]

### **A. "Magic Words" Standard**

This standard for distinguishing between campaign advertisements and issue advertisements became known as the "magic words" test. Advertisements that expressly advocated the election or defeat of candidates were subject to the source prohibitions, contribution limits, and reporting requirements of FECA. Political advertisements that avoided the magic words, but focused on candidates anyway, were classified as "issue ads" immune from federal

campaign finance regulation. Electioneering issue ads could therefore be financed by soft money and the sources of the funds not disclosed to the public. [\[FN16\]](#)

By the 2000 federal elections, the issue advocacy and soft money loopholes rendered the regulatory regime of FECA virtually meaningless. The national parties were raising and spending \$500 million in soft money, primarily to pay for television "issue ads" promoting or attacking federal candidates without using the magic words of express advocacy. [\[FN17\]](#) Special interest groups followed suit and began a wave of their own broadcast electioneering issue ads without anything more than cursory disclosure requirements--such as "Paid for by the Good Government Committee"--placed on the televised ads themselves. [\[FN18\]](#)

**\*241** Consequently, television ads, such as the "Don't Be Gored" ad sponsored by Americans for Job Security in the 2000 general election, aired entirely outside federal campaign finance regulation. The ad explicitly attacked Democratic candidate Al Gore for proposing a tax increase on gasoline and aired shortly before the election in key competitive states. But instead of using the magic words of express advocacy, the ad--in order to avoid regulation--concluded "Don't be Gored at the gas pump." [\[FN19\]](#)

## **B. Buying Time 2000**

In a study on political television advertising in the 2000 federal elections, the Brennan Center at New York University documented how pervasive and abusive the issue ad/soft money loophole had become. [\[FN20\]](#) Known as the "Buying Time" study, researchers compiled a database of nearly all political television commercials aired in the 2000 general election. The commercials were captured by the Campaign Media Analysis Group (CMAG), largely by tapping into an old Navy satellite that had previously been used to monitor Soviet submarines during the Cold War. The ads were then coded for content by a team of students at the University of Wisconsin under the direction of Professor Kenneth Goldstein.

In federal elections only, a total of 2871 unique ads were aired 845,923 times at an estimated cost of \$628,655,572. The greatest share of these airings occurred in the few months immediately prior to the general election. [\[FN21\]](#)

Over all elections in 2000 combined, candidates were the principal sponsors of most political television ads, with party committees running second and independent groups third. [\[FN22\]](#) Parties played virtually no role in primary elections, but became a critical player in the general election at all levels-- House, Senate and Presidential. [\[FN23\]](#) There was, however, one very important caveat to this overall trend: for the first time in recent history, political advertising by parties and groups outspent political ads by candidates in the 2000 presidential general **\*242** election. [\[FN24\]](#) In other words, political players other than candidates were primarily responsible for determining which issues were discussed and which candidate images were seen on the television airwaves. [\[FN25\]](#)

Although group-sponsored ads were not as prominent as candidate and party ads in the 2000 federal elections, they were rapidly gaining ground. In a matter of just a few years, issue advocacy had come on the political scene with a vengeance. Issue advocacy largely became

a concern in the 1996 presidential election, spiraled in use in the 1998 congressional elections, and increased six-fold two years later. In the 2000 election, there were 142,421 airings of political television ads sponsored by independent groups at a cost conservatively estimated above \$98 million. [\[FN26\]](#)

These ads were campaign ads by any standard, except by the magic words standard. FECA, interpreted in the Buckley decision as applicable only to express advocacy communications, became irrelevant to the real world of campaign activity promoting the election or defeat of federal candidates. Soft money could, and did, become the principal source of funds to pay for these campaign ads.

### **C. Soft Money**

In the late 1970s, Congress amended FECA to allow the national parties to finance some party-building activities with "soft money." [\[FN27\]](#) Soft money--money in federal elections that would otherwise be illegal, such as direct corporate or union contributions or contributions in excess of legal limits--was then seen as a potential source of revenues to bolster non-electioneering party activities, and to place parties on par with the rising campaign activity of independent groups. Fearful that campaign finance regulations disadvantaged political parties in relation to outside independent groups, who could spend unlimited treasury funds for issue advocacy, Congress sought to strengthen the parties by permitting them to receive and spend those same corporate and union treasury funds for party-building activities. [\[FN28\]](#)

Prior to implementation of the Bipartisan Campaign Reform Act of 2002 (BCRA), the national and state parties made direct appeals to wealthy individuals, corporations, and unions for soft money contributions to the \*243 parties. In the 2002 election cycle, national and congressional party committees broke all previous records in soft money fundraising and, for the first time, Democratic party committees were on par with Republican party committees in terms of raising and spending soft money. [\[FN29\]](#) These national committee soft money expenditures were for many political purposes, not just television advertising. This was a banner year for soft money, which totaled more than five times the amounts raised and spent in 1992. [\[FN30\]](#)

Research, however, showed that soft money was rarely used for its intended get-out-the-vote and party-building purposes. Only eight and one-half cents out of every soft money dollar were spent by the parties on activities associated with mobilizing voters, such as get-out-the-vote drives, party registration efforts, absentee ballot mailings, party slate mailings, phone banks, and other activities intended to fortify a party's electoral base. By far, the single greatest share of soft money dollars spent by the parties relative to federal elections went into electioneering "issue" advertising for or against candidates. [\[FN31\]](#)

### **III. BCRA and the McConnell Decision**

Under tremendous public pressure, Congress and the President relented to the reform movement and passed the Bipartisan Campaign Reform Act of 2002 (BCRA), [\[FN32\]](#) also

known as the McCain-Feingold campaign finance law, when the Senate was controlled by the Democrats. Briefly, the two key pillars of BCRA are (1) a ban on soft money fundraising and spending by candidates and parties in federal elections; and (2) a redefinition of campaign ads to include broadcast ads that mention a candidate, target the candidate's election district, and air within thirty days of a primary election or sixty days of a general election. The act banned soft money donations to the national parties and federal officeholders, [FN33] and ads that are designed to promote the election or defeat of candidates are to be considered campaign ads, subject to contribution limits and disclosure requirements. [FN34]

BCRA sharply curtailed the role of soft money in federal elections. Most of the provisions of the new campaign finance law went into effect on November \*244 6, 2002. [FN35] Federal officeholders and candidates and the national parties are now prohibited from raising or spending soft money in most instances. As part of a congressional compromise, however, entities may contribute up to \$10,000 in soft money (known as Levin funds) to each state and local party organization, if permitted by state law, that may be spent for voter mobilization activity in federal elections. [FN36] Additionally, the Federal Election Commission has promulgated a series of regulations to loosen the soft money ban somewhat, [FN37] much to the consternation of the congressional sponsors, who have filed a lawsuit in response. [FN38]

BCRA also provides a new definition of campaign ad, as differentiated from an issue ad. [FN39] The law retains the magic words standard as well as the concept that any advertisement sponsored by a candidate is a campaign ad. But it also imposes a "bright-line standard" in which any broadcast advertisement that depicts a candidate within thirty days of a primary election or sixty days of a general election, and is targeted to the voting constituency of that candidate, constitutes an "electioneering communication" subject to federal campaign laws. [FN40]

In a sweeping victory for campaign finance reform, the U.S. Supreme Court in *McConnell v. FEC* [FN41] upheld nearly all elements of BCRA. In a 5-to-4 decision, the majority of the Court ruled:

*[T]he statute's two principal, complementary features--Congress' effort to plug the soft money loophole and its regulation of electioneering communications-- must be upheld in the main. [FN42]*

The majority opinion, written by Justices Stevens and O'Connor, upheld the two key provisions of the campaign finance law: the ban on soft money in federal elections, and the regulation of campaign advertisements disguised as "issue ads." [FN43] More than that, the Court upheld nearly every element of BCRA and did so in a tone that will be interpreted as a strong endorsement of a strict campaign finance regulatory regime. For example, the Court majority clearly \*245 acknowledged that soft money was being used to finance campaign advertisements and not for party-building activities and voter mobilization when it said:

*The record here reflects that corporations and unions used soft money to finance*

*a virtual torrent of televised election-related ads during the relevant period. Congress justifiably concluded that remedial legislation was necessary to stanch that flow of money. [FN44]*

The Court also recognized that the free flow of soft money to the national parties was a prescription for corruption, not just the appearance of corruption:

*So pervasive is this practice that the six national party committees actually furnish their own menus of opportunity for access to would-be soft-money donors, with increased prices reflecting an increased level of access. For example, the [Democratic Congressional Campaign Committee (DCCC)] offers a range of donor options, starting with the \$10,000-per-year Business Forum program, and going up to the \$100,000-per-year National Finance Board program. The latter entitles the donor to bimonthly conference calls with the Democratic House leadership and chair of the DCCC, complimentary invitations to all DCCC fundraising events, two private dinners with the Democratic House leadership and ranking members, and two retreats with the Democratic House leader and DCCC chair in Telluride, Colorado, and Hyannisport, Massachusetts. . . .*

*. . . . As the record demonstrates, it is the manner in which parties have sold access to federal candidates and officeholders that has given rise to the appearance of undue influence. . . . It is no surprise then that purchasers of such access unabashedly admit that they are seeking to purchase just such influence. [FN45]*

The Court even admonished the Federal Election Commission for letting money in politics get so out of hand. FEC regulations, noted the Court, created the problem of soft money. In the words of the Justices, "the FEC regulations permitted more than Congress, in enacting FECA, had ever intended." [FN46] As such, BCRA, affirmed by the McConnell decision, has largely removed the national political parties and federal officeholders from the soft money game.

But the law has not ended the soft money game altogether.

#### **IV. Electioneering Non-Profit Groups and the Tax Code**

After celebrating passage of the most sweeping campaign finance reform legislation in over a quarter century, and hailing significant improvements in the disclosure law covering Section 527 groups, a harsh reality is beginning to grip the reform community. The two central features of BCRA--the soft money ban and sham issue ad regulation--are being threatened by an old conduit in new clothes: non-profit groups. The problem lies in the permissible electioneering activities of two distinct but related classes of non-profit \*246 organizations: § 527 groups and § 501(c) non-profit groups. The latter assume special importance under today's campaign finance regime.

It is critical in attempting to understand the permissible political activities of non-profit

organizations to realize that two different sets of laws regulate these activities: the Federal Election Campaign Act (FECA) and the Internal Revenue Code. Both laws use different definitions of "electioneering" activities and pursue different objectives in regulating organizations.

FECA specifically regulates campaign activity of organizations. In so doing, FECA operates on a very narrow definition of electioneering activity. Under FECA, as amended by BCRA, electioneering activity includes:

**Express advocacy communications**, which employ the "magic words" of "vote for," "vote against," "elect" or something comparable; and

**Electioneering communications**, which depict a federal candidate within sixty days of a general or runoff election or thirty days before a primary election, and which target the voting constituency in that election. [\[FN47\]](#)

By contrast, the Internal Revenue Code specifically regulates the tax status of organizations. As such, the tax code uses a broad definition of electioneering activity, which is any activity designed to influence the election or appointment of individuals to federal, state, or local office, or office in a political organization. [\[FN48\]](#) Electioneering activities for tax purposes include electioneering issue advocacy and voter mobilization efforts, which commonly are not included in FECA's definition of electioneering. [\[FN49\]](#)

## **A. Key Categories of Electioneering Non-Profit Groups**

The laws apply differently to different classes of organizations. Political action committees, or PACs, whose activities fall under FECA's definition of electioneering, must register with the Federal Election Commission and abide by all the contribution limits and reporting requirements of federal campaign law. Non-profit groups that avoid the express advocacy or electioneering communications definitions of FECA, but which pursue other electioneering \*247 activity as their primary purpose, must register with the IRS as Section 527 groups. [\[FN50\]](#) Business, labor and ideological groups that intend to conduct substantial amounts of electioneering activity, but not as the primary purpose of the organization, may register with the IRS as 501(c) non-profit tax exempt groups. [\[FN51\]](#) This entitles them to dramatically reduced disclosure requirements compared to what is imposed on Section 527's groups. Finally, groups that do not plan on conducting substantial lobbying and electioneering activity may register as 501(c)(3) charities, entitled to generous tax benefits for the contribution to the organization. [\[FN52\]](#) All these classes of non-profit groups file their financial activity reports with the IRS and not the FEC, no matter what their level of electioneering activity. [\[FN53\]](#)

### **1. Section 527s**

The tax code established 527 groups so that a group may engage in electioneering activities without jeopardizing its tax exempt status. As a result, it had been the favorite vehicle for special interest groups seeking to influence federal elections, especially prior to the 527-



disclosure law of 2000 and subsequent disclosure improvements in 2002. [\[FN54\]](#) Special interest group 527s are founded and sponsored by many types of entities--corporations, unions, advocacy groups on the right and left, and individuals seeking to determine the outcome of elections. They are most known for pumping huge sums of money into elections to put up electioneering ads on TV and radio. But increasingly they are operating "ground wars," large direct mail and telemarketing efforts, as well as voter identification and get out the vote operations. They can even be used to pay for the administrative costs of running a PAC, which raises hard money that can then be used to purchase campaign advertisements. [\[FN55\]](#)

Section 527s are no longer the "stealth PACs" of yore. Congress approved a law in July 2000 requiring all 527s to file regular financial disclosure reports with the IRS. The disclosure requirements applicable to 527s were improved even further with passage of the Brady-Lieberman disclosure law in 2002, which became effective in July 2003. Among its most important provisions, the law requires § 527 groups to file regular reports with much of the same disclosure information that is required of FECA-regulated political committees, \*248 and the reports must be filed electronically and made easily available on the IRS Web site in a searchable and downloadable format.

## **2. 501(c) Non-Profits**

The disclosure requirements for 527s do not apply to 501(c) non-profit organizations. Instead, 501(c) non-profits could become the new "stealth PACs" of choice for soft money operatives wishing to evade campaign finance disclosure laws. As permitted under the tax code, with no regulations to the contrary under federal campaign finance law, non-profits may conduct substantial electioneering activities, and can pay for these activities with soft money. [\[FN56\]](#) Although these groups may not engage in express advocacy or electioneering communications (as defined by BCRA) without registering with the FEC, the reporting and disclosure requirements for all other electioneering activity by non-profits, unlike for § 527 groups, are rudimentary. On their annual Form 990 disclosure reports, the groups only have to list gross receipts and expenditures in a handful of categories. [\[FN57\]](#) There is no detailed information that is publicly disclosed about who the individual contributors are or how much the group spends on television ads, direct mail, telemarketing or other activities. Moreover, the little information that is disclosed is not done in a timely fashion. The groups, for example, do not have to provide regular reports to the IRS during election season. They simply are required to file their Form 990 with the IRS within four and one-half months after their fiscal year ends. [\[FN58\]](#) This is routinely extended an extra six months, which usually puts this limited reporting well past the final election. It can even be difficult to get a group's limited report, often requiring a written request or a trip to the organization's headquarters. [\[FN59\]](#)

Not only are the disclosure laws weaker for 501(c) non-profits than for 527 groups, but BCRA's ban on soft money fundraising by federal officials does not even apply to 501(c) non-profit groups. On the premise that non-profits are not primarily electioneering entities, BCRA allows federal officials to solicit unlimited soft money for non-profit groups whether or not the group conducts substantial electioneering activity.

## B. The Posturing of Non-Profit Groups

BCRA proponents have been startled by the extent to which national party leaders and federal officeholders are clinging to maintain control over the flow \*249 of soft money through electioneering non-profit organizations. [FN60] This is made possible in part by a dramatic and bold rebuke to BCRA in an FEC rulemaking, which, at the time this Policy Essay went to press, was being challenged in court. [FN61] As part of its controversial rulemaking, the FEC decided to grandfather in groups set up prior to November 6, 2002 by the leaders of the national parties by assuming that the new groups are not coordinating activities with the parties. [FN62] As a result, federal officeholders and party leaders have established and financed numerous new non-profits--both § 527 and 501(c) non-profit groups--specifically for the purpose of resuming banned soft money operations in federal elections. Such 527 groups include the Leadership Forum, created on November 4, 2002 by the National Republican Congressional Committee with a \$1 million transfer in party funds, and the Democratic Majority Senate PAC--Non-Federal Account, formed on the same day by the Democratic Senate Majority PAC--Federal Account, and staffed by a former aide to Al Gore. [FN63]

The explicit purpose of many of these new "unaffiliated" 527 groups is to pick up where the national parties and federal officeholders left off--that is, to raise huge sums of soft money from corporations, unions, and wealthy individuals and to pump that money into electioneering issue ads (which can run up to sixty days before a general election) promoting and attacking candidates. [FN64] They are staffed by the same people who worked with the national parties and congressional caucuses, maintain the same connections, and carry the same electoral objectives. In addition to the 527 groups, many additional shadow committees have been established as 501(c) non-profit groups, but registration records of most of these organizations are not readily available.

Just as ominous for the spirit of BCRA is the expressed concerted effort by progressive groups, labor unions, and wealthy individuals to fund a massive electioneering non-profit drive specifically to oppose the presidential re-election of George Bush. Alarmed by the hard money fundraising prowess of the Bush campaign--expected to raise and spend \$200 million in the 2004 primaries alone, possibly triple the amount of the closest Democratic competitor [FN65]--several Democratic-leaning organizations and individuals have \*250 committed to raise and spend anywhere between \$200 million and \$300 million through non-profits in broadcast advertising before the 60-day window, direct mail ads, and voter mobilization activities. [FN66]

America Coming Together (ACT), a § 527 group led by Steve Rosenthal, former political director of the AFL-CIO, and Ellen Malcolm, president of EMILY's List, is designed to spearhead this effort. Hoping to raise \$94 million in soft money, [FN67] ACT is planning on conducting a massive field effort to register new Democrats and get them out to vote to "defeat George Bush in 2004." [FN68] ACT's ground war is targeting 17 key states that could help determine the outcome of the presidential election. [FN69]

ACT also plans to coordinate its efforts with another 527, The Media Fund. The purpose of The Media Fund is to run broadcast ads supporting the Democratic presumptive nominee in the period from the primary elections in March, 2004, through the Democratic convention in July, 2004--after which the nominee receives a \$74 million grant in public funds to pay for the general election campaign. [\[FN70\]](#) (George Bush is also expected to re-join the presidential public financing program for the general election only and accept the \$74 million general election grant and spending ceiling. [\[FN71\]](#))

Partnership for America's Families, a § 527 group also run by Rosenthal, plans on spending \$12 million in soft money for voter mobilization drives in urban communities. [\[FN72\]](#) Voices for Working Families will complement that voter mobilization drive by focusing on minority voters likely to cast Democratic ballots. [\[FN73\]](#) America Votes and Grassroots Democrats are two more § 527 groups intending to raise and spend soft money on behalf of Democratic candidates. [\[FN74\]](#)

If these objectives are realized, much of the soft money that BCRA sought to eliminate would find its way back into federal elections. Perhaps even more troubling would be that much of this money would go from the well-disclosed coffers of the national parties to the more cloaked coffers of the non-profit community.

**\*251 V. Conclusion: Making BCRA Work--With a Little Help from McConnell**

Section 527s and 501(c) non-profit organizations invariably will play a larger role in federal elections following the ban on soft money under BCRA. But it needs to be emphasized that this does not mark a failure of the new campaign finance regime nor even an unintended consequence.

According to the four primary sponsors of BCRA, reducing the amount of money in federal elections has never been a primary objective of BCRA. This is a reform for another day. [\[FN75\]](#) Instead, the primary objectives of BCRA are (2) to end large contributions from corporations, unions, and wealthy individuals to the national parties and federal officeholders, where the potential for corruption is greatest; and (2) to capture the bulk of electioneering issue ads by parties and independent groups under federal campaign finance law. Both of these objectives have been largely achieved, even with the FEC attempting to pull the rug from beneath them.

Soft money may continue to flow into federal elections through non-profit groups, but non-profits are an arm's length away from officeholders. A \$100,000 soft money contribution to the NRA, for example, is not as likely to buy a sleep-over in the Lincoln bedroom or other favors as a similar soft money contribution to the national parties. And even independent groups are subject to FECA's regulatory regime for so-called issue ads broadcast near an election, at a time when such ads have their greatest impact on elections.

The congressional floor debate over the campaign finance law shows that it was widely

expected that some additional soft money would move from the parties to non-profit groups. [\[FN76\]](#) No one is surprised by this development.

The amount of soft money that may yet flow to electioneering non-profit groups, however, is surprising. The emergence of shadow parties as electioneering non-profit groups waging a full-scale second campaign with non-profits independent of the candidates, flies in the face of the principle of keeping campaign spending down to reasonable levels.

McConnell provides the means for addressing this problem and others.

Under the prior Buckley precedent, federal election activity subject to regulation was limited in scope to express advocacy as defined by the magic words test. McConnell corrects that loophole and vastly expands the constitutional parameters of the type of activity that may be subject to regulation. While the type of political activity that may be subject to regulation \*252 has been expanded, an important--and positive-- constitutional constraint on the scope of regulation still exists: the limitations of FECA must apply only to those groups who have influencing federal elections as their "major purpose." The Court has repeatedly confirmed this tenet [\[FN77\]](#) and did not revise it under McConnell. In the part of Buckley that still governs, the Court ruled that campaign finance regulations "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." [\[FN78\]](#)

Section 527 groups have as their primary purpose affecting elections, while 501(c) non-profit groups do not.

Section 527s were born of the express advocacy loophole created by Buckley. But that loophole may now be closed. Section 527s, which have as their primary purpose activity to influence federal elections, may appropriately be captured under FECA's definition of "political committee" subject to contribution limits and source prohibitions. Ending the exemption of 527s from federal campaign finance law may arguably be achieved either by statute or even through simple regulation by the Federal Election Commission. [\[FN79\]](#) After McConnell, the constitutional obstacle to regulating the electioneering activities of these groups whose major purpose is to influence federal elections is no longer present.

Extending the regulatory regime to capture § 527 political groups must be accompanied by significant safeguards to ensure that legitimate advocacy work by other non-profits is not also captured under the regime. These safeguards would include (1) clarifying that the "major purpose" test for electioneering activity is sufficiently expansive so as not to capture those groups whose electioneering activity is ancillary to their primary purpose of advocacy work \*253 (e.g. 501(c) non-profit groups); and (2) enhancing the disclosure requirements for only aggregate expenditure activity of 501(c) non-profit groups (rather than disclosure of contributors) so that a non-profit group with excessive electioneering expenditures is flagged for the IRS and the public for further scrutiny. Regulation of § 527s is likely to push some electioneering shadow groups who wish to remain cloaked into the 501(c) non-profit community. An enhanced disclosure system for 501(c) groups could help in weeding out

legitimate advocacy organizations from shadow political operatives for the parties or candidates.

Such an improved disclosure system for the non-profit community would not penalize groups with extensive political expenditures--for a substantial amount of electioneering advertising is permissible for 501(c) groups, and many or most of these political communications may in fact be deemed genuine issue advertising--but it would help the IRS flag potential abuses of the tax code for closer scrutiny under the "facts-and-circumstances" test.

The Bipartisan Campaign Reform Act has saved FECA and preserved the integrity of the federal campaign finance regulatory regime. The McConnell decision provides the constitutional framework for curbing electioneering abuses and preventing political operatives from discovering new loopholes--as long as the FEC faithfully administers the law.

# Permissible Political Activities of PACs and Non-Profit Organizations Under Federal Campaign Finance and Tax Laws

Prepared by Public Citizen's Congress Watch (February, 2004)

Campaign Activity	Federally Regulated PACs	Section 527 Groups	Non-Profits 501(c)(4)-(8)	Charities 501(c)(3)
<p><b>Express Advocacy</b> Defined by FECA as political communications that use the “Magic Words,” such as “vote for” or “vote against”</p>	<ul style="list-style-type: none"> <li>▪ Unlimited, but subject to FECA’s contribution limits and reporting requirements.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Prohibited for Section 527s, unless registered as limited<sup>1</sup> “independent expenditures” and subject to the disclosure requirements and limits of FECA.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Prohibited for 501(c) non-profits, unless registered as limited<sup>1</sup> “independent expenditures” and subject to the disclosure requirements and limits of FECA.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Prohibited.</li> </ul>
<p><b>Electioneering Communications</b> Defined by FECA as broadcast communications that depict a candidate with in 60 days of a general election, 30 days of a primary election</p>	<ul style="list-style-type: none"> <li>▪ Unlimited, but subject to FECA’s contribution limits and reporting requirements.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Prohibited for Section 527s, unless registered as limited<sup>1</sup> “electioneering communications” and subject to reporting requirements and limits of FECA.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Prohibited for 501(c) non-profits, unless registered as limited<sup>1</sup> “electioneering communications” and subject to reporting requirements and limits of FECA.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Prohibited.</li> </ul>
<p><b>Electioneering Activity</b> Defined broadly by the IRS as political activity designed to influence the selection of any individual to federal, state or local office, including issue advocacy, broadcast ads, polling, get-out-the-vote activities, and so forth. <i>Note:</i> Despite the broader definition of electioneering activity under the IRS Code, express advocacy and electioneering communications are still subject to FECA regulations.</p>	<ul style="list-style-type: none"> <li>▪ Unlimited, but subject to FECA’s contribution limits and reporting requirements.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Permitted, as the primary purpose of the organization is to accept contributions and make expenditures for electioneering activity.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Permitted, but not as the “primary purpose” of the organization.</li> <li>▪ Permissible electioneering activity must be relevant to the organization’s “primary purpose” stated in its IRS registration and articles of incorporation.<sup>2</sup> Electioneering activity that addresses matters beyond the organization’s policy objectives is not permitted, such as advertisements that discuss the full range of a candidate’s viewpoints and bear no relation to the organization’s principal objectives.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Prohibited, except for non-partisan voter registration and educational activities, such as sponsoring a candidate debate and distributing unbiased voter records.</li> </ul>

Campaign Activity	Federally Regulated PACs	Section 527 Groups	Non-Profits 501(c)(4)-(8)	Charities 501(c)(3)
<p><b>Contribution Limits to the Organization</b></p>	<ul style="list-style-type: none"> <li>▪ Subject to FECA limits: Individuals: \$5,000/year. PACs: \$5,000/year. Parties: \$5,000/year. Corporations/Unions: Prohibited.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Unlimited from corporations, unions, and individuals.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Unlimited from corporations, unions, and individuals.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Unlimited from corporations, unions, and individuals.</li> </ul>
<p><b>Disclosure Requirements</b></p>	<ul style="list-style-type: none"> <li>▪ Groups receiving contributions or making expenditures of \$1,000 or more to promote or attack federal candidates must register with the FEC as a PAC within 10 days.</li> <li>▪ PACs must file with the FEC total and itemized contributions and expenditures on a quarterly basis in an election year, along with a pre-election and post-election reports. Biannual reports are required in non-election years.</li> <li>▪ The reports must include itemized contributions and expenditures of \$200 or more, including the name, date, occupation/employer of contributors and the purpose and candidates affected by the expenditures.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Groups receiving contributions or making expenditures of \$25,000 or more must register with the IRS within 24 hours after formation.</li> <li>▪ 527s must file with the IRS total and itemized contributions and expenditures on a quarterly basis in an election year, along with additional pre-election and post-election reports. Biannual reports are required in non-election years.</li> <li>▪ The reports must include itemized contributions of \$200 or more and expenditures of \$500 or more, including much of the same information as required of PACs except that candidates and campaigns targeted by the expenditures need not be disclosed.</li> <li>▪ Information on the date of contributions and purpose of expenditures are required in the reports.</li> </ul>	<ul style="list-style-type: none"> <li>▪ File with the IRS annually a description of major programs, gross income and expenses, assets and liabilities, and total contributions received.</li> <li>▪ Major donors of \$5,000 or more must also be reported to the IRS but are not publicly disclosed.</li> <li>▪ Must indicate in the filings the total amount spent on lobbying and electioneering activities combined, which is public information.</li> </ul>	<ul style="list-style-type: none"> <li>▪ File with the IRS annually a description of major programs, gross income and expenses, assets and liabilities, and total contributions received.</li> <li>▪ Major donors of \$5,000 or more must also be reported to the IRS but are not publicly disclosed.</li> <li>▪ Charities that elect 501(h) status (“elected expenditures test”) must also account for direct and grass-roots lobbying expenditures. Non-electing charities must disclose amounts expended for general methods of lobbying.</li> <li>▪ Financial activity on non-partisan analyses of legislation must also be filed with the IRS.</li> </ul>

Campaign Activity	Federally Regulated PACs	Section 527 Groups	Non-Profits 501(c)(4)-(8)	Charities 501(c)(3)
<p><b>Disclosure Requirements</b> <i>Continued...</i></p>	<ul style="list-style-type: none"> <li>▪ Reports must be filed electronically for PACs with financial activity of \$50,000 or more and made available to the public on the FEC Web site within 48 hours.</li> <li>▪ The Database on the FEC Web site is searchable, sortable, and downloadable.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Reports must be filed electronically for 527's with financial activity of \$50,000 or more and made available to the public on the IRS Web site within 48 hours (effective June 30, 2003).</li> <li>▪ The Database on the IRS Web site must be searchable and downloadable (effective June 30, 2003).</li> </ul>	<ul style="list-style-type: none"> <li>▪ 990 filings must be made within 2½ months after the end of the organization's tax year, although 6-month extensions are routinely granted.</li> <li>▪ Copies of the annual reports are made available to the public within 30 days after submitting a written request to the organization or the IRS based in Ogden, Utah; or immediately if the request is made in person at the headquarters of the organization. None of these filings are made available on the IRS Web site.</li> </ul>	<ul style="list-style-type: none"> <li>▪ 990 filings must be made within 2½ months after the end of the organization's tax year, although 6-month extensions are routinely granted.</li> <li>▪ Copies of the annual reports are made available to the public within 30 days after submitting a written request to the organization or the IRS based in Ogden, Utah; or immediately if the request is made in person at the headquarters of the organization. None of these filings are made available on the IRS Web site, though they are available online at Guidestar.</li> </ul>
<p><b>Role of Federal Officials/Parties</b></p>	<ul style="list-style-type: none"> <li>▪ Federal officeholders, candidates and national parties may only solicit FEC-regulated money within the contribution limits applicable to the PAC for any political purpose.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Federal officeholders and candidates may not explicitly "ask for" soft money for federal election purposes, although FEC regulations permit officeholders to participate in soft money fundraising events.</li> <li>▪ Federal officeholders and candidates may solicit up to \$20,000/year in soft money exclusively for GOTV purposes.</li> <li>▪ National parties may not solicit soft money for Section 527 groups.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Federal officeholders and candidates may solicit unlimited soft money for non-profit groups whose function is not primarily electioneering, whether or not the group conducts substantial electioneering activity.</li> <li>▪ National parties may not solicit soft money for non-profit groups.</li> </ul>	<ul style="list-style-type: none"> <li>▪ No limit on soft money fundraising for non-profit groups whose function is not primarily electioneering. National parties may not solicit or spend soft money for any purpose.</li> <li>▪ National parties may not solicit soft money for charities.</li> </ul>



Campaign Activity	Federally Regulated PACs	Section 527 Groups	Non-Profits 501(c)(4)-(8)	Charities 501(c)(3)
<b>Tax Exemption<sup>3</sup></b>	<ul style="list-style-type: none"> <li>▪ Contributions are tax exempt, but not deductible.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Contributions are tax exempt, but not deductible.</li> <li>▪ Contributions of \$10,000 or more are exempt from the hefty gift tax.</li> <li>▪ Investment income is taxable at the highest corporate rate.</li> <li>▪ Transfers of funds between 527s and PACs are tax exempt.</li> <li>▪ Risks losing tax exempt status if electioneering funds and non-electioneering funds are co-mingled and unaccounted; or if electioneering activity extends into express advocacy or electioneering communications under FECA.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Contributions are tax exempt, but not deductible.</li> <li>▪ Contributions of \$10,000 or more are <i>not</i> exempt from the hefty gift tax.</li> <li>▪ Investment income is tax exempt for organizations not involved in electioneering activity.</li> <li>▪ For organizations involved in electioneering activity, it is subject to tax on the lesser amount of investment income or the amount expended on electioneering activity.</li> <li>▪ Expenditures for electioneering activities are tax exempt.</li> <li>▪ Risks losing tax exemption status by failing the surrounding facts-and-circumstances test—that is, based on a determination of the group’s activities, it is deemed that the organization’s communications are designed primarily to influence candidate elections rather than promote the organization’s objectives through lobbying.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Contributions are tax exempt and deductible.</li> <li>▪ Contributions of \$10,000 or more are exempt from the hefty gift tax.</li> <li>▪ Investment income is tax exempt.</li> <li>▪ Risks losing tax exemption status by either: (a) failing the 20% maximum expenditures test for lobbying activities if an elected charity; or (b) the facts-and-circumstances test of whether their lobbying activities are substantial relative to other activities if a non-elected charity.</li> </ul>

Campaign Activity	Federally Regulated PACs	Section 527 Groups	Non-Profits 501(c)(4)-(8)	Charities 501(c)(3)
<b>Lobbying Activity</b>	<ul style="list-style-type: none"> <li>▪ No limit, but organized primarily as an electioneering PAC.</li> </ul>	<ul style="list-style-type: none"> <li>▪ No limit, but electioneering is the organization’s primary purpose.</li> </ul>	<ul style="list-style-type: none"> <li>▪ No limit.</li> </ul>	<ul style="list-style-type: none"> <li>▪ “No substantial part” of its activities may be for either “direct” lobbying (influence legislative bodies) or “grass-roots” lobbying (influence public opinion to affect legislation).</li> <li>▪ “No substantial part” has ever been clearly defined, but the expenditures test is that lobbying activity should not exceed 5% of the charity’s revenues if the charity has not elected 501(h) status, or 20% of direct lobbying activity and 25% of indirect lobbying activity if the charity elected 501(h) status, up to a maximum of \$1 million.</li> <li>▪ Lobbying activity does not include communications of non-partisan analyses, research or reports.</li> </ul>

<sup>1</sup> Section 527s and 501(c) non-profits may not have as their “major purpose” independent expenditures or electioneering communications without assuming PAC status, fully subject to FECA.

<sup>2</sup> The primary purpose standard for a 501(c) can be very broadly stated in the organization’s registration documents and tax filings. In assessing whether an organization’s electioneering activities have exceeded permissible boundaries, the IRS would apply a facts-and-circumstances test. For example, if a 501(c)(5) labor union ran extensive political ads promoting candidates explicitly because they are affiliated with the Democratic party, the facts-and-circumstances in this case could warrant a decision that party affiliation is not a primary purpose of the labor union and thus the ads risk the union’s tax status.

<sup>3</sup> Despite ambiguity, the facts-and-circumstances test for tax exemption status can be distinguished from the elected expenditure test [501(h) status] in two respects. First, the latter is based exclusively on expenditures of money, whereas the former looks at expenditures as well as other factors such as time and effort expended, including the time and effort of unpaid volunteers, and the relative place of the organization’s lobbying activities in its larger agenda. Second, the elected expenditure test limits grass-roots lobbying to one-fourth of permissible lobbying, whereas the facts-and-circumstances test makes no distinction between direct and grass-roots lobbying.

## Endnotes

[FNd1]. Craig Holman, Legislative Representative, Public Citizen's Congress Watch.

[FNdd1]. Joan Claybrook, President, Public Citizen.

[FN1]. [Pub. L. No. 107-155](#), 116 Stat. 81 (2002) (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C.).

[FN2]. Under the leadership of President Theodore Roosevelt, the Tillman Act of 1907 banned corporate campaign contributions to candidate and party committees in federal elections. Decades later, in the 1930s, conservative officeholders became concerned that the expansion of the federal workforce under President Franklin Roosevelt's New Deal would lead to the creation of a large, new labor group working for a liberal Democratic party. As a result, Congress passed the Hatch Act of 1939, named after Senator Carl Hatch (D-N.M.), which extended earlier prohibitions against political activity by federal employees, including solicitation of political contributions. As labor unions continued to play a significant role in Democratic party politics, Congress finally passed the 1943 War Labor Disputes Act (Smith-Connally Act) over Roosevelt's veto. The Smith-Connally Act barred direct contributions from union treasuries to federal candidates. This restriction was renewed permanently in 1947 as the Taft-Hartley Act. In the 1970s, the prohibition on corporate and union treasury money in federal elections became codified, along with a \$1,000 limit on contributions from individuals, in the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at [2 U.S.C. §§441a\(a\), 441b\(a\) \(2000\)](#)).

[FN3]. Press Release, Fed. Election Comm'n, Party Fundraising Reaches \$1.1 Billion in 2002 Election Cycle, (Dec. 18, 2002), available at <http://www.fec.gov/press/press2002/20021218party/20021218party.html>.

[FN4]. The first lawsuit was filed by the National Rifle Association (NRA), which, according to standard court protocol, should have established the name of the case as NRA v. Federal Election Commission. However, the court adjusted the official name of the case to McConnell in deference to the wishes of the plaintiffs. Ironically, because of the name change, "McConnell" is the term now used to describe the constitutional precedent in favor of strict limits on the financing of campaigns.

[FN5]. Although BCRA has some immediate impact on campaign finance in state and local elections, such as the Levin Amendment's ban on state party committees receiving and spending more than \$10,000 each on activities that affect any election in which a federal candidate is on the ballot, a more significant impact of BCRA on the states is likely to be in paving the way for comparable state campaign finance laws. As of this writing, reform groups are already considering soft money bans and/or electioneering communications restrictions for regulating state elections in Alabama, Georgia, Oregon and Wisconsin.

[FN6]. Section 527 groups and 501(c) organizations are two classes of non-profit organizations

registered with the Internal Revenue Service. See [I.R.C. §§501, 527 \(2000\)](#). These organizations are distinct from "political committees" registered with the Federal Election Commission in that they are not supposed to have as their major purpose campaigning for or against federal candidates. For further discussion of the distinction between federal campaign finance law and the tax code, see Appendix A.

[FN7]. [2 U.S.C. §§431-456 \(2000\)](#).

[FN8]. For a discussion of the early FECA, see Herbert Alexander, *Financing the 1976 Election* (1979).

[FN9]. [424 U.S. 1 \(1976\)](#).

[FN10]. [Id. at 44-45](#).

[FN11]. Glenn Moramarco, Brennan Ctr. for Justice, *Regulating Electioneering: Distinguishing Between "Express Advocacy" and "Issue Advocacy"* 6 (1998).

[FN12]. [Buckley, 424 U.S. at 44](#).

[FN13]. [Id. at 44 n.52](#). The Court recognized that using such a "magic words" standard of express advocacy was untested at the time and could conceivably be subject to abuse. In its *Buckley* decision, the Court lamented: "It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." *Id.* at 45.

[FN14]. Some subsequent court decisions have expanded the list of words of express advocacy. For example, one court extended the express advocacy test to include the essential nature of the message when read as a whole. In [Federal Election Commission v. Furgatch, 807 F.2d 857 \(9th Cir. 1987\)](#), the Ninth Circuit determined that an ad sharply critical of President Jimmy Carter, which asserted that "if he succeeds [in reelection] the country will be burdened with four more years of incoherencies, ineptness and illusion... DON'T LET HIM DO IT," constituted express advocacy. In another decision by the Supreme Court, [Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 \(1980\)](#), a pamphlet that encouraged readers to "vote pro-life" was deemed electioneering in nature subject to the disclosure requirements of federal law. Other court decisions have continued to adhere to the specific examples of words of express advocacy offered in footnote 52 as the appropriate standard for distinguishing campaign ads from issue ads. See, e.g., [Fed. Election Comm'n v. Christian Action Network, Inc., 110 F.3d 1049 \(4th Cir. 1997\)](#).

[FN15]. The problem of distinguishing which type of political activity is electioneering and which type is merely meant to promote issues emerged early in the debate to reform campaign financing. The Anti-Saloon League, formed in the late 1800s to promote Prohibition, had become an effective political force in American politics, lobbying officeholders in Capitol Hill, publishing leaflets, and campaigning for and against congressional candidates. In 1926, the U.S.

Senate launched an investigation into the League's campaign activities. The League responded that its activities did not fall under federal campaign finance disclosure laws because they were "educational, scientific, and charitable rather than political as intended by law." Craig **Holman & Luke McLoughlin**, *Buying Time 2000: Television Advertising in the 2000 Federal Elections* 24 (2001).

[FN16]. See, e.g., *id.* at 23.

[FN17]. *Id.* at 60-68. Although the Buckley decision permitted the national parties to raise and spend unlimited soft money on electioneering issue ads, FEC regulations required that the parties disclose their soft money accounts to the public. Interest groups, on the other hand, fell outside the disclosure requirements of FECA. [11 C.F.R. §104.8\(e\)-\(f\) \(2000\)](#), superseded by Bipartisan Campaign Reform Act of 2002 (BCRA), [Pub. L. No. 107-155](#), 116 Stat. 81 (2002).

[FN18]. In addition to being confused by independent groups using nondescript names in their disclosure lines and frequently falling outside financial activity reporting requirements, viewers often confuse group-sponsored ads for candidate-sponsored ads because of the lax disclosure requirements. See generally *Election Advocacy: Soft Money and Issue Advocacy in the 2000 Congressional Elections* (David Magleby ed.), at <http://csed.byu.edu/index.jsp> (last updated Dec. 17, 2003).

[FN19]. Overlaying unflattering images of Al Gore and high prices at the gas pump, the announcer ominously intoned:  
Are you taxed enough already? Not according to Al Gore. Gore plans to squeeze more money out of middle class families at the gasoline pump. Gore cast the tie-breaking vote to raise gas taxes 4.3 cents a gallon. He admits he'll add more taxes on gasoline with what he calls a CO2 tax. Gore supported a call to raise taxes so much that gas would cost \$3 a gallon. And Gore's ideas are so extreme. If they ever came to pass, Americans would truly be Gored at the pump.

[FN20]. **Holman & McLoughlin**, *supra* note 15.

[FN21]. *Id.* at 52-53.

[FN22]. *Id.* at 29.

[FN23]. *Id.*

[FN24]. Press Release, Brennan Ctr. For Justice, 2000 Presidential Race First in Modern History Where Political Parties Spend More on TV Ads than Candidates (Dec. 11, 2000), available at [http://www.brennancenter.org/presscenter/releases\\_2000/pressrelease\\_2000\\_1211cmag.html](http://www.brennancenter.org/presscenter/releases_2000/pressrelease_2000_1211cmag.html).

[FN25]. Of the \$163,129,637 spent on TV advertising in the presidential elections of 2000, candidates spent \$67,116,919, parties spent \$79,894,799, and other groups spent \$16,117,919. *Id.*

[FN26]. **Holman & McLoughlin**, *supra* note 15, at 20. In the 1998 congressional elections,

groups spent about \$11 million to air 21,712 television ads. Id.

[FN27]. See *Financing the 2000 Election* 4 (David Magleby ed., 2002).

[FN28]. Id.

[FN29]. National Republican party committees raised \$250.0 million in soft money and spent \$258.1 million in soft money, while national Democratic party committees raised \$245.9 million in soft money and spent \$249.9 million. See Press Release, Fed. Election Comm'n, Non-federal Summary, 1992-2002 (Dec. 18, 2002), available at <http://www.fec.gov/press/press2002/20021218party/nonfederalsummary.xls>.

[FN30]. Id.

[FN31]. Some 37.8% of federal soft money went to media "issue advertising," compared to 18.1% for administration, 15.4% for fundraising, 14.3% for salaries, 8.5% for voter mobilization, 3.5% for general mail, and 2.4% for consultants. **Holman & McLoughlin**, *supra* note 15, at 67.

[FN32]. [Pub. L. No. 107-155](#), 116 Stat. 81 (2002) (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C.).

[FN33]. Id. §101, 116 Stat. at 82-86.

[FN34]. Id. §§201-204, 116 Stat. at 88-92.

[FN35]. Id. §402, 116 Stat. at 112-113.

[FN36]. Id. §102, 116 Stat. at 86-87.

[FN37]. Some of the contested regulations are [11 C.F.R. §300.52](#) (officeholders participating in fundraising); [11 C.F.R. §100.5](#) (definition of political committee); [11 C.F.R. §100.29](#) (content standard as measure of coordination); [11 C.F.R. §100.24](#) (definition of federal election activity); [11 C.F.R. §100.133](#) (voter registration activities); and [11 C.F.R. §106.5](#) (allocation of expenditures).

[FN38]. *Shays v. Fed. Election Comm'n*, No. 02-CV-1984 (D.D.C. filed Oct. 8, 2003). On October 8, 2003, Congressmen Christopher Shays (R-Conn.) and Marty Meehan (D-Mass.), two of the principal sponsors of the Bipartisan Campaign Reform Act, filed suit in the U.S. District Court for the District of Columbia to have the soft money and coordination rules the FEC adopted to implement Title I and parts of Title II of the Act reversed. The suit alleges that the FEC acted "arbitrarily and capriciously" in its rulemaking by opening numerous loopholes through which soft money can still be raised and spent.

[FN39]. BCRA §§201-204.

[FN40]. Id.

[\[FN41\]. 124 S. Ct. 619 \(2003\)](#)

[\[FN42\]. Id. at 627.](#)

[\[FN43\]. Id.](#)

[\[FN44\]. Id. at 636.](#)

[\[FN45\]. Id. at 665-66.](#)

[\[FN46\]. Id. at 660 n.44.](#)

[\[FN47\]. Bipartisan Campaign Reform Act of 2002 \(BCRA\), Pub. L. No. 107- 155, §201, 116 Stat. 81, 88 \(2002\).](#)

[\[FN48\]. For a § 527 organization, electioneering activity is defined as "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice- Presidential electors, whether or not such individual or electors are selected, nominated, elected or appointed." I.R.C. § 527\(e\)\(2\) \(2002\). For a 501\(c\) non-profit group, "political expenditure" means an expenditure in "any participation in, or intervention in \(including the publication or distribution of statements\), any political campaign on behalf of \(or in opposition to\) any candidate for public office." I.R.C. §4955\(a\)\(1\) \(2002\).](#)

[\[FN49\]. A series of Revenue Rulings from the IRS clarify that facts and circumstances are to be taken into consideration in determining whether an activity constitutes an "intervention" in a campaign. These facts and circumstances include such factors as timing of the message, targeting the message, and tone of the message. Rev. Rul. 78-248, 1978-1 C.B. 154; Rev. Rul. 80-282, 1980-2 C.B. 178; Rev. Rul. 81-95, 1981-1 C.B. 332.](#)

[\[FN50\]. I.R.C. §527\(e\)\(1\) \(2002\).](#)

[\[FN51\]. I.R.C. §501\(c\)\(4\)-\(6\) \(2002\).](#)

[\[FN52\]. I.R.C. §501\(c\)\(3\) \(2002\).](#)

[\[FN53\]. See Appendix A, Permissible Political Activities of PACs and Non- Profit Groups Under FECA and the Tax Code.](#)

[\[FN54\]. Act of July 1, 2000, Pub. L. No. 106-230, 114 Stat. 477 \(amending requirement of 527 organizations to disclose their political activities\); Income Tax Notification and Return Requirements--Political Committees of 2002, Pub. L. No. 107-276, 116 Stat. 1929.](#)

[\[FN55\]. See Richard Kornylak, Disclosing the Election-Related Activities of Interest Groups Through §527 of the Tax Code, 87 Cornell L. Rev. 230 \(2001\).](#)

[FN56]. For a discussion of permissible political activities by 501(c) non-profits, see [Rev. Rul. 2004-6, 2004-4 I.R.B. 328](#).

[FN57]. I.R.S. Form 990 and Form 990-EZ Instructions (2003).

[FN58]. *Id.* at 6.

[FN59]. Only reports for 501(c)(3) groups are available on the web at [www.guidestar.org](http://www.guidestar.org).

[FN60]. Amy Keller, McCain Takes Aim at "Shadow" Groups, Roll Call, Nov. 18, 2002, [2002 WL 8127314](#).

[FN61]. *Shays v. Fed. Election Comm'n*, No. 02-CV-1984 (D.D.C. filed Oct. 8, 2003).

[FN62]. [11 C.F.R. §110.3](#).

[FN63]. Chris Cillizza, New Democratic PACs Prosper, Roll Call, Aug. 4, 2003, [2003 WL 7691714](#).

[FN64]. Amy Keller, Reform Oriented 527 Teams Up with ACT, Roll Call, Feb. 9, 2004, [2004 WL 61550718](#); Senate Passes Campaign Finance Reform Bill, *The Bulletin's Frontrunner*, Mar. 21, 2002.

[FN65]. William Schneider, The Internet as ATM, *Nat'l J.*, Oct. 25, 2003; see also [www.WhiteHouseForSale.org](http://www.WhiteHouseForSale.org).

[FN66]. Eliza Newlin Carney et al., New Rules of the Game, *Nat'l J.*, Dec. 20, 2003, at 3804.

[FN67]. *Id.* at 3803.

[FN68]. Thomas Edsall, Liberals Form Fund to Defeat President, *Wash. Post*, Aug. 8, 2003, at A3.

[FN69]. Carney et. al, *supra* note 66, at 3803.

[FN70]. Press Release, Fed. Election Comm'n, 2004 Presidential Spending Limits Now Available (Mar. 8, 2004), available at <http://www.fec.gov>.

[FN71]. Jill Lawrence & Jim Drinkard, Kerry, Dean Might Forgo Cash, *USA Today*, Sep. 16, 2003, at 1A; see also [www.WhiteHouseForSale.org](http://www.WhiteHouseForSale.org).

[FN72]. Carney et. al, *supra* note 66, at 3803.

[FN73]. *Id.*



[FN74]. Id.

[FN75]. W. Parker Baxter, Recent Developments in Campaign Finance Law: Implementing the Bipartisan Campaign Reform Act of 2002, 6 N.Y.U. J. L. & Pub. Pol'y 589, 591-592 (2002).

[FN76]. "The soft money ban in this bill will be more of a temporary road block than a true dead end. I believe that eventually soft money will find a detour, and it will into federal elections from another direction." 149 Cong. Rec. 539 33-06, S 3240 (2001) (statement of Senator Bill Nelson).

[FN77]. See, e.g., [Fed. Election Comm'n v. Mass. Citizens for Life, 479 U.S. 238, 262 \(1986\)](#) ("[If an] organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee.").

[FN78]. Id. (citing [Buckley v. Valeo, 424 U.S. 1, 79 \(1976\)](#)) (emphasis added).

[FN79]. Due to the prodding of the Republican national party, the FEC is considering promulgating new regulations to extend the contribution limits and disclosure requirements of FECA to [§527](#) groups that conduct "federal election activity," defined as any activity that "promotes, supports, attacks or opposes" a federal candidate at any time. On February 18, 2004, the commission discussed the issue in response to an advisory opinion request from Americans for a Better Country (ABC), a Republican-leaning PAC and [§527](#) group. The advisory opinion finally approved by the commission signaled that the agency favors some form of stricter regulation of the political activities of §527s, but noted that the advisory opinion was not the proper forum for addressing the issue. The commission agreed that the entire issue of regulating the activities of political committees and non-profit groups must be addressed through the normal regulatory process, complete with public hearings.

Regulatory proceedings on the issue were initiated on March 1, 2004, with the issuance of Notice of Proposed Rulemaking 2004-06, "Political Committee Status." Public comments were scheduled for April 5, 2004, with public hearings to follow within the month. The issue has stirred considerable controversy. See, e.g., Dan Balz, Democrats Forming Parallel Campaign, Wash. Post, Mar. 10, 2004, at 1A; Glen Justice, Political Groups Taking on Bush in Ad Campaign, N.Y. Times, Mar. 10, 2004, at 1A.

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