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The Current State of Campaign Finance Law

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The Federal Election Campaign Act (FECA) was adopted by Congress in 1971. The act was amended substantially in 1974 and again, more recently, by the Bipartisan Campaign Reform Act of 2002 (BCRA, commonly known as the McCain-Feingold law).¹ Congress has written federal campaign finance law broadly, to cover all money spent “in connection with” or “for the purpose of influencing” federal elections. The intent of Congress has always been to regulate all funds raised or spent for federal election purposes. However, in *Buckley v. Valeo* and subsequent cases, the Supreme Court defined those statutory phrases to have a more limited reach.² The Court held that federal election laws must narrowly and clearly define the activity covered so as not to “chill” speech protected by the First Amendment and that they must give speakers notice that the activity is regulated. In the Supreme Court’s latest campaign finance case, *McConnell v. FEC*, the Court accepted a clearly delineated but congressional approach to defining the reach of federal regulation of political spending, deferring to Congress’s ability to identify and regulate the appearance of corruption or undue influence as a reasonable balance on certain First Amendment rights.³ This chapter describes the nature and extent of federal campaign finance regulation, particularly limits on campaign contributions and expenditures in connection

with federal elections. It also describes the many entities engaged in political speech and spending, from party committees to labor unions to tax-exempt organizations.

Direct Contributions to Federal Candidates and National Committees of Political Parties

Federal law defines “contribution” to include “anything of value” given to a federal candidate or committee, a definition that encompasses not only direct financial contributions, loans, loan guarantees, and the like, but also in-kind contributions of office space and equipment, fundraising expenses, salaries paid to persons who assist a candidate, and the like.⁴

Individuals

Federal law permits individuals to contribute up to \$2,100 to a candidate per election.⁵ The term “election” under the act includes “a general, special, primary, or run-off election; an individual therefore may contribute up to \$2,100 to a candidate’s primary campaign and another \$2,100 to the general election campaign.”⁶ Each individual has his or her own limit, so that a couple may give \$8,400 in total per election cycle to each federal candidate. In addition, minor children may give if the money given is their own, under their own control and voluntarily contributed—requirements that politically active parents of infants and schoolchildren sometimes ignore.

Individuals also are limited in the amounts that they can contribute to other political entities. BCRA established higher limits for most federal contributions (as a partial response to the elimination of “soft money”) and separated the limits for candidate campaign and party committees. Individuals are limited to \$26,700 a year in contributions to the federal accounts of a national party committee, such as the Republican National Committee (RNC) or Democratic National Committee (DNC).⁷ In addition, individual contributions are limited to \$5,000 a year to any other political committee, including a political action committee (PAC).⁸ Contributions to state party committees are likewise limited to \$5,000 a year. Local party committees are considered part of state party committees, so the \$5,000 limit is a combined limit on the two.⁹

In addition to the specific limits on contributions to various candidates and committees, individuals have an aggregate annual federal contribution limit of \$101,400 per election cycle.¹⁰ Smaller aggregate limits also apply to categories of contributions: individuals are limited to \$61,400 in contributions during

an election cycle to federal noncandidate committees, including no more than \$37,500 to PACs and state and local parties' federal accounts, and there is a separate \$40,000 limit on federal candidate contributions. All of the limits are inflation adjusted, and they will increase modestly for the 2006 election cycle.

Campaign finance laws and Federal Election Commission (FEC) regulations contain a host of exceptions to the definition of "contribution" that apply to individuals. Among the principal exceptions are the donation of personal time to a candidate (unless it is time paid for by someone else, such as an employer), home hospitality of up to \$1,000 per candidate per election, and costs of personal travel of up to \$1,000 per candidate per election and up to \$2,000 a year for party committees.

Political Committees

Whether an organization is a "political committee" required to register with the FEC and subject to the federal limitations on amounts and sources of contributions is a crucial question for any entity engaged in political activity. Federal statutory law defines a "political committee" as

(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year; or

(B) any separate segregated fund established under [the Federal Election Campaign Act]; or

(C) any local committee of a political party which receives contributions aggregating in excess of \$5,000 during a calendar year, or makes payments exempted from the definitions of contribution or expenditure as defined [by the act] aggregating in excess of \$5,000 during a calendar year, or makes contributions aggregating in excess of \$1,000 during a calendar year or makes expenditures aggregating in excess of \$1,000 during a calendar year.¹¹

In *Buckley v. Valeo*, however, the Supreme Court construed the term "political committee" more narrowly than the statute, to "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."¹² In other words, regardless of a noncandidate organization's campaign finance activities, the

organization is a political committee under federal law only if its “major purpose” is to nominate or elect a candidate.

Whether an organization is a political committee and thus subject to all the federal election laws or is instead an entity completely unregulated by the FECA and BCRA—though perhaps reporting to the Internal Revenue Service (IRS) as a section 527 political organization—has been the subject of much legal controversy. This is a crucial issue, and the debate will likely continue to be hard fought, because groups that can successfully avoid being categorized as a federal political committee may continue to raise funds—without restriction and with only minimal disclosure requirements—for activities designed to influence federal elections. The debate has centered on whether organizations “organized and operated primarily” for the purpose of influencing the selection of candidates to elected or appointed office (the definition of a section 527 organization) are subject to federal regulation as political committees.

Different forms of federal political committees face differing candidate contribution limits. Political action committees are political committees that may qualify for *multicandidate committee* status. To so qualify, a PAC must demonstrate that it has been registered with the FEC for six months, must receive contributions from at least fifty-one persons, and must contribute to at least five federal candidates.¹³ A multicandidate committee may contribute up to \$5,000 to a candidate per election and up to \$5,000 to other separate PACs each year. In addition, multicandidate committees can contribute up to \$15,000 per year to a national party committee, and they have a combined limit of up to \$10,000 per year to local and state party committees.

A PAC that does not qualify for multicandidate committee status is limited to contributions of \$2,000 per candidate per election, but it may still contribute up to \$5,000 to another PAC each year. Such PACs may contribute up to \$25,000 a year to national party committees (more than multicandidate committees can), and they have a combined limit of up to \$10,000 a year for local and state party committees.

There are two types of noncandidate political committees: nonconnected (or independent) committees and corporate or labor PACs, formally called separate segregated funds (SSFs). Corporations and labor unions may pay all the administrative and solicitation costs of their SSFs, while nonconnected PACs must pay such costs out of the funds that they raise. Corporate and labor PACs, however, face strict rules on whom they may solicit, while non-connected committees may solicit the general public.

Leadership PACs and Joint Fundraising Committees

Beginning in the 1980s, a number of political committees were established that had an “association” with a member of the congressional leadership. These “leadership PACs” usually use the name of a member of Congress in an honorific capacity such as “honorary chair,” and the committee treasurer often is a close associate of the congressional member (and sometimes an employee of the congressional office). Leadership PACs traditionally have been used by legislative leaders to contribute to the campaigns of other members of Congress as a way of gaining a party majority and earning the gratitude of their colleagues or as a way of financing nationwide political activity by party leaders. Leadership PACs may not expend more than \$5,000 to elect or defeat a federal candidate, including their “honorary chair.”

Members of Congress often personally solicit contributions to “their” leadership PACs, and the news media report contributions and expenditures by the committees as if they were a component of the member’s campaign apparatus. Under FEC regulations, all committees “established, financed, maintained or controlled” by the same person or group of persons are “affiliated” and treated as a single committee for the purpose of determining contribution limits.¹⁴ Nevertheless, the FEC has long held that leadership PACs are not “affiliated” with the associated Congress member’s campaign committee, a result made explicit by the FEC in 2003.¹⁵ Consequently, leadership PACs do not share a single contribution limit with the candidate’s campaign committee.

A leadership PAC may be used to support the campaigns of other candidates and to pay for the associated Congress member’s officeholder expenses, because such expenditures are not considered by the FEC to be furthering the associated Congress member’s personal campaign for federal office. Leadership PACs may accept contributions of up to \$5,000 per person per calendar year (a candidate’s campaign committee may accept only contributions of up to \$2,000 per person per election). Furthermore, since leadership PACs are not considered an affiliate of the candidate’s campaign committee, members of Congress may obtain contributions from the same sources for both committees (a single multicandidate PAC could give \$20,000 in an election cycle: \$5,000 each for the primary and general elections to the campaign committee and \$5,000 per year to the leadership PAC).

However, leadership PACs must take care not to make excessive (more than \$5,000) cash or in-kind contributions to the campaign committees of their Congressional sponsors.

Party Committees

FEC regulations define a party committee as “a political committee which represents a political party and is part of the official party structure at the national, state, or local level.”¹⁶ A party committee’s contribution limits are the same as those for a multicandidate political committee, with three major exceptions:

—For purposes of federal election law (but not necessarily state law), party committees can transfer unlimited federal funds to other party committees without such transfers being treated as contributions.

—A national party committee and the national party senatorial committee may together contribute up to \$37,300 to a candidate for the U.S. Senate. The \$37,300 limit is for the entire election cycle, rather than for each separate election within the cycle.¹⁷

—National and state party committees may spend an inflation-adjusted amount for coordinated spending supporting the party’s House and Senate candidates; the amount differs by state, depending on the voting age population.

In 1979, Congress amended the FECA to exempt party spending on certain state party-building or volunteer activities from the definition of “contribution” and “expenditure,” provided that they were paid for with funds raised under the act (“hard” or “federal” money) by state and local parties and not with funds transferred from the national party committees. The exempted activities include yard signs, pins and bumper stickers, get-out-the-vote programs, and volunteer mailings, but not broadcast advertising or certain activities by paid staff. The exemption has generated years of FEC enforcement investigations and litigation (What is “volunteer” activity? What is a “mass mailing?” When is it paid for by a transfer of funds from a national party committee, using which accounting principles?) because such activity provides an important avenue for state parties to support their federal candidates in priority races outside of federal contribution limits for political parties.

The law now requires state and local parties to finance voter registration activity closely proximate to federal elections, get-out-the-vote activity undertaken in connection with an election in which a federal candidate appears on the ballot, and general public political advertising promoting or attacking clearly identified federal candidates either exclusively with hard money contributions or with a mix of such hard money contributions and so-called “Levin funds.”¹⁸

Expenditures

Campaign finance law defines an *expenditure* to include “(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and (ii) a written contract, promise, or agreement to make an expenditure.”¹⁹ “Expenditure” thus encompasses virtually every payment made in connection with the federal election, including contributions.

Party Committee Expenditures

National and state party committees may expend additional limited amounts for “coordinated” expenditures on behalf of their federal candidates. The amount is based on the voting-age population of the state (or, in the case of House candidates for states with more than one representative, a fixed dollar amount). Such expenditures may be made at any time, but only for the benefit of general election candidates.²⁰

Expenditures can pay for goods and services for a candidate, but payments cannot be made directly to the candidate’s campaign—that is, party committees may not simply give a candidate money. However, it is important to understand that the expenditures are coordinated with the candidate: they are payments that candidates can specifically request and direct. When a committee makes expenditures independent of a candidate, they are not subject to limits, as explained below.

Independent Expenditures

Independent expenditures are just that—expenditures by individuals and political committees that pertain to elections for federal office but are not coordinated with the candidates seeking office. There are no dollar limits on independent expenditures; *Buckley v. Valeo* established that the First Amendment protects the right of individuals and political committees to spend unlimited amounts of their own money on an independent basis to participate in the election process. Independent expenditures, however, must be publicly disclosed through the FEC.

At one time, the FEC presumed that party committees were incapable of making independent expenditures, reasoning that parties and their candidates were so intertwined that there could be no truly uncoordinated expenditures. However, in the first *Colorado Republican Federal Campaign Committee v. Federal Election Commission (Colorado I)*, the Supreme Court ruled that party committees had the same right to make independent expenditures as

other committees, if the factual record demonstrates the actual independence of the activity.²¹ In the second *Colorado Republican* decision (*Colorado II*), the Court considered the remaining issue in that case: whether party committees may constitutionally be restricted in the amount that they may spend on a coordinated basis to elect their candidates.²² The Court proceeded to uphold those restrictions, on the grounds that they help prevent circumvention of limits on contributions by individuals to candidates (who, in the absence of party coordinated spending limitations, could arrange for the parties to serve as conduits for contributions in excess of the amounts that individuals may give directly to candidates).

The definition of what constitutes a coordinated expenditure has been clarified over time. The FEC has looked at several criteria in determining the definition. For instance, inside knowledge of a candidate's strategy, plans, or needs; consultation with a candidate or his or her agents about the expenditure; distribution of candidate-prepared material; or use of vendors also used by a candidate were considered by the FEC to be evidence of coordination.²³ Based on the decision of the U.S. District Court for the District of Columbia in *FEC v. Christian Coalition*, the FEC issued regulations in December 2000 defining when general public political communications made by outside groups would be considered coordinated with candidates or parties.²⁴ Those regulations would have found coordination only when the party or candidate controlled the communication or when there was "substantial discussion" between the communication's sponsors and a party or candidate resulting in "collaboration or agreement."²⁵

Congress considered the FEC's coordination definition insufficiently comprehensive and, in BCRA, explicitly vacated it. Congress mandated that the FEC promulgate a new regulation defining coordination between outside groups and parties or candidates that addresses a number of factors and, most important, does not require "agreement" or "formal collaboration" to establish coordination.²⁶

The FEC responded to Congress by adopting a new coordination rule in 2003. Representatives Christopher Shays and Martin Meehan, sponsors of BCRA in the House, then sued the FEC, alleging that the FEC's new coordination regulation (among other BCRA-related regulations) undermined the language and congressional purposes of BCRA and excluded important forms of coordination. In September 2004, a federal district court ruled in favor of Shays and Meehan and ordered the FEC to rewrite fifteen of its BCRA-related rules, including the 2003 coordination rule.²⁷ The FEC is currently engaged in a rewriting of the regulations invalidated in *Shays v. FEC*,

and it also has appealed the district court decision to the D.C. Circuit Court of Appeals.

Electioneering Communications

Perhaps the most significant change in federal campaign finance law resulting from Congress's adoption of BCRA was the new prohibition on the use of corporate or union funds for "electioneering communications." Electioneering communications are defined as broadcast, cable, or satellite communications referring to a clearly identified candidate for federal office, airing within sixty days of the candidate's general election or thirty days of the candidate's primary election, and targeting the candidate's electorate. The definition was crafted to encompass what have been referred to as "sham issue ads" paid for with corporate or labor union funds—ads that clearly intend to influence an election but avoid the use of *Buckley's* "magic words" (for example, "vote for," "vote against," "support," "oppose") and so escape federal regulation as political express advocacy expenditures (see the discussion of issue advocacy in chapter 7).

Federal law requires disclosure of payments made for electioneering communications and also prohibits the use of corporate or union treasury funds for electioneering communication payments. The Supreme Court in *McConnell* upheld BCRA's electioneering communication provisions against constitutional challenge, holding that the record in the case showed that such communications often are intended to influence federal elections—and achieve that effect—and that therefore they may be regulated by Congress.²⁸

Prohibited Contributions, Expenditures, and Payments for Electioneering Communications

While individuals (except candidates using their own funds) and organizations are limited in their ability to make contributions in connection with federal elections, others are entirely prohibited by law from making contributions, expenditures, and payments for electioneering communications.

National Bank, Corporation, and Labor Organization Prohibitions

It is unlawful for any national bank or any corporation organized by authority of any law of Congress, any other corporation, or any labor organization to make contributions, expenditures, or payments for electioneering communications in connection with a federal election or for anyone to accept such contributions. Thus corporations and unions cannot contribute their general

treasury funds to a federal candidate (PAC funds, contributed voluntarily by individuals for such purposes, are not covered by the provision). This broad prohibition is subject to three significant exceptions.

—*Nonprofit issue advocacy groups exemption.* The Supreme Court ruled in *FEC v. Massachusetts Citizens for Life (MCFL)* and *McConnell* that certain small, ideologically based nonprofit corporations must be exempt from the prohibition on independent expenditures and electioneering communications by corporations in connection with federal elections.²⁹ FEC regulations contain the criteria that a corporation must meet to be exempt under these rulings. According to the FEC, such a corporation:

- (1) must have as its only express purpose the promotion of political ideas;³⁰
- (2) cannot engage in business activities other than fundraising expressly describing the intended political use of donations;
- (3) can have:
 - (i) No shareholders or other persons, other than employees and creditors with no ownership interest, affiliated in any way that could allow them to make a claim on the corporation's assets or earnings; and
 - (ii) No persons who are offered or who receive any benefit that is a disincentive for them to disassociate themselves with the corporation on the basis of the corporation's position on a political issue;³¹
- (4) . . . cannot be established by a business corporation or labor organization or accept anything of value from business corporations or labor organizations.³²

If those criteria are satisfied, the corporation may make unlimited *independent expenditures* in connection with a federal election.³³

If a qualified *MCFL* corporation has aggregate independent expenditures of more than \$250 in a single year, it must report the expenditures to the FEC, as with any other independent expenditure. *MCFL* corporations also must certify to the FEC that the corporation meets the qualifying criteria for the *MCFL* exemption.

—*The press exemption.* The second major exception to the corporate prohibition exempts certain press activities from the definitions of “expenditure” and “electioneering communication.”³⁴ The definitions specifically exclude any news story, commentary, or editorial distributed through the facilities of

any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate. According to the legislative history of the press exemption from the definition of “expenditure,” Congress included the provision to indicate that it did not intend “to limit or burden in any way the first amendment freedoms of the press” and to ensure “the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.”³⁵

Thus any qualifying media organization can make expenditures and electioneering communications in connection with federal elections provided that the organization falls within the bounds of the exemption. The FEC historically has employed a three-part test to determine the applicability of the press exemption to a particular corporation. In order to qualify for the press exemption, the corporation must

- be a press entity as described by the federal statute (that is, a broadcasting station, newspaper, magazine, or other periodical publication)

- not be owned or controlled by a political party, political committee, or candidate

- must be acting as a press entity in conducting the activity at issue (for example, a TV broadcasting station may not claim the media exemption for expenditures related to sending candidate endorsement literature to voters by mail).³⁶

Despite the seemingly clear three-part test, challenges to the application of the press exemption arose during the 2004 presidential election. The greatest difficulty involves determining whether a corporation is a legitimate press entity. Given BCRA’s prohibition of direct soft money contributions to political parties and restrictions on electioneering communications, an increasing number of corporations will likely seek through the press exemption an alternative way to support parties and candidates in federal elections.

For example, the National Rifle Association (NRA) is a corporation generally prohibited from using treasury funds to make contributions, expenditures, or payments for electioneering communications. In June 2004, however, the NRA launched a satellite radio news program to discuss the 2004 federal elections. Reasonable minds could disagree as to whether the NRA is an actual news entity or simply a corporation seeking to influence federal elections through its expenditure of treasury funds.

- Internal communications exemption.* All corporations are permitted to communicate with their *restricted class* whenever they so choose, and labor

unions may likewise communicate with their members. A corporation's restricted class is defined as its stockholders and its executive or administrative personnel and their families.³⁷ Thus a corporation can send mailings endorsing a particular candidate to its restricted class. Similarly, a corporation could invite a candidate to appear before its restricted class and endorse the candidate in connection with the event. However, the corporation must take steps to ensure that only its restricted class receives such communications. Communications with the restricted class generally are not regulated by the FEC, but internal communications costing more than \$2,000 per election that expressly advocate the election or defeat of a candidate must be reported.³⁸

The exemption for communications with members has been used by labor unions for voter registration drives, telephone banks to turn out the vote on election day, and candidate endorsements. Such communications may be expressly partisan in nature, but they can be directed only to a union's members or to a corporation's restricted class, *not* to the general public (see the discussion of general issue advocacy below and in chapter 7).

Foreign National Prohibitions

For many years there was no ban on foreign contributions, but in 1938, in the face of evidence that Nazi Germany was spending money to influence the U.S. political debate, Congress passed the Foreign Agents Registration Act. The act required agents of foreign entities engaged in publishing political "propaganda" to register and disclose their activities, but it did not regulate political contributions. After congressional hearings in 1962–63 revealed campaign contributions to federal candidates by Philippine sugar producers and agents of Nicaraguan president Luis Somoza, Congress moved in 1966 to prohibit political contributions in *any* U.S. election by any foreign government, political party, corporation, or individual, except foreign nationals who are permanent residents of the United States.³⁹

In 1976, the Federal Election Campaign Act incorporated and enhanced the 1966 prohibition.⁴⁰ The FECA now directly prohibits foreign nationals from making a "contribution *or donation of money or other thing of value*" in connection with a federal, state, or local election; a "contribution *or donation* to a committee of a political party"; or an expenditure, independent expenditure, or disbursement for an electioneering communication.⁴¹ Federal law prohibits a presidential inaugural committee from accepting donations from foreign nationals—the only restriction on inaugural committee funding. The

law also prohibits any person from soliciting, accepting, or receiving such a contribution or donation from a foreign national.⁴² It defines “foreign national” as

- (1) a foreign principal, as such term is defined by section 611(b) of title 22, except that the term “foreign national” shall not include any individual who is a citizen of the United States;⁴³ or
- (2) an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence, as defined by section 1101(a)(20) of title 8.⁴⁴

The prohibition also operates to prevent domestic subsidiaries of foreign corporations from establishing PACs if the foreign parent finances the PAC’s establishment, administration, or solicitation costs or if individual foreign nationals within the corporation make decisions for the PAC, participate in its operation, or serve as its officers.⁴⁵ Similarly, foreign nationals may not participate in the selection of the individuals who run the PAC.

The foreign national ban was strengthened in BCRA to counter arguments that foreign soft money was not prohibited in the 1996 election because it did not meet the definition of a contribution. The FEC then adopted broad regulations implementing the prohibition on foreign spending “in connection with” any election in the United States.⁴⁶

Federal Contractor Prohibition

Federal campaign finance law prohibits anyone who contracts with the United States or any of its departments or agencies to make any contribution to any political party, committee, or candidate for public office, and no such contribution may be solicited from any person between the time of negotiations and completion of the contract. However, federal contractors that are corporations can establish federal PACs.⁴⁷

“In the Name of Another” Prohibition

The law also provides that “no person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.”⁴⁸ This section is often enforced in connection with other prohibitions. For example, when a foreign national gives money to a U.S. citizen to be contributed to a federal candidate, two provisions are violated: the one governing foreign contributions and the one

governing contributions in the name of another. The same is true if a corporation reimburses an executive for a political contribution.⁴⁹

The Presidential System

Since 1976, the United States has had a system of voluntary public funding for presidential candidates. The system has two components: partial matching funding for presidential primary candidates and full public funding for major party presidential nominees in a general election. The law provides for some public funding for minor party candidates in proportion to their percentage of the votes cast.

Major Parties (Democrats and Republicans)

The contribution and expenditure limits described above apply to all federal elections other than presidential campaigns. Presidential elections are partially publicly funded. Once a major party presidential candidate meets certain requirements, his or her primary or general election campaign or both may choose to receive U.S. government funding from the Treasury accounts funded by the \$3 voluntary income tax form check-off.

Presidential Primaries

If candidates choose to participate in the primary funding system, their campaigns are funded through a combination of public and private funding. The partial public funding is provided in matching funds, with public funds matching up to \$250 of a single individual's contributions. To qualify for funding, a candidate must demonstrate nationwide support by raising at least \$5,000 in individual contributions of up to \$250 each in at least twenty separate states. Participating candidates must also agree, among other things, to

- limit primary spending to an inflation-adjusted amount—approximately \$37 million in 1996, \$45 million in 2000, and \$50 million in 2004
- limit spending in each primary state to a specific amount that increases with population
- limit spending of personal funds to \$50,000.

Once the requirements are met or agreed to, the candidate can receive matching payments.⁵⁰

Private contributions for presidential candidates are limited as in other federal elections. Individuals may contribute up to \$2,100 to a presidential primary campaign committee, and qualified multicandidate PACs can contribute up to \$5,000.

The General Election

Once a candidate becomes the nominee of a major party, he or she becomes eligible for a public grant (\$67.56 million in 2000 and \$74.62 million in 2004). To receive the funds, however, the candidate must agree to spend no more than the grant received and not to accept private contributions.⁵¹ In addition, the two major party national committees may each spend an amount adjusted for the voting-age population (\$13.7 million in 2000 and \$16.2 million in 2004) in coordination with their presidential candidates.⁵² That amount is separate from any get-out-the-vote or generic party-building activities the parties conduct. During the 2004 election cycle, both parties made independent expenditures on behalf of their presidential candidate and collaborated with their candidate in financing “hybrid” communications, which included both generic party messages as well as candidate-related messages.

Candidates Not Accepting Public Funds

Candidates are not required to accept public funds in either the primary or general elections, and those who refuse public funds are permitted to spend as much of their own money as they wish to support their campaigns and as much money as they can raise in contributions from others within the federal contribution limits. As a result, a candidate who refused public funding would have no per-state spending limit or overall spending limit in the primary campaign (Steve Forbes in 1996; George W. Bush in 2000; and Howard Dean, John Kerry, and President Bush in 2004) and no spending limit in the general election campaign (Ross Perot in 1992). Candidates who do not opt into the system for a primary election may opt into it for the general election.

Convention Funding

Each of the major parties’ nominating conventions may also be paid for, in part, by public funding.⁵³ Each major party received a grant of \$13.51 million in 2000 and \$14.9 million in 2004 to finance its nominating convention. Minor parties may qualify for convention funding based on their presidential candidate’s share of the popular vote in the preceding election. The Reform Party received \$2.5 million in convention funding in 2000.

Political parties that accept convention funding may spend in connection with the convention only the amount of public funds that they receive. However, the host city and other sponsors support conventions in a variety of

ways. The city, through its host committee (a federally registered committee created to support convention activities) may spend money promoting itself as a convention location, pay for the convention hall, and provide local transportation and related services to the convention.⁵⁴ In addition, the host city itself may directly accept unlimited cash and in-kind contributions, which often are received by a tax-deductible entity.⁵⁵ In some circumstances, corporations also can provide goods (such as automobiles) free to a convention as part of a promotional program. Such exemptions, as interpreted by the FEC, have in practice resulted in extensive convention-related fundraising by the host city and the political parties, usually raising individual, corporate, and labor funds for the convention that are far greater in total than the federal grant. Conventions now have “official” airlines, computer companies, car rental agencies, and the like, all in addition to the federal grants to the political parties.

Third and Minor Party Presidential Candidates

Minor parties (those that received at least 5 percent but no more than 25 percent of the popular vote in the preceding presidential election) and new parties (a party that is not a major or minor party) may also receive partial public funding for the general election, in some instances. New and minor party candidates may accept private contributions, but only within the general limits on such contributions.

A candidate who agrees to abide by the restrictions on publicly funded presidential candidates (including an FEC audit and a \$50,000 limit on the use of personal funds) and who then meets a threshold of 5 percent of the general election vote will receive public funding based on his or her share of the vote, but not until *after* the election.⁵⁶ (Days after the 1980 general election, independent John Anderson became the first candidate to receive “retroactive” funding, based on unofficial vote totals showing that he had received nearly 7 percent of the popular vote.) In subsequent elections, an individual who has received 5 percent or more of the vote in a previous general election—or the nominee of a minor party whose candidate received 5 percent or more of the vote in a previous general election—may be eligible to receive general election funding *before* the election.⁵⁷ The most prominent example is Ross Perot, who ran as an independent in 1992, then appeared on most state ballots as the nominee of the Reform Party in 1996. Even though Perot had not run under the Reform Party banner in 1992, he received general election public funding in 1996 based on his 1992 general election vote total. Likewise, Pat Buchanan—judged to be the Reform Party

nominee in 2000 in the wake of party infighting—received \$12.6 million in general election public funding based on Perot’s 8 percent general election showing in 1996.

In addition, minor party candidates may be eligible for primary funding as well. Examples include Lyndon H. LaRouche, who appeared on the ballot in several states as the candidate of the U.S. Labor Party in 1976 but failed to qualify for public funding in that year’s general election. Beginning in 1980, however, LaRouche sought the Democratic Party’s nomination for president several times. He secured matching funds for most of those primary campaigns by receiving the necessary individual contributions to meet the statutory criteria for “nationwide support.” Similarly, Lenora Fulani received matching funds when she sought the New Alliance Party nomination in 1988 and 1992. However, because of the 5 percent threshold, she failed to qualify for general election funding in both years. In the 2000 presidential elections, Green Party, Reform Party, and Natural Law party candidates received primary funding. No minor party candidates qualified for primary funding in 2004, but Ralph Nader qualified for matching funds as an independent and received slightly more than \$865,000 for the 2004 election cycle.

The End of Party Soft Money

In a series of advisory opinions issued in the 1980s, the FEC allowed state and national party committees to accept funds from sources and in amounts otherwise prohibited by federal election law, provided that the funds were placed in separate, “nonfederal” accounts and not used for federal election purposes.

Over time, the FEC created a complex system of allocation formulas regulating the proportions of hard and soft money that party committees could use for “generic” party activity (administration, overhead, get-out-the-vote drives that do not mention specific candidates, issue ads, and so forth), fundraising, and “exempt activities” mentioning federal and nonfederal candidates (sample ballots, slate cards, bumper stickers, and so forth). National—but not state and local—party committees also were required to disclose soft money donations to the FEC.

By the end of the 1996 election, the claim that nonfederal or soft monies were not used for federal election purposes had become farcical. President Clinton personally raised soft money, telling donors that it would assist his reelection, and then selected the states in which it would be spent—on such

items as broadcast advertisements praising him and attacking his general election opponent, Senator Bob Dole. The RNC and Senator Dole largely followed suit, with Senator Dole famously saying of the soft money ads, “I hope it’s obvious they’re about me—I’m the only person in them.” The funds for those party advertisements came from very large contributions from corporations and unions not permitted to spend money in federal elections and from individuals who clearly had an interest in the outcome of the election.

In 2002, BCRA outlawed many of the soft money practices sanctioned over the years by the FEC. The new campaign finance law prohibits federal candidates and national party committees from receiving, soliciting, or spending funds not subject to the law’s limits, prohibitions, and reporting requirements. That provision serves to ban corporate and labor treasury contributions to national party committees and limit individual and PAC contributions to \$25,000 and \$15,000 per national party committee per year respectively. BCRA’s national party soft money ban extends also to entities “directly or indirectly established, financed, maintained or controlled” by a national party committee, as well as to officers and agents acting on behalf of a national party committee.⁵⁸

BCRA also prevents state, local, and district party committees from spending nonfederal funds on voter registration activity within 120 days of a regularly scheduled federal election; get-out-the-vote, voter identification, and generic campaign activity in connection with an election in which a federal candidate appears on the ballot; and general public political advertising promoting or attacking clearly identified federal candidates (not only advertisements containing express advocacy). A narrow exception permits party committees to spend \$10,000 of each donor’s permissible nonfederal contribution per year in combination with hard money on voter drive activities that do not mention federal candidates, subject to a number of strict conditions relating to the solicitation and receipt of these federal and non-federal funds.

Restrictions on Political Fundraising by Members of Congress and Executive Branch Officials

Several statutes regulate the location and form of political fundraising. Most are designed to protect federal employees from pressure to contribute to federal candidates and parties, but one simply prohibits any solicitation or receipt of a federal contribution in a federal workplace. The statutes carry criminal or civil penalties, and their intricacies have been the focus of much

attention following reported fundraising activities at the White House during the 1996 election.

A series of criminal provisions makes it unlawful for anyone to attempt to obtain a political contribution from a government employee by means of threat of firing; for a candidate for Congress or federal employee or officer to solicit a campaign contribution from any other federal employee or officer; for a federal officer or employee to contribute to his or her employer's campaign; for any person to solicit a political contribution from someone known to be entitled to funds for federal "work relief"; or for anyone to demote or threaten to demote a federal employee for giving or withholding a political contribution.⁵⁹

In addition, it is a criminal offense (subject to a fine of up to \$5,000 or three years in jail or both) for any person to "solicit or receive a donation of money or other thing of value in connection with a Federal, State or local election from a person who is located in a room or building occupied in the discharge of official duties by an officer or employee of the United States."⁶⁰ Congress is specifically exempted from the receipt portion of the provision, provided that any funds received are transferred within seven days to a federal political committee and that the contributors were not told to send or deliver the money to the federal office building. During the 1996 investigations of fundraising by President Clinton and Vice President Gore, the attorney general indicated that the Justice Department would pursue prosecutions under this law only if "aggravating factors"—such as coercion or knowing disregard for the law—were present.⁶¹

Soft Money Fundraising

BCRA amended the provision on fundraising on federal property to cover "a donation of money or other thing of value in connection with a Federal, state or local election," clarifying that the prohibition covers solicitations for soft money.⁶² The act also more generally restrains soft money fundraising by federal officeholders and candidates, entities that they establish or control, and their agents—wherever they or a prospective donor may be located. Such individuals and entities may not solicit, direct, receive, transfer, or spend soft money in connection with a federal election, including for general public political advertisements promoting or attacking federal candidates or for get-out-the-vote drives (they would be limited to soliciting hard money in those instances). Along the same lines, they may not solicit soft money for state and local parties to spend on "Federal election activities," though they may attend and speak at state or local party fundraisers. In soliciting funds solely

for state and local elections, federal officeholders and candidates may seek donations only from permissible hard money donors in amounts that correspond to the hard money contribution limits (for example, a federal officeholder could suggest that an individual contribute \$2,100 to the general election campaign of a gubernatorial candidate but could not ask for corporate or labor treasury contributions to that candidate).⁶³ In addition to these general rules, BCRA provides more specific guidance regarding permissible solicitations by federal officeholders and candidates on behalf of section 501(c) tax-exempt organizations.

Congress

As noted above, the prohibition on receiving contributions in a federal building does not apply to Congress, as long as certain conditions are met. However, the ban on solicitations from a federal workplace does apply to Congress.

The Committee on Standards of Official Conduct has reminded House members that, entirely aside from the criminal statute, the rules of the House also regulate political fundraising and “are quite specific, and quite restrictive.”⁶⁴ Under House rules, “*Members and staff may not solicit political contributions in their office or elsewhere in the House buildings, whether in person, over the telephone, or otherwise*” [emphasis in original]. Added the committee, “The rule bars *all* political solicitations in these House buildings. Thus, a telephone solicitation would not be permissible merely because, for example, the call is billed to the credit card of a political organization or to an outside telephone number, or it is made using a cell phone in the hallway.” Nor may House telephone numbers be left for a return call if the purpose is solicitation of a political contribution, according to the committee. The memo responds to claims that members of Congress were using cellular telephones in their offices or raising funds in the Capitol instead of using cubicles set aside for fundraising telephone calls in office buildings near the Capitol owned by the Democratic and Republican campaign committees.

The Senate also has rules that regulate campaign activity in Senate buildings and the Capitol and restrict the number of members of a Senator’s staff who may handle campaign contributions.⁶⁵

The Hatch Act

The Hatch Act, first passed by Congress in 1939, during President Franklin Roosevelt’s second administration, to protect federal employees from political pressure, bans all executive branch federal employees from knowingly soliciting, accepting, or receiving a political contribution from any person (see

chapter 1 of this volume).⁶⁶ Although “political contribution” is broadly defined as “any gift . . . made for any political purpose,” the penalty for violation of the Hatch Act (with discretion not to prosecute) is either thirty days’ suspension without pay or removal of the employee from his or her position. The Hatch Act has no criminal penalties.

Political Advertising

Congress and the courts have long debated the extent to which political advertising should and could be constitutionally regulated. For many years, the distinction between “express advocacy” and “issue advocacy” was seen to be the dividing line. The Supreme Court first distinguished between advertising that advocated the election or defeat of political candidates (express advocacy) and advertising related to political issues (issue advocacy) in its 1976 *Buckley* decision. Amendments to the FECA in 1974 contained two expenditure-related provisions that led to that distinction by the Court. One provision restricted independent expenditures “relative to a clearly identified candidate.” The other required disclosure of expenditures used “for the purpose of . . . influencing” a federal election.⁶⁷

When the constitutionality of those provisions was before the Supreme Court in *Buckley*, the Court found the phrases “relative to” and “for the purpose of . . . influencing” unconstitutionally vague for defining an expenditure by persons or organizations not already political committees. The Court reinterpreted the term “expenditure” to be limited to communications that included explicit words of advocacy of election or defeat of a candidate. In a footnote, the Court provided examples of such words, including “vote for,” “elect,” “support,” “defeat,” and “reject.”⁶⁸ Those phrases quickly became known in the world of campaign finance law as *Buckley*’s “magic words.”

From the 1976 *Buckley* decision until Congress’s adoption of BCRA in 2002, a nonfederal committee advertisement was not subject to federal campaign finance laws unless it contained express advocacy using the magic words or similar language with a clear and unmistakable meaning. Instead, such an advertisement would be deemed issue advocacy and not subject to federal campaign finance laws, even if broadcast in the midst of an election campaign with the only visible “issue” being a candidate’s competence for office. This legal distinction between express and issue advocacy had at least two significant consequences in federal elections.

First, although federal law prohibited corporations and unions from making express advocacy expenditures from treasury funds, they could spend

unlimited treasury funds on issue advocacy. Second, federal laws requiring disclosure of expenditures did not apply to issue advocacy, so individuals, corporations, and labor unions were free to raise and spend undisclosed amounts of money from undisclosed sources by avoiding the use of magic words. In short, issue advocacy escaped federal regulation altogether.

Congress enacted BCRA in 2002 in part to address the problem of unregulated soft money issue advocacy spending and to restore efficacy to the long-standing ban on corporate and union expenditures. Congress repudiated the long-ineffective magic words test, enacting a new “bright-line” test—“electioneering communications”—to regulate corporate and union campaign spending.

When the Supreme Court in *McConnell* reviewed the constitutionality of BCRA’s electioneering communications provisions, it upheld the provisions in their entirety. The Supreme Court acknowledged the uselessness of using the magic words test to distinguish between campaign speech that can and cannot be constitutionally regulated. The Court reasoned:

Not only can advertisers easily evade the [*Buckley* bright] line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election. *Buckley*’s express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption.⁶⁹

The Court observed “the overwhelming evidence that the line between express advocacy and other types of election-influencing expression is . . . functionally meaningless.”⁷⁰

The Court conclusively rejected the *McConnell* plaintiffs’ central argument that the express advocacy test was a constitutional mandate, emphasizing that it was instead “an endpoint of statutory interpretation, not a first principle of constitutional law.”⁷¹ The Court said that in *Buckley* it had resorted to interpreting the statutory language at issue as limited in scope to express advocacy in order to save the statute from being held void for vagueness, but that case “in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech.”⁷² The Court continued:

Nor are we persuaded . . . that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. That notion

cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad.⁷³

In sum, the Supreme Court in *McConnell* made clear that individuals and organizations do not possess a First Amendment right to engage in unlimited advertising referring to federal candidates financed by undisclosed sources immediately before an election. The *McConnell* Court upheld the regulation of *all* electioneering communications even if they not always—but only *often*—are intended to influence an election. Electioneering communications that are not so intended—those that may be “genuine” issue ads—are nonetheless still permissibly regulated by the statute because they fall within the scope of the statutory bright-line test and because the statute provides acceptable alternatives (for example, a corporation’s or union’s connected political committee subject to contribution limits and disclosure requirements) that allow speakers to convey their messages.

The distinction between “express” and “issue” advocacy remains relevant during the periods not covered by BCRA’s electioneering communication provisions (that is, more than sixty days before a general election or thirty days before a primary election or party convention), although the Supreme Court’s attack on its literalness leaves open the possibility that the courts and the FEC may now take a broader view of what constitutes “expressly advocating” a candidate’s election or defeat.

Another aspect of political advertising relates to expenditures and payments for electioneering communications coordinated between the advertiser and a candidate’s campaign. Under federal law, an expenditure or payment for an electioneering communication that is controlled by or coordinated with a candidate is deemed a contribution to the candidate and is subject to the applicable federal contribution limit.

The Internet

As discussed in detail in chapter 9, the Internet and e-mail are relatively new but increasingly important platforms for campaign activity relating to federal elections and the expression of political opinion. Like businesses and the media, party committees, candidates, and issue groups are attracted to the Internet because it enables them to transmit information in the desired format quickly, to either broad or highly specific audiences, at relatively low

cost. Indeed, campaigns have used e-mail and the Internet to solicit political contributions, mobilize voters, and recruit volunteers, among other things.⁷⁴ The Internet also facilitates the receipt of information from voters. Unsurprisingly, campaign websites now accept donations by credit card.⁷⁵

The FEC has had to consider the applicability of the FECA—written long before the age of cyberspace—to Internet and e-mail communications. Its deliberations in this regard have affected not only parties and candidates but also private citizens and outside groups. For example, what if a private citizen operating his or her own website posts an express advocacy message (“Vote for Candidate X”) on the site? Is that an “independent expenditure” costing more than \$200, subject to reporting requirements under the FECA? Is it a “contribution” to the promoted candidate? What if a union provides a link to the website of a candidate whom it endorses for election—is that an illegal contribution to a candidate?

Until now, the FEC has proceeded in a piecemeal manner in this area—resolving discrete questions through advisory opinions and narrow rulemaking. In November 1999, the FEC issued a notice of inquiry regarding the use of the Internet for campaign activity and received more than 1,300 comments, most urging the commission not to subject Internet communications to any form of regulation.⁷⁶ The commission followed up by inviting public comment on a draft set of regulations dealing only with the issues of Internet activities of campaign volunteers and of links and candidate endorsements posted on corporate or labor websites.⁷⁷ However, the commission never voted on any version of the draft rules.

The FEC’s advisory opinions in this area have on some occasions found Internet communications to trigger restrictions or reporting requirements under the FECA, though the trend seems to be toward resisting regulation of online campaigning. For example, the FEC ruled in 1998 that if an individual creates a website expressly advocating the election of a federal candidate, the costs of that website (for example, the fee to secure registration of the domain name) must be reported as an independent expenditure if they are greater than \$250 per year. Moreover, the website would have to post a disclaimer indicating who paid for the advertisement and whether it was authorized by a candidate or the candidate’s committee.⁷⁸ However, the commission has more recently held that the costs of websites or e-mails supporting a campaign prepared by campaign volunteers using their home computers (including the re-publication of candidate materials) did not result in a contribution to a campaign.⁷⁹ Along the same lines, websites (including those

of corporations) that provide candidate-related content that is nonpartisan in nature would not be considered to have made an expenditure or contribution to mentioned candidates.⁸⁰

Then, as part of its BCRA-required rulemaking, the FEC adopted a regulation defining “public communication” that excluded all Internet communications. That regulatory definition had great significance in the context of coordinated expenditures. Under the regulation, candidates would be free to coordinate with Internet advertisers without the coordinated advertising expenditures being deemed a contribution from the advertiser to the candidate. Further, state parties could spend unlimited soft monies on Internet communications, including advertisements. However, because of these consequences, the regulation was challenged and invalidated by the district court in *Shays v. FEC*.⁸¹ The FEC currently is considering new rules that would deal with these and other Internet issues.

Other Players in the Arena

Other significant entities play a role in political campaigns, including unions, corporations, and section 501(c)(4), section 501(c)(3), and section 527 organizations.

Unions

Campaign finance law and FEC regulations treat corporate and union funds similarly. Like corporations, they may not contribute directly to federal candidates. However, they may create and administer a PAC, which they must use to finance any electioneering communications within thirty days of a primary and sixty days of a general election. The Supreme Court in *McConnell* upheld the ban on electioneering communications paid for with union treasury funds, thereby for the first time explicitly approving the equal treatment of unions and corporations, despite the argument that union funds are derived from association members rather than from the legally constructed corporate person.

As membership organizations, unions also may communicate with their members (numbering in the millions) on any subject (including by urging them to vote for specific candidates or parties) and may use union treasury funds to do so. In *Communications Workers of America v. Beck*, the Supreme Court determined that under the National Labor Relations Act, nonunion employees could prevent union use of their agency fees (sometimes required as a condition of employment) for political activity.⁸² As a result, nonunion

employees in closed-shop states cannot be required to fund political spending as a condition of their employment.

That decision has not reduced the political use of agency fees paid to unions by nonmembers to the extent desired and anticipated by union critics. Among other things, the critics attribute this shortcoming to alleged inadequacies in the notice given to nonmembers of their “*Beck* rights,” which, under *Beck* and subsequent National Labor Relations Board decisions, unions must provide. However, successive presidential administrations have alternated positions on whether to require government contractors to inform employees of their “*Beck* rights” as well.

On April 13, 1992, President George H. W. Bush issued executive order 12800, which required government contractors to post notices informing their nonunion employees that they could object to use of their union dues for political purposes. On February 1, 1993, however, President Bill Clinton issued executive order 12836, rescinding Executive Order 12800, and referred the issue to the National Labor Relations Board for further consideration. On February 17, 2001, President George W. Bush issued an executive order requiring federal contractors again to post notices informing nonunion employees of their *Beck* rights. However, the U.S. District Court for the District of Columbia struck down the order on the grounds that it was inconsistent with the National Labor Relations Act.⁸³

The broader question of the use of dues from union members themselves for political activity was not addressed in *Beck*. Republican party leaders have argued that union members should be given some mechanism for authorizing or restricting the use of their dues for political purposes (perhaps including issue advertising), claiming that a substantial number of union members disagree with the political choices made by union leaders. Proposals to implement this idea are commonly known as “paycheck protection.” Democrats and unions have responded that union leaders are freely elected by the membership and thus are only exercising their representative authority. Besides, they add, corporate shareholders do not vote on whether to approve corporate political spending on issue advocacy either. Member dues in any case provide only a portion of the funds available to unions for such communications, so union leaders could probably use other funds for those activities if necessary—for instance, unions reportedly receive tens of millions of dollars annually in fees from members’ “affinity” credit cards. During consideration of BCRA in the Senate in 2001, a “paycheck protection” amendment (which was seen as a “poison pill” impairing passage of the McCain-Feingold bill) was defeated.

Corporations

Corporations have been prohibited from contributing to federal candidates since the beginning of the twentieth century, when the first federal campaign finance restrictions were enacted by Congress (see chapter 1 for a detailed description of the history of the ban). However, like unions, corporations still participate in the political process in a variety of ways.

Most visibly, corporations may establish and pay the administrative costs of corporate political action committees (referred to in the law as “separate segregated funds”) and may encourage employees and stockholders to contribute personal funds to those committees. In addition, corporations may communicate with their executives and management personnel, urging them to support and contribute to specific parties or candidates, and they may host visits by candidates at corporate facilities, subject to FEC rules. The most important aspect of such internal corporate activity is the ability of corporate executives and PACs to raise funds for federal candidates. The FEC has issued complicated regulations governing such corporate political activity, but fundraising by corporate executives under the rules remains a substantial source of money for federal candidates.

Corporations, like unions, are prohibited from using treasury funds to run electioneering communications thirty days before a primary and sixty days before a general election, but they can fund such advertisements through their affiliated PACs, using voluntarily contributed individual monies in the PAC accounts. Some corporations pay for electioneering-related activities through donations to other groups, such as industry associations—section 501(c)(6) tax-exempt organizations such as the U.S. Chamber of Commerce or Americans for Job Security—or issue-oriented section 501(c)(4)s, such as the Sierra Club or the NRA.

The Supreme Court has held it unconstitutional to prohibit corporations from spending funds to campaign for and against state ballot measures.⁸⁴ In states where ballot initiatives often are identified with particular candidates or political parties, that ruling can provide an avenue for a significant direct expenditure of corporate funds that may have the effect of influencing an election.

Section 501(c)(4) Organizations

Section 501(c)(4) of the Tax Code provides for the exemption of “social welfare organizations” from federal income tax. While such organizations must be operated for the promotion of the public social welfare and not for profit,

they can engage in political activities as long as those activities do not become their primary purpose.

The Internal Revenue Service interprets that restriction to allow 501(c)(4) organizations to participate in an election by doing such things as rating candidates on a partisan basis.⁸⁵ They also may promote legislation.⁸⁶ Under FEC regulations, incorporated 501(c)(4)s that qualify as *MCFL* corporations may engage in independent political expenditures and electioneering communications. However, just as in the case of other corporations, campaign finance law prohibits incorporated 501(c)(4)s from making contributions to federal candidates, a ban upheld recently by the Supreme Court in *FEC v. Beaumont*.⁸⁷

As more light has been shed on politically active 501(c)(4) organizations, there have been calls for limits on such activities by tax-exempt entities. For instance, the Christian Coalition, an entity that has long sought 501(c)(4) status, has at times played a highly visible role in state and national Republican Party politics, going so far as to claim credit for the Republican success in the 1994 elections and to create a multimillion-dollar war room at the 1996 Republican National Convention. The FEC sued the group, claiming it illegally coordinated its activities (particularly its “voter guide” activities) with federal candidates, resulting in prohibited and unreported contributions to candidates. In a 1999 decision, the U.S. District Court for the District of Columbia largely dismissed the FEC’s enforcement action against the Christian Coalition on the grounds that the interactions between the coalition and federal candidates did not rise to the level of “coordination,” as a matter of law.⁸⁸ Republicans argue that many other groups, especially labor unions, engage in similar activities on behalf of Democrats.

In addition, the IRS appears to be questioning whether some groups may become so partisan in nature or purpose that they advance a narrow private or partisan purpose rather than the general social welfare and thus are not entitled to tax-exempt status. Indeed, the IRS denied that status under section 501(c)(4) to the Christian Coalition, apparently on the grounds that it engaged in excessive partisan political activity (the organization later reorganized as a for-profit corporation known as Christian Coalition International). Likewise, the IRS denied tax-exempt status to the National Policy Forum, headed by former RNC chairman Haley Barbour, on the same basis. Traditionally, both major parties have benefited from such organizations: the Democratic Leadership Council (DLC) is a 501(c)(4) organization that obtained its exemption in the 1980s and was once headed by Bill Clinton, before he became president.

501(c)(3) Organizations

Section 501(c)(3) organizations are tax-exempt entities organized for charitable and other similar purposes and are prohibited by law from intervening in any political campaigns. Therefore the organizations cannot endorse candidates, contribute to campaigns, or organize a political action committee. However, they can conduct nonpartisan voter registration and get-out-the-vote efforts in accord with FEC regulations as well as participate in activities related to state and local ballot measures.⁸⁹ In addition, they may sponsor candidate forums on issues of public concern.⁹⁰

Campaign finance laws prohibit party committees from soliciting hard or soft money from or transferring soft money funds to 501(c) tax-exempt organizations that engage in activities in connection with federal elections, including nonpartisan get-out-the-vote and voter registration efforts. The law does not restrict federal officeholders and candidates from raising funds for nonelectoral purposes on behalf of 501(c) tax-exempts that are not principally engaged in electoral activity. However, if a 501(c) organization is principally engaged in such activity (again including nonpartisan get-out-the-vote or voter registration efforts) or if the solicitation is for get-out-the-vote or voter registration activity, the federal officeholder may raise funds only from individuals (as opposed to groups, corporations, and unions) in limited amounts. A federal officeholder may not raise funds for a 501(c) tax-exempt group to engage in issue advocacy advertisements.⁹¹

Many well-known think tanks are 501(c)(3) organizations, including Brookings, the American Enterprise Institute, Heritage, Cato, the Family Research Council, and the Progressive Policy Institute (associated with the DLC). Some are genuinely nonpartisan, while others appear to be close to one party or group of candidates. In addition, many organizations maintain a collection of entities under one umbrella, such as the Sierra Club (which has a 501(c)(3), a 501(c)(4), and a PAC) and the Club for Growth (which has a 501(c)(4), a PAC, and a section 527 organization). Many of the ethics charges against former House Speaker Newt Gingrich related to his use of just such a collection of organizations, including charitable and educational groups, for political purposes.

527 Organizations

As discussed above, the IRS has sometimes denied 501(c) tax-exempt status to certain organizations because of their partisan political activity. Furthermore, large donations to 501(c)(4)s may be subject to a gift tax. Accordingly,

some entities intending to engage in substantial amounts of electioneering have instead organized under section 527 of the Internal Revenue Code. Section 527 provides beneficial tax treatment (that is, exemption from tax except for investment income) for “political organizations”—defined as organizations formed primarily for “the function of 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.”⁹²

When Congress wrote section 527 of the Tax Code to clarify that political organizations were not subject to tax, the organizations that fell into that category were political committees—parties, candidate committees, and political action committees at the federal, state and local levels. However, by claiming that their primary purpose is to influence elections in general but not any *specific* election, certain organizations have been able to enjoy the tax benefits of section 527 status without having to register as a federal or state political committee. This mismatch between the Internal Revenue Code and campaign finance laws has spurred the creation of certain types of 527 organizations (sometimes registered as political committees at the state level) that raise unlimited soft money donations and spend them on candidate-specific issue advocacy ads clearly designed to affect federal races. Prominent and well-funded 527s were active at both ends of the ideological spectrum during the 2004 election cycle, from America Coming Together and the Media Fund on the left to Progress for America and the Swift Boat Veterans and POWs for Truth on the right.

Congressional sponsors of reform bills like the section 527 legislation and BCRA and other reform groups have taken the position that any 527 group whose major purpose is to influence federal elections—and that spends more than \$1,000 doing so—must register as a political committee with the FEC and use only federal funds for its election activities.

Federal statutory law defines the term “political committee” to mean “any committee, club, association or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.”⁹³

In *Buckley*, the Supreme Court narrowly construed the statutory definition of “political committee” to “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.”⁹⁴ In *FEC v. GOPAC*, a single federal district court further narrowed the “major purpose” test to encompass only “the nomination or election of a *particular candidate or candidates* for federal

office”⁹⁵ Though many believe that the district court in *GOPAC* misinterpreted the law and incorrectly narrowed the test for qualifying as a “political committee” as set forth by the Supreme Court in *Buckley*, the FEC deadlocked on whether to appeal the district court’s decision.

The Supreme Court in *McConnell* restated the “major purpose” test for political committee status as iterated in *Buckley* and made no mention of the *GOPAC* requirement that a *particular* candidate be identified.⁹⁶

Prior to 2000, the Internal Revenue Code did not require section 527 organizations to disclose their contributors and spending. Accordingly, organizations that avoided federal political committee status by engaging solely in electioneering issue advocacy were not subject to meaningful disclosure requirements. Congress intervened, passing legislation requiring 527s (except for federal political committees, state candidate committees, and organizations with less than \$25,000 in estimated gross receipts) to disclose to the IRS the names of those who contributed at least \$200 to the organization a year, as well as their disbursements to a single person of over \$500 a year.⁹⁷ The enactment of those requirements reportedly caused certain 527 organizations—such as Citizens for a Better Medicare—to switch to 501(c)(4) tax-exempt status to avoid disclosure.⁹⁸

Congress passed an amendment to the section 527 law on November 2, 2002, that exempted from IRS contributor and expenditure disclosure requirements state PACs that focused exclusively on state-level elections and that already disclosed their contributions and expenditures to state election oversight agencies.

The section 527 law has come under attack from various observers for being either too narrow or too broad. On the other hand, certain public interest groups believe the law must be strengthened to require groups to declare the purpose of each expenditure over the \$500 threshold and to impose an electronic filing requirement on 527 organizations receiving or spending \$50,000 or more a year.

A number of section 527 organizations were established during the 2004 election cycle. Groups like those mentioned above (ACT, Swift Boat, and others) raised and spent millions of dollars to affect the outcome of the hotly contested presidential race between President George W. Bush and Senator John Kerry. Reform groups estimate that Democratic Party-oriented 527 organizations spent nearly \$185 million while Republican-oriented 527 organizations spent \$77 million. (Republican-oriented 527s became active only in the last three months of the campaign.) One important element of the 2004 campaign was the amount of money raised and spent by these

Table 2-1. Summary of Campaign Finance Law, 2005

<i>Contributors</i>	<i>Federal candidates</i>	<i>National and state party committees</i>	<i>Independent expenditures and express advocacy (not coordinated)</i>	<i>Electioneering communications</i>
Individuals (excluding foreign nationals without U.S. residency permit)	\$2,100 per election (subject to aggregate limit) ^a	\$26,700 per year and \$61,400 per cycle to national committees; \$10,000 per year and an aggregate \$37,500 per cycle to state party federal accounts (and federal PACs)	Unlimited but must be disclosed to the FEC	Unlimited but must be disclosed to the FEC
Corporations and unions	Prohibited	Prohibited in the case of national committees; prohibited to state party federal accounts	Prohibited	Prohibited
PACs	\$5,000 per year	\$15,000 per year to national committees; \$5,000 per year to state committee federal accounts	Unlimited but must be disclosed	Unlimited but must be disclosed
National party committees	\$37,300 to Senate candidates per cycle; \$5,000 to presidential and House candidates	Unlimited transfers to other party committees	Unlimited but must be disclosed ^b	Unlimited but must be disclosed
Section 527 organizations not registered with the FEC	Prohibited	Prohibited	Prohibited if incorporated	Prohibited if incorporated. If not incorporated, unlimited ^c
501(c)(4)s and 501(c)(6)s	Prohibited	Prohibited	Prohibited except for qualifying 501(c)(4) <i>MCFL</i> corporations	

a. (All figures are indexed for inflation for 2005.) Individuals are subject to an aggregate limit of \$101,400 per two-year election cycle. Of that limit, there is a \$61,400 limit on federal noncandidate contributions, including no more than \$37,500 to PACs and to state/local parties' federal accounts, and a \$40,000 limit on federal candidate contributions.

b. The national party can make unlimited independent expenditures for the party's candidate if the national party committee is *not* the designated campaign committee.

c. If not incorporated, unlimited so long as the only funds used are those contributed by individuals and disclosed to the FEC if more than \$10,000.

organizations that came from a limited number of very wealthy donors. Forty-one percent (nearly \$85 million) of the funding of Democratic-leaning organizations involved with federal elections came from just fourteen wealthy donors. Fifty-two percent (\$41.5 million) of the funding of Republican-leaning organizations involved with federal elections came from only eleven wealthy donors.⁹⁹

During the 2004 election cycle, with its multimillion-dollar donations to section 527 organizations and heightened public scrutiny of the problem, congressional sponsors urged the FEC to write regulations to define these 527s as federal political committees subject to “hard money” rules. The FEC reopened a dormant rulemaking, accepted public comment, and held hearings. In the end, after a postponement of ninety days by the FEC on the matter (until it was too late for any rules to apply to the 2004 election cycle), the FEC finally rejected its own staff recommendation regarding the regulation of 527 organizations, and it has taken no action to bring 527s into compliance with the law. It deadlocked 3-3 on whether to continue exploring the issue in its last vote in August 2004, but it did establish allocation ratios for 527 spending that took effect in January 2005.

The inaction of the FEC spurred the filing of two lawsuits against the agency for failure to promulgate new rules regarding the definition of “political committee.” Representatives Marty Meehan (D-Mass.) and Christopher Shays (R-Conn.) and President Bush filed suit in the D.C. District Court in the fall of 2004 to force the FEC to address the matter and bring all section 527 organizations under campaign finance regulations. The litigation is ongoing.

Enforcement

The Federal Election Commission

The federal campaign finance laws are enforced by the FEC in the case of civil violations and by the Department of Justice when a criminal violation is charged. The FEC itself has no independent authority to impose penalties except for administrative fines for reporting violations.¹⁰⁰ If, after an investigation, alleged violators of federal campaign finance law are unwilling to sign a settlement agreement and pay a monetary penalty to the U.S. Treasury, then the FEC can vote to sue the offender in federal court, present the evidence to a judge, and ask the court to find a violation and impose a fine.¹⁰¹

Penalties sought by the FEC range from a few hundred dollars to hundreds of thousands of dollars, depending on the size and nature of the violation. The law restricts penalties to \$5,000 per violation or the amount at

issue, whichever is larger, and doubles those sums in the case of knowing and willful violations.¹⁰² (For a detailed discussion of the FEC, see chapter 8.)

When the FEC Deadlocks or Fails to Act

Campaign finance law contains a provision allowing persons whose complaints have been dismissed or otherwise not acted on by the FEC to file suit against the FEC in federal court alleging that the FEC's failure to act was arbitrary and capricious. If successful, the person can obtain a court order requiring the FEC to act on the complaint in accord with the law. If the FEC does not follow the court order within thirty days, the party may sue the alleged campaign law violator directly.¹⁰³ A rare recent example of the use of this provision is *Democratic Senatorial Campaign Committee v. Federal Election Commission*, when a federal judge held that the FEC had failed in its statutory duty to investigate a Democratic complaint against Republican campaign activity in a number of Senate campaigns in 1992.¹⁰⁴ The judge ruled that the commission's inability to complete its investigative process after four and a half years was an abdication of its enforcement role and as a result gave the Democratic Senatorial Campaign Committee (DSCC) the right to sue the National Republican Senatorial Committee directly in federal district court over the alleged violations. On remand from the appeals court, the district court found that the DSCC lacked standing (see *Akins* discussion to follow) but reconfirmed its prior order finding that the commission unreasonably delayed action on the DSCC complaint.¹⁰⁵

The statutory right to challenge FEC action or inaction is an unusual provision that has served as the basis for a number of successful challenges to FEC enforcement decisions in the past. However, the right to seek judicial review of FEC actions requires a high standard of proof—that the FEC decision was “arbitrary and capricious”—and is in any case subject to the complainant having “standing” in federal court. As recent D.C. Circuit Court decisions make clear, complainants seeking judicial review of FEC action or nonaction must meet federal requirements regarding standing (the right to file suit) under Article III of the Constitution. They must suffer an “injury-in-fact” caused by the FEC's action (or failure to act) that may be redressed by the court's order. In *FEC v. Akins*, the Supreme Court held that if the FEC's failure to bring an enforcement action in a particular case deprived complainants, as voters, of *legally required* information about campaign-related activities, that failure constituted an injury sufficient to confer standing under the FECA (even though the harm may be widely shared).¹⁰⁶ However, the assertion that the FEC's acts deprived voters of information

generally is not sufficient to convey standing.¹⁰⁷ In *Common Cause v. FEC*, Common Cause was denied the right to challenge the FEC's conclusion of an investigation of Republican Party spending in Montana, even though Common Cause had filed the original complaint with the FEC. The D.C. Circuit held that Common Cause could not secure standing by alleging that it was deprived of knowledge of whether a violation of the FECA had occurred, for the FECA does not require that such information concerning violations be disclosed to the public.¹⁰⁸ Similarly, in *Wertheimer v. FEC*, the D.C. Circuit Court rejected arguments from various reform groups that they were given standing by the FEC's failure to identify party spending that was coordinated with presidential candidates as "contributions" and "expenditures."¹⁰⁹ The Court noted that the transactions in question were reported in some form and that appellants were actually seeking a "legal conclusion" rather than disclosure of additional facts.

The FEC may not make public "any notification or investigation" without the consent of the person who receives such notification or who is under investigation.¹¹⁰ The FEC interpreted the confidentiality provision as allowing it to publicly include exhibits pertaining to an ongoing investigation in a subpoena enforcement action and to make public complete enforcement action files upon termination of a case. Both interpretations were rebuffed in the courts. Indeed, the D.C. Circuit ruled in *In re Sealed Case* that documents relating to an ongoing FEC enforcement case must remain under seal, even when the FEC institutes a court action to enforce a subpoena.¹¹¹ The FEC voted unanimously not to appeal the D.C. Circuit Court's ruling but instead to adopt the court's position on the issue. In *AFL-CIO v. FEC*, the U.S. District Court for the District of Columbia overturned the FEC's practice of making entire case files public upon termination of a case.¹¹² The court found that the federal campaign finance law did not support the idea that the confidentiality requirement lapsed once the FEC terminated an investigation and suggested that case file disclosure could chill the free exercise of political speech. The FEC has adopted policies that limit what materials may be made public at the conclusion of enforcement matters.¹¹³

The Justice Department—Criminal Prosecutions

The Justice Department pursues criminal violations of the campaign finance laws either after referral from the FEC or upon independent discovery. U.S. Attorneys or the department's Public Integrity Section may investigate alleged violations, using FBI assistance and grand juries. Cases are tried in federal court, and allegations may include ancillary mail or wire fraud and

conspiracy to violate the laws. Penalties may include jail terms and substantial monetary penalties.

Aggravated and intentional campaign finance crimes may be prosecuted either as misdemeanor violations of the act or as felonies under the conspiracy and false statement provisions.¹¹⁴ Prosecution under the mail or wire fraud statutes also may be available in some cases.¹¹⁵ The law that allows prosecution of fraudulent schemes “to deprive another of the intangible right of honest services”¹¹⁶ has also been employed to enforce campaign contribution violations.¹¹⁷ The Department of Justice pursues campaign finance crimes involving up to \$10,000 as FECA misdemeanors and considers for felony prosecution only those involving more than \$10,000.¹¹⁸

Criminal prosecution of federal election law violations is pursued in cases demonstrating “willful violation of a core” provision, involving “a substantial sum of money” (\$2,000 or more) and resulting “in the reporting of false campaign information to the FEC.”¹¹⁹ The core provisions of the law include the following:

- the contribution limits
- the ban on corporation and labor contributions
- the ban on contributions from federal contractors
- the ban on contributions from foreign nationals
- the prohibition against making contributions in the name of another
- the avoidance of FEC disclosure requirements.

Schemes used to disguise illegal contributions also have been prosecuted as conspiracy to obstruct the lawful functioning of a government agency and submitting false information to a federal agency.¹²⁰

Defendants convicted of campaign finance misdemeanors may receive sentences of imprisonment, and corporate defendants may receive large fines for misdemeanor FECA violations.¹²¹

Significant sentences have been applied to felony campaign finance crimes prosecuted under the conspiracy to obstruct or false statements provisions. The theory behind conspiracy prosecutions is explained in the Justice Department’s handbook on election law crimes: “A scheme to infuse patently illegal funds into a federal campaign, such as by using conduits or other means calculated to conceal the illegal source of the contribution, thus disrupts and impedes the FEC in the performance of its statutory duties.”¹²² To obtain a conviction under the conspiracy to obstruct provision, the evidence must show that the defendant intended to disrupt and impede the lawful functioning of the FEC (such as by causing false information to be provided to the FEC by the recipient committee, thereby “misleading the public as to

the actual source of the contribution”). Successful prosecution of violations of the false statements and false papers provisions requires a showing “that the defendant knew that statements [being] made were false” and “that the defendant intentionally caused such statements to be made by another,” not proof that the defendant knew acts to be unlawful.¹²³ Similarly, conduits serving as intakes are significantly restricted by the fact that a “committee may not report that a signer is the actual source of funds if it is aware that the signer is not the source.”¹²⁴ Thus the “simple interposition of conduits to sign” checks is sufficient to result in false reports by committees.¹²⁵ Taken together, the false statements and false papers provisions criminalize acts that cause another person (that is, a campaign treasurer) to submit false information to the FEC.¹²⁶

Statute of Limitations Issues

In 2002, BCRA increased the statute of limitations for prosecution of criminal violations of campaign finance law from three to five years.¹²⁷ With that change, the Justice Department no longer needs to rely on the five-year statute of limitations for ancillary criminal provisions (conspiracy, fraud, and so forth), though such provisions remain available for prosecution of campaign finance violations.¹²⁸ However, the law does not specify the statute of limitations for *civil* enforcement actions. A number of courts have concluded that the general federal default five-year statute of limitations applies to civil actions.¹²⁹

Some courts have found that the statute of limitations period commences when the violation is committed. In *FEC v. Williams*, the court rejected the FEC’s argument that the period should be “tolled” (with the clock not started) until the violation is discovered.¹³⁰ The FEC also contended that the period should be tolled or frozen under the doctrine of “equitable tolling” for fraudulent concealment. Tolling a limit under this theory requires a showing that the defendant fraudulently concealed operative facts that the FEC failed to discover in the limitation period and that the FEC pursued the facts diligently until discovery of the facts. The court rejected that argument also, determining that the FEC had the facts it needed in campaign finance reports filed by recipient committees to discover the operative facts.¹³¹ The practical effect of those decisions was to make it significantly more difficult for the FEC to pursue allegations of campaign finance violations and to cause the commission to close a number of high-profile investigations that were past or near the five-year limit. Especially in the case of presidential campaigns, which undergo a multiyear audit before the commission even authorizes the

opening of an enforcement matter, the combination of the FEC's current capabilities and the five-year statute of limitations means that many investigations will as a practical matter be aborted without a resolution.

Notes

1. Bipartisan Campaign Reform Act of 2002 (BCRA), P. L. 107-155 (codified as amended at 2 U.S.C. 431 et seq.).

2. *Buckley v. Valeo*, 424 U.S. 1 (1976).

3. *McConnell v. FEC*, 124 S. Ct. 619 (2003).

4. 2 U.S.C. sec. 431(8)(A).

5. 2 U.S.C. sec. 441a(a)(1)(A); Federal Election Commission, "New Federal Contribution Limits Announced," press release, February 3, 2005.

6. 2 U.S.C. sec. 431(1)(A).

7. 2 U.S.C. sec. 441a(a)(1)(B); FEC, "New Federal Contribution Limits Announced."

8. 2 U.S.C. sec. 441a(a)(1)(C).

9. In certain circumstances, when a local committee can sufficiently demonstrate its independence, it will not be considered part of a state committee.

10. 2 U.S.C. sec. 441a(a)(3); FEC, "New Federal Contribution Limits Announced." New campaign finance laws set the aggregate limit on contributions by individuals to federal candidates at \$37,500 over two years (starting with an odd-numbered year), indexed for inflation. BCRA, secs. 307(b), (d)(1). Likewise, contributions to multicandidate committees by individuals are always counted toward the indexed \$37,500 aggregate limit of the year in which the contributions are made. 2 U.S.C. sec. 441a(a)(3); BCRA secs. 307(b), (d)(1).

11. 2 U.S.C. sec. 431(4).

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

13. 11 C.F.R. sec. 100.5(e)(3).

14. 11 C.F.R. secs. 100.5(g)(2) and 110.3(a).

15. 11 C.F.R. sec. 100.5(9)(5).

16. 11 C.F.R. sec. 100.5(e)(4).

17. 11 C.F.R. sec. 110.2(e); FEC, "New Federal Contribution Limits Announced."

18. "Levin funds" are funds raised and spent by state, district, and local party committees for federal election activity, subject to a combination of state and special federal restrictions rather than the federal hard money restrictions that apply to all other federal election fundraising. State, district, and local party committees raise Levin funds according to state campaign finance laws. However, under no circumstances may Levin fund contributions to a state, district, or local party committee exceed a federal law limit of \$10,000 per person per calendar year. Furthermore, federal election activities paid for with Levin funds may not refer to a clearly identified candidate for federal office.

19. 2 U.S.C. sec. 431(9).

20. See 2 U.S.C. sec. 441a(d).

21. *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996).

22. *Colorado Republican Federal Campaign Committee v. FEC*, 533 U.S. 431 (2001).

23. See 11 C.F.R. sec. 109.1(d) (campaign literature); FEC Advisory Opinions 1982-30 and 1979-80. All FEC advisory opinions since 1977 are available on the FEC's website (www.fec.gov/law/advisoryopinions.shtml). Each opinion is identified by the year it was filed and the order in which it was received—for example, Advisory Opinion 1999-01 refers to the first opinion received by the FEC in 1999.

24. *FEC v. Christian Coalition*, 53 F. Supp. 2d 45 (D.D.C. 1999).

25. See former 11 C.F.R. secs. 109.1(b)(4) and 100.23.

26. BCRA sec. 214. For a discussion of the legal implications of coordinating issue advocacy advertising with candidates and parties, see chapter 7.

27. *Shays v. FEC*, 337 F. Supp. 2d 28, 56–71 (D.D.C. 2004).

28. *McConnell*, 124 S. Ct. at 697.

29. See *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*). See also *McConnell*, 124 S. Ct. at 698–99 (citing *MCFL*).

30. “Promotion of political ideas” is defined as “issue advocacy, election influencing activity, and research, training or educational activity that is expressly tied to the organization’s political goals.” 11 C.F.R. sec. 114.10(b)(1).

31. Examples of such benefits are credit cards, insurance policies, savings plans or training, education, or business information supplied by the corporation. 11 C.F.R. sec. 114.10(c)(3)(ii)(A) and (B).

32. A nonprofit corporation can show through its accounting records that this criterion is satisfied or that it will meet this requirement if it is a qualified 501(c)(4) corporation and has a written policy against accepting donations from business corporations or labor organizations. 11 C.F.R. sec. 114.10(c)(4)(iii).

33. 11 C.F.R. sec. 114.10.

34. 2 U.S.C. sec. 431(9)(B)(i) (expenditure) and sec. 434(f)(3)(B)(i) (electioneering communication).

35. U.S. House of Representatives, Report 1239, *A Legislative History*, 93 Cong. 2 sess., p. 4.

36. See FEC Advisory Opinions 2004-7, 2003-34, 2000-13, 1998-17, 1996-48, 1996-41, 1996-16, 1982-44. See also *Readers Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312–13 (D.D.C. 1981).

37. 11 C.F.R. sec. 114.3(a).

38. 2 U.S.C. sec. 431(9)(B)(iii).

39. Amendments to Foreign Agents Registration Act, Pub. L. no. 89-486, sec. 4(e), 80 Stat. 244, 248 (1966).

40. Federal Election Campaign Act Amendments of 1976, Pub. L. no. 94-283, sec. 324, 90 Stat. 475, 493.

41. 2 U.S.C. sec. 441e (a)

42. Donations to a building fund of a national or state political party committee were specifically excepted from treatment as a “contribution” under the FECA. 2 U.S.C. sec. 431(8)(B)(viii). BCRA deleted that exception for donations to a national party building fund and, as discussed above, amended the foreign national prohibition to cover not merely a “contribution” but also a “donation of money or other thing of value . . . in connection with a Federal, state or local election” and a “contribution or donation

to a committee of a political party.” BCRA secs. 103(b)(1), 303. Therefore a foreign national may no longer make donations to a building fund of a national or state political party committee.

43. 22 U.S.C. sec. 611(b) provides:

(b) The term “foreign principal” includes—

(1) a government of a foreign country and a foreign political party;

(2) a person outside of the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and

(3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

44. 8 U.S.C. sec. 1101(a)(20) provides:

(20) The term “lawfully admitted for permanent residence” means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

In her testimony before the Senate Judiciary Committee on April 30, 1997, former U.S. attorney general Janet Reno indicated that the Department of Justice was interpreting Section 441e to prohibit soft money contributions to party committees from foreign nationals. See Hearing of the Senate Judiciary Committee, “Department of Justice Oversight,” Federal News Service, April 30, 1997 (responses to questions from Senator Fred Thompson). Senator Thompson asserted in his questioning of Attorney General Reno that her interpretation that “soft money” was never a “contribution” under the act would make acceptance of soft money contributions from foreign sources legal. The attorney general disagreed, stating that “441e prohibits contributions from foreign nationals in connection with all elections, state and federal, and thus they can’t use soft money from foreign sources for issue ads by political parties.”

45. 11 C.F.R. sec. 110.4(a)(2) and (3).

46. 11 C.F.R. sec. 100.20(i).

47. 2 U.S.C. sec. 441c.

48. 2 U.S.C. sec. 441f.

49. 2 U.S.C. sec. 441e (foreign contributions) and sec. 441b (reimbursement).

50. See generally 11 C.F.R. sec. 9033.1.

51. Individuals may still contribute to a special fund that campaign committees may establish under FECA limits or restrictions to pay for legal and accounting compliance expenses.

52. 2 U.S.C. sec. 441a(d)(2).

53. See 26 U.S.C. sec. 9008.

54. See 11 C.F.R. 9008.52.

55. See 11 C.F.R. 9008.53.
56. See 11 C.F.R. sec. 9004.3.
57. See 11 C.F.R. sec. 9004.2.
58. BCRA sec. 101(a).
59. 18 U.S.C. sec. 601 (threat of firing), sec. 602 (solicitation from a federal employee), sec. 603 (contribution to employer's campaign), sec. 604 ("work relief" entitlement), and sec. 606 (demotion).
60. 18 U.S.C. sec. 607.
61. Robert Suro, "Reno Decides against Independent Counsel to Probe Clinton, Gore," *Washington Post*, December 3, 1997, p. A1.
62. BCRA sec. 302 (amending 18 U.S.C. sec. 607).
63. BCRA sec. 101.
64. U.S. House of Representatives, Committee on Standards of Official Conduct, "Memorandum for All Members, Officers, and Employees," April 25, 1997.
65. See U.S. Senate, Select Committee on Ethics, *Senate Ethics Manual*, S. Pub. 106-40 (September 2000), pp. 139-47.
66. 5 U.S.C. sec. 7322.
67. *Buckley*, 424 U.S. at 13 and 63, respectively.
68. *Id.* at 42-44 and 44 n. 52, respectively.
69. *McConnell*, 124 S. Ct. at 689.
70. *Id.* at 703.
71. *Id.* at 687.
72. *Id.* at 688.
73. *Id.* at 688-89.
74. See Rebecca Fairley Raney, "Candidates Try Asking for Money via E-Mail," *New York Times*, July 15, 1999 (<http://nytimes.com/library/tech/99/07/cyber/articles/15campaign.html> [May 17, 2005]); Leslie Wayne, "E-Mail Used to Mobilize Voters," *New York Times*, November 6, 2000 (www.nytimes.com/2000/11/06/technology/06MAIL.html [May 17, 2005]).
75. In fact, the FEC permits matching of credit card contributions received by presidential primary candidates. 11 CFR secs. 9034.2, 9034.3; FEC Advisory Opinion 1999-36. Some analysts suggest, however, that for online fundraising to succeed, it must be stimulated or supplemented by more traditional fundraising activities, such as phone calls or events. See Rebecca Fairley Raney, "Volunteers' Actions Lead Skeptics to Question McCain's Online Donations," *New York Times*, February 12, 2000 (www.nytimes.com/library/tech/00/02/cyber/articles/12campaign.html [May 17, 2005]).
76. "Notice of Inquiry: Use of Internet for Campaign Activity," 64 *Federal Register* 60360 (November 5, 1999).
77. "The Internet and Federal Elections: Candidate-Related Materials on Web Sites of Individuals, Corporations, and Labor Organizations," 66 *Federal Register* 50358 (proposed Oct. 3, 1999), to be codified at 11 C.F.R. parts 100, 114, and 117.
78. FEC Advisory Opinion 1998-22.
79. FEC Advisory Opinion 1999-17.
80. FEC Advisory Opinions 1999-7, 1999-24, and 1999-25.
81. *Shays*, 337 F. Supp. 2d at 65-71.
82. *Communications Workers of America v. Beck*, 487 U.S. 735 (1988).

83. *UAW-Labor Employment and Training Co. v. Chao*, No. Civ. A. 01-00950, 2002 U.S. Dist. LEXIS 50 (D.D.C. Jan. 2, 2002).
84. See *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); document 3.2.
85. U.S. Department of the Treasury (Treasury Department), Rev. Rul. 67-368, 1967-2 *Cumulative Bulletin* 194.
86. Treasury Department, Rev. Rul. 71-530, 1971-2 *Cumulative Bulletin* 237 (July), and Rev. Rul. 67-293, 1967-2 *Cumulative Bulletin* 185.
87. *FEC v. Beaumont*, 123 S.Ct. 2200, 556 (2003).
88. *FEC v. Christian Coalition*, 53 F. Supp. 2d 45 (D.D.C. 1999).
89. See 11 C.F.R. sec. 114.4.
90. Treasury Department, Rev. Rul. 86-95, 1986-2 *Cumulative Bulletin* 73.
91. BCRA sec. 101.
92. 26 U.S.C. sec. 527(e)(2).
93. 2 U.S.C. sec. 431(4); see also 11 C.F.R. sec. 100.5(a).
94. *Buckley*, 424 U.S. at 79.
95. *FEC v. GOPAC*, 917 F. Supp. 851, 859 (D.D.C. 1996) (emphasis added).
96. *McConnell*, 124 S.Ct. at 675, n. 64.
97. 26 U.S.C. sec. 527(j).
98. Campaign Finance Institute, data as of November 11, 2004.
99. *Ibid.*
100. 2 U.S.C. sec. 437g(a)(4)(A) and (C).
101. 2 U.S.C. sec. 437g(6).
102. *Id.*
103. 2 U.S.C. sec. 437g(a)(8).
104. *Democratic Senatorial Campaign Committee v. FEC*, Civil Action No. 96-2184 (JHG), (D.D.C. May 30, 1997).
105. See FEC Case Abstracts at www.fec.gov/pdf/cca.pdf.
106. *FEC v. Akins*, 524 U.S. 11 (1998).
107. *Common Cause v. FEC*, 108 F.3d 413 (D.C. Cir. 1997).
108. *Id.* at 418.
109. *Wertheimer v. FEC*, No. 00-5371 (D.C. Cir. Oct. 28, 2001), <http://pacer.cadc.uscourts.gov/common/opinions/200110/00-5371a.txt>.
110. 2 U.S.C. sec. 437g(a)(12).
111. *In re Sealed Case*, 237 F.3d 657, 667 (D.C. Cir. 2001).
112. *AFL-CIO v. FEC*, Civil Action No. 01-1522 (D.D.C. December 19, 2001), www.fecwatch.org/law/court/opinions/AFL-CIO.DDC.pdf.
113. 2 U.S.C. sec. 437g(a)(12).
114. 2 U.S.C. sec. 437g(d); 18 U.S.C. sec. 371, 1001. See generally Laura A. Ingersoll, ed., *Federal Prosecution of Election Offenses*, 6th ed. (Department of Justice, January 1995), pp. 133-35.
115. See 18 U.S.C. secs. 1341 and 1343.
116. 18 U.S.C. sec. 1346.
117. *United States v. Sun-Diamond*, 138 F.3d 961 (D.C. Cir. 1998).
118. Ingersoll, p. 115.
119. Ingersoll, p. 93.
120. 18 U.S.C. secs. 371 and 1001, respectively.

121. See *United States v. Goland*, 959 F.2d 1449 (9th Cir. 1992) (ninety days' imprisonment); *United States v. Fugi Medical Systems*, C.R. No. 90-288 (S.D.N.Y., sentencing proceedings, August 15, 1990).

122. Ingersoll, p. 109.

123. 18 U.S.C. secs. 1001 and 1002, respectively. See *United States v. Hsia*, 176 F.3d 517 (D.C. Cir. 1999).

124. *United States v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999).

125. *Hsia*, 176 F.3d at 523.

126. See *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994).

127. 2 U.S.C. sec. 455(a).

128. See 18 U.S.C. sec. 3282.

129. *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996); *FEC v. National Right to Work Committee*, 916 F. Supp. 10 (D.D.C. 1996); *FEC v. National Republican Senatorial Committee*, 877 F. Supp. 15 (D.D.C. 1995).

130. *Williams*, 104 F.3d at 240.

131. *Id.* at 241.