Swift Boat Democracy
& the New American Campaign Finance Regime

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The Bipartisan Campaign Reform Act of 2002

Commonly known as McCain-Feingold in the Senate and Shays-Meehan in the House, the Bipartisan Campaign Reform Act of 2002 ("BCRA") amended the Federal Election Campaign Act of 1971 ("FECA") to impose significant new restrictions on American politicians, political parties, interest groups and business corporations interested in expressing an opinion on public policy or presidential and congressional elections. BCRA passed Congress after years of attempts. Following the Enron and WorldCom scandals (which had nothing to do with election activity), political conditions finally supported passage of sweeping new restrictions on corporate political activity. The Bipartisan Campaign Reform Act was passed by Congress and signed by the President in March 2002.[2] The new law went into effect November 6, 2002, and the Federal Election Commission (FEC) quickly implemented dozens of new regulations to implement the new law. The key provisions of the new law are summarized below. What remains to be seen is what impact they will have upon American elections and democratic speech.

Overriding Purpose of BCRA

The overriding purpose of the new reforms was to eliminate unlimited expenditures by corporations, unions, and interest groups. Reformers argued that such expenditures "corrupted" politicians. Such unlimited expenditures had become known as "soft money," – vast election-season expenditures by interest groups and corporations and large, unlimited personal and corporate contributions to political parties. The new law's primary purpose was to eliminate "soft money," from influencing federal elections. Before BCRA, the expenditures influenced elections in two primary respects: (1) large expenditures on "issue advocacy" on the eve of elections, and (2) unlimited contributions to the "non-federal" accounts of the political party committees.

"Issue advocacy," as it became known, was political advertising that identified a federal candidate by name but stopped short of expressly exhorting people to vote for or against the candidate (which is known as "express advocacy"). The messages would say, "John Smith voted

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[2] Pub. L. No. 107-155, 116 Stat. 81 (2002).

twelve times to raise your taxes. Call John Smith and tell him you pay too much in taxes." Before enactment of BCRA, corporations and unions, as well as interest groups funded by them, were free to broadcast these messages under a bright line drawn by the Supreme Court in *Buckley v. Vale*o.[3] The BRCA imposed strict limitations upon such advocacy when funded by corporations, labor unions and interest groups funded by corporations or unions.

Before BCRA, individuals, corporations, unions and interest groups also had been free to donate unlimited funds to the national party committees' "non-federal" accounts. The national party committees used these funds for generic party-building activities, get-out-the-vote drives, and state elections. BCRA eliminated "non-federal" accounts altogether on the theory that the national party committees were a conduit between large corporate, union and individual financial contributions and federal officeholders who would be beholden to the big party donors. BCRA also imposed new restrictions on funding of state political parties for their activities touching on federal elections.

Corporations, Unions and Interest Groups

At the heart of the new BCRA restrictions is its restriction against any reference or depiction of a federal candidate on television or radio within 30 days of the candidate's primary election or 60 days of the general election if the communication is funded by a corporation, labor union or interest group that receives funding from either. The 30- and 60-day blackout periods apply to any depiction, mention or "unambiguous reference" to a candidate, called an "electioneering communication" by BCRA. The blackout period applies even if the reference is made in the context of a legitimate issue message and even if the candidate is an incumbent casting votes in Congress on the eve of an election. The blackout rules do not apply to print, mail or Internet communications.

Prior to BCRA, corporate America understood its political speech rights to be defined by the Supreme Court's decision in *Buckley v. Valeo*. *Buckley* held that FECA restricts only speech that "expressly advocates" the election or defeat of candidates. That is, FECA regulated only public messages and advertisements that contain language expressly exhorting voters to "vote for Smith," "vote against Smith," "support Jones" or "oppose Jones."[4] That meant corporations could spend unlimited funds to discuss public policy while mentioning the name of public officials in the context of policy, so long as they stopped short of saying "vote for" or "vote against" the public official. Such speech was believed to be protected by the First Amendment and was not restricted or even regulated under FECA.[5]

Under *Buckley*, corporations had been free to fund advertisements that say "Senator Jones supports tax policies that will drive businesses and jobs to other countries … Call Senator Jones and tell him to change his position," but completely prohibited from funding advertisements that

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[3] 424 U.S. 1 (1976).

[4] 424 U.S. at 44, fn. 52.

[5] Although FECA was held not to regulate these expenditures, the Internal Revenue Service adopted special rules regarding the tax treatment of such expenditures.

say "Senator Jones supports tax policies that will drive businesses and jobs to other countries … It's time to oppose Senator Jones." The first ad is an example of "issue advocacy" while the latter is "express advocacy" under the *Buckley* regime.

The *Buckley* bright line between "express advocacy" versus "issue advocacy" had defined the boundaries for permissible corporate political speech for 25 years. The Supreme Court consistently had upheld the Constitutional right of corporations to express a position – and to spend corporate funds to do so – on matters of public policy.[6]

However, with passage of BCRA, Congress took steps to close this avenue of public discourse. In the 1990s, those who believed stricter limits on political activity were needed to "cleanse" an expensive system of political campaigns became concerned that too many corporations and other "special interest" groups were exploiting the *Buckley* bright line as a "loophole" with carefully worded advertisements broadcast in the months leading up to elections. They believed these advertisements effectively moved public opinion and thereby unfairly impacted the outcome of elections. Therefore, in BCRA they banned "issue advertisements" funded with corporate funds that mention the name of any federal candidate within 30 days of any federal primary election and 60 days of any federal general election.

Political Parties

BCRA also closed another important avenue of political activity by America's corporations. For decades corporations, labor unions and individuals were permitted to donate unlimited funds to the "non-federal" accounts of the national political parties for non-express advocacy activities such as generic party-building activities, administrative overhead and get-out-the-vote activities. These funds, though unlimited, were still regulated in how they could be used, and were publicly disclosed. Critics labeled these funds "soft money." BCRA completely prohibits the national political parties from receiving any corporate funds and abolishes their "non-federal" accounts.

Likewise, state political parties are now restricted from spending "soft money" on activities which have the effect of aiding federal candidates. BCRA imposed new restrictions on political parties engaged in "federal election activity." Under BCRA, federal election activity includes four categories of activities: (1) voter registration activity during the 120 days before a federal election, (2) voter identification, get-out-the-vote (GOTV) and generic campaign activity conducted in connection with an election in which a federal candidate is on the ballot, (3) a public communication that refers to a clearly identified candidate for federal office and promotes, supports, attacks or opposes a candidate for that office and (4) the services provided by certain political party committee employees.[7] Limits on federal election activity were applied in BCRA only to state and local political parties (and in certain circumstances to officeholders soliciting funds for non-party organizations). The limits are not absolute, however, and state parties may place contributions of no more than $10,000 from single donors into "Levin

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[6] *See, e.g., First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986).

[7] *See* 2 U.S.C. § 431(20)-(24).

accounts" (named for Senator Carl Levin who proposed the limited exception) to spend on federal election activities.

Political Action Committees

Federal political action committees have been subject to strict contribution limits for nearly thirty years. In order to participate in federal elections, a PAC may accept no more than $5,000 from an individual and may contribute no more than $5,000 to a federal candidate in each election. BCRA did not alter these hard money limits. In fact, BCRA's legislative history is quite complimentary of PACs.

PACs also may pay for advertisements that expressly advocate the election or defeat of candidates as well as electioneering communications which reference candidates without an explicit exhortation to vote one way or the other. Although hard money limits restrict the amount of advocacy PACs can afford, PACs remain the principal mechanism for political action by business corporations, labor unions and interest groups.

Individual Citizens

In keeping with BCRA's goal of shifting more political expenditures from "soft money" to "hard money" (funds subject to strict limits), BCRA increased individual contribution limits from $1,000 per election to $2,000 per election. BCRA also increased annual aggregate contribution limits for individuals from $25,000 per year to $95,000 per two-year election cycle. These increases were intended to update FECA's contribution limits, first implemented in 1974, for inflation and to encourage more "hard money" expenditures.

One area of individual activity BCRA did not restrict was the right of individual citizens to make unlimited "independent expenditures to advocate the election or defeat of federal candidates. "Independent expenditures" means an individual's expenditures of personal resources to express his or her own point of view on a candidate or election, and which is not coordinated in any way with a candidate, a political party or their agents. So long as an individual publicly discloses such expenditures, he remains free to spend his own money to communicate his opinions of federal candidates and elections.

Another activity BCRA appears to have left unrestricted is the right of individual citizens to combine their resources in a tax-exempt, unincorporated association to fund "electioneering communications" throughout the election season. Thus, a group of individuals may pool their funds to air all the television and radio messages referring to candidates they can afford. Thus, individual citizens – and especially wealthy citizens -- remain free under BCRA to communicate their opinions about candidates and public officials. More discussion regarding tax-exempt associations of individuals follows below.

Constitutional Challenge: *McConnell v. FEC*

BCRA's new restrictions quickly became the subject of a constitutional challenge, first in a consolidated federal court, and then in the United States Supreme Court, in a case styled *McConnell v. Federal Election Commission*. In that case, a wide range of parties, including the California Republican and Democratic Parties, the AFL-CIO and the United States Chamber of Commerce, as well as dozens of other organizations representing the entire ideological spectrum, challenged the new restrictions as too restrictive under the First and Tenth Amendments of the Constitution. Representing the rights of American business community, the United States Chamber of Commerce, the Associated Builders & Contractors, and the National Association of Manufacturers quickly challenged the new restrictions on corporate political activity as unconstitutional under *Buckley* and its progeny. A similar lawsuit was filed by the AFL-CIO. In all, over 75 plaintiffs have challenged the law in 11 cases consolidated under the style *McConnell v. Federal Election Commission*. The lead plaintiff was U.S. Senator Mitch McConnell of Kentucky.[8]

A federal three-judge panel struck certain provisions and upheld others in May 2003, and then quickly stayed its own 1,630 page opinion in deference to the Supreme Court. The Supreme Court, recognizing the importance of settling the rules before presidential primaries were to commence in January 2004, expedited the appeal, hearing arguments shortly after Labor Day 2003. A landmark 5 – 4 opinion defining the constitutional rights of all American citizens, political parties, unions and corporations to participate in the democracy was handed down on December 10, 2003.[9]

The 5 – 4 majority (O'Connor, Stevens, Breyer, Souter, Ginsberg) of the Supreme Court upheld the constitutionality of substantially all provisions of the Bipartisan Campaign Reform Act of 2002. Of particular interest, the Court upheld the following provisions:

1. 30/60-Day Blackout Periods on "Electioneering Communications":

   The Court upheld the new ban against corporate-funded communications broadcast over television, cable or radio that refer to a federal candidate within 30 days of a primary election and 60 days of a general election. Previously it had been permissible for trade associations and corporations (and labor unions) to broadcast "issue ads" that referred to but did not expressly advocate the election or defeat of a federal candidate at any time.

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[8] To read briefs and court opinions in the *McConnell v. FEC* and track case developments access www.law.stanford.edu/library/campaignfinance.

[9] *McDonnell v. Federal Election Commission*, 540 U.S. 93 (2003).

2. Prohibition Against National Party "Soft Money":

The Court upheld BCRA's prohibition against all corporate contributions to the national political parties' "non-federal" accounts. Previously the national parties had been permitted to receive unlimited corporate and individual contributions for state-related and party-building activities.

3. State Party "Levin Accounts":

The Court upheld BCRA's new restrictions on the ability of state political parties to spend corporate contributions in those states where corporate contributions are permitted by state law, including the $10,000 contribution limit for "Levin Accounts." State parties may receive corporate contributions of up to $10,000, segregate those funds in special "Levin Accounts," and use those funds for combined state and federal election activity. Previously, federal law only scarcely restricted the activities of state political parties.

4. Coordination Without Agreement:

The Court upheld BCRA's revised definition of what constitutes "coordination" between a corporation (or other organization) and a federal candidate/campaign. Previously the law required an agreement between an outside group and a candidate/campaign before the outside group's independent political activities could be deemed a *contribution* to the candidate because it was "coordinated" with the candidate or his staff. Now a formal agreement is not required, and ordinary course meetings and conversations between a corporation's representatives and a candidate could trigger illegal contributions when corporations engage in political activities, such as issue advocacy, based upon information shared in those meetings.

5. Additional Disclosure Burdens on Broadcasters and Advertisers

The Court upheld BCRA's requirement that broadcasters maintain certain publicly available records of politically related broadcasting requests. These include "candidate requests," election message requests" and "issue requests."

The Supreme Court issued three separate majority opinions to address BCRA's five challenged "Titles." Justices Stevens and O'Connor—joined by Justices Souter, Ginsburg and Breyer—delivered the opinion of the Court with respect to Titles I and II. Chief Justice Rehnquist—joined by all members of the Court to varying degrees—delivered the opinion of the Court with respect to Titles III and IV. Justice Breyer—joined by Justices Stevens, O'Connor, Souter and Ginsburg—delivered the opinion of the Court with respect to Title V. Separate dissents and opinions were authored by Chief Justice Rehnquist and Justices Stevens, Scalia, Thomas and Kennedy.

Swift Board Veterans for Truth and
MoveOn.org: The 527 Phenomenon

As restrictive as the new BCRA was intended, however, it did not foreclose all avenues of political association and spending and public communications discussing federal candidates. A myriad of new tax-exempt interest groups have sprung up in the wake of campaign finance reform. Many of these organizations, like Swift Boat Veterans for Truth and the MoveOn.org Voter Fund, are what have become known as "527 organizations" (or "527s" for short), a title drawn from Section 527 of the Internal Revenue Code, pursuant to which the organizations claim their tax-exempt status. The participation of these and other tax-exempt organizations in the 2004 elections is the first field test of campaign finance reform.

Political organizations that claim tax-exempt status under Section 527 of the Internal Revenue Code are referred to as "527 organizations" or "527s." These organizations are formed and operated primarily to receive and make contributions for the purpose of influencing the selection, nomination, election or appointment of any individual to federal, state or local public office. 527 organizations are exempt from federal income tax on contributions received. These organizations do not need to file most of the reports required by the Internal Revenue Service.

Some 527 organizations – federal political action committees – must comply with the requirements of the FEC. A federal PAC is, by definition, a 527, but not all 527s are federal PACs. 527s that are not subject to the FEC's oversight are often called "shadow" or "soft money" organizations because they can raise unlimited funds from a variety of sources. Although 527s organization does not need to be incorporated or have formal organizational documents, these organizations must register with the IRS and must disclose information about their contributions and expenditures.

Under the BCRA regime, different types of 527 organizations can engage in different kinds of political activity and communications depending upon how they are funded and constituted. An incorporated 527 that receives donations from corporations may not pay for express advocacy or electioneering communications. By comparison, an unincorporated 527 that receives only donations from individuals (even wealthy individuals) may pay for electioneering communications, but not express advocacy. A federal political action committee, another type of 527 organization, may pay for both express advocacy and electioneering contributions because it abides by FECA's hard money source and amount limits (that is, it receives contributions only from individuals in amounts of less than $5,000 per year).

The most prominent 527 organizations that have emerged during the Fall 2004 elections are those funded solely by individuals. These unincorporated associations of individual citizens have been left free to pool their resources to advertise the relative virtues of federal candidates so long as they do not expressly advocate the candidates' election or defeat. Thus, organizations such as Swift Boat Veterans for Truth and MoveOn.org Voter Fund have run television advertisements throughout the Fall of 2004 discussing John Kerry's secret meeting with Communist North Vietnamese officials in the early 1970s (Swift Boat Veterans) and George W. Bush's allegedly harmful economic policies (MoveOn.org).

Moreover, dozens of 527 and other tax-exempt organizations (including 501(c)(4) and 501(c)(6) organizations) have coordinated their collective efforts on the left and right ends of the political spectrum in a strategic effort to maximize their political effect in battleground states. A prominent consortium of left-leaning interest groups is Americans Coming Together ("ACT").

One political watchdog organization estimates that the combined total of all expenditures by 527 organizations in connection with the 2004 federal elections exceeded $221 million as of September 2004, with tens of millions more expected to be spent in the final month of the 2004 campaigns.[10] Total expenditures by all politically motivated organizations, including tax-exempt 501(c)(4) and 501(c)(6) organizations on election-season communications focusing on narrow policy issues (not candidates) pushes the total even higher. The upshot of this political activity is that a significant amount of "soft money" continues to influence elections in the United States following enactment of BCRA in 2002.

FEC Attempts to Regulate 527s

The extent to which political activity by tax-exempt associations or individuals could be restricted even if Congress were to revisit campaign finance reform is the subject of continuing constitutional debate. The Supreme Court held in *FEC v. Massachusetts Citizens for Life*[11] that the government could not apply its prohibition on corporate expenditures to a non-profit 501(c)(4) organization funded solely by individual citizens. By extension, this constitutional protection may apply to 527 organizations funded by individuals. Nevertheless, some additional restrictions on 527 activity have been proposed as new regulations at the Federal Election Commission ("FEC"), although agreement on such restrictions has not been achievable thus far. The FEC has settled, for the time being, on a new restriction on 527 fundraising solicitations.

In 2003 and 2004, the FEC considered a rule to sweep 527s and their expenditures into regulated categories of "political committees" and "expenditures." Some FEC Commissioners argued that unregulated political advocacy by non-party 527 organizations might circumvent or undermine the goals of BCRA.[12] Unable to reach the four votes necessary to adopt the proposed rules, however, on August 19, 2004, the FEC adopted a new rule restricting fundraising appeals by 527 organizations. The rule, to take effect January 1, 2005, will count as "contributions" any funds provided "in response to any communication . . . if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." As contributions, such funds will be subject to hard money limits. According to discussions at the August 19, 2004 FEC meeting, it appears that this provision might apply even if a small part of an issue advocacy letter by a 527 organization states that the funds given to the organization as a result of the letter would be used to stop a federal candidate and implies that the stopping would be at the polls. The FEC's General Counsel stated that the rule would be textual

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[10] Center for Responsive Politics, www.opensecrets.org/527s/527cmtes.asp?level=E&cycle=2004 (compiling data collected from the IRS on Sept. 28, 2004).

[11] 479 U.S. 238 (1986).

[12] 66 Fed. Reg. 13681 (March 7, 2001); 63 Fed. Reg. 11736 (March 11, 2004).

and would apply to solicitations that say the funds will be used in connection with elections or the act of voting.

Conclusion

It has often been said that political expression in a democracy (as well as the resources that fund it) flows like a river – when one rock is put in place, it flows in another direction. Put another way, speech will find an outlet. The authors of BCRA may have intended to build a dam in order to diminish the influence of large political expenditures to highly controlled trickles, but it remains to be seen precisely how much political spending and speech BCRA has effectively blocked.

Increased "hard money" limits undoubtedly raised the spending bar for the two presidential aspirants during the primary season as well as many congressional candidates. But the most intriguing financial story of the 2004 elections, once it is finally written, is what happened to "soft money." Quite possibly, the real effect of BCRA reforms may turn out not to be *elimination* of "soft money" from federal elections, but that the democracy experienced a fundamental *shift* of "soft money" and political advocacy from the two national political parties to dozens of highly effective interest groups with their own ideological agendas, many established for the principal purpose of influencing the outcome of the 2004 federal elections. Assuming the 2004 elections actually give rise to such a measurable shift, it remains to be determined whether such a shift is a positive development for American democracy. Many observers argue that more speech regarding public policy and candidates is good for democracy, pitting interest against interest in a great rhetorical and get-out-the-vote melee as the Founders envisioned. BCRA advocates worry about what they call the "corrupting" effects of the hundreds of millions of dollars in expenditures to fund all that speech and political action. This fundamental disagreement animated the debate over campaign finance reform before enactment of BCRA, and is likely to continue being debated long after the 2004 elections are concluded.