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Lessons Learned from McConnell v. FEC: An analysis by key participants in this historic Supreme Court case

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Co-hosted by:

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Lessons Learned from *McConnell v. FEC*:

An Analysis by Key Participants in this Historic Supreme Court Case

A Report of the
Bipartisan Campaign Reform Act
Constitutional Law Conference
George Washington University
January 14, 2004

Co-hosted by
The Campaign Legal Center and Democracy 21

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Contents

Foreword

On January 16, 2004, representatives of the national reform community came together to discuss the landmark decision by the Supreme Court in *McConnell v. FEC*. This one-day conference analyzed the origins, holdings and consequences of the *McConnell* decision.

The record and pleadings on which the Supreme Court relied in upholding the Bipartisan Campaign Reform Act of 2002 were due to the preparation and efforts of many in the reform community–from those who published research on campaign finance and authored the legislation to those who presented the legal defense of the law. The conference panelists were intricately involved in defending BCRA either as counsel in the case, counsel for amici, or as expert witnesses. We also heard from academics and other experts who helped build a foundation of political science research that served as the evidentiary basis of the case.

As the reform community pursues further goals and defends the implementation and enforcement of BCRA, it is helpful to look back and examine the elements of the McCain-Feingold reform of campaign finance laws and the historic Supreme Court decision it produced. Our panelists offered us an enlightening and lively discussion. We hope that you will find helpful the edited transcript of their remarks as well as the question and answer periods in the following pages.

Trevor Potter
President and General Counsel, Campaign Legal Center

Fred Wertheimer
President and CEO, Democracy 21

Opening Remarks

Trevor Potter and Fred Wertheimer

Welcome by Trevor Potter:

I'm Trevor Potter, the President and General Counsel of the Campaign Legal Center. On behalf of myself and Fred Wertheimer, President of Democracy 21, I'd like to welcome you to this conference. We are delighted to be able to do this today, here at George Washington University, and in this superb conference room. We are also grateful for the fact that this is made possible through the generosity of two foundations which have played a long and strong role in campaign finance reform.

The Joyce Foundation of Chicago is one of those, and Larry Hansen of Joyce is here today. It was Larry who thought having a gathering of people following the decision, however the decision came out, to talk about the litigation and the effects would make sense. The Campaign Legal Center and Democracy 21 were happy to carry that forward and put this event together. The Joyce Foundation was then joined by the Carnegie Corporation of New York. Gerri Mannion of Carnegie had planned to be with us today, but unfortunately could not at the last minute. Carnegie too has had a long interest in campaign finance matters and has been involved significantly over the years in making possible a range of research and information and education efforts on this subject.

We meet this morning following a historic decision by the Supreme Court. The purpose of our panels today is to spend some time talking about how that decision came about, exactly what it says, what new ground it breaks, and what it means for future campaign finance efforts at the federal and the state level. We have an opportunity today to hear from people who have been intricately involved in defending the new law either as counsel in the case, as counsel for amici, or as expert witnesses and prolific academic writers.

We have a superb group of people to take us through this discussion. As I look at the audience, and as I've looked at the list of attendees today, we have a group of people who are very knowledgeable about this subject, either themselves having been involved in the case as amici or active in the state level in issues that built up to this case or will flow from it. I think we have a good day ahead. We are taping today's conference and it will be available in transcribed form for participants and audiences as well as others.

Welcome by Fred Wertheimer:

Thank you Trevor. I would like to join Trevor in welcoming everyone and also join him in thanking the Joyce Foundation and Larry Hansen and the Carnegie Corporation and Gerri Mannion for both sponsoring this event and for all the terrific support they've provided over the years to efforts being made in this area.

Trevor and I were both privileged to be members of the legal team that represented the congressional sponsors of the new campaign finance law in the *McConnell* case. It was truly a privilege to be able to be part of this effort. We will hear, today, from among many of the valuable contributors to this effort, three individuals who led the congressional sponsors' defense team, Roger Witten, Seth Waxman and Randy Moss of the law firm of Wilmer Cutler & Pickering, who will be on the first panel.

Wilmer Cutler was the lead firm for the defense team. But this was an effort that ALSO involved dozens of lawyers from the congressional sponsors' defense team, from the Justice Department and from the FEC. It also involved the academics and other experts and consultants who helped build the legal case, the foundations that supported years of research in this field that came heavily into play in the development of this legal case, and all of the legal personnel who did the extraordinary production efforts that go into the legal briefs that are developed and filed in a case like this.

For those of us who had been involved in the case of *Buckley v. Valeo*, which seems like a lifetime ago, where the Justice Department abdicated its responsibilities to defend the law, and for those who were familiar with the fact that Attorney General Ashcroft, as a Senator, had opposed this law, we did not know what the approach of the Justice Department and the Solicitor General would be in this case. For those who have been critical of the Federal Election Commission over the years, and I count myself as one of those, for failing to properly administer and enforce the law, again, we did not know how they would approach this case.

I say this because I think it's important for people to know that the lawyers at the Justice Department and at the FEC made an all out complete no holds barred effort in this case and did a terrific job. The Justice Department lawyers at the Civil Division, the Solicitor General and the Deputy Solicitor General defended this law as if the Administration had proposed and drafted it.

The legal defense team for the sponsors involved three prominent national law firms and lawyers from a number of organizations who had long been involved in the campaign finance area. The legal services were provided pro bono to the congressional sponsors.

Special recognition needs to be taken of the extraordinary contribution of time, resources and brainpower that the law firm of Wilmer Cutler & Pickering provided in leading this effort for the congressional sponsors. In the 1970's, Wilmer Cutler was the lead law firm that defended the campaign finance law enacted in the wake of the Watergate scandals. This was at a time when the Justice Department had taken a walk on the case.

Wilmer, Cutler was not just the lead outside law firm. They led the whole defense. Thirty years later, Wilmer Cutler was back leading the team for the congressional sponsors and doing an extraordinary job in this effort.

There are other individuals who provided enormous support for this effort, including financial support. Jerry Kohlberg, with whom Cheryl Perrin worked, has been committed to this effort for years, and, as an individual, was a one man band early on in the business community for building support, joined later on by Charlie Kolb and CED, who also provided tremendous support from the business community.

So, in the end, we're here today to discuss a remarkable result in the Supreme Court and a terrific achievement by numerous individuals, organizations, institutions representing years of work that led to the passage of this bill and presented this case to the Supreme Court.

Panel I: Litigation Background

Moderated by Fred Wertheimer

Comments by Roger Witten:

I'm particularly delighted to be sitting here this morning. I suppose one alternative to sitting up here this morning would be sitting in the audience listening to Ken Starr and Floyd Abrams tell us why this law was obviously unconstitutional from the outset.

What I'd like to do in a short 10 minutes is to identify the main strategic thoughts that animated our effort, and to talk just a little bit about how they were implemented.

We were fortunate at the outset that the sponsors of the law were particularly attentive to constitutional concerns. It was obvious that the constitutionality of the statute was going to be litigated and that it would go right to the Supreme Court. The sponsors, both in connection with the drafting of the law, and in connection with the development of the legislative history, were attentive to the issues that might arise, and attentive to the need to develop a legislative record that would set forth, plainly, the basis for the various provisions of the statute.

That said, however, we reached the judgment that the most critical thing we could contribute to a successful defense of the statute's constitutionality was the development of a deep and wide factual record in Court, a factual record that would be the litigation equivalent of one producing "shock and awe", a factual record that might even have the force of bending ideology or predilections when the case was presented in the Supreme Court. We reached that conclusion, in part, because of our experience in *Buckley* where there was a very truncated, hastily assembled, and, in the end, inadequate factual record. We didn't want that problem to haunt us again. We wanted to have a factual record that would make it difficult to ignore that the abuses perpetrated by the political parties and others had really made a mockery of provisions of law that had, in many cases, been with us for decades upon decades. We wanted to have a factual record that would provoke in a judge or a justice's mind, the question, can it really be that Congress lacks the power to deal with a problem with dimensions such as these?

We readily reached agreement with the Department of Justice and the Federal Election Commission that the development of a factual record was important. We sparred with the plaintiffs, who took the position that no factual record needed to be developed. They contended that the law was unconstitutional on its face and little more needed to be told to the Court. We fought that issue in the District Court at the first hearing and, happily, prevailed. In short, developing the factual record was, as a general proposition, an important element of our strategic thinking.

Second, we thought it was important to tie the factual record very tightly to, and to stress in our advocacy the point that, the measures in BCRA really were aimed to serve legislative objectives that had been central as a policy matter to the regulation of U.S. campaign finance for, in the case of corporations, almost 100 years and, in the case of labor

unions, half a century. We stressed that these provisions were necessary to maintain the integrity of legislative enactments, whose goal was to keep corporate treasury and union dues out of federal elections. We wanted to show that the abuses, both with respect to soft money and the sham issue ads, undermined the efficacy of statutes whose importance the Supreme Court had, over a span of decades, sustained. We wanted to show that, as breathtaking as BCRA was, it was, in the end, a loophole closing measure and anti-circumvention measure that did not require the development of new constitutional theory to be sustained.

Third, and relatedly, we wanted to tie all of that to the question of the impact of campaign finance abuses on the healthy functioning of our democracy. This theme had been sounded by the Supreme Court as early as the *United Auto Workers* case and had been repeated very eloquently by Justice Souter much more recently in the *Shrink Missouri* case. We wanted to show that this case was not just about campaign finance regulation technicalities, but was about something more fundamental, the healthy functioning of our democracy and citizen participation in our democracy.

To that end, we raised the point, which the Supreme Court adopted, that there were competing constitutional interests on both sides of the case. This wasn't a case where the plaintiffs were defending the Constitution and we were simply saying, well, we haven't injured freedom of speech all that much. As I said, this idea was picked up by the Supreme Court. Indeed the Court, surprisingly to me, talked about the need for it to defer to Congress's weighing of competing constitutional interests.

With respect to the soft money issue, our main thoughts were as follows. First, we wanted to establish that there was no God-given right to solicit soft money, that soft money was a consequence of a loophole established in the law by the Federal Election Commission. And, again, the Court picked up on this theme.

Second, we wanted to show, quite convincingly through the factual record, that this loophole effectively eviscerated the contribution limits in the Federal Election Campaign Act and the ban on corporate and union contributions. We wanted to show, in addition, that the evil lay in the way the money was raised, and not in the way the money was spent. We wanted to show that Congress needed to, and had the power to, legislate comprehensively to deal not only with the loopholes that had been opened by the Commission, but to loopholes that might be opened if Congress took a narrower approach. To that end, we specifically focused on the justifications for the soft money provisions as they applied at the state and local level.

And, finally, we wanted to emphasize, and did, that in this area the Court owed some degree of deference to Congress, which was, after all, more expert than the Court in the area of electoral politics.

With respect to the sham issue ads addressed in Title II, I think there were two main points we thought it was important to get across. First, these sham issue ads had effectively

eviscerated the ban on corporate and union expenditures and had really made a laughing stock of laws that the Supreme Court had sustained in the past.

Second, we needed to dispel the public myth that Title II "banned speech". To that end, we wanted to emphasize that individuals, while they were now made subject to disclosure requirements, were not otherwise subject to BCRA's provisions, and that unions and corporations had the alternative of funding covered ads through their PACs.

Finally, as a general matter, we wanted to emphasize to the Court that the plaintiffs were making a facial over breadth argument and they had a very strong burden of persuasion to carry in that regard.

I wanted to read two illustrative sentences from the decision, one relating to soft money and one relating to issue ads. In fact, you can pick up this decision and read from almost any page and find that the factual record was important to the Court. But, as an example on page 44, the Court said, in connection with the discussion of soft money, "the evidence set forth above, which is but a sampling of the reams of disquieting evidence contained in the record, convincingly demonstrates that," etc. Then, in connection with the sham issue ad question, the Court, on page 86, said, "indeed the unmistakable lesson from the record in this litigation, as all three judges on the District Court agreed, is that *Buckley's* magic words requirement is functionally meaningless." So, the idea of building a factual record seemed to have good effect.

One question we confronted was how to build the factual record in the context of a statute that required accelerated litigation. The answer we came up with, and persuaded our colleagues and the Court of, was to conduct what we called a "paper trial" where all the direct evidence was submitted by affidavit or declaration, all the cross-examination was done outside of the Court in a deposition format, and then that record was submitted to and briefed by the parties on an extraordinarily accelerated schedule.

Before closing, I want to describe what seemed to have been the plaintiffs strategy, because it was interesting to us at the time and, now in retrospect, it seems particularly interesting to focus on what, in contrast to what we were trying to emphasize, they were trying to emphasize.

First, it was a central part of their case to make believe that there was no appearance of corruption discernable to anyone in America. I was able to say in my part of the District Court argument that I had listened with interest to the advocates for the plaintiffs who had uttered the word "corruption" only once over the course of at least an hour and one-half. The Supreme Court, obviously, just did not buy plaintiffs' argument that no appearance of corruption existed.

Second, plaintiffs chose to stress federalism issues, apparently with Justice O'Connor in mind, and to make the argument that Congress lacked authority under Article I, § 4 of the Constitution, the "Elections Clause", to fix the problems in this area. Although

that argument was the centerpiece of Ken Starr's argument in the Supreme Court, it was an argument that was disposed of in at most a page by the Supreme Court.

Third, plaintiffs decided in connection with the soft money provisions to try to identify anomalous fringe applications of the statute, particularly at the state and local level. As a result, there was a time when we were trying to bend our minds around the possible impact of this law on the Yolo County Bean Feed. In the end, that proved entirely unimportant to the Supreme Court.

In the Title II issue ads area, plaintiffs really placed a big bet on trying to get the Supreme Court to say that the "express advocacy" standard articulated in *Buckley* was a constitutional norm. The Court disposed of that very quickly as well.

Finally, plaintiffs engaged in a lot of, I guess I'd call it, "public relations", to try to perpetrate the idea that Title II "banned speech". One part of our litigation strategy, which Fred Wertheimer will come back to later, is the public communications effort we engaged in to try to counteract what we called the "big lie".

In conclusion, in the very first paragraph of our Supreme Court brief, we decided to cite Elihu Root, who was active at the turn of the 20th century in connection with the Theodore Roosevelt Administration's campaign finance reform effort. And, guess what? In the very first substantive paragraph of the Supreme Court's decision, Elihu Root, referred to by the Court as "sober-minded", was quoted, exactly for the proposition that we thought was at the core of our case: reform legislation that would curtail the deployment of large aggregations of wealth in connection with federal elections would "strik[e] at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government." 352 U.S. at 571.

Thank you.

Comments by Randy Moss:

Fred mentioned, during his introductory comments, that it was my job to steer the ship. My principle goal in getting involved in this was to make sure the ship was not the Exxon Valdez and that I wasn't Captain Hazelton.

I remember early on, shortly after we had taken on the case, one of my former partners came up to me at a party and she looked at me and she said, Randy, you better not lose that case. We certainly felt that enormous pressure in this case. Not only do the stars only align so often in a fashion that would allow Congress to pass such important legislation, into which so much work had gone in crafting a very thoughtful and well-reasoned statute, but also to lose the case would set a precedent that would make campaign finance regulation, in our view, virtually impossible for years to come.

We felt a great deal of pressure. In steering the Exxon Valdez as we went forward, we saw two principal shoals early on in the case. One was the statutory command for expedition and the requirement that the courts, as quickly as possible, resolve the question of the constitutionality of the statute. The other shoal was the one that Roger mentioned, which was the need for a factual record. The Supreme Court, in the *Turner Broadcasting* case had said that the proponents of the constitutionality of the statute subject to First Amendment attack have a burden of putting on a factual record and demonstrating that Congress had good reason to enact legislation. In addition, on top of the *Turner Broadcasting* concern, I think we also just had the strategic concern that Roger discussed as well.

The last thing we wanted to do was to try this case by hypothetical. We wanted to try it in the real world where the statute would really apply and where the hypotheticals that the other side often imagined of the outrageous applications of the statute in fact just didn't exist. We had very, very little time and a need to put on a substantial factual record. In the end, it was about seven months from the time that the District Court entered a scheduling order in the case and the process of actually beginning to try the case got going, to the time in which we submitted the last of our briefs in the District Court.

During that period of time, we took enormous amounts of discovery. We defended discovery that was being sought from us. We defended depositions. We took depositions which involved the examination and cross-examination of witnesses. There were hundreds of pages of expert reports on both sides of the case, expert depositions, and expert cross-examinations.

I want to talk to you about just some of the hurdles that we had to overcome during that seven-month period of time. I want to give you a flavor for it, and not really try and chronicle all of it by any means, and I'd be happy to discuss particulars during the question period if we have time.

Just to give you a flavor of how difficult it was to do as much as was done in the short period of time, let me mention a few things. One was the protective order in the case. Ordinarily this is the sort of thing you'd say, this is something you deal with in the litigation,

it's not a big deal, you have a protective order. If there are documents out there that folks think are confidential and should be treated in a confidential fashion, everyone agrees to treat them that way and if there are fights over particular documents you deal with it.

In this case, where we only had five months for discovery, we had little choice but to agree early on in the case to a fairly sweeping protective order. The reason for that was that we simply did not have time to fight with all the parties who we were seeking discovery with over whether they had to produce documents to us that they said were sensitive and to spend a month or six weeks fighting through motions practice over what a protective order ought to look like in the case. We simply had to agree to treat documents that were designated as confidential, as confidential.

At the same time, we were very concerned about doing that for two reasons. One was simply the historic record in the case. We realized going into this that a lot of the materials that we were going to receive were of historic importance. But, also, more pragmatically, we were concerned about how both the Trial Court and the Supreme Court could write opinions in the case, and in a case that we knew turned on the facts so much, when the facts themselves would be confidential. We didn't want the District Court to be in a position in which it felt like it couldn't cite to documents in an opinion that would undoubtedly be a public opinion because those documents were confidential.

It also turned into an absolute nightmare just on a daily basis of handling the case. We wrote briefs with the government that totaled, just before the District Court, 793 pages with most pages of those briefs containing some factual references on them. At times there were pages with dozens of factual references and we had to go through and take enormous care to make sure that all those documents that were being referenced were public record. If they were not public record, we had to go through and prepare a redacted version of the brief that excised those portions. Ordinarily, that's the sort of thing that lawyers deal with, but when you are briefing a case of this magnitude, and filing 793 pages of briefs all in a single month, the process of doing that is just absolutely overwhelming.

The briefing is another example of the hurdles in the case. This is simply the opening brief that we filed in the District Court. It was a joint brief that was filed with the government. The District Court requested that a single brief be filed by the defendants in the case. The government was not in the position in which it could, or, as a matter of its practice, would agree to jointly author a brief with non-governmental entities or individuals.

In addition, there simply was not time in that period of time to kind of come up with a brief that the FEC would agree with, that the Justice Department would agree with, and that the interveners would agree with. In fact, there were differences in our positions. I think that we went into much greater detail, at least, in explaining what we thought was the history of where the soft money loophole came from and that it was largely a result of the stakes and lack of regulation by the FEC early on that created it. We had to come up with a single brief that balanced all of this.

This brief itself was probably 300-400 pages long. The way we ended up piecing it together – and we had no other choice – was to simply put in our introduction followed by the government's introduction, and then our argument on Title I followed by the government's argument on Title I, and so forth through the entire brief.

On the notions of production issues and getting something like this done on the time that we are done, one story that is amusing today was not so amusing, I think, to the lawyer involved at the time. This lawyer was the principal lawyer from the Justice Department at the trial level and worked around the clock getting the brief ready. Finally, on the night before the brief was due, this lawyer was up until 4:30–5:00 in the morning putting on the final touches. The brief was, in his view, done. He was going to ship their sections of the brief over to us in the morning. We were going to put it all together and get it filed in the Court. I think it had to be in the Court by 3:00. He goes to sleep in his office and he puts on his door a huge sign which says, do not wake under any circumstances, and he goes to sleep. A little while later, there was a knock on his door.

One of the lawyers on his staff comes in and says, "Jim, I'm really sorry I have to wake you up, but there's a big problem." He responds by asking, "What's the big problem?" There was a problem with some additional lawyers whose names needed to be on the front of the brief, and could not be on the inside cover of the brief. He had to then, at that point in time, get up from his slumber and find some way to get additional names onto the front page of the brief. This brief itself has listed on it 62 lawyers just for the defendants.

I actually think there are a lot of remarkable things about this case. But the thing to my mind that is most remarkable is that 62, and perhaps 62 or more lawyers, were actually able to work together as effectively and as much of a team as this group did.

The amount of work was just overwhelming and you can imagine that the process of simply keeping track of what 62 different lawyers are doing and keeping them all moving in the same direction would be an overwhelming task. In fact, that really wasn't the case. People worked together incredibly well and efficiently and got things done. Our work with the government lawyers worked spectacularly well. They were wonderful lawyers in the case and they worked exceptionally well with us. We had just a fabulous relationship, which helped us build the record that Roger indicated was so important in the case.

Another issue to mention about the difficulty of handling this case, particularly in such a short timeframe, was who our clients were. The fact that we were representing members of Congress raised a number of sort of tricky issues. One issue was, in their depositions and cross-examinations in the case, what could they say, comfortably, about the legislative process? There is, in general, embodied in the Constitution, something called the speech or debate clause on unity. A member of Congress cannot be compelled to give testimony about the legislative process.

On the other hand, as public officials, I don't think any of the members of Congress wanted to be in a position in which they were perceived, or, were in actuality, holding back

in the discussion of what happened. But, on the other hand, their personal views about the legislative process are not really relevant in a legal sense. They may have some practical implications, but what's really relevant is what happened before Congress enacted the law and what they said when they enacted the law, not what Members said after the fact. There were a number of issues that we had to balance relating to speech or debate clause on unity.

Another issue that comes up with who your clients are in a case like this is just the time that they have. I remember that on the day that Senator McCain's cross-examination was taken in this case, Roger and I showed up in Senator McCain's office. We thought, though while cutting it quite close, we'd show up about a half an hour early to have some time to spend with our client before he had to be subject to cross-examination.

Where is Senator McCain? We can't find him anywhere. No one knows where Senator McCain is. Someone points at the television set and says, there he is. He's on the floor of the Senate leading the debate on the authorization for the hostilities in Iraq. Finally, he disappears from the television set, shows up in his office, and, says, okay, let's go.

So we go right in. He does extraordinarily well in giving his cross-examination testimony, gets up towards the end of it and says, I really do need to get going, as I am managing this important legislation on the floor of the Senate. Everyone says, thank you very much for your time, as he gets up and disappears. It's just extraordinary being able to switch gears in that fashion.

Just one final note was that in the process of taking discovery in the case, we also had the complication that it was very important to us to maintain political balance, both in actuality and to be perceived that we were maintaining political balance. This was not about accusing the Democrats of misconduct or the Republicans of misconduct. At times, we found that we were negotiating against ourselves in the process of obtaining discovery as a result of this, and that anything that we might agree to give up in a negotiation with one political party in order to convince them to give some information that we needed from them, would quickly meet a demand of the other political party for the same thing, even though they weren't necessarily giving us the same quid pro quo for obtaining the information.

At times, those discussions even found their ways into the press where we would be accused of favoring one party over the other as part of the litigation dynamic and people trying to resist the discovery in the case. So that was another difficult part, again, in a very tight timeframe of trying to balance what we needed to achieve. But, at the end of the day, we were able to assemble a really massive factual record that had the information in it that we needed. It was a hard process, but it was a successful one.

Comments by Seth Waxman:

Fred asked me to talk about the Supreme Court litigation aspect of it and I'm happy to do that. I guess the first thing I would say is I felt like we acquitted ourselves well in the Supreme Court, but there's no doubt that this case was won in the District Court. It was won before we ever argued the case in the District Court.

The most important event that occurred in the litigation defense of this case occurred at the first time that the three of us and others on our truly exceptional legal team sat down to try and figure out what the themes were going to be and how we were going to manage the litigation to establish and to lay out the factual record that we knew we could make in a perfect world and that we knew justified what Congress did, but that is often difficult to bring about in the real world of litigation. I think when Roger says it's difficult to read very far in the Supreme Court's opinion without running into many, many references to what the record before Congress, and, in particular, what the record before the District Court showed, that's true. That sort of shows how the West was won.

In terms of the Supreme Court itself, the Supreme Court decides hard cases. The one thing they don't decide very well is how hard cases should proceed. The justices don't like to decide who gets to argue and who doesn't, and whether page limits should be exceeded or shouldn't. And the Supreme Court just doesn't deal well with controversy of that sort in a very difficult multi-party case where there are many – here there were 12 – consolidated cases, everybody was both an appellant and an appellee.

The Clerk's Office and the justices really look to the parties to come up with a proposal and sort of work this out for them. Like just about everything else in this litigation, that, of course, was a major challenge. We had, to begin with, a gargantuan factual record. We had a District Court opinion that fills its own volume of the Federal Supplement. It was 1,700 pages long. We had something like 82 parties. Everybody was both appealing and resisting appeals. I think it's fair to say that the Supreme Court, particularly on the truncated schedule that everybody understood we would be on, was sort of bewildered about how to deal with this.

Who were going to be appellants and who were going to be appellees when everybody was an appellant and an appellee? How was argument time going to be divided? Ordinarily, the Supreme Court consolidates related cases and allocates one hour of argument for all the cases. In the District Court we had an argument that spanned two days. It seemed, with the number of challenging parties, and the number of different lawsuits, and just the complexity of BCRA and the campaign finance statutory scheme and regulatory scheme that BCRA was laid upon, the whole notion of anybody making their own little case in one hour seemed a little bit difficult.

We needed to work, I think, closely and cooperatively both with the United States and with our opponents in trying to come up with some coherent proposal that the Court could accept, particularly since this all came to the Supreme Court during its summer recess when the justices are used to resting and relaxing and laying fallow, if I can be irreverent,

and not dealing with how to manage this uniquely complicated and complex piece of litigation. Even before we got to the briefing and argument of the case, there was a considerable amount of hand wringing, and negotiation back and forth, and strategizing among all the different legal camps about how many pages everybody should have, and who should go first and who should go second, and how much argument time there would be. As things worked out, the Court allocated not one, not two, but four hours of argument to this case, which is, for people who follow the Supreme Court of Chief Justice William Rehnquist, beyond extraordinary. It is truly unprecedented. This was the first case in decades, I think probably since *Buckley v. Valeo*, which was before a very different Court and a very different time, in which the Court heard four hours of argument in consolidated cases. The previous record under this Chief Justice was two hours in a couple of really exceptional cases that I had argued. It's, I believe, the first time since the Pentagon Papers case in the early '70's that the Supreme Court heard argument in a case during the summer, or what the Supreme Court views as the summer, which is to say right after Labor Day, but before the first Monday in October, which is when the Supreme Court term starts. We knew, and the justices certainly recognized, that this was truly an exceptional, historic case of considerable magnitude. The justices basically said, in effect, each side won something and lost something in the District Court. But we're going to proceed in this case as if nothing happened in the District Court and the challengers are going to be the appellants, people who were plaintiffs are going to be appellants, and the members of Congress and the United States are going to be defendants.

What that meant was our opponents had an opportunity to file two briefs and we only had an opportunity to file one. We were considerably vexed by the page limits that were imposed on the interveners. We were given one 75 page brief to basically make a case about a statute that, itself, printed out, runs to about 30 pages. We had, I think, eight briefs on the other side, which ranged in length from 50 pages, plus 20 pages for a reply, to, in the case of the Republicans, 100 pages in their opening brief, and a considerably larger number in their reply.

We only had one 75-page brief to make our arguments. We had written a lot more pages than that in the District Court, and even that was sort of a struggle, given the nature of the record and the sort of muscle bound nature of our team. I remember the day that the law was enacted. Senator McConnell had a press conference with his legal team and talked about how this was the legal dream team of the century. He spoke of how such a great pool of talent had never been collected before and that this team plus the patent unconstitutionality of the law would provide a juggernaut for the centuries.

I have to say, we're all litigators and there was nothing that I think motivated us, even more than the rightness of our cause, than being told that the law was patently unconstitutional, on its face, and that the dream team was going to be stating the obvious to courts. There's no doubt that the dream team was a very fine group of lawyers. But, I have to say, and I'm not only talking about my fine colleagues at Wilmer, but, one of the marvelous and also most daunting things about litigating this case throughout, including in the Supreme Court, was the real, the impossible dream team. This included lawyers for Common Cause, the Brennan Center, the Heller firm, the Munger Tolles firm, Public Citizen

and any number of other people who were otherwise unaffiliated with institutions, but volunteered untold amounts of their time and energies in helping us in the case.

Of course, everybody wanted to help with what was the main event. From the minute this law was ever contemplated by the very first sponsor, whoever it was, everybody understood this had Supreme Court written all over it. And this case was going to be decided, the constitutionality of this statute, whatever Congress enacted, by the Supreme Court of the United States. And by a Supreme Court that included three justices who had already said *Buckley v. Valeo* was a fools mission and needs to be overruled and where just the First Amendment isn't going to allow regulation of this core speech.

For those of you who either do math better than me or follow the Supreme Court, there are nine justices and you need a majority, which means you need five. If three people are sort of off the table, we're not talking about a large margin of error here. We had the most formidable legal team for the interveners, plus the Solicitor General's office, that I think can be imagined. But, one of the challenges is that we were muscle bound. It's like the great weightlifters who can't touch their shoulders. They can't do basic functions because they are so powerful. Being told, in addition, that we are going to make our entire case in 75 pages was probably the most daunting thing about this case.

The most daunting thing was not winning this case in the Supreme Court. I had had no experience with campaign finance legislation before and was not really very active in electoral politics or partisan politics. When I became Solicitor General, as Fred said, these cases started coming up on the docket. This is a Supreme Court that is quite smitten with the First Amendment, with a very aggressive reading of the First Amendment, and interpretation of free speech principals and campaign finance regulation cuts right to the core of that.

When the first case came up, the *Shrink Missouri* case, which I argued in the Supreme Court, everybody, the popular press and the legal academy, basically said this was the end for *Buckley v. Valeo* – this is a stupid law, certainly this Supreme Court is going to declare it unconstitutional. We won. We won by quite a bit. When the next case came up, *Colorado Republican II*, everybody said, well, this is really it. Now Congress says, these people must be mindlessly heedless of where the Supreme Court is going in the First Amendment area. This is truly a fool's mission. But, this was an active Congress and people in the Solicitor General's office then, and I'm happy to say now, properly defend acts of Congress when something can be said for it.

We defended it and we won. When I left government I ran across Fred at a social, at a mutual friend's house shortly after that, and he said, we're going to pass this law, and, now that you're free maybe you can help us out. I said, sure. I think at that point there were many, many people, including many people in this room, who thought this was phenomenally important for Congress to do and that we needed to take real steps to try and reintroduce integrity into the system by which we finance candidate campaigns.

If for no reason other than just to show an increasingly dispirited and cynical American public that the political branch's somewhat underdeveloped capacity for self-restraint could be marshaled in the face of overwhelming dispiriting cynicism. I'm not sure how many people there actually were who were utterly, blithely confident that if Congress would just pass this law, we would get it upheld. But I'm confident that Fred and I were two of those people.

When BCRA came along, there was almost no one who wrote seriously in this area who thought that this law was just simply going to be upheld. The most wildly optimistic people from the Academy thought Title I would be upheld, but Title II was just something to give up in order to win something else. We never approached the case that way. I thought that this case was winnable en toto at the outset. It turns out that the 75-page limit that we had for our sort of muscle bound team was one of the best things that really ever happened to us.

I'm over my time and so I won't talk about the oral argument, as it's all transcribed. When I talk about our team, I just want to say, and to segue into the other two speakers, we had the true dream team that extended beyond the people who were actually listed as counsel and counsel of record for the interveners. There are many cases that have many amicus briefs filed in the Supreme Court. We had a lot of them on our side and we had a lot of them opposed to us. We had some amicus briefs on our side that were just truly exceptional beyond the norm and that had an enormous impact on the Supreme Court. You are going to hear from the author of one of them, Dan Ortiz, who just wrote an absolutely pellucid, elegant treatment of Title II.

There was a brief for political scientists I think that Norm wrote, and was involved in, that just sort of laid out the political reality in 20 pages in a way that was just incredibly refreshing. We had an amicus brief by Senator Fred Thompson who had chaired the Thompson Committee hearings that had spent an enormous amount of time looking into the abuses.

The parties in cases can't write amicus briefs or have any significant input into briefs that are written by friends of the Court, but I remember talking to Fred Thompson, who was so involved in the 9/11 legislation that he couldn't be a witness. I told him that I didn't know what he thought about this law and I didn't know what he was prepared to say about it, but you have spent more time in the trenches looking at the problems that generated this than anybody else, and so you ought to think about, as this is the last chance to say something about this. He wrote an amicus brief in the case that you couldn't find fault with. He basically said, I was there, I came into this knowing little about, except that there was a big problem, and here's what we found.

I think Trevor was certainly, among his many other responsibilities, the guy who sort of had to answer the calls from amici, and potential amici, and he gets an enormous amount of credit for having, in the end, come up with a coherent set of amicus briefs that we couldn't write and we couldn't engineer but that we could encourage.

Comments by Trevor Potter:

The Campaign Legal Center had been active in talking with Members of Congress and looking at draft legislation, and then as part of the legal team representing the congressional sponsors. There were a couple of areas in which we could be helpful. We served as the contact person to groups that were thinking of being amici to let them know the briefing schedule and information about how the case was proceeding. Mark Glaze of the Legal Center took a lead role there; Glen Shor of the Legal Center took a lead role in working with the Wilmer team and others on drafting the briefs.

I would emphasize one item of all those you have heard today, which is that there was an enormous amount of work that went into this case before the law was ever passed or there was the first meeting of the legal team. A lot of that was building a record from academics, political scientists and lawyer's research over a number of years.

Again, this was a lesson learned from the *Buckley* decision, which had very little academic research in the record. One of the key factors in the development of the record in the *McConnell* case was the academic research. In many cases the research was funded by some of the foundations that took an interest in this area 10-15 years ago, Pew, Joyce, Carnegie and others. Those they funded became key players in the case because they had specialized knowledge. They had spent so much time looking at these issues, looking at where the money was going, what the allegations of corruption were, and the changes in the way political parties operated.

Tom Mann at Brookings, Norm Ornstein at AEI, Tony Corrado at Colby, Dan Ortiz at the University of Virginia, Dave Magleby at Brigham Young University, were all cited in the Supreme Court decision or played a key role in testimony in the case. Richard Briffault at Columbia and Rick Hasen at Loyola are two additional lawyers who wrote significant work in this area. There was an exceptionally firm foundation that Members of Congress could look at when they were trying to figure out how to draft the legislation, and then it became terrifically important in defending it. Obviously, the groundbreaking work on the Title II electioneering communications side was done by the Brennan Center, in Jon Krasno's and Ken Goldstein's Buying Time study. This base of academic research made this case different from other campaign finance cases previously litigated.

There has been a lot of focus on the breath of the plaintiffs in the case. What an amazing collection, from the ACLU to the NRA to the labor unions', it is often said. I think there has been less attention to the breath of the defendants, those who were upholding the law. You start with the fact, as Fred Wertheimer and others have noted, that it was not a given that you would have the Department of Justice, the Federal Election Commission lawyers, and the congressional sponsors as interveners all lined up, working shoulder-by-shoulder. That, I think, was significant.

They each had different institutional interests and could have come at it from different ways. In addition to that core group, you had a range of people and organizations, some in the District Court, many more in the Supreme Court, who lined up as amici in the

case. Religious groups, civil rights groups, business groups, former members of Congress, former leaders of the ACLU, Common Cause, the League of Women Voters, political scientists, and 21 State Attorneys General. By my count there were 1,120 pages of amicus briefs and that is a lot when you are looking, as Seth Waxman has noted, at the fact that the sponsors of the law as interveners were only allowed 75 pages. A couple of those I note as being particularly important, two being dogs that did not bark.

Going into this case there was a lot of talk about federalism. In the course of the case there was an angry dispute in the District Court over the Buying Time study. The issues essentially disappeared from the case in the Supreme Court.

On the federalism issue, there were 21 state attorneys general, almost a majority of the states, who wrote a very strong amicus brief. They said that we, too, as states are concerned about these issues. We are concerned about corruption in our state and government. We are concerned that you, the Supreme Court, will be led astray and adopt constitutional standards that will make it impossible for us to deal with corruption at the state and local level. That seemed, to me a very strong argument coming from the states to counteract the federalism argument. One will note that federalism played a very small role when the Supreme Court wrote the opinions. In fact, one of my favorite moments in oral argument was Justice Kennedy saying, "You keep talking about the Tenth Amendment, should not you be talking about the First Amendment?" I think part of the disappearance of the issue in the opinions can be explained by the Brief from the 21 State Attorneys General said that this is not a federalism case.

In terms of the Buying Time study, there had been some very confusing treatment in the District Court. Three judges wrote three different ways about what they thought it meant, what the methodology was, how it affected the case, and whether Congress had, in fact, relied on it significantly.

I think there were some plaintiffs who thought it was a potential Achilles heel. However, by the time Dan Ortiz and the League of Women Voters were finished masterfully explaining in their amicus the arcane question of numerator and denominator, something that I had had people trying to explain to me for months, it must have been persuasive because that issue, too, did not loom large in the opinions.

There was another group here that was more of a man bites dog story; that was the role of the business groups. I think there was a common public perception that business favored soft money, that they liked the access it bought, and that they would not want it to crimp their style. For many years Jerry Kohlberg and his organization, Campaign for America, headed by Cheryl Perrin, had been effectively, publicly arguing as a group of business executives that this was false. They argued that they were disturbed by what was happening, and how it was not good for American business and their public perception of business. They were joined by the Committee for Economic Development, CED, with a staff team headed by Charles Kolb and Mike Petro. The CED played a key role through a taskforce of business executives and academicians who published a report saying that we

think soft money is wrong, harmful to America (and thus to American business) and that we strongly recommend it be abolished.

These business groups were very helpful, politically, going through the legislative debate. Business executives provided key witnesses in the litigation, and made statements about what they had seen personally and why they thought this was corrupting. The amicus brief was cited in the Supreme Court's majority opinion.

As Seth Waxman has noted, Senator Fred Thompson's amicus brief, laying out what he had seen firsthand, and the Thompson hearings was very powerful. Both were cited throughout the majority's opinion and put to rest the argument that there was no corruption in the soft money system.

The brief from the former ACLU leaders did a very effective job in taking the edge off the ACLU argument that there was only one way to look at the case as a First Amendment issue. I thought that it was very helpful to have the ACLU's most senior, former leaders, say there is another way to look at this case, and argue that the law was constitutional.

Norm Ornstein's brief, on behalf of the political scientists, took on the state and national political parties' argument. The parties, of course, were saying, the sky is falling and we will never survive this. Norm did an exceptional job of putting the case in historical perspective and explaining that parties in fact were likely to come out of this just fine.

I mention all of this to point out the importance of the political science and legal research and writing in the case. All this work was accomplished before the law was enacted and was available to lawyers in preparation for the case. I can recall in the early days of the litigation when the Wilmer team met these people who had been working in this area for five and ten years and asked could we argue this, or is there any evidence of what we plan to argue? These people said, "I am so pleased you asked. Let me show you." I think we can all recognize now what an important piece of the case those years of research are.

Comments by Dan Ortiz:

I take it that I'm here as an example, I hope not as a cautionary tale, of how non-parties can help frame and further a case that's fairly complicated in terms of doctrine, evidence, and theory. I represented the League of Women Voters, an organization that historically has spent much time toiling in this field. After a discussion with other amici, the League decided that it wanted to do two very different things.

First, it wanted to go big picture. It felt it was important to make the electioneering communications provisions in a way which portrayed them and made them understandable as not doing much that hadn't actually been done or approved by the Supreme Court before. The League basically wanted to show that BCRA's handling of so-called "issue ads" simply followed the basic architecture of long-settled and relatively uncontroversial campaign finance cases. The basic point was that what Title II of BCRA did was draw a big distinction between the treatment of corporations and unions, on the one hand, and individuals, on the other. It forbids corporations and unions to spend money on "electioneering communications" while it allowed individuals to do so - so long as they disclosed. The prior law, the League argued, clearly allowed treating each group this way and treating each differently from the other. *Austin v Michigan State Chamber of Commerce* allowed Congress to bar corporate and union spending and *Buckley* allowed Congress to require disclosure of spending by individuals. We wanted to make that simple structural point and then go on to show how the existing test that the lower courts had developed, the so-called "magic words" test, actually undermined both that structure and the long-settled objectives of campaign finance that the Supreme Court itself had approved, like preventing corruption and the appearance of corruption.

Second, the League wanted to address an issue that wasn't "big picture" but was fairly interesting and concerned a critical part of the case. The League wanted to defend one of the central studies, the Buying Time studies, that Congress had relied on in enacting BCRA, a study which had come under a lot of criticism from the plaintiffs in the case.

Now, as Trevor mentioned when he started talking about numerators, denominators, and the higher math of BCRA, there was some danger that going in and trying to support the Buying Time studies would be a little bit like going in to Vietnam. Once you got in there, you wouldn't really be able to gracefully exit and you might create as many problems as you settled.

You'll remember that BCRA's primary definition of "electioneering communications" covered broadcasting, cable, and satellite advertisements (not print and mass media) that referred to a clearly identified candidate for federal office within 60 days of a general or 30 days of a primary election and that were targeted to a candidate's district, or, in the case of someone who is running for senate, the whole state.

The Buying Time studies looked at the effect this test would have had on advertising in the 1998 and 2000 elections. It showed that very few real issue ads would have been

wrongly caught up by BCRA. My aim in working for the League was to defend these studies from some seemingly serious challenges.

The plaintiffs basically claimed that the underlying data had been inappropriately recoded. Some of the allegations, in fact, almost went to the point of suggesting unprofessional conduct on the part of people running the study. The plaintiffs claimed that the studies used the wrong statistical measures- this is the numerator and denominator problem that Trevor alluded to- and they also claimed that they couldn't replicate the findings.

Now, in addressing something technical, but very important, what do you do? There's a huge risk that you'll lose people right off the start, especially people who, like Supreme Court justices, aren't trained in this stuff. The League decided to defend the Buying Time studies by building from the easy-to-understand defenses to the more technical ones, all of which were important. The hope was that people reading the brief, whether on the Court or elsewhere, could peel off at the point when their eyes began to glaze over.

We started with the point that two of the three judges on the District Court found the study's basic conclusions reliable and exceedingly persuasive. As one of the district court judge's referred to the plaintiffs' attacks, they represented a piñata party. The plaintiffs were taking random whacks at the study from different angles and hoping that after enough whacks the whole thing would fall. We also pointed out, as the District Court had, that the plaintiffs did no studies of their own and that at some point it really takes a study to beat a study. We then turned some of the plaintiffs' arguments against them by noting that the plaintiffs' handling of both the underlying data and some of the empirical questions was itself highly questionable.

After discussing how the fact that the study had been commissioned did not indicate any bias, we explained how actions the plaintiffs thought were suspicious were actually innocent. Standard statistical methodology, we showed, would "clean" databases and try to account for so-called "cookie-cutter ads," which are ads that serve as templates for others. That plaintiffs could not actually replicate the results, we showed, proved not that there were problems in the initial study but in the plaintiffs' own statistical technique.

We then went on to argue a very simple point. Even if the plaintiffs' charges were true and parts of these studies were unreliable, the plaintiffs' challenges would still leave most of the major conclusions of the Buying Time studies intact. No one challenged that the magic words that the lower courts had been looking for before were rarely used in political advertisements, that interest-group sponsored ads mentioning candidates tended to be concentrated in the days right before an election, and that ads sponsored by parties and interest groups comprised an increasingly large and significant portion of overall political advertising.

We made some other points too: that other studies in the literature supported these same conclusions and that these other studies hadn't been criticized by plaintiffs and perhaps

most powerfully that the plaintiffs' own experts relied on many of the conclusions in the study, which went a long way, we thought, towards neutralizing the plaintiffs' criticisms.

Now I won't actually go into numerators and denominators here because I feel at this point your eyes are all glazing over. I'm happy to answer questions about them later, though, if you want. I'll just say that this discussion occurred at the very end of the brief. We hoped that everyone would get there, but there was no expectation that many of the justices would slog that far. If they or their clerks did, however, we hoped to persuade them even though the argument was somewhat technical.

Thank goodness we escaped mention in the Supreme Court. If Buying Time study had actually come up, it would have meant that there was a real issue and perhaps a problem. As Trevor said, the brief's success lay in all it discussed not being mentioned. It took an issue that was potentially important and succeeded in turning it into a non-issue. As Trevor said, it was a case of the dog that didn't bark.

The brief was a wonderfully fun challenge. If nothing else, I want to convey to you what a treat it was to work with such a great group of lawyers, political scientists, and other people. The group effort was just wonderful.

Panel I: Question & Answer (Excerpted Portions)

QUESTION

Is there a lesson in this for Congress?

ANSWER

Randy Moss: I think there is a wonderful lesson for Congress in this in that the people who helped to draft this legislation took their jobs very seriously. They went and they looked at what the Supreme Court had said and they drafted the legislation in a way that was consistent with what the Supreme Court had said in the past. One can say that the case was won in the District Court. I think perhaps one might say it was even before that.

Seth Waxman: As somebody who has unsuccessfully defended a number of acts of Congress in the Supreme Court, and occasionally successfully, I can't really say enough to underscore what Randy just said. The Supreme Court has been criticized as giving too little deference to the judgment of the political branches.

The Supreme Court pays attention to the way that the political branches go about their jobs. They take more seriously legislation that bares the hallmark of being truly serious. Now, any act of Congress, any legislation that Congress enacts and that the President signs, or that's enacted over the President's veto, we have to presume is serious. We have to presume that it was enacted by our representatives as being, (a) consistent with the Constitution, and (b) in the best interest of the republic.

One of the first cases that I argued in the Supreme Court was the defense of the Communications Decency Act. There were, I think, only one or two members of Congress that ever publicly took credit for anything. It reflected the level of care that Congress appears to have given it. The Supreme Court opinion drips with the sense of recognition that Congress take very seriously the drafting and crafting of this legislation, and we're not going to spend a whole lot of time agonizing over each little provision either.

Yet, when Congress does something like the rest of the Telecommunications Act of 1996, or BCRA, the Supreme Court knows, and can tell when Congress has really struggled with a difficult problem, and come up with the best solution that it thinks benefits the country. That was reflected here. We elect people to govern us by their own lights and ordinarily there is a presumption that a law is constitutional if it is sufficiently, rationally related to an objective that the Constitution allocates to the federal government. But where the law affects certain fundamental rights, and the First Amendment is the paradigm, the Supreme Court, over time, has evolved different tiers of scrutiny.

As the scrutiny gets higher, the degree of deference to what Congress might have wanted or might have thought is reduced. You find, essentially, three tiers. First, there are laws that don't affect fundamental First Amendment rights and are fundamental economic legislation. Second, they are upheld if there is any rational basis on which Congress could

have concluded that this legislation promotes a legitimate objective. Third, they are laws that have a discriminatory effect - that might affect different groups, for example racial groups, differently, either intentionally or otherwise.

Then, there are laws that go to the core of political speech. Title II, the electioneering provisions, was a good example of this, where Congress applies what's called strict scrutiny. Here, they want to make sure that based on the evidence that Congress heard that it applied the most narrowly tailored legislation reasonably possible in order to promote a compelling interest.

Then, the Court has sort of a medium standard, and this applied to the Title I soft money provisions, which was first articulated I think in the *Turner Broadcasting* case - also a First Amendment case, in which it looks principally at the evidence that was in the legislative record, but allows the supporters or the defenders of the law to supplement it with a factual record made in the case.

We felt, at the outset, that this is where we were with respect to major portions of this act. If you look at the factual record, the legislative record, it wasn't just the record before the Congress that enacted BCRA, campaign finance legislation had been attempted in many, many prior congresses. There was a lot of evidence there. The extent to which Congress needs to sort of cross its T's and dot its I's by the Supreme Court's lights depends on the extent to which it is legislating in a core area of a fundamental right.

QUESTION

Are there any thoughts as to what remains to be done with all of the documents in the extensive factual record in this case?

ANSWER

Randy Moss: Just as a matter of public policy, it's unfortunate that documents that would be very instructive on public policy issues and that were relevant to the decision are still being hidden from the public.

Panel II: New Constitutional Framework

Moderated by Roger Whitten

Comments by Richard Briffault:

I'm very happy to be here. As I understood from the little blurb for the conference, the focus of this panel is on precedent. To what extent is *McConnell* rooted in prior precedent, or is it a change, and what are the implications for the future? That's going to be the focus of my comments - how *McConnell* connects to precedent and what are the implications for possible changes?

In terms of precedent *McConnell* presents an interesting question. In some respects it is a relatively conservative decision, very tightly rooted in prior decisions. The case is framed as a First Amendment case, as all campaign finance cases have been since *Buckley*. In the provisions dealing with soft money, the Court applied the lower standard of review of contribution restrictions that dates back to *Buckley* and was recently applied in *Shrink Missouri.* In Title II it follows the especially stringent restrictions on corporate and union treasury funds that date back at least to *National Right to Work Committee*, most famously *Austin*, and more recently *Beaumont*.

McConnell relied heavily on the anti-circumvention principle to justify regulations of practices that may not be, in themselves, problematic, but are being used to evade basic rules. The Court goes back to *Buckley*, to *CalMed*, and, in its application of the anti-circumvention principle to political parties, to the more recent decision, *Colorado Republican II*. In leaning on the importance of disclosure, *McConnell* goes back to *Buckley*. So, in many ways, the case is a fairly modest incremental extension of doctrines already developed in *Buckley*, in *Austin*, in *Shrink Missouri* and *Colorado Republican II*. It can be seen as a relatively conservative decision, in keeping with relatively conservative statute, which, in many ways is designed to restore the status quo ante of about 1980, rather than do anything other than that.

But I think this focus on the words of the Court, the specific way which it treats precedent, may miss the music of the decision. In many ways, the case is closely rooted in precedent, but it feels very different in many important respects. One, which I'll talk about in greater length in a minute, is the Court's use of the concept of corruption. Obviously prevention of corruption and the appearance of corruption has been the main justification, practically the sole justification for restricting campaign finance practices since *Buckley*.

There's a good argument that the case pushes out the meaning of corruption in several ways, which I'll talk about. Second, with respect to the use of the anti-circumvention principle, *McConnell* really broadens it, pushing it, especially in dealing with political parties, far broader than the principle had been used before. Third, may be the demise of the concern about over breadth, seen most dramatically in the Court's treatment of the Title II provisions, the issue of the scope of campaign finance regulation. This issue, which had haunted lower courts and commentators and the District Court in this case, just vanished. And we'll talk about that in a minute.

Maybe most importantly, although the case is clearly a First Amendment case, in many ways the Court is reframing the way in which it approaches campaign finance regulation by emphasizing the democracy promoting aspects of campaign finance regulation. The Court says that contribution limits encourage public participation and promote government integrity. This is a case in which the Court, as a whole, embraces the position taken by Justice Breyer a few years back, that campaign finance reform is not simply a matter of accommodating the First Amendment, or dealing with First Amendment objections to governmental regulation, but of reconciling competing constitutional values of freedom of speech and association on the one hand, but also the interest in governmental integrity and democracy on the other.

This is coupled, I think, with the enormous deference that Congress received in this case. Not only does the Court defer to Congress' expertise in assessing the impact of campaign finance practices on elections and government, but it also defers to Congress' decision in balancing the multiple speech association, privacy and integrity values. So, again, it can all be traced back to earlier cases but it does seem to me that there may be a qualitative difference here.

Final preliminary observation, before getting into some of the more specific points; the other thing that comes across is that this is a huge, dramatic victory, arguably transformative in some ways. It was also incredibly close in at least two of its major points, particularly the Court's reliance on *Austin* to justify especially stringent restrictions on corporate union treasury founds. Well, *Austin* is now down to 5-4, as opposed to 6-3, when it was first decided. And the four are vehemently against. As for the Court's reliance on the lower standard of review for contribution restrictions, on the one hand it seems lower than ever before, on the other hand there are clearly two justices who would reject that, and two more- Justice Kennedy and Chief Justice Rehnquist- were very critical of the *Buckley* standard. They purported to apply it. They didn't challenge it head on. But, Justice Kennedy repeatedly referred to it as unwieldy and ill-advised. This makes you wonder just how much support there is for the lower standard of review amongst those four. Only disclosure received an enormous 8-1 support on the Court. So *McConnell* is a sweeping victory for reform but one, as in so many things with the Supreme Court, that may be hostage to future changes in the composition of the Court.

Let me turn to corruption. I want to focus primarily on corruption and also on the demise of the overbreadth question in the definition of the scope of electioneering communications. I think that the Court dealt with three issues in thinking about corruption, particularly soft money title. What do we mean by corrupt result? Protected by the First Amendment of Freedom of Speech and Association, people have a right to seek to influence government. That right is part of our political system and constitutionally protected, as are officeholder responses to peoples' efforts to influence the government. We want a responsive government. We don't want a government insulated from popular pressure, popular concerns. The trick is how do you distinguish, as Justice Kennedy referred to it, between good responsiveness and bad responsiveness? When can Congress adopt measures that would preclude official corruption? But what kinds of responses are considered corrupt

as opposed to what kinds of responses are considered legitimate responsiveness to popular interest?

Buckley was the first to rely on corruption, the prevention of corruption or the appearance of corruption to justify regulation. I think it would be fair to say that *Buckley* was maddeningly imprecise in its definition of corruption, as the Court has remained ever since, making it clear that it's not just vote buying, it's things that are less clear cut than vote buying.

How far beyond vote buying does it go? *McConnell* picks up on the question of what is a corrupt result of a campaign contribution. That's one question that the Court looked at, which I'll get to in a second. The second is, what's a corrupt transaction? The model in the Court from the beginning from *Buckley* is the phrase, the *quid pro quo*, amplified in *NCPAC*, a dollars for political favorites.

Well, what counts as a transaction or what counts as an exchange? That I think was quite essential in the Court's resolution of the title dealing with political parties. And, finally, connected to the first two, what evidence is necessary to make out that there was either a danger of a corrupt result, or there's a corrupt transaction?

On the first, corrupt result, as I said, in early cases the Court went beyond vote buying to say Congress could pick up imprecise concepts such as undue influence and favoritism. In *McConnell*, the Court seems somewhat more procedural and focused over and over again on the concept of access. Access, special access, preferential access, were the phrases the Court used over and over again as something that Congress could treat as either corrupt in itself or as giving off the appearance of corruption. While it's certainly true that access provides the opportunity for special influence and access provides the appearance of special influence, in many ways the Court actually focused on access as harmful in itself.

It's certainly easier to prove- it's more measurable to see when people are actually meeting with other people, in a way that it's much more difficult to prove when undue influence is being exercised, or even what influence is undue, what is favoritism. But it seems to me that in defining corrupt results to include access or special access or preferential access rather than requiring evidence of showing that corrupt actions were occurring after the result, that by taking this more procedural approach, the Court certainly opened up the definition of corruption.

Second, and I think more attention was focused on this issue in the case, was the question of what's a corrupt transaction or a corrupt exchange? Here, of course, the issue is when does money given to a political party create a problem of corruption? This is the situation in which the money isn't being given to political parties to make contributions to candidates, or even to be used in coordinated expenditures with candidates, or even solicited by candidates.

Yes, section 323(f) dealt with solicitations by candidates and office holders. That was upheld 7-2. The other provisions were upheld 5-4 and were more problematic because the political parties weren't being used as a conduit in quite the same way that they were used in the earlier cases- most prominently, *Colorado Republican* II. In *McConnell* the money was given to political parties to be used in ways that would directly or indirectly aid their candidates, but wasn't given to their candidates or being used for speech that was engaging in express advocacy promoting their candidates.

What the Court did is uphold the treatment money given to political parties, as raising a danger of a corrupt transaction even if that money is not being handed over to candidates, and even if that money is not being used to promote candidates. The most striking really is the upholding of 323(a), the complete ban on national party committees receiving any soft money. That applies to national parties receiving soft money to engage in spending on off-year elections on ballot propositions at a time when there's no federal candidate on the ballot or in sight.

With the Court relying on the concept of the special relationship and unity of interest between parties and, at this point, not even candidates, I think, but office holders, between party committees and office holders, it held that that relationship, that Congress could find that relationship also gives rise to a danger of corruption that permits regulation. This is where Justice Kennedy's dissent was sharpest, in criticizing the Court for finding that a corrupt transaction may occur even when no money is getting to candidates. McConnell finds that money given to parties that might not even be used to help candidates raises a sufficient danger of a corrupt transaction that Congress could regulate it. On this point, I think, *McConnell* is really most significant in pushing out the notion of corruption.

Finally, there's the question of evidence. I think the amount of evidence required to prove corruption shrunk in *Shrink Missouri*. There was remarkably little evidence to support the finding of corruption in that case. But the evidence proffered in *Shrink Missouri* related to what might be called corrupt acts, statements that public officials were investing money in banks where the banks had made contributions to them, or the public officials had actually engaged in acts of favoritism. In *McConnell*, almost all the evidence the Court cited, with one exception, had to do with evidence of access. That was enough. This goes back to the first point, and reinforces that first point. There was a brief reference to some statements of the sponsors, that there was more than access, that soft money donations affected the way in which legislation was handled. But the bulk of the evidence had to do with access.

The second area in which I think the Court widened the range of evidence was its presumption of party committee- office holder unity. The Court relied heavily on political science experts, for this point, as well as the statements of the sponsors. The Court accepted as fact that Congress could find that there is a unity of the political parties and office holders at the national level justifying total regulation of the funding of the national party committees.

Finally, in the area of evidence, there was an expansion on the anti-circumvention principle that, as Justice Thomas says sarcastically in his dissent brought the Court to third-order anti-circumvention. National party soft money is being regulated to prevent evasion of FECA's limits on contributions to candidates. State party soft money is being regulated to prevent evasion of FECA's limits on the new limits on contributions to parties. And then tax-exempt organizations and state candidates and office holders are being regulated to prevent evasion of the limits on state and local parties, to prevent evasion of the limits on national parties, to prevent evasion of limits on donations to candidates.

Certainly, for some of these restrictions, particularly 323(f), the Court cited little or no evidence that there was a specific danger of corruption on even that such activity raises the danger of corruption. The Court was relying on the fact that we've seen 25-30 years of regular evasion, so that Congress could act proactively. The Court found that Congress could determine, as a matter of common sense, that there is a danger of evasion in the future. Apart from that there was little specific evidence to support the restrictions in § 323(f).

Turning quickly to Title II, the essential Title II question was the regulation of issue advocacy. The express advocacy/ issue advocacy distinction, had previously dominated so much of the debate among law professors, political scientists, and the lower courts which had been regularly invalidating state efforts to regulate in this area, and of course in the District Court in this case.

The question is how can Congress define election relatedness to permit restrictions on party funds, disclosure, and the ban on corporate and union treasury funds? Again, especially in light of *Buckley's* statement in dealing with the provisions in FECA, reading in the express advocacy standard into FECA's definition of expenditure, and *MCFL* doing the same thing with respect to the FECA provision dealing with corporations. What was astonishing is that in *McConnell* the issue just vanished.

The Court transformed *Buckley* into a case about statutory interpretation only, having no weight for this case. The question then became whether the statute satisfied the underlying concerns in *Buckley*- vagueness and overbreadth. The definition of electioneering communication clearly satisfied the vagueness concern. You couldn't have been sharper than the statute's four elements of medium, time, reference to candidate and the targeting to a constituency. The Court, however, said almost nothing about overbreadth.

BCRA really deals with the issue advocacy problem in three places.

One is in the definition of the public communications component of the federal election activities of state and local parties and state and local candidates and office holders for purpose of the soft money restrictions. There, BCBR didn't use the electioneering communication definition, but a much broader one: anything which promotes or opposes a clearly identified federal candidate. It doesn't have the temporal limitation of the 60-30 day rule for electioneering communication. Nor does it have the constituency targeting limitation.

The Court had no trouble upholding this provision. The theory was not greatly spelled out in the opinion. The Court deals with it in a paragraph and a footnote and only really one sentence on the key point, suggesting that we can pretty much assume that parties are going to support candidates so that a party's speech concerning candidates is likely to be electioneering. The Court says almost nothing to make this argument. I think it's a very plausible argument. What's really striking is the lack of articulation of the argument, rather than the argument itself.

When you get to the electioneering communication definition, which plays out in the disclosure and the corporate and union restrictions, the Court says even less. Having found that it's not vague in the disclosure context, the Court doesn't even discuss the over breadth question, which had so bedeviled everyone else. Indeed the disclosure restriction is upheld by a vote of 8 to 1 and Justice Thomas' dissent actually doesn't discuss the over breadth question either. Justice Thomas is simply focused on disclosure and his view is that *McIntyre* eliminates the disclosure interest. The majority restates the value of disclosure. The dissent states its concerns about disclosure. No one discusses the over breadth question.

With respect to Section 203, the application of the electioneering communication standard to the restrictions on corporations and union, the Court divided 5-4. But, again, the question of overbreadth largely disappeared. The lower court had pages and pages on this. There was expert testimony in volumes. But the Court basically says, in a sentence, that the vast majority of ads are clearly election related. And, even more interestingly even if the ads aren't election-relation, corporations can avoid the restriction by either avoiding express references to candidates or forming a PAC and using a PAC.

The Court's reasoning implicitly rejects the idea that speakers should be able to make their speech in the most effective way, and that the use of a candidate's name is often the most effective way. The Court also ignores the argument, which had been given some weight in the *MCFL* decision, that forcing a corporation to speak through a PAC is actually constitutionally burdensome. I believe Justice O'Connor specifically wrote a separate opinion in *MCFL* stressing the constitutional significance of the administrative burden of having to form a PAC to engage in speech. She, of course, is the co-author of the opinion in this case, basically saying that having to form a PAC is the solution to corporate regulation, and not a problem.

More strikingly, perhaps, even the dissents actually didn't focus on the over breadth challenge to the definition of electioneering communication. The dissents were all focused on *Austin* and the constitutionally troublesome factor for them that *Austin* bans corporate speech. The dissents also had almost nothing to say about the definition of electioneering communication.

Thus, an issue which had loomed very large in the run-up to BCRA and *McConnell* basically vanished. The public communication definition was resolved based on what the Court thought about parties. The disclosure definition was resolved based on what they thought about disclosure. The restriction on corporations was resolved based on what they thought about restricting corporations. To be sure, the vagueness problem was solved at least

for the electioneering communication definition, although one could debate the arguable vagueness of the public communication definition. But with the vagueness problem solved by Congress, the over breadth problem disappeared from the Court's concerns.

I've got time for a final comment. *McConnell* is the rare Supreme Court decision that answers more questions than it opens. It really did resolve emphatically at least a decade's worth of debate about soft money and issue advocacy. It seems to me most questions about soft money and issue advocacy have been put to bed, rather than opened, which leads me to try to find one that is open.

One such question is, what, if anything, is the implication of *McConnell* for the central piece of *Buckley* that is anti-reform and is still standing? That is the flat ban on expenditure restrictions, whether on independent spending, including candidates on candidates' total spending on candidates' use of their own funds. There are three possible answers.

One, of course, is no impact. The case, particularly the soft money treatment, opens with a restatement of the traditional longstanding rule distinguishing contribution restrictions and expenditure restrictions and stressing that this is a contributions case. Moreover, the Court tries to say, the majority tries to say that *Austin* really isn't even a spending ban, *Austin*, in their view, is really a requirement that corporations use PACs, not a ban on corporations.

And, finally, three of the five justices in the majority, not that long ago in *Colorado Republican I*, reiterated the importance of protecting independent spending from limitations when they found and upheld the rights of political parties to engage in independent expenditures.

On the other hand, the question does arise because of the Court's embrace of the theme that campaign finance regulation promotes democracy. The Court might be willing to open up this question again. In *McConnell*, the Court stated that campaign finance restrictions, like disclosure and contribution restrictions, can promote public participation and can promote governmental integrity and electoral integrity. Based on this, it may be possible to suggest that to the extent that unlimited spending clashes with political equality values and allows incumbents to build up very large war chests, which discourage competitors, that widely uneven spending is not consistent with fair competition and, thus, with democracy.

There might be some argument, I think, that the democracy-promoting values which are front and center in this case would support some restrictions on spending. Certainly if the Court accepts the philosophy that Justice Breyer articulated in his *Shrink Missouri* concurrence, in which he specifically referred to the possibility of limiting the ability of wealthy, independent candidates to use their own funds, it may be that the issue of spending limits can be reopened. It would certainly reduce the dissonance with *Austin*, which takes a very, very different view of the ability of the Congress's power to limit spending in general.

The third possibility is that this whole thing could collapse. As I said, it is striking how much *McConnell* is a 5-4 case. The opinion of the majority is very broad and very emphatic but the minority is just as emphatic in not buying any of it. *Austin* could go, possibly even *Buckley's* basic approach could go following a change in the composition of the Court.

I am not saying that this is likely to happen. Indeed, currently there is a very stable majority in favor of campaign finance regulation. One can look at McConnell as one of a succession of recent cases – including *Shrink Missouri*, *Colorado Republican II* and *Beaumont* – in which a majority of the Court has repeatedly embraced the view that campaign finance regulation promotes democracy. But the hold of that view on the Court is tenuous. It's a real majority but the dissenters are not persuaded, and the divide within the Court is deep.

Comments by Martin Lederman:

I'd like to say that it's a great pleasure to be here. I'd like to thank Fred and Trevor and the Center and Democracy 21 for inviting me. I see that the title of the Conference is Reform Community. I'm not part of that. I'm an interloper coming from a very different perspective, or somewhat different perspective, I suppose.

I spent many years litigating on behalf of the union side labor law and so have a close tie to labor unions who are not particularly happy with the Title II provisions being upheld here. And then I spent a number of years in the Office of Legal Counsel of the Department of Justice where I specialized, among other things, in First Amendment law and was something of a free speech hawk, but also thinking about, in various contexts, ways in which federal statutes could be defended and upheld. The advice we would give depended in large part on where the doctrine was at any particular moment.

When BCRA was being considered, at which time I was in the Department, it did strike me as, for the most part, that the central provisions, what the Court calls the core provisions of BCRA, were pretty clearly constitutional. This is the theme that both Richard and Spencer have focused on. In some ways the *McConnell* decision is extremely conservative and simply restates the law as it had existed for many years as to those core provisions of BCRA.

It's a tale. But I also think it's a tale of two opinions in a sense, because the peripheral provisions and the peripheral or unpublicized parts of the Court's opinion, as I consider some of them, have much more generative power and a potential to drive the law into new areas and to possibly allow for greater campaign finance reform than previous doctrine had allowed. I'm going to try to turn to that at the end of my remarks, which is, in some ways, a preview of the panel this afternoon, asking what some of the practical questions that this might open.

As I was saying, I think the first of the two core provisions was Title I's ban on so-called soft money to political parties. Richard points out that some of the analysis was somewhat cursory as to the justifications that were given by the Court for upholding this, but they are positively detailed compared to the provision that *Buckley* upheld. Recall that *Buckley* upheld a $25,000 limit, on all contributions by any person total, and *Buckley* assumed, because the Solicitor General had told the Court that this was the case, that all money given to political parties counted toward that contribution limit.

There was no such thing as soft money. If you gave $1 to a political party, it counted toward your $25,000 cap. The Court upheld that in one paragraph with virtually no analysis whatsoever. That was the law post-*Buckley*, that you couldn't give more than $25,000 to candidates, parties and PACs combined. It was only when the FEC started in the late 70's to say that you can if it's used by the parties for certain purposes, that the whole loophole system started.

What I find one of the most remarkable and most telling portions of the *McConnell* opinion is where the Court says, as to this principal provision that everyone was arguing about, the main goal of 323(a), which is the ban on soft money to national parties, is modest. In large part it simply affects a return to the scheme that was approved in *Buckley* and that was subverted by the creation of the FEC's allocation regime, which permitted the political parties to fund electioneering efforts with a combination of hard and soft money. As the Court saw it, all they were doing was returning to 1977. I think for the most part, that is exactly what has happened here. Title I is a return to 1977.

Similarly, Title II, the principal provision that got so much attention and got everyone so exercised, unprecedented as not since the Sedition Act has there been a restriction of speech anything like it. It is, and Justices Kennedy and Scalia and Thomas are apoplectic that this seems to be a core restriction on speech, the requirement that corporations and unions use segregated PACs rather than using their treasury funds to fund electioneering communications.

This is a direct restriction on speech. It's not a ban. Yet, it's not a contribution limit either. Therefore, strict scrutiny applies.

This is not new. This is not the first time since the Sedition Act. This has been in place since 1947. It was upheld in *Austin* in 1990 over a dissent that Justice O'Conner joined. It seems clear to me from this opinion, and what was striking to me in the briefs was, the plaintiffs pretended as though *Austin* had never been decided. There was barely a mention of *Austin* in their briefs. By contrast, what I'll call the bottom-side briefs, the defenders and interveners briefs, were *Austin*, *Austin*, *Austin*, *Austin*.

If you look at Seth's and Paul Clement's oral argument in the Supreme Court, the word *Austin* is invoked dozens and dozens of time, to the point where Justice Scalia, very frustrated with Paul Clement, got up and said, "don't you have anything else to cite? It seems that you really like *Austin*." Paul Clement responded, "I love *Austin*." I think it was Justice Scalia, who at one point also said, "but that was over my dissent and it was a 5 to 4 vote." It wasn't. It was a 6 to 3 vote. But Paul Clement's immediate retort, and the correct one, was, "that's right, Your Honor, and I'll take 5 to 4," which is what he got. All I need is 5, that's all I'm counting to, "I'm not really including you" was the message sent, and as Paul clerked for Justice Scalia, it was a very friendly interchange.

But what this did, in essence, was to reaffirm *Austin* and to keep in place the PAC requirement that has been in place since the Taft-Hartley Act of 1947. I think that's what Justice O'Connor finally saw. You could see this as Seth and Paul were saying it up there. It was the plaintiffs that were asking for a pretty profound change. I think if this was a new provision that had never been enacted before, it would have gone down. I think it would have been rejected at least 5-4, with Justice O'Connor in the dissent. But I think she saw that, as the Court says in its opinion, no one was asking for *Austin* to be overturned. The plaintiffs pretend as though it doesn't even exist, and no one is giving any reason why corporations and unions were at all bothered by this for over 50 years and therefore why should we worry about it now?

That's the flavor that I get out of the opinion. So after those two principal provisions, I think this was a profoundly conservative decision that basically takes the law back to where it was in 1977. Now I agree with Richard completely, in that it's hanging by a thread. All it takes is one justice, and it will unravel, and there will be the quite radical change in the law.

Having said that, there are many parts of the Court's opinion that have garnered far less attention in the briefs, in the argument, and in the discussion of the case afterward, that do have, it strikes me, much more generative effect. They generate new law. They, for the most part, as Richard suggested, answer questions that were barely being asked in the case, and resolve questions that everyone assumed would continue after the *McConnell* decision was decided – with one major exception, and it opens one major question that I'll get to right at the end.

Let me go over some of those, because I assume that they are the sorts of practical things that people here would care about and that might be discussed later this afternoon.

The first is disclosure, and Richard spoke about this. The plaintiffs pretended, the plaintiffs barely mentioned the disclosure provisions, which are the third great prong of this three-headed statute, the PAC requirement, soft money provisions and the disclosure provisions. They pretended, in part, because many of them were publicly on record as saying the disclosure provisions were the way to go, were what Congress should be doing. They didn't mention the disclosure provisions in their briefs.

It appears that page 42 of the ACLU brief, the *Ron Paul* brief focuses on it. There is very little discussion of it, almost none in the oral argument and Floyd Abrams, the great defender of the First Amendment, gets up and basically says to the Court, in no uncertain terms we're not challenging the disclosure provisions here. I point to you the ACLU brief, they have a nice little argument, but we're not really challenging that here. This is Floyd Abrams. And, therefore, the vote is 8 to 1 on the principal disclosure provisions.

Now Justice Thomas, I think very understandably, says, excuse me, we just decided this *McIntyre* case. We have this *Watchtower* case from a term ago with Jehovah's Witnesses. We have a series of cases under *Reilly* restricting disclosures and contacts of solicitations. What happened to all these precedents? I think going forward that the rule as to disclosure, should consist of three rules:

First, for television and radio, there is no constitutional problem at all with requiring disclosure. Section 504 was upheld, and I have to say this is the provision, other than the minor's contribution provision, that most of us in the Justice Department, certainly I, thought was the least defensible part of the statute.

Section 504 requires disclosure of broadcast ads that have nothing to do with electoral politics for any matter of national importance or political saliency. It gets upheld 5-4 mostly because there seems to be a majority for the fairness doctrine and for the FCC

continuing to regulate content on TV and radio. I think disclosure, any disclosure as to TV and radio, is going to be upheld.

Secondly, even apart from TV and radio, I think disclosure will be upheld facially as to almost all campaign finance matters. That seems to be what's going on. I do think, however, that there's a series of cases that the Court, including *Watchtower*, which was written by Stephens and joined by many of the majority in *McConnell*, and *Brown v. Socialist Workers Party* and *McIntyre*, which basically say, we're going to uphold disclosure provisions, but if you can come in and show that you're a single individual handing out a pamphlet or a minority political party who doesn't, the disclosure of whose members will cause it to be chilled in its speaking, we will grant you an as-applied exemption. There will be exemptions where you can show that the disclosure causes your speech to be chilled, but facially disclosure provisions are much stronger now than they were before the case started.

Secondly, with coordination, which was an issue that barely surfaced in the Supreme Court because most of it was thrown out on standing grounds below, the Court almost gratuitously emphasizes that, as said in *Buckley*, it doesn't take much for something to be coordinated. They go further than *Buckley*. They say a wink or a nod or an advertisement that is run at the suggestion of a candidate will be deemed coordinated. I think that paragraph on coordination has effectively cut off about 20 years of litigation on this. I don't know what the FEC will do, but I think the Court is very comfortable with a very broad definition of coordination.

Third, is the *MCFL* exception question. For the most part, the whole Title II thing was pitched not as something about the AFL-CIO and General Motors corporate and union expenditures, but as the NRA and the ACLU being restricted in making issue ads. What they were really asking for, when you read their briefs carefully, is that the *MCFL* exception, should be expanded.

The only reason that the ACLU and the NRA are even covered by the segregated fund requirement at all is because they both take a little bit of corporate money, they both allow corporations to contribute to them, though very small percentages of their war chests, but they do nonetheless. If they were to tomorrow say they were not accepting corporate funds anymore, they would not be covered by the segregated fund requirement. What they were essentially asking the Court was to expand *MCFL* to cover non-profit corporations if only a tiny percentage of their funds are coming from corporate America.

The Court, again, almost gratuitously said, that's for another day, but, we carefully considered the standards in *MCFL* and we're sticking to them here, and one of them is that you have to agree not to take any corporate funds. I can't imagine lower courts, maybe with the exception of the 4th Circuit, now expanding the *MCFL* exception. I can imagine the Supreme Court doing it one day, but I think those groups are now stuck with either giving up their corporate funding or abiding by the segregated fund requirement.

Finally, and to my mind, most significantly, the segregated fund requirement was upheld in *Austin* as to corporations under certain theories that are barely touched upon by the

Supreme Court. As I said, I think O'Connor was basically saying, it's been there for 56 years, you haven't given me a reason to change it, I'm not changing it. The Court extends it, basically upholds it, as to labor unions, something it had never done before, and, to my mind, there's very little justification doctrinally or constitutionally for requiring the segregated fund requirement as to labor unions, though remember, I'm coming from a labor background.

Now, the AFL-CIO barely hinted to the Court, principally in its oral argument, that the rationale of *Austin* does not apply to unions. It did suggest it in its oral argument, and the Court blows right by it. Now we have basically *Austin* for unions without any explanation whatsoever. So, one question going forward is this segregated fund requirement, the requirement that unions and corporations speak through their PACs for political activities.

To what extent can that be extended? I think there are issues here beyond campaign finance. In terms of going forward, what is left of Balloti and can unions and corporations generally be required to speak through PACs rather than through their treasury funds as to any number of, even as to genuine, intended and perceived issue advertisements and other sorts of things? But that's not really this community's concern, but I think it's a very interesting issue.

I think the Court resolved all of those issues and others almost offhandedly with barely any discussion in the briefs or oral argument and in a paragraph or so in each. There's one big issue, though, that it opened up, to my mind, and I think this is what the focus of this afternoon's panel will be. And that is, in the context of contribution restrictions, what sorts of groups can Congress or the states restrict people from giving contributions to and when?

That is to say, they uphold the contribution limitations as to national parties, and I think that was consistent with *Buckley*, but what about other groups? What about groups that don't have, as the Court put it, the unique relationship with candidates and office holders that parties have? Can you restrict what individuals can give to 527s, to other non-profit corporations, to other sorts of PACs, and the like?

Now, in the *CalMed* case that Richard spoke about, the Court held that Congress could restrict, to $5,000, the amount that people could give to certain sorts of PACs, namely PACs that made contributions to candidates. The theory there was an anti-circumvention one, which is that money is fundable and it allows you to get around your individual contribution limits to candidates.

The Court, in *McConnell* goes much further. In two footnotes, and in one paragraph in the text, that, my great prediction here, will be that will generate all of the litigation in the next ten years in the same way the "magic words" footnote generated litigation from *Buckley*. The two footnotes are 48 and 51, and they are mostly in response to Chief Justice Rehnquist's dissent where he says, this theory is boundless.

Why can't you restrict someone from giving money to their friend or to a newspaper editor who supports the Republican Party, or to a talk show host? Why limit it? The Court says it would be unconstitutional to restrict people's contributions to talk show hosts and newspaper editors just because those folks may use the money to speak on behalf of certain candidates and thereby benefit the candidates. Congress couldn't go there.

But then in footnote 48 they say there is something special about parties. So, on the one hand it looks like it's limited to parties, but then in footnote 48 they say, no, *CalMed* wasn't just about that, it was also about preventing people from giving money that will be used for independent expenditures by the recipients. And, most remarkably, Section 323(f), was a provision that was barely defended by the interveners or by the Solicitor General, frankly because I'm not sure anyone figured out a way to defend it.

Section 323(f) limits the amount of money that can be given by individuals to state and local, not parties, office holders and candidates, for use by them in independent expenditures. The Court upholds it, as Richard suggested, with hardly any justification at all except, remarkably, that they'll use the money that will fund public communications with the greatest potential to corrupt or give rise to the appearance of corruption of federal candidates and office holders.

Well, that's basically just saying, the money is going to be used for independent expenditures, which will, in turn, corrupt office holders. That's a limitless theory. It won't be limitless, but on the page it is limitless and potentially, it seems to me, can be used to limit whatever money is being contributed to individuals and organizations that are not themselves making contributions to or coordinated expenditures with federal candidates.

Now, in particular, I think that it will continue to be the case that someone like George Soros will be able to use unlimited funds to make independent expenditures on behalf of federal candidates.

Comments by Spencer Overton:

Thank you very much, Roger. I want to thank Fred and Trevor for including me. I want to welcome you all to GW.

I don't want to talk about how far *McConnell* might let us go in terms of restrictions and regulations. In other words, I won't discuss whether *McConnell* interprets to Constitution in a way that would allow Congress to close the next loophole. We won by one vote. One appointment to the Supreme Court could reverse *McConnell*. We could lose one case in a place like the 4th Circuit and we might be reluctant to appeal the case to the Supreme Court out of fear of an adverse decision.

Like the defenders of affirmative action in the University of Michigan case, I think we enjoyed a significant victory but we are still on fragile ground. Thus, today I want to talk about how we solidify our narrow victory in *McConnell*. How do we build on the great language and the majority opinion? What steps can we take to reduce the chance that the Court's next big campaign finance case won't reverse *McConnell*?

I think that we can do this by emphasizing three lessons that came out of the opinion. These three lessons should be part of our discourse, should be part of our rhetoric, our language, our conversation.

I think the first lesson here is that *McConnell* followed precedent, and by doing so, the Court enhanced the stability and the credibility of campaign finance doctrine in the contested, politically contested environment of money and politics. I would agree with Richard that this was a new context, but the Court in *McConnell* largely situated BCRA within the framework of past cases. Past cases generally upheld restrictions on contributions. *McConnell* certainly did that with regard to the soft money contributions. Past cases prohibited restrictions on spending on issues like ballot initiatives but tolerated the regulation of money used to support candidate campaigns. *McConnell* followed this line of cases by upholding the electioneering provisions.

Finally, past cases like *Beaumont* and *Austin* allowed for restrictions on corporate spending and contributions. This case, *McConnell*, followed that line with both soft money contributions and the electioneering provision. Granted, *McConnell* explicitly proclaimed that restrictions on labor unions were constitutional for the first time, and thus it pushed past cases a little bit.

But my point is, for the most part, the *McConnell* Court stayed within the established constitutional framework. There are important reasons for us to emphasize these past cases. Adherence to past cases promotes uniformity, consistency, and fairness.

So why is the adherence to past cases so uniquely important in the campaign finance context? It's important because campaign reforms involve political theory. They involve partisan interests. They involve complex evidentiary records about politics. Absent paying attention to past cases, judges can basically act like politicians. Judges can promote their

own political view. They can use a First Amendment flag but essentially put forward their own political vision as to how democracy should work, and basically overturn the will of the people.

Past cases basically allow some consistency and fairness. If a judge were to ignore past campaign finance cases, every decision by a judge would seem politically motivated as opposed to based on legal principles. I think the first thing we need to do is make it clear to the extent that Justice Thomas and the 4th Circuit ignore these past cases, they are substituting their own political views for the will of the people. I think that's a lesson that we need to get out there.

The second important lesson of *McConnell* is that campaign finance is an area that involves pragmatic reasoning that balances democratic interests and considers political context. For example, *McConnell* rejected mechanical First Amendment absolutes about the right to contribute unlimited sums to parties. It weighed the values of public participation, of self-government, of decisions based on the will of the people. The Court recognized that some regulations can advance these values.

The Court was also pragmatic by refusing to engage in legal formalities. For example, it rejected the notions that quid pro quos, explicit verbal agreements to establish coordination, or express advocacy were needed before Congress could regulate political money. It recognized that those technicalities facilitate circumvention of reform. They prevent Congress from kind of getting to the root of the matter. The justices in the majority in *McConnell* recognized that if they paid attention to these hurdles they would facilitate circumvention and undermine the ability of the people to maintain widespread democratic participation and self-government.

Finally, a third important lesson of *McConnell* is that the people through the representatives play an important role in structuring the political process, a process that balances expressive interest in democratic integrity. The Court repeated its view that Congress has special expertise in this area. I would agree with critics that we must pay attention to concerns about entrenchment. In fact, I'd say that reformers need to be the most vigilant against reforms that are entrenching because this is a legitimate concern of the anti-reformers.

But even though entrenchment is a danger, we also need to make sure that folks understand that this entrenchment concern shouldn't disqualify Congress from dealing with money and politics. The *McConnell* Court said that Congress has an important role to play and we need to emphasize that.

How do we emphasize the role of the people through their elected representatives? Well, if Congress has an important responsibility in the campaign finance context it has to exercise this responsibility. Political bodies need to exercise their responsibility in ensuring wide spread participation and self-government that close the next loophole, but by fixing the presidential public financing system, by empowering smaller contributors with matching funds and other methods, and by supporting clean money in the states.

In summary, we need to emphasize these three lessons of *McConnell*, respect for past opinions, pragmatism, and acknowledging the important role of the people through their elected representatives or through ballot initiatives. We've got to emphasize these three points for three reasons. First, one of the most potent weapons of the opponents of campaign reform is the First Amendment card. When reform is debated in Congress, opponents of reform often don't engage in a discussion of the merits because most reasonable people would disagree with them. Instead, they throw around First Amendment slogans.

McConnell shows that there are values other than the absolute right to use limitless amounts of money. It shows that there are values like democratic integrity, widespread participation, and government that's responsive to the will of the people. My point here is we've got to trumpet those values in the democratic debate. Those are no less important than expressive values.

Second, we are only one vote away from *McConnell* being overturned. I think judicial appointments to the Court of Appeals and the U.S. Supreme Court are even more important to us now. We've got to use these three lessons as characteristics of good judging to scrutinize nominees.

We're not going to say, "Hey, what way are you going to come out on this case?" Instead, I think we've got to evaluate judges based on their approach to judging. Do they understand and do they embrace the three important lessons of judging in *McConnell*? We must define a good judge as one who pays attention to past cases, respects Congress, and is pragmatic in this area in terms of balancing interest.

Finally, when the next reforms are challenged in Court, we want judges to feel a certain amount of discomfort in overturning reforms. In other words, rather than arrogantly relying on their own assumptions about how politics should work, judges need to feel as though people are going to call them activists and that they are going to lose credibility to the extent that they second guess reforms that are not entrenching and that don't excessively infringe on the speech of average Americans.

In my conclusion, we had some divisions within our campaign reform community over provisions in BCRA. I think that this opinion is really a fresh start. It's an opportunity here for reconciliation. It's an opportunity for us all to move forward together. We all have an interest in the lessons of *McConnell* being embraced by judges in the future. We all have an interest in this opinion being upheld and followed in the future. We need to emphasize these themes of *McConnell*, about self-government and broad participation, together.

When we talk about self-government and broad participation we're not just talking about people who can afford to contribute $2,000.00. We're talking about all Americans. This is really an opportunity for us to reenergize our movement. *McConnell* is great start for us to substantively change democracy for Americans of all social, racial, and financial backgrounds.

Comments by Don Simon:

The analysis is different for primarily non-political spenders -- that is corporations, labor unions, non-profit groups including, for instance, C(4) entities. I think there still exists a concern about vagueness in drawing lines to regulate their political activities, principally their independent spending in connection with, or for the purpose of influencing, an election. But what we know now, and this is very important and it resolves a fight that's been going on for years and years, what we know now is that the express advocacy test is not the only permissible test to address the vagueness concern. A "timeframe" test, as was included in Title II and was accepted by the Court, works equally well. Indeed, I think it better serves the purpose of demarcating electioneering discussion, for the purpose of campaign finance regulation.

Now, this opens the door to additional reforms along these same lines, particularly at the state level where state campaign finance laws have been undermined in the same ways that the federal laws have been by the artificial constraint of the express advocacy test. I would expect to see a wave of reform at the state level that in the first instance mimics the Title II timeframe test of BCRA. Nor is there anything magical or constitutionally required about the particular 30-day and 60-day timeframe test enacted under BCRA.

That timeframe was a legislative judgment made by Congress based on the record before it. Where a record can be established that a different, and even perhaps broader, timeframe adopted by a legislature, is also reasonably related to identifying ads which influence elections, so too should that different timeframe pass constitutional scrutiny. Indeed, there may be other tests that do not rely primarily on timeframes to determine a category of communications that are in connection with an election, and which are sufficiently clear to meet constitutional concerns about vagueness.

For the same reason, the "electioneering communications" test in BCRA itself might also be broadened to include non-broadcast forms of communications, including, for instance, direct mail or phone banks. In rejecting a challenge that Title II was under-inclusive, because it didn't include these kinds of non-broadcast forms of communication, the Court noted that Congress may proceed on a step-by-step basis in these sorts of reforms. That's what it was doing in BCRA, but it certainly didn't say that the reforms along this path in BCRA are the end of the road.

Now, as a separate matter, and I want to turn to the questions raised by Marty, there is this question of further reform for primarily political entities and, in my mind, this involves the Section 527 groups, which are entities that register with the IRS as political organizations. They self-identify. They volunteer for this status -- that they are primarily in the business of trying to influence candidate elections. By definition, they are in the electioneering business, whether at the federal, state or local level.

There have been two sets of problems here in the past, which I think are coming to the fore in light of BCRA.

First, only a relatively narrow subset of all 527s are federal political committees and thus subject to the federal campaign finance laws, which, as Marty indicated, include contribution limits and source prohibitions, in large part because the express advocacy test was viewed as something of a limiting principal on the identification of political committees. In other words, the argument was made and, to a large degree, accepted by the FEC, that if a group did not spend money for express advocacy, apart from making contributions, if it didn't spend money for express advocacy of a federal candidate, then it was not a federal political committee no matter how overt its activities were otherwise to influence federal elections.

This was expressed in a kind of more general proposition made by opponents of the campaign finance laws that the federal election laws could extend only to the regulation of express advocacy, whether it was outside groups, political organizations or even ultimately political parties. Now, I think that argument was always wrong, but, in light of *McConnell*, I think it's indisputably wrong. The Court, I think, made clear that the express advocacy test is not a constitutional barrier beyond which no regulation may extend.

Indeed, when dealing with an entity whose primary purpose is electioneering, such as for all 527 political organizations, the express advocacy test isn't applicable at all. Such organizations can be subject to much broader and more inclusive regulatory tests like the longstanding statutory standard of regulating their activities which are "for the purpose of influencing" a federal election. That's because, as the Court first pointed out in *Buckley*, and then reiterated in *McConnell*, these groups have a major purpose, a primary purpose, of influencing elections and therefore they are, by definition, campaign related. You don't get into these concerns about vagueness and trying to draw a line between their issue discussion and their electioneering discussion.

I think what this means is that a much broader set of Section 527 political organizations should now be treated as federal political committees if those groups engage in activities to influence federal elections, even if that activity doesn't involve express advocacy. That was really the basis of the complaint filed yesterday by a number of the reform organizations against several Section 527 groups which are clearly set up to influence the 2004 presidential or congressional elections, but which are intending to do so through voter mobilization activities or non-express advocacy type ads. I think *McConnell* helps to clarify that those groups should be treated as federal political committees and thus subject to the federal campaign finance laws.

The second problem that I think is going to come to the fore with the regulation of the Section 527 groups is in their purported ability to allocate expenditures between a federal account and a non-federal account when engaged in voter drive activities. Now, this is another case study of the problem directly addressed by the Court in *McConnell* in the context of allocation between federal and non-federal accounts by party committees.

One of the very interesting aspects of *McConnell* is that the Court really got it right in identifying the historical basis of the soft money problem. And it repeatedly, four or five or even six times, came back to a criticism of the allocation system that was established by

the FEC for party committees. It noted that allocation "invited widespread circumvention of the law" and was a means to "subvert" the law. That's quite strong language.

Now, in principle, precisely the same criticisms apply to allocation by non-party groups, including Section 527 groups. I think it's important that once allocation has been discredited as a methodology that adequately protects federal interest in regulating activities by political groups, I think it ought to be considered to be discredited for all purposes, not just for purposes of regulating behavior by the political parties.

The important question arising from *McConnell* is really now before the FEC in terms of how it deals with this question of allocation. I think the FEC got cuffed around pretty badly by the Supreme Court for allowing allocation by party groups, and the question really is now the same question of whether the FEC is going to allow allocation by non-party groups. Not only should the FEC use a broader definition of political committee that is made available by *McConnell* to bring the Section 527 groups engaged in federal activity within the regulatory umbrella of federal political committees, but I think it also should refuse to allow these entities to be, in a sense, the new conduit for the flow of soft money into federal elections through this sort of same discredited myth of allocation that the Court, I think, properly debunked in *McConnell*. Thanks.

Panel II: Question & Answer (Excerpted Portions)

QUESTION

The original McCain – Feingold bill years ago had language in it that would have eliminated political action committees (PACs). Given what the Court said about this safety escape-hold or corporations and unions using their PAC money, do you believe they sent a message that any attempt at a ban on PACs is constitutionally suspect? What else does the decision say in that arena?

ANSWER

Richard Briffault: PAC bans, I don't think you get much mileage to support a complete PAC ban from this case. For one thing, the Court relies on the PAC option in relieving itself of concern about 203's restrictions on corporations and union treasury funds. Indeed the Court basically reformulates 203 as not a corporation and union treasury fund ban, but a requirement that they spend through PACs. In doing so, the Court is creating a more positive way of looking at it. It would be hard to follow that up.

The other thing is, if you look at the only outright contribution ban in the case, the ban on minors, the Court treats that as very different - a complete prohibition as opposed to a limitation - and I think did there actually require more. The Court makes there the distinction, as it's made in other settings, between limitation and outright prohibition.

I'm not sure it supports a ban. I certainly don't see anything that helps and I see a couple of things that might harm, that might hinder.

Don Simon: I guess my reaction to that is that *Austin*, I think, rests on a thin majority. I think part of what it rests on is the alternate ability of corporations and unions to speak through a PAC and that helps the Court sustain the ban on spending of the treasury funds. I think it would be very tricky to really interfere with that alternative route of speech.

Richard Briffault: The other half would be to limit the fraction of the candidates funds that could come from PACs. Would that be the point? I think that's harder, actually. Who knows? If Congress could make an argument that corruption lies in being overly dependent on special interest contributions, that might be an argument that could be made, and with the argument also being made that the PACs who are banned, who are prohibited from giving money because the candidate has topped out, could engage in independent spending. I assume that would be the structure of the argument in defense.

QUESTION

How will this decision affect section 527 groups?

ANSWER

Don Simon: Let me make a comment about the misconception of what 527s are. 527 is a very broad category. It's an IRS category. It includes all political organizations, candidate committees, party committees, state candidate committees. It operates not just at the federal level, but it includes political organizations at all levels. A subset of all 527s are federal political committees. Then there are different kinds of federal political committees. There are candidate committees. There are party committees. There are non-connected committees. There are separate segregated funds. All of those are 527s.

What we are talking about here, and what the controversy recently has been about, are those 527s, which have not registered as any kind of federal political committee, and whether under the campaign finance laws they should be treated as federal political committees, and therefore whether they are subject to contribution limits and source prohibitions.

QUESTION

How will the soft-money ban affect the flow of money through state parties?

ANSWER

Don Simon: The Court, I think, said something interesting, and this was in the context of the state parties, where it said, Congress reviewed the history of how soft money was flowing through state parties, but then it said, Congress also made a prediction. The prediction was that if you closed soft money system down at the national level, it would just recreate itself and flow through the state parties. I think the Court gave some deference to the prediction Congress made, or at least judged it to be sufficiently reasonable.

Martin Lederman: I think that's right. I didn't mean to be suggesting that that's not a reasonable inference. It is. That's where the soft money will flow. The question is whether the corruption possibilities are the same with respect to Arnold Schwarzenegger that they are with respect to the parties, or, frankly, a 527. You are getting more and more attenuated from the office holder. It's not obvious that money given to Arnold Schwarzenegger will get you favors with federal office holders.

QUESTION

How does the law affect the activities of individuals such as George Soros in making independent expenditures?

ANSWER

Don Simon: It is something of an anomaly that under *Buckley* an individual, like George Soros, has a right to make unlimited independent expenditures. So George Soros can take $10M and buy $10M worth of TV ads opposing Bush's reelection. But, at least under current law, he can't give that $10M to a federal political committee for that political committee to buy independent expenditures. But, he can spend, and he has a right to make unlimited independent expenditures as an individual.

Panel III: Issue Advocacy and Political Parties

Moderated by Trevor Potter

Comments by Deborah Goldberg:

Thank you very much, Trevor, and thank you for inviting me. I'm going to focus principally on the implications of BCRA from the perspective of the electioneering communications and speak only briefly about the soft money provisions. Both sets of provisions present opportunities in the states.

I went back to some of the cases before *McConnell* on the so-called issue advocacy, express advocacy distinction. By my count, there were approximately three dozen of them in federal and state court that turned on that distinction. In some cases, they were narrowing the scope of regulations that related to advertising- limiting disclosure rules, for example, to only those that contained expressed advocacy. There had also been a recent effort to expand its application to challenge the definitions of organizations that could be subject to regulation at all, limiting political action committee definitions, for example, only to those organizations that engaged in express advocacy.

Among the three dozen or so cases that came down the wrong way, or sometimes in the right way, were decisions that were from the Federal Courts of Appeals of the 1st, 2nd, 4th, 5th, 8th, 9th and 10th Circuits. All of the circuits assumed that there was a constitutionally mandated distinction between express advocacy, which could be regulated, and issue advocacy, which was immune from regulation. Only the 9th Circuit in the *Furgatch* case concluded that express advocacy did not require "magic words," but even it assumed that the distinction was constitutionally mandated.

The 9th Circuit's alternative, which was a form of a reasonable person test, was codified by the FEC shortly after the *Furgatch* decision and then promptly struck down in two circuits. As a result of that, most of the state courts that adopted a *Furgatch*-type test were in the 9th Circuit. There are four states in the 9th Circuit that have adopted a form of a reasonable person test, which is in effect there and has been upheld by the Courts of that state. One is Arizona; one is the state of Washington; there is a split among California's Appellate Courts, and its Supreme Court has never resolved the conflict. But the three states, Arizona, Washington and California that did adopt the *Furgatch* approach narrowed it further than the 9th Circuit did to rule the references to considerations that were not part of the text of the ad.

So, in other words, *Furgatch* allowed limited reference to external events- for example, the timeframe in which the ad was run- to determine whether or not the ad was express advocacy. These three Courts said, "We are willing to give up the magic words test, we think that makes no sense, but we are not willing to go outside the language of the advertising, and that's got to have a clear call to action that no reasonable person could regard as anything other than an exhortation to vote for or against a candidate.

There is one state also in the 9th Circuit that, rather than limiting *Furgatch*, actually broadened *Furgatch*, and that is Oregon. Oregon actually allowed the reference to external factors and eliminated the requirement that there be no other reasonable interpretation of the language. The Court took that approach in part because Oregon did not have criminal penalties. Since the law improved only civil penalties, the Court relaxed the First Amendment standard of review under which it was considering the constitutional challenge.

There were two cases that left open the possibility of a *Furgatch* type test for what could be regulated, without actually deciding that issue. One was a Wisconsin Supreme Court decision, *Wisconsin Manufacturers and Commerce.* The state of Wisconsin then opted, instead, for a "timeframe" type test following BCRA. The other one was a District Court decision in Kansas, which struck down an enforcement policy of that state on the grounds that actually it was neither a "magic words" test nor a *Furgatch* test, suggesting that perhaps a *Furgatch* test would have been acceptable if only that was what Kansas was trying to enforce. Unfortunately, that decision was quickly superseded by the 8th Circuit in an Iowa case, which struck down a form of reasonable person test.

With the exception of these few states- Arizona, Washington, California, Oregon- and one more that I'll speak about in a minute, all of the states in the country had been left without any way to regulate sham issue ads in their states. Even before the *McConnell* decision came down, there had been several states that had attempted to implement timeframe-type restrictions, including West Virginia, Michigan, Vermont, Wisconsin, and Connecticut. West Virginia's was struck down, Michigan's was struck down, Vermont's was struck down.

Wisconsin's actually, in a prescient decision by the District Court in Wisconsin, survived the summary judgment motion. The Court said it had to consider a factual record before it was going to strike something down on over breadth grounds. I don't really know exactly where that litigation stands right now. If anybody does, I'd welcome the comment from the floor. Connecticut's, miraculously, I cannot explain why, has never been challenged and is on the books and is active and effective. They are in good shape.

There are two states that had tried to address this issue by passing laws regulating ads that either explicitly or implicitly advocated the election or defeat of a candidate. They were New Hampshire and Vermont. Those were struck down. Of the approached taken in all of these different states- which I think is California, Florida, Indiana, Iowa, Kansas, Michigan, Mississippi, New York, North Carolina, Vermont, Virginia and West Virginia- I think that provision would probably still be struck down, even after *McConnell,* on vagueness grounds.

For all of those states, what does *McConnell* really mean in practical terms? Well, first of all, it's clear that there is no longer a constitutionally mandated distinction between express advocacy and issue advocacy. Understood as a "magic words" test, the distinction was a matter of statutory construction. We now know that "magic words" are not necessary for regulation, and, what's more, that express advocacy is not required for regulation so long as the test that you do have is not substantially overbroad or vague.

I think that we can also conclude that overbreadth challenges, unlike what happened before *McConnell*, can no longer be granted on their face, that the courts are going to have to look at an evidentiary record to decide whether or not there is an overbreadth claim.

I think there is still an open question about the reasonable person test on the FEC model. Clearly, to the extent that courts relied on the assumption that there's a mandatory distinction between express and issue advocacy, their reasoning has been called into question. Whether or not those kinds of tests would survive a vagueness challenge I don't think has really been fully resolved.

The Supreme Court had that type of a test as the backup definition in BCRA. The Court never reached the question of the constitutionality of the backup definition because it upheld the electioneering communications definition with the timeframe. But the District Court did reach that definition, and the panel was very split on whether or not it was vague. I think that we would be likely to see vagueness challenges if the states tend to go forward with reasonable person tests in the wake of *McConnell*. And it would be predictable, for example, in the 4th Circuit, that they would fail, though they might survive in other jurisdictions. But states that go forward with a BCRA-type test, a timeframe-type test, stand a very good chance of either not having a challenge at all, particularly if the law is limited to television and radio broadcast advertising, or at the very least having an opportunity to prove that it's not substantially overbroad.

There is a question about many of the states in which the laws were struck down. Is there anything that could be done short of new legislation? The answer to that is: it depends on whether the laws are still on the books. If the laws are still on the books, it would be possible for parties to that litigation, and the defendants in that litigation, to go back to the Court and ask to have the injunction vacated under Rule 60(b)(5). There's been a change in the law. There's no reason for them to continue enjoining the enforcement of those laws.

My research is not complete on this. It seems to me that the states with provisions still on the books, notwithstanding the holdings of unconstitutionality, include at least, Mississippi, North Carolina (and, in fact, there is a cert petition pending right now in the *Leake* case from North Carolina, seeking review in the wake of *McConnell),* Vermont (where part of the definition would probably be good law now).

Many of the other states repealed or amended their laws in the wake of the adverse court decisions. In those cases, we obviously would need to go back either for legislation or potentially for rulemakings. I think another issue that needs to be investigated legally a little bit more is going to be the regulatory authority of administrative agencies to implement a BCRA-type provision in the absence of legislative action.

So, for those states that do go forward with legislation, what *McConnell* establishes is that you should certainly be able to get reporting of electioneering communications under a "timeframe" test. You should be able to get a ban on corporate or union spending on electioneering communications. You should be able to have, I think, expenditures on

electioneering communications included in any determination of whether an organization has electioneering as its major purpose, to the extent that the major purpose test is going to be used to determine whether or not an organization is a political committee. And we should be able to get disclosure of sponsor information.

I think that what's interesting about all of these provisions is that with the exception, perhaps, of the ban on corporate and union spending, there could be a real likelihood in many states of actually getting legislation passed. The fact that there were so many states trying to regulate their issue ads before *McConnell* suggests that candidates believe them to be the banes of their existence. Even sitting office holders are going to want to get disclosure (and get further regulation of these ads that they can't control), so there could be some real movement in the states on that issue.

I'm a little bit less sanguine about whether or not we're going to get soft money bans in the states on the model of the federal soft money ban. I think a lot will depend on the politics of the state, but if what happened in the *McConnell* litigation is any indication of what's going to happen, the political parties were decidedly not on our side. It may be very difficult to get new legislation closing state soft money loopholes. Obviously, in states with initiatives, there might be a possibility of closing the soft money loopholes there.

Trevor Potter: A question I wanted to ask on that is: when you talk about the soft money loophole, are you referring, in those comments are you referring to a state ban on using corporate and labor money for electioneering communications by issue groups?

Deborah Goldberg: No. In that case I'm talking about prohibiting corporations and unions from giving unlimited funds to political parties. To the extent that states want to prohibit the huge sums of money that are going to their state parties in the way that the federal government prohibited the large sums of money coming into the national parties, I think that that will be a much more difficult fight, unless you are in a state with an initiative procedure.

I also just wanted to take one minute to let you know that the Brennan Center is in the process of updating Writing Reform, which is our legislative drafting guide for state and local campaign finance reform, to incorporate these new developments and that if there's anybody out here who has not been on our mailing list for that and would like to get a copy, you should let me know.

Comments by Anthony Corrado:

Trevor Potter: Tony is going to talk a little bit about what all this means for the political party world and the regulation thereof.

Anthony Corrado: To move us from law into the area of practice, I was asked to talk about the effects on the parties that we're seeing so far and offer some comments about the law. In doing so, we should remember that for the past few decades, one of the things that the parties have demonstrated is that they are highly adaptable organizations, particularly when it comes to electoral politics.

In this regard, I don't believe that the response to BCRA is going to be any different from the response to the other campaign finance laws to which parties have been subjected in recent years. The parties will adapt to the new rules and proceed accordingly. In that way they will, in large part, conform to some of the practices that this law seeks to advance.

For the most part, the law is forcing the parties to adapt because as you all know they now have to live in a world without soft money. They now have to live in a world where their interactions with state and local party affiliates are going to have to be conducted in different ways than in the last six to eight years, largely because of the provisions of the law that seek to set forth some distinctions between what constitutes federal election activity and what constitutes solely state and local party activity. As a result, the parties are going to have to change many of the financial strategies and orientations that they have adopted largely during the course of the past five years.

In doing so, I think they will manifest one of the underlying premises of this law, which was that it sought to spur this adaptation in a specific direction. The concept underlying some features of the law was that you could actually strengthen the political parties. And, in some ways, insure their role in electoral politics if you got away from the kind of top-down, hierarchical structure that had developed in the soft money world, where the national party committees were largely raising most of the money, determining where it would be spent and then in many instances sending money to state parties to fulfill their federal election requirements. Or a system at least where state parties were called upon to raise certain types of money to help trigger the expenditure of national committee soft money funds. Instead, the new law seeks to force parties to pursue a more bottoms up, grassroots-oriented model where they would have to spend only hard money and essentially broaden their base of support, and return to the concept of relying on smaller individual donors rather than large corporate and labor union donors to finance their activities.

As you all know, this change in the financial approach has generated an enormous amount of commentary, particularly predictions about the decline of the party organizations, and questions about whether the parties will continue to be relevant forces in future elections. In some cases I've heard queries about whether this means Armageddon for the party and whether we are about to live in an entirely interest group dominated kind of post-Armageddon world.

I tend not to agree with any of those predictions, largely because I think that what we are seeing is that while the law certainly places burdens on the parties and great restrictions on their activity, for the most part the initial experience under the law in year one has been that the parties seem to be alive and well and continuing to do what they do even under the restrictions of the new law in the way that the new law largely intended.

If we look at the experience in 2003, which is almost out in the public now since they'll be filing their year end report soon, I think one of the things that's been very clear is that this demise of the parties has been seriously exaggerated. On both sides of the political aisle the parties began to adapt to the new law very quickly, in fact, more quickly than I expected. They didn't even wait for the legal battles. They didn't even wait to see what the final rules would be in most instances.

Beginning back in November of 2002, both parties asked, how are we going to start to raise our funds and operate under these new restrictions without soft money? How are we going to start to go about training our state and local party leaders? How are we going to start to restructure our financial strategies in preparation for 2004? One of the things that we are seeing now is that they are already baring fruit from the decisions they made, especially their renewed emphasis and investment in small donor solicitation.

If we look at 2003, the only fair conclusion that can be drawn is that the party committees are showing impressive financial strength. Once it's all said and done, once the reports are in, in 2003 the national party committees in a hard money only world are going to raise over $300 million. The Democrats alone may exceed $100 million in 2003, and the Republicans, as always, will do better than that, and probably breach the $200 million mark.

Now to give you some idea of what that means, it means that the national party committees alone have raised more hard money this year than they raised in hard and soft money combined in 1999, the last pre-presidential election year. In fact, they've already exceeded it by $30 million or $40 million. Let me tell you, 1999 was a good year for party fundraising, and yet already they have quickly adapted and largely replaced the soft money that they had raised that year.

I think what's most notable in this is two phenomenon. One is the expansion in the base of support. Both parties are reporting enormous increases in new donors. The Democrats are already reporting at least 600,000 new donors. The Republicans are reporting over 1,000,000 new donors. What most impressed me about this was the fact that the Democrats in particular have made quite a turn. If you looked at the Democratic Party in the last couple of election cycles—and of course there's going to be lots of discussion about the Democratic Party because of the fact that they will always lag the Republicans in a hard money world—the Democrats lagged the Republicans in a hard money world for decades until the advent of soft money. Democrats continue to lag behind Republicans in the soft money world. Democrats will continue to lag behind the Republicans when we are back to the hard money world. What's important about this year is that the Democrats are starting to see the payoff from investing money in soliciting small donors. What struck me most about what the Democratic Party is doing this year is not just the fact that they've basically

managed to double their hard money receipts already, but that the party has developed a very small donor oriented base of support.

If you look at the Democratic Party in the last couple of cycles, they were top heavy on big donors. A majority of their money last time came from soft money. If you looked at their hard money, it was very oriented towards larger donors who were giving $10,000, $15,000, $20,000 and then finishing off with a soft money gift. What we see now, at least from what Chairman McAuliffe is reporting these days, is that 76 percent of the money, the hard money that the Democrats have raised, has come from small contributors, of an average of $37.

That's an enormous difference. They are raising $3 out of every $4 now from small gifts. There are comments that they have already raised more over the Internet than they expected to raise in this entire cycle. They have 85 percent more money from small donors than they did at this time four years ago. They are really starting to see the benefits.

To give you one other example, the Democratic Hill Committee, which had never raised $1 million in small donor direct mail contributions in a month in its history, has now done it for seven consecutive months.

The potential of the Internet, the fact that the two parties have now built in 1.6 million more people who can now be repeat donors because they've already given once, and the prospects, at least on the Democratic side, that some of these folks who are dialing up their Internet connection for Howard Dean might find it a good idea to dial up and send $25 to the Democrats, gives me reason to believe that the parties can continue in the direction that they have begun in this pre-election year. They haven't simply just plucked the easy money and put themselves in a position where it's going to get very hard from here on in. It seems to me that there's no reason to believe that the parties can't approach the kinds of money they had in the 1996 election in hard and soft money combined if they keep up in the directions that they're heading.

What that means is that the national party committees are going to have a lot of money. I think that they are obviously going to have to use more of that money to pay for some of the things that soft money used to pay for. They are going to have to use some of that to pay the chunk of administration and overhead costs they used to dump into the soft money pool. They're going to have to use it more on a dollar for dollar basis because they can't just use their hard money to leverage soft money for issue advertising and other expenses anymore. The dollars won't go as far as they used to, but I think it's still the case that the parties are going to have the funds they need to contact voters, to conduct the election campaigns they want to conduct in the competitive races. I don't see them losing their relevance.

More complex is the question of the state and local party committees and how they will manage under the new law. Because there are so many new restrictions and provisions placed on state parties, which have essentially now been brought into the sphere of federal

regulation to the extent that the federal election activities they conduct now have to be paid for solely with money raised under federal limits or hard money.

In thinking about that, it's clearly the case that a greater fundraising burden is going to be placed on many of the parties, in part because they can no longer just rely on transfers from the national committees, which is one of the activities that is restricted in certain circumstances under the new law. While the law will force many state and local parties to change their fundraising strategies, it doesn't simply mean that they are all going to whither on the vine and die.

It seems to me that much of the discussion about the effects of this law doesn't recognize, first of all, that it's going to have diverse effects. State parties are very different. There are some state parties that are well funded. There are others that are much more dependant on national party transfers. There are some state parties, frankly about 20 state party committees, that even in the world of national party transfers are still incredibly weak organizations that haven't really amounted to much. There's a lot of disparity out there.

One general trend that I think has not been given enough attention in recent years, except by some people like Bob Biersack when he wears his academic hat, and other scholars like Ray La Raja who are interested in these topics, is that state parties have engaged in an impressive amount of hard money fundraising over the course of the last decade. In fact, one of the most pronounced trends in national party fundraising, if you look at these reports, is the dramatic growth in the amount of hard money subject to federal contribution limits that state parties have been raising in recent election cycles.

The state parties often were asked to raise hard money so that they could match the soft money the federal committee wanted to send in to use for voter mobilization or issue ads. As a result, if you look at just the hard money they reported, for all these various joint activities in the old soft money world, including administration and overhead, voter registration, advertising, and other joint activities, what you'll find is that the state parties came up with $136 million in hard money in 1992. They alone raised over $174 million in hard money in 1996. They raised $190 million in hard money on their own in 2000.

These are not parties that have to start from scratch. It is the case that in raising hard money for these activities under the new law, they will be in a position where some of the advantages they used to have may not be as available to them. It's difficult to determine the extent to which federal elected officials were actually doing some of the solicitations and fundraising efforts for these groups. I don't think, especially on the hard money side, it was that extensive.

It's not clear to what extent state parties had an easier time raising hard money when they could go to a donor and say, listen, if you give us this money, we're going to get $2 in additional money from the Republican National Committee in soft money that we can use. Obviously, there's going to be some changed incentive structures there.

But, on the other side, there's more incentive now for the national committees to work with state and local parties, to train them on the new law, to build up on their hard money fundraising, to help them with how to go about raising this money because of the fact that they need to rely on the state and local parties for some of this funding for state and local voter registration efforts and turnout efforts.

As a result, I think that they will begin not necessarily from a very weak position. In fact, if you look at the best funded committees in the last two election cycles, one of the great things that folks rarely talk about is that over 60 percent of the hard money that was spent through these state/local, joint federal/non-federal accounts. Over 60 percent of the hard money came from the state parties, over one-third of the soft money came from the state parties.

State parties have been doing a lot of fundraising for a while. As a result, there are quite a few committees that won't necessarily be strapped for cash under this new system. The issue will be to what extent the parties under these changed incentive structures will prosper. I think that the large party organizations with well-established fundraising bases will do well.

Yesterday, I read a report about the California Democratic and Republican Parties, which I know are very concerned about this law. But I did note that they raised a combined $20 million in this off-election year and the Republican Party in California is very excited about how much new money is coming in as a result of Arnold Schwarzenegger's gubernatorial position.

We have to wait to see to what extent state and local committees take advantage of the opportunities the new law provides to allow them to raise additional monies and gain leverage for the hard money they raise by doing things, like taking advantage of the Levin Amendment and setting up Levin accounts that will allow them to raise contributions of up to $10,000 for their voter registration and mobilization programs. These seem to be the things the parties are most concerned about.

I think the Levin Amendment in a number of states, particularly those states that are going to have battleground races, offers a real opportunity. State parties are essentially required to set up a separate account, something that they didn't have too much trouble adapting to in the '80's once it was determined that a state party could have a joint federal, non-federal or just a state account. They quickly set up the third bank account in 50 states. I think they can set up a fourth bank account in 50 states without too much trouble.

We are likely to see quite a few states taking advantage of this opportunity. Right now it's not clear to what extent it will be valuable because there's been a lot of uncertainty and a lot of waiting to see what the Court would say about this. I think that it offers an opportunity that's very important for us to follow because it provides parties with a way to more efficiently conduct their grassroots operations. I wouldn't be surprised to see many of these state party organizations starting to develop more sophisticated voter contact and registration efforts. In their highly partisan areas, where parties know they're going to have

strong partisan support, Levin Amendment sponsored, Levin account funded, voter turnout drives can be done because the parties know that most of the voters that are turned out will be their supporters. Parties could then concentrate their hard money resources when federal candidates are on the ballot into those areas where they need to do more persuasion, more identity of federal candidates to win those real battleground areas in the state.

I think that given the structures that this law sets up, I'm not ready to count the parties out yet. I still think the parties will do far better than all of these 527 committees combined in terms of the resources they bring to bare in the next election cycle.

Trevor Potter: Thank you, Anthony. Any specific questions to Anthony before we go on and in fact talk about 527s? Yes?

Question: How will the new law affect state parties?

Anthony Corrado: One of the issues during the Congressional debate was whether or not to restrict soft money at the state and local level as a means of plugging the possibility of circumventing a federal ban and having all the soft money moved to the state level. There was a concern raised by the Congressional Black Caucus, Congressional Hispanic Caucus, and some of the supporters of party mobilization efforts that the soft money ban undercut the voter mobilization activities that had started to develop in state parties and there wouldn't be enough money for get out the vote.

In order to address that concern, Senator Levin from Michigan helped to sponsor an amendment that is basically an exemption from the soft money restriction. State and local party committees can set up funds that can raise contributions, if allowed by state law, up to the amount of $10,000.00, which have to be used strictly for voter mobilization projects. This money can't be used for TV ads, it can't be used for broadcast ads, but it can be used to help turn out voters for generic party voter activities, or for generic party building activities. The expenditure of those funds would be subject to the same kind of allocation rules that used to apply in the old soft money rules so that the party has to match the Levin money with some hard money to spend it.

The other major restriction that some of the parties have expressed concern about is that the money used for Levin activities has to all be raised in the state. A state party can't have the national party committee raising the money and sending it to a state account. A state party can't even have the national party committee sending in the hard money component of Levin Amendment funds. The idea was this: if a state party can raise the money and they do so in the state and want to conduct a grassroots effort, the law will give the party some opportunity to do that. That is the background of the exemption that was made.

The last point I would make is this, remember that when we're talking about all of these voter turnout activities, we're talking about a pretty small universe of state party funding. If you look at how all those funds were spent by state and local committees that

reported to the FEC over the years of the soft money system, a fairly steady 15 percent of that state party money went towards voter activities.

This big surge that we've seen in hard/soft money spending largely was eaten up in recent cycles by the TV ads, which went from what used to be 3 to 4 percent of state party expenditures to 43 percent of state party expenditures. In the last cycle, all of the state and local parties reporting to the FEC on activities connected to federal elections, both sides of the aisle included, spent about $52 million, even including yard signs, banners, buttons and the whole shebang. We're not talking about a huge amount of money that necessarily has to be replaced here.

Trevor Potter: A further note is that it's in that instance, and only that instance, that national parties are prohibited from transferring funds to state parties. They can go ahead and transfer funds to state parties, it's just the only funds the national parties now have are hard money. But to the extent a national party wants to invest in a state party, they can use their party funds to do so. It's simply that those transfers of national party funds can't be used by the states to show that they have met their own hard money raising responsibilities under the Levin Amendment that enables them to spend the matched soft money.

Question: Who are these new donors that - from what your research says - are able to double their contributions?

Anthony Corrado: The new donors are the people the parties are largely getting as a result of the investments they have made in actually ginning up, once again, their direct mail programs, and working more on their Internet sites. The Democrats have developed greater capacities in part as a result of the investment of soft money in a new headquarters, developing their voter lists, developing their party membership lists, and cleaning everything up, as well as this effort they now have under way called "Demzilla," which will be their massive effort to get out the democratic vote in the fall.

It is not just the soft money donors converting to hard money donors. This is new donors. There are donors who are giving $100.00 and less. In part, it's largely the politics of the time where the anti-Bush, anti-war kind of coalition that would tend to support the Democrats are translating their policy beliefs into bigger donations.

I think it's the same on both sides. I think the Republicans are benefiting from the popularity of Bush. It's not surprising small donors give when a party reflects something they believe in.

Trevor Potter: It is hard to comment on this without sounding smug, so I will only half apologize for sounding smug on this, but, one of the arguments the sponsors of BCRA made was that this actually was good for the parties in the sense that it would cause them to focus on their base and that the drive for hard money converted immediately into television advertising had turned people off and more importantly had caused them not to focus on the Internet, on small donors, on getting people involved at the grassroots level.

I think when the sponsors said that, many people thought it was a nice piece of rhetoric that was put out there in order to justify their soft money ban as opposed to something they actually thought would happen. As I've been sitting here listening to Tony, I have been really pleased to hear the numbers beginning to show substantial results, 1.6 million new donors beginning to show that if you, in fact, focus on small donors it will yield some results.

Comments by Glen Shor:

Trevor Potter: Glen, would you like to talk a little bit about how all this now plays out at the FEC and what you think the next steps are from the perspective of the enforcement of the new law?

Glen Shor: Certainly. Thanks, Trevor. In trying to figure out what the next steps are from an enforcement perspective, I think the first and an important place to start is actually by looking at the *McConnell* decision, because the *McConnell* decision sorted out a little bit of history regarding the origins and the nature and the rationale for the rise of the soft money system as operated by the political parties and candidates. What the *McConnell* decision had to say on this had important bearing for the FEC and I think should color how we look at the FEC today. It certainly, I think, puts the FEC in the spotlight.

The soft money system as operated by political parties and candidates involved the political parties raising soft money and spending it in ways in which most observers would say was on federal elections, was aimed at federal elections, had a clear benefit for federal candidates, and the ability of candidates to essentially glom themselves on to this system, ultimately resulting in the joint fundraising committee arrangement that essentially allowed them to raise soft money for their own races and their ability to coordinate with outside groups that were spending soft money on federal campaigns.

Some had said that this system was a product of Congress having authorized it in 1979. Some said that this system was a function of overly narrow drafting of the Federal Election Campaign Act, particularly the idea that soft money was not for the purpose of influencing a federal election, which was all that the Act covered. Some said that some narrow constructions of the terms of the Federal Election Campaign Act were constitutionally compelled. The *McConnell* decision said no to all these variants of explaining the rise of the party and candidate soft money system. I think it fairly fixed responsibility for that fact with the Federal Election Commission and what I would say are mistakes by the Commission in interpreting the Federal Election Campaign Act in ways that licensed spending the soft money on federal elections. The quotes are unambiguous from this decision. The Court said the FEC's allocation regime had "subverted" the federal campaign finance limits that were approved in *Buckley* by, and here's the quote, "permit[ing] the political parties to fund federal electioneering efforts with a combination of hard and soft money." The Court characterized the FEC's allocation regulations for political parties as "Permit[ing] more than Congress, in enacting FECA, had ever intended." It reiterated this judgment in indicating that, and the quote is, "the FEC's allocation regime has invited widespread circumvention of FECA's limits on contributions to parties for the purpose of influencing federal elections." They rendered the same judgment as to state party spending of soft money on federal elections. They said that the efficacy of FECA's long-time statutory restriction on contributions to state and local party committees for the purpose of influencing federal elections had been both approved by the Court and eroded by the FEC's allocation regime.

At the same time, the Court also disputed some of the logical building blocks of the soft money system that had been cited by the Federal Election Commission over the years in support of their refusal to enforce the amount restrictions and the source prohibitions that were enshrined in federal campaign finance laws since, really, elements of it starting at the beginning of the 20th century, 1907. They disputed the idea that political parties couldn't be asked to comply with anything but the brightest of bright line rules. They disputed the idea that coordination as a federal campaign finance law concept had to be shrunk to the extent of being utterly ineffective. Instead they anticipated that wink and nod arrangements between candidates and outside spenders constituted coordination under the law, and could be regulated under the law, that spending the results out of those wink and nod arrangements could be treated as in-kind contributions.

So what emerges from the *McConnell* decision I think is an image of an agency that has made repeated mistakes over two-and-a-half decades at a considerable price to the integrity of our political system. This sort of judgment, I think an indictment of the FEC's performance, necessarily directs attention to the Agency now. It necessarily shines a spotlight on the Agency, and, one would argue, it could and should chasten them. Of course one would think that the enactment of the Reform Act would have chastened the Commission because the Reform Act was based precisely on this perspective, that the soft money system was more than Congress had ever intended, that Congress had not authorized soft money. That instead it was a result of an allocation system created by the Commission that was not faithful to the statutes on the books.

As it played out immediately after the enactment of the Reform Act, when the Commission was called upon to issue regulations implementing that law, they did not proceed in a way that indicated that they were chastened by the enactment of the Reform Act. I think the Commission acted in ways that departed from the text of the statute and the intent of the sponsors and opened loopholes in terms of how that law would be implemented and enforced.

There are numerous examples. I've discussed them in other settings, and I won't go into too many. Among the most prominent is the Commission's regulation that licenses the most overt forms of coordination between federal candidates and outside spenders on advertising that isn't aired within 120 days of a federal election and doesn't expressly advocate a federal election result. This is essentially a rule saying, if you're Bill Yellowtail's opponent, that you can write your Bill Yellowtail ad with the outside group that intends to finance it. And so long as that ad isn't aired within 120 days of Bill Yellowtail's primary or general election, that's fine, it's not treated as an in-kind contribution to Bill Yellowtail's opponent.

It's completely legal under the FEC's regulations. This 120-day rule essentially licenses overtly unabashedly coordinated advertising during wide swaths of an election year. Imagine a state with a March primary, an early primary. So those ads couldn't be aired within 120 days back from the March primary, and they couldn't be aired 120 days back from the November elections, but what about June? June of an election year? I think most

people would say that election season is pretty much underway at that time. Is that within 120 days of November? No, it's not.

This is but one example of the Commission's regulations implementing the Reform Act. It joins other regulations saying that a party phone bank that encourages people to get out and vote in light of issues at stake in the election is not get out the vote activity.

There is also an FEC regulation that says that 501(c)(3)'s are not subject to the rules for using hard money for electioneering communications, despite the absence of any such authorization in statute and an express plea in the legislative history for the Commission not to do that. Again, I think the evidence is that at least the enactment of BCRA itself did not chasten the Commission.

The question remains now whether the *McConnell* decision, which made no bones about who was responsible for the party and candidate soft money system, would essentially serve to create a new day at that agency. In the event that it does not, there are certainly vehicles out there that aim to replace the Commission and achieve structural changes in an election enforcement agency. As we all know, Senators McCain and Feingold and Congressman Shays and Meehan have introduced legislation to replace the FEC with a Federal Election Administration.

I guess the key feature of it is that they would have three commissioners rather than six. This is aimed at preventing the deadlocks that have characterized the Commission's performance on some very, very major enforcement cases. It would give the Commission powers that it currently does not have. Right now the Commission doesn't really have powers to sanction somebody except for administrative fines, if there's probable cause that somebody violated an election law, the Commission has to take them to court if they can't convince them to sign a conciliation agreement.

But I think that the real test for the Commission now is going to be how they deal with the proliferation of these 527 organizations. Certainly you have the *McConnell* decision coming down, which has criticized the Commission's performance in the past and its tendency to fictionalize federal campaign finance practice. And now you have a circumstance where groups are being created to raise soft money, and they have made it very clear that their intention is to spend that soft money to elect or defeat federal candidates, identified federal candidates.

In many respects, the issues presented by the 527 phenomenon, or the new 527 phenomenon, resemble the issues that the Court grappled with in *McConnell*: for example, when would you say that spending is for the purpose of influencing a federal election or not? So this is obviously going to be an important test for the Commission.

The FEC will commence hearings in April and hopefully get a rulemaking done by May. At the same time, yesterday, the Campaign Legal Center, the Center for Responsive Politics and Democracy 21 filed a complaint against three of these 527 organizations alleging that in light of their announced purposes, that they are federal political committees

that should have registered with the Federal Election Commission. In this sense, they are violating the laws that exist right now, which basically say that entities that make expenditures or receive contributions of $1,000.00 or more for the purpose of influencing a federal election and at a minimum have a major purpose of influencing federal elections, should register with the Commission as federal political committees.

So, that is where things stand right now on the 527 front. The Commission's adjudication of this issue is going to be, obviously, a major test for the agency in the wake of a decision which found much lacking in its prior administration of campaign finance law.

Trevor Potter: Thank you, Glen, very much. Any specific questions to Glen at this point? Yes?

Question: Is there a way in which the FEC's implementation of the new law into regulations may still change?

Glen Shor: Well, let me thank you for reminding me to mention one thing that I did not mention. The Commission's regulations to implement the Bipartisan Campaign Reform Act are not the final statement on whether those regulations are to be essentially the practical law in this area. Congressman Shays and Congressman Meehan, the principal House sponsors of the Reform Act, have filed litigation with the United States District Court for the District of Columbia to have those regulations overturned.

That challenge was filed prior to the *McConnell* Supreme Court case and was put on hold by Judge Kollar-Kotelly, who, actually, it's interesting, she was one of the District Court judges in the *McConnell* case, on the three-judge panel. And she also has wound up receiving jurisdiction over the *Shays v. FEC* case over the regulations implementing the Reform Act. She's certainly going to be adjudicating in an area with which she's quite familiar already. She put that Court case on hold during the pendency of the Supreme Court case. But now that the Supreme Court case is over, she has issued a scheduling order for the *Shays v. FEC* litigation, which essentially says that both sides have to file cross-motions for summary judgment on February 27th. They will deal with the merits of the case and standing issues, which the FEC, I think, has already raised. So, this litigation over the Reform Act regulations and their propriety is on the fast track. The final state of those regulations would depend upon how that Court case is decided.

Trevor Potter: As many people had, in fact, predicted, it looks as if the FEC is going to be the focus of a great deal of activity over the course of this year between the advisory opinion requests, the complaints and the rulemaking on this issue of political committees, and then the Court challenge and the possibility the Commission will have to rewrite some of the regulations after that. So there's going to be a lot going on there.

Comments by Tom Mann:

Trevor Potter: At this point I'm going to turn to Tom and to Norm.

Tom Mann: It's easy these days to be very discouraged about the state of American politics on a whole range of matters: the intense partisanship and ideological polarization, the manipulation of democratic rules of the game to try to advance one's long-term interests.

It's not a pretty sight and I've been very uncomfortable feeling myself being so negative, so critical of American politics, that it was with great relief and much heart that I heard about and then read the decision in *McConnell v. FEC*. There are some constitutional scholars, law professors that will find great doctrinal shortcomings in the reasoning of the Court. There are also lots of critics who, having lost the argument in Congress and now in the courts, will carry it forward to the implementation stage.

I'm upbeat about the state of affairs, not because I think I have an exaggerated, naïve view about the extent to which this law, as affirmed by the Court, will transform our politics. In fact, it is the very sort of realism, incrementalism, pragmatism, careful constitutional reasoning in the minds of and efforts of what I call the new reform community that made possible the passage of the law and its being upheld by the Court.

What I find so encouraging is the extent to which the majority opinion in *McConnell* recognized those qualities, those features of this reform initiative that the critics simply have not. What is stunning, and Norman will give you chapter and verse, is the extent to which old critiques are leveled against new legislative proposals and court interpretations. It's as if the reform agenda in BCRA was the reform agenda of a decade or 15 years ago, as if reformers didn't see the problems with things like banning PACs. As if they didn't see the importance of raising contribution limits, of creating space and opportunities for political parties to operate in the system, as if they didn't realize that the problem wasn't the overall amount of money in politics but the problematic aspects associated with how it was raised and how it was distributed across the electoral system.

What I am struck by in the Court opinion is the extent to which five justices saw exactly what the Congress was about. They didn't get distracted by a couple of speeches in support that claimed other objectives, but looked at the crafters, looked at the extraordinary evidentiary record, saw the pragmatic view of money and politics taken by the authors of BCRA and then adopted this themselves. In doing so, they showed appropriate deference to Congress, in part by recognizing the constitutional care Congress took in crafting the legislation and the desirability of genuine stability in law and regulation. The Court saw this legislation for what it is and what it was intended to be, which was to get us back to a point in time after FECA and *Buckley* and before that law was undermined in the ways that we have discussed here.

I was struck by the fact that in perusing the dissenting opinions, there were only two alternatives, realistically, where the Court might have ruled otherwise. One I call sort of an honest straightforward alternative, which is the Clarence Thomas-Antonin Scalia alternative, which is to repeal *Buckley* and its progeny and basically go to a deregulated system with some amount of disclosure.

Whatever its liabilities and shortcomings, it has the virtue of having on the books in law what is done in practice. We have learned there is nothing close to a majority on the Court, a majority in the Congress or a majority in the country that favors that sort of return to what I call a state of nature in campaign finance.

The other alternative was the Kennedy-Rehnquist alternative, which was, in my mind, a very crabbed interpretation of *Buckley* and a repeal of *Austin*, producing a regulatory regime designed to fail at least as badly as the post-1994 system has failed. They would have upheld the prohibition on solicitation of soft money by federal office holders and candidates, the disclosure of electioneer and communications and treating electioneer and communications coordinated with candidates as contributions.

The rest of the two pillars would have crumbled and you can imagine right now what election law lawyers and political consultants were doing. It was a recipe for disaster, making, I see the sort of doctrinal nitpicks raised about the inadequate reasoning of the Court, in my mind, secondary to the fact that the Court saw what the objective here was. It was limited, put priority on stability in law and regulation and honesty in the system and it seems to me found a perfectly reasonable constitutional space to allow Congress to engage in just such activities.

That's why I'm so upbeat. But, when I really get down is when I see what has transpired, not so much in the implementation of the law where I'm really encouraged that in fact much of what was said at the outset about the healthy consequences of this act on political parties and other parts of the system are coming to bare, but by the extent to which the critics aligned with the media. With Jim, of course, basically trying to show how none of it will make any difference, that it's all being undermined and that the law of unanticipated consequences will render all of this ineffective if not downright harmful.

Having stated it, it's supposed to be taken as a truism rather than the beginning of a serious effort to begin to measure the impact of this new law in the particular context. Those efforts are now underway, but to allow those efforts to get underway one needs to keep the world from coming to believe in the myths, which I presume my colleague, Norman Ornstein, will now discuss.

Comments by Norm Ornstein:

Thanks, Tom. I wanted to get back for a second to what Fred said this morning. From the time that we really began a serious debate on this set of issues there was a massive and intended assault on the truth and reality by a substantial group of people trying to set a myth in place before anything happened that would make it very difficult to have a law pass. It was often built around very direct misrepresentations of what was in the bill going back even to the first McCain-Feingold, but a particularly clever sort of intermixing, as if the term McCain-Feingold would apply to a half dozen alternatives, crafted, recrafted, adjusted along the way.

What I found most striking at an early stage, though, was that it wasn't just opponents of the bill in the Congress who were doing this. They found all kinds of allies out there, some witting and some perhaps less witting. The witting ones in the political community, including a lot of consultants and lawyers who had made very handsome livings, purchased many Mercedes and BMWs, through soft money, who had a very strong and direct interest in maintaining the status quo. But also, with Jim excepted, in the reporting community. I don't know how anybody involved in this process from an early stage could come away anything but disillusioned in much of the press core.

Fred and others among us made innumerable calls to reporters who kept writing that this bill would ban all kinds of ads. Even when you would tell them and go through specifically what was there, it didn't matter, either they didn't want to try to figure out a way to write this within the context, they were lazy, or they simply wanted to repeat a canard, for whatever reason, it kept being out there. It's not as if this was meaningless.

I have found, as I have gone around the country and even been around Washington that very smart and very able and very sophisticated participants in the political process who are not deeply immersed in the details of legislation-- which is most people, including most members of Congress, I have to say-- believe this because this is what they saw and read and heard all the time. I can't tell you how many people said to me, after the Court decision, how stunned they were that the Court accepted Title II here because they all assumed that it would be thrown out on its face because how could you have a provision in the law that would ban ads?

So, myth making has an implication for a larger reality out there and it has continued since the Court decision with the same kind of interaction in an attempt, I think, to try and set the stage for some for repeal. And we know there are people out there who have an intent to try and move as soon as feasible to repeal it, but also to set the stage for a change in the Supreme Court and an attempt to make an assault in other ways as well.

The myths go beyond just simply repeating that this would ban ads, and in some ways it's kind of amusing because they are kind of internally contradictory. We have the same people saying at one of the same time when this bill was up, when it passed and when the Court announced its decision that this was going to impose radical change on the campaign finance system, which, would, among other things, do very little, while bringing

about Armageddon, while also backfiring. It's hard to sort all that out, but it's all there together.

Along the way, we've spent a lot of time trying to counter myths with realities. It's interesting now though because a court decision aside, we've now had a year under our belts, not a full picture, not a full portrait of an election cycle, but a year of operation under this law and we can begin to measure, if only in crude initial terms, what is myth and what is reality. Just to go through a few of these things, and Tony has done it well with the parties, I'll elaborate upon that just a tiny bit, though, and as Tom has done as well.

One of the myths along the way, and even now, is that this was a law put together by a bunch of naïve people who wanted to end the role of money and politics and it was a fool's errand. Just to give you an example, *The Washington Times* said that the reforms are based on a utopian dream that some system can be concocted to make money meaningless in politics.

As Tom said, this was much more a pragmatic and hardheaded reality of recognizing that you need a lot of money in politics, campaigns are a necessity, expensive, and growing more so. The goal here was much more to break up the nexus among large donors, political parties and elected officials. As we are seeing, there is certainly a healthy dose of money in politics now coming in through the hard money system at minimum. But what we have also seen at least in very strong anecdotal evidence is that the old combination of shakedowns and influence peddling that parties and office holders were using with large donors has been cut back sharply, even if it hasn't disappeared.

Clearly we have challenges on the horizon, like Tom DeLay's charity scheme that are trying to find ways around this, but it is radically different than what we had before. Around this time of the year, I used to see coming across my desk all kinds of solicitations from parties and members of Congress that in effect were: pay this amount of money, you get lunch with the committee chair of your choice; pay that amount of money, you get lunch with as many committee chairs as you want; pay that extra amount of money, you'll meet with the Speaker or you can meet with the leader, you can discuss whatever you want and so on.

That just doesn't happen anymore. In fact, while we have not broken up that nexus, and it is impossible to do so entirely, it is a different atmosphere. If we do focus, as the Court has in the past, if not entirely in the same way now, on questions of corruption and whether it's a quid pro quo corruption going from donors to office holders, the problem that I found much more worrisome, in recent years, really was the protection racket coming from people in positions of power in the governmental process, threatening donors repeatedly, who had no protection because there were no limits. It is simply a different climate and world right now.

Myth number two was, as Tony talked about before and we have also discussed, that BCRA would both weaken the parties and strengthen the interest groups, and, in particular, strike a death blow to the Democratic Party in this process. That's been one that an awful

lot of rather cynical reporters have picked up on, Tom Edsall, not the least among them, who cannot write a story about this act without talking about how it's had the unintended consequence of damaging both parties, but particularly the Democrats. I think the evidence that Tony presented certainly suggests otherwise.

Let me just read a couple of things. One is a headline of a press release from the Democratic National Committee of January 7th, 2004, "Democratic National Committee ends year in best financial shape ever." From *The Hill*, the other newspaper on Capital Hill, of January 14th, headline, "House Dems Unfazed By Loss Of Soft Money." The Democratic Congressional Campaign Committee, the fundraising arm for House Democrats raised $28.5M in 2003, close to the $31.7M record it set two years ago at the height of soft money's payday.

That certainly doesn't suggest that the parties are weaker or are dying on the vine. It certainly doesn't suggest that the Democratic Party is dying on the vine. Other numbers would say the same thing. Are the Democrats doing the same brisk business as Republicans? No. But, as Tony suggested, they never have, and that's been true in a soft money world or any other kind of world. The soft money world that existed when Democrats held the presidency would create a very different dynamic in any event in the brave new world they face now, outside of the presidency. What's striking is to look at the fundraising prowess of the Democratic Party today compared to a period when they did hold all of the reins of power. The dexterity is rather robust, interestingly, and strikingly robust in comparison.

Now, are interest groups strengthened along the way? Of course what we also get is another kind of canard that interest groups will be strengthened vis-à-vis parties, but will be devastated in this process because their speech will be killed – something that I'll get to a little bit later on. But I don't see any particular signs that interest groups on the whole in their role in the political process – whether it be the ones that have gotten the most attention, like the National Rifle Association or the Sierra Club, or others whose active participation in the campaign political process was of more recent vintage, like the ACLU, running its ad in Dennis Hastert's district – have suddenly developed an overweaning role here, vis-à-vis the political parties. Nor do I see any signs that they are being devastated by the impact of the new rules involving electioneering communications.

I don't have it immediately handy, but there was a very interesting quote from Wayne LaPierre, vice president of the National Rifle Association, who echoed the words of Mitch McConnell, Joe Sandler and others, and said, "this law is the worst thing to happen since the Alien and Sedition Act." Wayne LaPierre has also said, "when it comes to this new world, raising hard monies and putting their energies into avenues other than television advertising, we are going to be heard, I promise that. We have new lines on the football field, but the game is still going to be played." This is basically the same attitude we see in the parties, not surprisingly, as we see among the interest groups. I doubt very much – and none of the evidence so far would suggest – that the relative positions are going to be tilted in any considerable fashion.

Another myth exists, of course, that this was a huge and vast incumbent protection scheme. As Jim Bopp – who needs no introduction, but who may be introduced less frequently after the Court decision – said, the law is an orgy of incumbent protection.

Just to use a few updated figures that we now have: Looking first at 1976 and 1978, the first two years under the post-*Buckley* hard money regime and the two just before soft money was created, the reelection rate for House incumbents was 95.8 percent and 93.7 percent, respectively; for Senate incumbents 64 percent and 60 percent. Now segue forward to the most recent two elections before BCRA, 2000 and 2002; this was the soft money system that reform critics said that if it went away would result in a vast incumbent protection scheme. The reelection rate for incumbents in those two elections for House incumbents was 97.8 percent and 95.9 percent, and for Senate incumbents, 79.6 percent and 88.9 percent. That's how much of a role soft money and issue ads played in creating a more level playing field and increasing competition.

There is not much in BCRA that will explicitly increase competition, but we have some evidence, at least, that the Campaign Finance Institute has come up with, suggesting that an increase in the contribution limits will work to the benefit of challengers. As we look at just the initial stages of fundraising among challengers around the country, that seems to be, at least at the initial stages, happening a little bit.

What may well happen is that as we see at least some diminution in the issue ads run by outside groups and parties using soft money, the bidding war within districts and states with television stations with a very limited amount of ad space – in particular, the prime ad space in the months right before an election – created a setting where the lowest minimum rate that politicians were supposed to get, became an absolutely meaningless entity. If politicians wanted to get time that actually did run in prime spaces where they wanted it close to an election, they had to pay a whole lot more. If you change in a small fashion the demand for those ads, it will make it easier for political figures to buy ads at reasonable rates. What we have seen in the past is that if you have opportunities to buy ads – with a double hard money contribution limit – more challengers will have some resources to do so and that can begin to level the playing field a little bit and may help as well.

I want to just mention a couple of little footnotes here, as well, that have just struck me in the last few weeks. There are a couple of provisions of this act that were not a part of our core strategy. In pulling together what I think, in retrospect, was a pretty good comprehensive package of things that worked together, that it managed to go through the legislative process and stay reasonably coherent is a small miracle in and of itself.

But I want to just address, for a minute, the Millionaire's Amendment and the Stand By Your Ad Provisions, which, of course, may not stay forever. They were basically dealt with in the Court by being denied standing, and we've had some misgivings about that. Trevor and I, I think, actually have a small confession to make. We were probably there at the genesis of the Millionaire's Amendment, which actually came in a conversation with Senator Warner back when he was the top Republican on the Rules Committee and wanted to have his own campaign finance reform proposal.

Trevor Potter: Back when Norm and I were unsuccessfully attempting to make him a proponent and sponsor of this.

Norm Ornstein: Yes. We've tried to weave him into our net, and instead he went his own way. But, in going his own way, he took something that we had talked about, because he had been somewhat concerned about millionaires running, and built that concern into his legislation that ultimately was introduced by Senator Durbin in the Senate and made it into the bill. The Stand By Your Ad Provision was David Price's idea.

I think most of us thought that the Millionaire's Amendment would not stand up to scrutiny and probably wouldn't make much difference anyhow, and the Stand By Your Ad Provision might end up with the same fate. What's interesting is that at least with some early anecdotal evidence, they both seem to be having some impact, that what the Millionaire's Amendment has done is not to simply force all millionaires out of the process, or allow incumbents to avoid a challenge from a millionaire.

What the provision has done – because it basically provides more resources for other candidates if an individual puts a lot of his or her own money into the race – is probably weed out those multi-millionaires with nothing else going for them other than the total dominance of their money. And it's created a little bit more of a leveled playing field. We're seeing this a bit in Illinois in the Senate primaries. At least the experience in Iowa and in some of the other presidential primaries would suggest we're getting a slight difference in tone in the ads being run by the candidates when they have to stand up there and say, "I am Howard Dean, Wes Clark, or whomever, and I approve of this ad." Instead of having an anonymous voice with an ominous tone attack somebody else. The provision is not killing attack ads, which was never the intention.

Robust debate is important and necessary for a vigorous democracy, but an attack ad – we're now seeing a lot of them in Iowa as the race has tightened – done in this fashion is somewhat different than the attack ads done in a different way. And so, it's kind of interesting that simply little provisions that were either afterthoughts or that some of us thought maybe were best pushed aside, because they would take us away from our central focus, may, in fact, have some real impact on this process as well unless and until somebody gets standing.

Panel III: Question & Answer (Excerpted Portions)

QUESTION

Is there a way in which the FEC's implementation of BCRA may be successfully challenged?

ANSWER

Glen Shor: Well, let me start, first of all, by thanking you for reminding me to mention one thing that I did not mention. The Commission's regulations to implement the bipartisan campaign reform act are not the final statement of whether those regulations are to be essentially the practical law in this area. Congressman Shays and Congressman Meehan, the principal sponsors of the Reform Act, have filed litigation with the United States District Court for the District of Columbia to have those regulations overturned.

That challenge was filed prior to the *McConnell* Supreme Court case and was put on hold by Judge Kollar-Kotelly, who, actually, it's interesting, was one of the District Court judges of the three-judge panel in the *McConnell* case. And she also has wound up receiving jurisdiction over the *Shays v. FEC* case over the regulations implementing the reformat. She's certainly going to be adjudicating in an area in which she's quite familiar already. She put that court case on hold during the pendency of the Supreme Court case. But now that the Supreme Court case is over, she has issued a scheduling order for the *Shays v. FEC* litigation, which essentially orders both sides to file cross-motions for summary judgment on February 27th. They will deal with the merits of the case and standing issues, which the FEC, I think, has already raised. So, this litigation, dealing with the propriety of the reform acts' regulations is on the fast track. The final state of those regulations will depend upon how that Court case proceeds.

QUESTION

I'm just curious, a factual matter: You've said that the Democrats are doing very well and have always done worse than the Republicans. But, is the spread different now? Does it look like Democrats are doing worse than we have before or is it essentially the same as it's always been, in relative terms?

ANSWER

Tony Corrado: Well, just like in Vegas, there are lots of ways to figure out the spread. For example: If you look at absolute numbers, and you say, how many dollars? The answer is that the Republicans will have a bigger hard dollar advantage than they have in most past years because both parties are raising more. The Republicans right now, generally, are at a 2 to 1 pace, which is much better than the Democrats did in many of the races in the '80's or ever prior to the mid-1990's, where the Democrats would be behind 3 to

1, 4 to 1, and have significantly less money. A good year was $39M and they would be outspent 4 to 1 and capture the Congress - the good ole days.

I therefore expect the dollar amount would be, given the Democrats increased emphasis on hard money for fundraising, probably not worse than it was in the last two cycles where they were outdone by about $220M in hard money alone, as I recall. So I don't see how it can get worse, particularly given the fact that their fundraising is up so much on the hard side.

People would argue about what a meaningful spread is. I think that what's important is Norm's point, and that is their comparative fundraising ability and prowess is so much greater than it was even four or five years ago on the hard money side, it's very different in terms of the resources they'll bring into this race. You have to weigh that against the added costs they'll have that they have to pay for in things such as overhead.

First is, how much money do they need to give to candidates? And, given that redistricting and the number of Senate contests are up, it's a fairly small pool of races that the national committees have to play in this year. Depending on how the presidential race shakes out, how many states they really have to play there, it's not the case where they have to match dollar for dollar. It's a case where they need to have the resources to bring to bare to influence 15 states. The question is, will they have enough cash on hand to do that? At least as things look now it seems that they will.

Tom Mann: It seems to me that Tony is right. Deborah is right in one sense, that is, if you just look at the total amounts, Democrats and Republicans raised in the last presidential cycle, the Republicans will gain a bit in their lead. But there are two important reasons to qualify that.

If you look at Democrats vs. Democrats, that is, the past vs. the present, they will do as well. Therefore the total amount of dollars they have to play with is comparable. But, secondly, the way parties can spend money under BCRA is different as well. If you look to see where the soft dollars went, yes, some of it went to cover overhead and administration, but a lot of it went into a handful of races for issue ads that were also invested in by the other party. You had an arm's race operating in a handful of districts, and it isn't clear that the Democrats gained any advantage from the expenditure of those funds.

Now, unless they engage in independent expenditures, they're going to be making coordinated expenditures and they're going to be investing in get out the vote grassroots activities. It seems to me they will have substantial funds to top out whatever they have done in the past on the GOTV side of things.

There is just no question about it. I think they will now have an incentive to broaden the playing field in congressional races, not to be non-strategic, but instead of just playing in 15, will invest for two or three election cycles, and try to get that number back up. I think that's one of the things you're going to see.

Now the final remaining question is the presidential race. If the winning democratic candidate has opted into the public financing system and therefore is unable to raise and spend additional dollars between March and the July convention, Democrats have a real problem. If Howard Dean or John Kerry is the nominee, there is a good chance the Democratic Party will raise at least as much money as they need to be visible in the advertising wars that occur. Even if a Wes Clark or a John Edwards were to win the nomination, the Democratic Party will be able to raise and spend the hard money to counter some of this and there will be other activities in the outside political world to try to compensate for some of the difference. I think Democrats are not mortally wounded by this act.

Norm Ornstein: Let me add a couple of points. One is what is really a point of contention I have with a lot of the reporting on this, particularly when it comes to the congressional committees. The Republican overall dollar amounts seem to vastly outdistance those of the Democrats, but the Republicans have relied extraordinarily heavily on very expensive direct mail advertising, much of which is simply dollar for dollar. Their net ends up being either minimal or zero.

When you look at cash on hand, you find almost no difference between the two parties. Democrats have done almost no direct mail fundraising. They are now starting an effort at the DNC, which Tony talked about, where have been able to have a much lower per dollar cost of raising money to this point. The Internet potential has almost no cost at raising money: you don't have to send out mail, you don't have the $.37 stamps, and you don't have the cost of having envelopes come in and having staff to open them. The Internet potential is just right there, immediately, with credit cards, and, at least in the short-run, gives Democrats another advantage.

Finally, it's worth noting that I could make a case, and did, to disbelieving Democrats that the soft money system put them at a big disadvantage in relation to Republicans because they got seduced by the drug of soft money and did zero to build a base at the grassroots level of small donors, who not only would give a little money, but then would be active in politics.

When you look out there now what you see in the Democratic Party and actually even more, also in a heightened level in the Republican Party, is just what we hoped. Which is that they are now focusing heavily on get out the vote activities, grassroots activities to build a stronger base, an army out there of individuals who will be working in the process. That's what political scientists, from the beginning, saw as the signs of strength in parties and what was absent before, and this is working even better than we expected. I'm sure partly because this happens to be a cycle with very few people in the middle, where the get out the vote efforts become more significant, but regardless we're really seeing the first signs of health in the two political parties combined in 20 years.

Tony Corrado: Although not to let optimism overlook reality here, the Democrats will have a good year, given Bush's abilities and given the Republican National Committee's abilities. If the Democrats can get within $350M of the Republicans this year,

they are having a good year. Remember just one fun fact, for those of you who would like to think about the other side: George Bush has raised $131M, yet only $1M has come in over the Net. They haven't even begun to tap those six million names they've got in email files yet. So there's a little more fundraising to come.

QUESTION

Given the lack of competitive races and the large number of people who not only don't vote, but intentionally don't vote because they're not interested in all of this and don't consider themselves part of the party base of either party, how does any of this reach them and involve them in the system?

ANSWER

Tom Mann: As you know, the incentives for participation are, (1) it makes a difference, so, competitiveness, (2) information, that you actually know who is running and what the stakes are in the process, and (3) you operate within a social milieu in which someone actually asks you to participate. Can't do much on the structure of competition and House elections in this post-redistricting round, which continues to go on, but it seems to me there are signs of efforts in the campaign thus far, in the Democratic presidential primary, of efforts to try to reach non-traditional participants or non-participants in new ways, bringing some new people into the process. But also the environment, the political context, within which an election occurs, has a great deal to do with that.

My sense is that people will feel the stakes in this election, if not in their own House district in the broader presidential contest and that therefore, there are some reasonably encouraging signs. I wouldn't make too much of this idea about, yes, the partisans will turn out, but we have to get those independents. One of the best ways of getting people to participate in politics is to feel some affinity with one of the political parties. It's a tremendous motivation for being active. The number of Americans who vote who are not at least leaning toward one of the political parties is very, very small, and, therefore, partisan-oriented activities in the campaign should have a positive effect on rates of turnout.

QUESTION

To what extent will we see a lot of spending through the 527s, given Tony's earlier comment that he thought the party committees would continue to be the dominant, financial instruments out there?

ANSWER

Tony Corrado: Well, I guess I would start by saying right now you are looking at an election cycle where we are all focusing on a handful of committees. For all the talk about 527s, there are a lot of different entities within that compass.

Trevor Potter: 20,000.

Tony Corrado: There are some that have been newly formed that I think are sincere efforts to try to shar up a democratic intellectual infrastructure that's been sorely lacking, like John Podesta's group.

Trevor Potter: That's a (c)(3).

Tony Corrado: That's a (c)(3), and some of these others. There are going to be a number of them that are clearly oriented towards putting money into the presidential race. Will they raise the, what used to be the $200M that Tom Edsall put in every article that's now the $300M that he puts in every article? I don't think so. Just because, they are really not an entity that can translate the soft money that parties used to raise and put it over here.

What is clear is that they have an ability to attract donations from ideological donors who see these committees as being one way to help their side of the aisle or the other. What you get so far from some of these different groups are mixed signals. Some are doing fairly well in fundraising, some feel that they've got the money they need to do the advertising they want to do this summer, some think that they're going to do very well. Frankly, Club for Growth seems to indicate that they're having record fundraising ever since George Soros opened his mouth. It's the best fundraising pitch they've gotten so far to push against George Soros.

Now, that means that they will be players in this cycle. They are clearly developing efforts that are designed to play in federal elections. A lot of that effort is going to be devoted towards turning out vote. I'm not necessarily against having people turn out vote. I think the more groups we can get turning out vote the better, because in many instances they are going to be appealing to individuals who wouldn't respond to any party or candidate appeal but are going to turn out to vote for the particular issues they represent. On the other side, I think it's an issue that needs to be addressed, clarified, and determined soon or else you're going to be in the same problem that you just went through. It didn't seem so bad when the Kansas Republican Party wanted to pay 30 percent of their overhead in 1978 out of their Kansas state party fund that had corporate dollars, because, after all, that was the money they had and it's just administration and overhead costs, and since they're a state party and they have state elections, shouldn't we pay some of our overhead with that money? Everyone said, sure, why not? That sounds fine. Within 36 hours we had $20M going through that little provision. So, that, as a result, I think, if you don't address it, it may not be a big problem this cycle. Though, it's already going to be a sizable issue, and then it's a big problem in the next cycle.

From there on it becomes probably the method of choice in the 2008 presidential election, just like it only took four years for issue ads to go from a cute idea Dick Morris had to becoming the predominant means of campaigning. I think it's important to decide what the parameters are going to be there.

Panel IV: Conclusion

Comments by Fred Wertheimer:

I think Spencer Overton hit on a very important point this morning when he talked about looking at the Supreme Court decision as kind of a new beginning. In a sense, BCRA, at the national level, was the end of a very long battle.

The Supreme Court decision turned out not just to be a decision about whether that battle was successful or not, but in that opinion the Court opened up all kinds of new territory at the national level and at the state level. Just as importantly, I think it provided an awful lot of momentum for reform efforts because that opinion is not simply a constitutional decision, it provides a moral and a political framework for thinking about democracy and for thinking about it in the terms that we have been thinking about it in the reform community for an awful long time.

It is a validation, an affirmation, 5-4 yes, but the majority affirmation that in the largest sense our side of the argument, our side of the case, and our side of what we've been trying to accomplish in many different ways, was correct. It was right. That was not just very uplifting, I think, for all of us, but it was a mandate. It really was a mandate to look to the future. I think we'll see lots of battles very early on.

It's been clear from the beginning that it wasn't worth all of the efforts that we put in, and so many, many people put in, to win this battle, and then just sit around and watch what happened. Because, if we just sat around to watch what happened, we wouldn't have a law left in a very short period of time. It's been clear ever since the law was enacted and the Court decided this case that we would have to be proactive, we would have to make this law work. There was a lot of discussion today that went towards that end, whether it was the work at the Federal Election Commission, or whether it's the kind of work that's being done publicly.

Tom and Norm have just published a myths and reality piece to challenge a lot of the public discussion that's going on, in Washington at least. It's quite astonishing to me that the same people who said this law would never pass, and then when it did said it would never be upheld for the Supreme Court, are now saying, well, it's never going to work, and they're being treated as if they were right the first two times. They are zero for two, and I think there should be at least a little suspended credibility from the media when they start hearing their third round. But we're not getting it from a lot of folks and it just tells us that we have to be out there, proactively, at the FEC, in the courts, with the media, to make this new law work.

I think it's also clear that in the next Congress we will have a major fight in terms of efforts to both try to strengthen this law and weaken this law. There will be a battleground in the next Congress over the BCRA, no matter what happens in its implementation in this election. I think it's also clear that the efforts to fix the presidential public financing system

are also on a very short-term battleground, because we need to get it done by 2006 or we are unlikely to have it for the 2008 elections.

So you can look forward, right now, and see major battles in the Congress in the next couple of years in the campaign finance arena. You clearly can see them in the states, in what Deborah was talking about in terms of the opportunities opened for states to start dealing with these questions. We always see the cynicism, we always see the resistance, and sometimes it takes us away from recognizing the opportunity.

I think we have a great opportunity here in a very rough political world. It's a very strange tension where we have a finite result that says almost across the board that our philosophical view about this issue was correct. And, at the same time, we have a very rough political system, particularly at the national level, with people who control the levers being as adamantly opposed, if not more adamantly opposed, to what was done.

I just want to end by saying, we have a very, very important battle on our hands to make what we accomplished a reality in the next couple of years. I think we have the advantage. We have the advantage of the Supreme Court saying that what we've been trying to do was correct. But, it's a real battle, and, so, we have our work cut out for us. For 25 years or so at Common Cause, I used to end much of what I wrote with the words, "the fight goes on," and that's because the fight always went on.

I was talking with Roger Witten a little while ago about how we first met as lawyers in the *Buckley* case, and back 28 years ago we were fighting this same battle. After the Supreme Court decision came down, Roger said, well, it's a pretty good track record, one win every 28 years. I thought, well, you know, we've had some more, but I'll settle for that. But the fight here does go on in a very short time frame at the national level.

So, we all have a lot of work cut out for us and we have an absolutely remarkable landmark precedent-setting Supreme Court decision that's going to set the stage for the next round of battles. Thank you.

Comments by Trevor Potter:

Thank you, Fred. We do have a lot of work ahead of us and we are fortunate, as we engage in that at the state, local and federal levels, that we have had supporters who have been committed to helping us. Today we are grateful to Larry Hanson of Joyce and to Gerry Manion of Carnegie who brought us together today to have this conversation. This sort of a discussion, analyzing what went right, what went wrong, what we ought to be looking forward to in the future, is terrifically important if we are to make this new law work. We are grateful, as we have been for some time, for the support from Joyce and Carnegie for sponsoring the conference today.

I particularly would like to acknowledge Marianne Viray of the Campaign Legal Center, our Managing Director, because events like this don't just happen, as much as we wish they would, rather they take enormous amount of hard work. And, so, I want to recognize Marianne Viray and Shannon Robertson of the Legal Center, who really pulled this event together along with Rebecca Webber at Democracy 21. There is a lot of work that goes into this. Part of the work has been bringing over to us a number of pieces of information and background papers that are on the table in the rear of the room right by the television camera. They include lists of all the lawyers involved in the case, a description of all the amicus briefs, a number of position papers from Democracy 21 and some other writings. I would encourage you on the way out to stop and take those. We brought them over, but we just as soon not carry them back. Please go ahead and take those that are of interest.

So, with that said, I think that is the final blessing of the day and thank you all very much and good travels and we appreciate you being here.

Close.

Panelist Profiles

Richard Briffault is Vice-Dean and professor at Columbia Law School. Professor Briffault also serves as director of the Legislative Drafting Research Fund at Columbia University. He has been a visiting scholar at the Taubman Center for State and Local Government at the John F. Kennedy School of Government. Professor Briffault received a J.D. from Harvard Law School

Anthony Corrado is a professor of government at Colby College in Waterville, Maine. He is also a Visiting Fellow in Governance Studies at the Brooking Institution and considered to be one of the nation's leading experts on campaign finance. Mr. Corrado is the author or co-author of seven books, including most recently *Inside the Campaign Finance Battle* (Brookings 2003).

Deborah Goldberg is the Democracy Program Director at the Brennan Center for Justice at the NYU School of Law. Ms. Goldberg's other activities include chairing the Steering Committee of the Right to Vote Campaign, an organization campaigning to restore voting rights to persons with felony convictions. Ms. Goldberg received her J.D. from Harvard Law School.

Marty Lederman is an attorney in private practice in the Washington area, specializing in constitutional and appellate litigation. He served previously as an Attorney Advisor in the Office of Legal Counsel at the Department of Justice. Mr. Lederman assisted in the Department's defense of the statute before the district court.

Tom Mann is a Senior Fellow in Governance Studies at the Brookings Institution. Mr. Mann has also served as the Executive Director of the American Political Science Association. He has been an instructor at Princeton University, Johns Hopkins University, the University of Virginia and American University. Mr. Mann received his Ph.D. from the University of Michigan.

Randolph D. Moss specializes in constitutional and administrative law and complex civil litigation as an attorney for Wilmer, Cutler & Pickering. He has served as Assistant Attorney General for the Office of Legal Counsel in the Department of Justice. Mr. Moss received a law degree from Yale Law School.

Norman J. Ornstein is a Resident Scholar at the American Enterprise Institute for Public Policy Research. Mr. Ornstein serves as a columnist for *Roll Call* and election analyst for CBS News. He is a member of the Board of Directors of the Public Broadcasting System (PBS) and of the Board of Trustees of the U.S. Capitol Historical Society. Mr. Ornstein received a Ph.D. from the University of Michigan.

Daniel R. Ortiz is a law professor at the University of Virginia, where he specializes in election law, constitutional law and legal theory. In 2001, Professor Ortiz served under Presidents Carter and Ford as Coordinator of the National Commission on the Task Force on

Legal and Constitutional Issues. Professor Ortiz received an M.Phil. in English Studies from Magdalen College at Oxford University and a J.D. from Yale Law School.

Spencer Overton is a professor of law at The George Washington University Law School, specializing in campaign finance and voting rights. Professor Overton has been featured in *The Washington Post*, *Roll Call* and the *Los Angeles Times*. Professor Overton is a graduate of Harvard Law School where he earned his J.D.

Trevor Potter is President and General Counsel of the Campaign Legal Center. Mr. Potter is a former Commissioner and Chairman of the Federal Election Commission. He is currently a Member of Caplin & Drysdale, where he heads its political activities practice. Mr. Potter received his J.D. from the University Of Virginia School Of Law.

Glen Shor is Associate Legal Counsel and Director of the FEC Program at the Campaign Legal Center. Mr. Shor is a former Deputy Chief of Staff and Legislative Director for Congressman Marin T. Meehan (D-MA), a principal sponsor of BCRA. Mr. Shor received a law degree from Harvard Law School.

Donald J. Simon is an attorney at Sonosky Chambers. Mr. Simon served for five years as the Executive Vice President and General Counsel of Common Cause. In that capacity, Mr. Simon directed the legislative and legal programs for Common Cause, a leading public-interest organization. Mr. Simon earned a J.D. at Harvard Law School.

Seth Waxman is an attorney at Wilmer, Cutler & Pickering. Mr. Waxman served as the 41st Solicitor General of the United States, from 1997 to 2001. He has taught at both Harvard University's Kennedy School of Government and the Georgetown University Law Center. Mr. Waxman received a J.D. from Yale Law School.

Fred Wertheimer is the President and CEO of Democracy 21 and the Democracy 21 Education Fund. He previously served as President of Common Cause for 14 years. Mr. Wertheimer has also been a Fellow at the Shorenstein Center on the Press, Politics and Public Policy at Harvard University, a Visiting Fellow and Lecturer at Yale Law School, and a political analyst and consultant for CBS News, ABC News and ABC's Nightline.

Roger Witten is an attorney at Wilmer, Cutler & Pickering. His general litigation practice emphasizes complex international and domestic civil matters, internal corporate investigations, law enforcement and election law matters. Mr. Whitten served as legal counsel for Senators McCain and Feingold in litigation testing the constitutionality of BCRA. Mr. Whitten received a J.D. from Harvard Law School.

Appendix A: Attorneys in Defense of BCRA

The defense of the Bipartisan Campaign Reform Act of 2002 against the court challenge to its constitutionality was conducted by the Department of Justice, the Federal Election Commission and a legal team representing the congressional sponsors of the law (a complete compilation of documents submitted in the court challenge of BCRA is available at campaignlegalcenter.org).

Department of Justice

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Peter D. Keisler, *Assistant Attorney General*
Paul D. Clement, *Deputy Solicitor General*
Malcolm L. Stewart, *Asst. to the Solicitor General*
Gregory G. Garre, *Asst. to the Solicitor General*
Douglas N. Letter
James J. Gilligan
Michael S. Raab
Dana J. Martin
Terry M. Henry
Rupa Bhattacharyya
Andrea Gacki

Federal Election Commission

Lawrence H. Norton, *General Counsel*
Richard B. Bader, *Associate General Counsel*
Stephen E. Hershkowitz, *Assistant General Counsel*
David Kolker, *Assistant General Counsel*

Intervenors

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Appendix B: Amicus Briefs Filed in Defense of BCRA

Amicus Briefs Filed with the Supreme Court in *McConnell v. FEC* in Defense of BCRA

Amici	Counsel of Record	Argument
Common Cause and the 35 million-member strong American Association of Retired Persons	Don Simon, Sonosky, Chambers, Sachse, Endreson & Perry	Amici argued the evolution of the soft money system as a cheating scheme that allowed the political parties and outside interest groups to evade longstanding limits on the size and source of campaign contributions.
Committee on Economic Development, Warren E. Buffet, Edward A. Kangas, Jerome Kohlberg, Paul Volcker, and sixteen other business leaders	Steven Alan Reiss, Weil, Gotshal & Manges LLP	Amici argued that corporate leaders believe the soft money system forces businesses to "pay to play" in order to gain - or not lose - influence with elected officials. They believe the soft money system is corrupt and diminishes Americans' faith in business and government.
U.S. Representatives Castle, Price, with U.S. Representatives Allen, Andrews, Baird, Bass, Boehlert, Cardin, Eshoo, Frank, Gilchrest, Greenwood, Holt, Houghton, Nancy L. Johnson, Leach, John Lewis, Kenneth Lucas, Maloney, Petri, Platts, Ramstad, Schiff, Simmons, and Tom Udall	Richard Briffault, Columbia Law School	A bipartisan group of sitting House Members who voted for the new law also filed their own brief in support of the Act.
The Center for Governmental Studies	Richard L. Hasen, Loyola School of Law	Amici argued that a negative Court decision on BCRA could undermine attempts by *all* levels of government to police campaign finance practices in their own jurisdictions
Attorneys General of 20 states, Puerto Rico and the U.S. Virgin Islands including: Iowa, Vermont, Connecticut, Arizona, Colorado, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Maine, Minnesota, Mississippi, Missouri, Montana, New York, Oklahoma, Rhode Island, Washington, Wisconsin	Bridget C. Asay	Amici argued that the Reform Act fully honors principles of federalism, and warning that a decision by the Court to strike the law down would devastate states' authority to police campaign finance practices in their own jurisdictions.
Honorable Fred Thompson,	David C. Frederick, Kellogg, Huber, Hansen, Todd & Evans, PLLC	Amici described the scathing indictment of the political parties contained in the Thompson Committee Report and the need for the Reform Act.

Interfaith Alliance Foundation; General Synod of the United Church of Christ; Union of American Hebrew Congregations; Unitarian Universalist Association; Network, A National Catholic Social Justice Lobby; Central Conference of American Rabbis	Evan A. Davis, Cleary, Gottlieb, Steen, & Hamilton	Amici lent the support of people of faith to the law's potential to help restore integrity and honor to our politics.
Bipartisan group of more than 40 former Members of the United States Congress, including Vice President Walter Mondale and Senator Charles Percy (R-IL)	Randy L. Dryer, Parsons Behle & Latimer	Amici described their own experiences as elected officials and candidates who faced a growing conviction among their constituents that large corporate donors, rather than actual voters, called the tune in American politics.
The League of Women Voters of the United States	Daniel R. Ortiz, University of Virginia School of Law	Amici supported the constitutionality of the law's provisions regulating the financing of so-called "sham issue ads" - thinly-veiled campaign ads masquerading as ads about issues.
The Center for Responsive Politics	Lawrence M. Noble	Amici provided key empirical data tracking the growth of soft money over the years, particularly donations from certain highly-regulated industries.
Community organizations dedicated to depending the civil rights of racial minorities, led by the Greenlining Institute	Martin R. Glick, Howard, Rice, Nemerovski, Canady, Falk & Rabkin	Amici lauded the Act as an important step forward in the fight for political equality for all Americans
Former Leaders of the American Civil Liberties Union	Norman Dorsen	Amici argued that the Reform Act's restriction on the use of soft money to fund "issue ads" is fully consistent with the First Amendment.
A group of leading political scientists, led by Norm Ornstein of the American Enterprise Institute		Amici explained why the Act will strengthen the political parties, rather than hamstring them, as the law's opponents have argued.
International Experts	Christopher J. Wright, Harris, Wiltshire & Grannis LLP	Amici described the Act as a moderate approach to campaign finance that brings the U.S. closer to norms of campaign finance regulation and disclosure in other democracies.

Amicus Briefs Filed in the District Court Proceedings of *McConnell v. FEC* in Defense of BCRA

Amici	Counsel of Record	Argument
21 State Attorneys General (States of Iowa, Vermont, Alaska, Colorado, Connecticut, Hawaii, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, Oklahoma, Rhode Island, Washington, the Territory of the United States Virgin Islands, and the Commonwealth of Puerto Rico)	Thomas W. Andrews	The AGs argue that the Reform Act only regulates state political party activity to the extent that it affects federal elections, a power the federal government plainly has under Supreme Court precedent. The AGs set forth their view that the Reform Act does not in any way displace state authority to establish the time, place and manner of their own elections as the Constitution requires.
Committee on Economic Development	Peter D. Isakoff, Weil, Gotshal & Manges LLP, Steven Alan Reis, R. Bruce Rich, Josh A. Krevitt, Jonathan Bloom, Sascha N. Rand, Randi W. Singer, Weil, Gotshal & Manges LLP	The business leaders set forth their view that the soft money system is coercive, forcing businesses to contribute in order to gain, and to protect, commercial advantage. They argue that because soft money contributions are given to advance business interests rather than to convey a political message, these contributions require less First Amendment protection than true political speech. The business leaders also argue that the soft money system has led to an appearance of corruption that taints not just government, but the nation's corporate community as well.
Former Leaders of the American Civil Liberties Union	Norman Dorsen, Eric M. Lieberman, David B. Goldstein, Roger Bearden, Rabinowitz, Boudin, Standard, Kinsky & Lieberman	Almost every living former member of the ACLU leadership has filed a brief arguing that the provisions in the bill concerning sham "issue" ads are constitutional. The current ACLU is a plaintiff in the case, and has argued that those provisions, which prevent the use of corporate or union treasury funds in electioneering communications and require disclosure, violate the First Amendment's guarantee of free speech.

Appendix C: Amicus Briefs Filed in Opposition to BCRA

Amicus Briefs Filed with the Supreme Court in *McConnell v. FEC* in Opposition to BCRA

Amici	Counsel of Record	Argument
American Civil Rights Union	John C. Armour	The ACRU characterized the electioneering communication restrictions as "most obvious and noxious affronts to the 1st Amendment." Restrictions on campaign coordination infringe on party and states rights. The "Millionaire Amendment" in BCRA is a violation of the 5th Amendment. If BCRA is found to be unconstitutional, the entire law should be struck down because it would not reflect the original intentions of Congress.
The Cato Institute and the Institute for Justice	Eric S. Jaffe	Amici argued that *Buckley* erred in creating limits and disclosure for contributions as wells as "express" advocacy ads. It and its progeny should be struck down in favor of more speech-friendly provisions.
U.S. House Speaker Dennis Hastert (R-IL)	J. Randolph Evans	Amici held that BCRA prevents Federal candidates from participating in state politics to the extent that many state constitutions allow. Federal candidates are unfairly restricted in their speech and association with organizations because of BCRA.
Professor David Moshman	Kevin H. Theriot	Amici maintained that BCRA unfairly restricts legal minors from contributing to Federal candidates.
Rodney A. Smith	Clark Bensen	Amici claimed that campaign finance reform has historically resulted in an increased role for "big money" and greater advantages for wealthy candidates and incumbents. BCRA will create the same

		"unintended consequences."
Ten State Attorney Generals	Craig Engle	Amici viewed BCRA as a violation of state sovereignty by trumping a state's ability to choose its own officials.

Amicus Briefs Filed in the District Court proceedings of *McConnell v. FEC* in Opposition to BCRA

The Media Institute		Amici argued that the provisions regulating electioneering communications are restrictions on core political speech
U.S. House Speaker Dennis Hastert (R-IL)	J. Randolph Evans	Amici stated that BCRA prevents Federal candidates from participating in state politics to the extent that many state constitutions allow. Federal candidates are unfairly restricted in their speech and association with organizations because of BCRA.
The Cato Institute and the Institute for Justice	Eric S. Jaffe	Amici argued that *Buckley* erred in creating limits and disclosure for contributions as wells as "express" advocacy ads. It and its progeny should be struck down in favor of more speech-friendly provisions.
Eight State Attorney Generals	Craig Engle	Amici viewed BCRA as a violation of state sovereignty by trumping a state's ability to choose its own officials.

Acknowledgements

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