

Introduction

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The first edition of this book, *Campaign Finance Reform: A Sourcebook*, was published in the wake of the well-documented fundraising abuses in the 1996 presidential election. At that time there was a good deal of confusion over whether the scandal involved primarily violations of existing laws (and thus indicated a problem of enforcement) or exploitation of legal loopholes (which could be closed only by new legislation). Few observers had a firm grasp of campaign finance law and how it was being interpreted by the courts and enforced by the Federal Election Commission (FEC) and other agencies. The book was designed to bring all interested parties up to speed—by providing a repository of key documents (statutes, court decisions, FEC advisory opinions, and reports) and a series of original expositions on the state of the art in critical areas of campaign finance regulation. It focused not on the impact of money on elections and policymaking but instead on the statutory, judicial, and administrative dimensions of the regulatory regime for financing federal elections, what might have contributed to its apparent collapse in 1996, and what strategies were available for rehabilitating or replacing it.

The intervening years have constituted one of the most eventful periods of change in campaign finance law and practice in the nation's history. In 2000,

Congress adopted an amendment to the Internal Revenue Code establishing disclosure requirements for nonparty political groups known as section 527 organizations, which were not required to register with the FEC because their principal purpose purportedly was something other than influencing federal elections. Two years later Congress enacted the Bipartisan Campaign Reform Act (BCRA), the first major revision of federal campaign finance law in more than two decades. In 2003, in its landmark ruling in *McConnell v. FEC*, the Supreme Court upheld the major pillars of BCRA—the elimination of party soft money and the regulation of candidate-specific issue advertising—and charted new jurisprudential ground on corruption, circumvention, and express advocacy.

The new law was in effect during the 2004 federal election cycle, shaping the sources and flow of money in the campaign.¹ Candidates, parties, and nonparty organizations adapted their campaign finance strategies to the new legal regime and to the special circumstances of the 2004 election. Record amounts were raised and spent by all of the major players in federal elections—most notably presidential candidates George Bush and John Kerry and the national party committees—and the number of small donors skyrocketed. Controversies erupted over regulations implementing BCRA, the interpretation of federal rules as applied to the activities of section 527 groups, and the political activities of nonprofit groups. Federal and state courts began to recalibrate their opinions in campaign finance cases in light of *McConnell*, especially its dismissal of the “express advocacy” standard as constitutionally required or functionally useful. Reformers rushed to respond to new developments with appeals to administrative agencies and the courts and with fresh legislative proposals.

This successor volume to the original *Sourcebook* incorporates the many and diverse changes in campaign finance law and practice over the past decade. While it retains the the first volume’s focus on the statutory, judicial, and administrative dimensions of campaign finance, this book excludes the text of key documents (which are now readily available on the Brookings campaign finance website) and relies entirely on original essays written by its four coauthors.²

Chapter 1 recounts how concerns about the influence of money in politics stretch as far back as the 1830s, when political parties began to finance their campaign activities with assessments on those who enjoyed the “spoils” of office. Later in the nineteenth century, civil service reform largely dried up that source of party money and shifted the fundraising focus to corporations, which were beginning to have increasing stakes in the direction of national

policy. Anthony Corrado traces how early twentieth-century attempts to reduce the influence of corporations and wealthy individuals, limit spending, and disclose sources of campaign funds, though enacted into law, were frustrated by legal loopholes and woefully inadequate mechanisms for enforcement. It was only after the Watergate scandal and reports of fundraising abuses in the 1972 Nixon campaign that Congress embraced a comprehensive approach to campaign finance regulation. Yet the system envisioned in the Federal Election Campaign Act (FECA) Amendments of 1974 was never fully realized, as court decisions, subsequent amendments, and the combination of resourceful actions of entrepreneurial politicians and a weak Federal Election Commission reshaped it almost beyond recognition. Another set of fundraising abuses—this time in the 1996 presidential election—set the stage for the eventual passage of the Bipartisan Campaign Reform Act of 2002. BCRA is the end point of this chapter, but surely not of the history of campaign finance reform.

Chapter 2 gives an overview of the current state of campaign finance law. Trevor Potter describes the regulated portion of the federal election finance system, as well as those entities, funds, and activities that might influence federal elections but are not defined as federal political committees. He specifies the legal standing of individuals, political parties, political action committees, section 527 organizations, corporations, unions, and nonprofit groups and discusses the restrictions (if any) that govern their contributions, expenditures, and advocacy activities. The chapter also describes the civil and criminal mechanisms for enforcing campaign finance law.

The First Amendment looms large in the path of campaign finance regulation, and no single action had a greater impact in narrowing the reach of federal election law and in limiting the ambitions of reformers than the Supreme Court's decision in *Buckley v. Valeo*. In chapter 3, Dan Ortiz describes how *Buckley*, which dealt with a challenge to the 1974 FECA amendments, created a framework that continues to define constitutional limitations on campaign finance law. *Buckley* gave Congress broad scope to regulate contributions in order to prevent corruption. However, it found no compelling state interest in limiting independent expenditures, which the Court took to be a form of political expression protected by the First Amendment. Subsequent decisions by the Court introduced some inconsistency and confusion into the jurisprudence, but the basic structure of *Buckley* remained intact. To the dismay of its critics, the Supreme Court in *McConnell v. FEC* argued that BCRA's regulation of party soft money and so-called "sham issue advocacy" also fit squarely within the framework of *Buckley*.

Ortiz also provides a brief guide to the lively constitutional debate that *Buckley* and its progeny have precipitated outside the confines of the U.S. Supreme Court. His review illustrates how differences of opinion between those supporting and opposing reform are rooted in different normative and descriptive assumptions about democratic politics.

Public disclosure has long been considered the cornerstone of campaign finance law. In chapter 4, Trevor Potter explains how and why disclosure nonetheless remains a contested area of election law. He outlines the disclosure regime currently in place in federal and selected state elections, describes the constitutional framework that the Supreme Court has put in place for disclosure cases, reviews important cases in federal and state courts implementing the Supreme Court's rulings, and highlights new disclosure issues arising in legislative, administrative, and judicial settings.

Party fundraising strategies and successes changed dramatically in the 2004 election, partly as a result of BCRA's ban on soft money, partly because of special circumstances that led to a flood of new small donors. In chapter 5, Anthony Corrado traces the legislative, administrative, and judicial actions that have determined the legal boundaries within which the political parties raise and spend money on behalf of their candidates. He reconstructs the sequence of events, including crucial FEC advisory opinions and rules, that enabled the parties to operate outside the limits of federal election law and fueled the soft money explosion during the 1996 election. He also plumbs the BCRA statute and the *McConnell* decision to clarify the legal regime under which national and state party committees operate today. The chapter includes a discussion of the legal basis for various types of party expenditures: contributions, coordinated spending, independent spending, "hybrid" spending (shared by a presidential candidate and his or her party based on a supposedly generic party message), and Levin fund activity.

The 1974 FECA amendments created a voluntary system of public funding of presidential campaigns. The system includes matching funds for candidates during the nominating process, grants to parties for national nominating conventions, and full public financing of candidates in the general election campaign. Funding comes from a voluntary individual tax return check-off program, and acceptance of public funds is tied to limits on spending. In chapter 6, Corrado explains how this public financing system, after playing a major role in every presidential election since 1976, has fallen into disrepair. In the 2004 election both major party candidates opted out of the matching fund program, freeing them from prenomination spending limits. And what was designed as full public funding for the national party

conventions and general election campaigns became but a modest share of their budgets as candidates and parties continued to find new ways of circumventing the spending limits.

A central issue in campaign finance law concerns the scope of political communications that are properly subject to regulation under the First Amendment. In chapter 7, Potter and Kirk Jowers describe the genesis of the legal distinction between issue advocacy and express advocacy and why that distinction shaped political communications prior to BCRA. The initial boundary between the two forms of advocacy was drawn by the *Buckley* Court as an exercise in statutory interpretation designed to salvage the 1974 FECA. The Court believed that the law's language regulating independent spending "in connection with" or "for the purpose of influencing" a federal election was unconstitutionally vague and overly broad. Issue advocacy was effectively defined as all independent communications that did not expressly advocate the election or defeat of a candidate. Years later that expansive conception of protected speech became the basis of a major loophole in election law that allowed candidates, parties, and groups to raise and spend campaign funds that violated restrictions on the source and size of contributions. Potter and Jowers explain BCRA's response to that development, the *McConnell* Court's constitutional reasoning in upholding the new law's treatment of "electioneering communications," and subsequent decisions by lower courts applying this broader definition of campaign speech.

Weak enforcement has long plagued campaign finance law. Congress sought to address the problem in 1974 by establishing the Federal Election Commission. But the shortcomings of the commission became increasingly apparent, especially in the development of party soft money, the explosion of sham issue advocacy, and the failure to restrain new 527 groups active in the 2004 presidential elections. In chapter 8, Thomas Mann discusses how and why Congress structured the FEC to ensure that it would not develop into an aggressively independent enforcement agency; outlines the agency's responsibilities, activities, and resources; and reviews various proposals for improving disclosure and strengthening enforcement.

The Internet became a critically important campaign tool for candidates, parties, groups, and citizens in the 2004 election. The great fundraising potential of this medium is only the tip of the iceberg. Major questions arise regarding the suitability of the current campaign finance regulatory structure in a world of digital communications. In chapter 9, Potter and Jowers explain the FEC's legal and regulatory approach to governing political activity over the Internet. While the Internet remains largely unregulated under

BCRA and subsequent FEC decisions, important policy issues lie on the horizon.

In the final chapter, Mann canvasses the campaign finance reform agenda after BCRA and *McConnell*. Some proposals—repairing the presidential public funding system, strengthening enforcement, regulating 527 organizations, and reducing restrictions on party expenditures—are adjustments to the present system. Others, including tax credits for small donors, public subsidies, and free air time, are designed to enhance competition and participation. Still others are much more ambitious in scope, designed to replace rather than repair or supplement current law. These include full public funding, deregulation, and a wholesale rejection of the *Buckley* framework.

Campaign finance reform will always be a work in progress—an ongoing effort to satisfactorily manage rather than definitively solve the inherent problems of money in politics.

Notes

1. For an assessment of the impact of BCRA in the 2004 election, see Michael J. Malbin, ed., *The Election after Reform: Money, Politics, and the Bipartisan Campaign Reform Act* (Rowman & Littlefield, 2005).

2. See www.brookings.edu/campaignfinance.