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Campaign Finance Law: A Legal Analysis of the Supreme Court Ruling in *McConnell v. FEC*

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Summary

In its most comprehensive campaign finance ruling since *Buckley v. Valeo* in 1976, on December 10, 2003, the U.S. Supreme Court upheld against facial constitutional challenges key portions of the Bipartisan Campaign Reform Act of 2002 (BCRA), P.L. 107-155, also known as the McCain-Feingold or Shays-Meehan campaign finance reform law. In *McConnell v. FEC*, a 5 to 4 majority of the Court upheld restrictions on the raising and spending of previously unregulated political party soft money and a prohibition on corporations and labor unions using treasury funds to finance "electioneering communications," requiring that such ads may only be paid for with corporate and labor union political action committee (PAC) funds. The Court invalidated BCRA's requirement that parties choose between making independent expenditures or coordinated expenditures on behalf of a candidate and its prohibition on minors age 17 and under making campaign contributions. This report provides an analysis of the Supreme Court's major holdings in *McConnell v. FEC*, including a discussion of the developments leading to the enactment of BCRA, the 1976 seminal campaign finance decision, *Buckley v. Valeo*, and implications for future cases.

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Campaign Finance Law: A Legal Analysis of the Supreme Court Ruling in *McConnell v. FEC*

I. Background

A. Brief History of Federal Campaign Finance Law

The Bipartisan Campaign Reform Act of 2002 (BCRA)[1] is the most recently enacted federal law regulating money in the political sphere. One of the first such federal campaign finance law dates back to the 1907 Tillman Act,[2] which responded to President Roosevelt's request for legislation prohibiting all corporate political contributions. In 1925, with the Federal Corrupt Practices Act, Congress extended the prohibition on corporations making "contributions" to include "anything of value" and criminalized both the acceptance of corporate contributions as well as the making of such contributions.[3] With the Labor Management Relations Act of 1947, Congress prohibited labor union contributions in connection with federal elections.[4]

In 1972, Congress enacted the Federal Election Campaign Act (FECA).[5] As first enacted, FECA required disclosure of contributions and expenditures over a certain amount; prohibited contributions made in the name of another person and by government contractors; and ratified the earlier prohibition on the use of corporate and union general treasury funds for contributions and expenditures, but permitted corporations and unions to establish and administer separate segregated funds (also known as political action committees or PACs) for election related contributions and expenditures. Citing deficiencies in the 1972 law and responding to Watergate, Congress amended FECA in 1974, to include limits on individual, PAC, and party contributions; limits on candidate spending; and the establishment of the Federal Election Commission (FEC).[6] Primarily in response to the Supreme Court striking down the appointment process of the FEC in its 1976 seminal decision, *Buckley v.*

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[1]P.L. 107-155.

[2]Tillman Act, ch. 420, 34 Stat. 864.

[3]Federal Corrupt Practices Act of 1925, §§ 301, 313, 43 Stat. 1070, 1074.

[4]Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136.

[5]Federal Election Campaign Act of 1971, P.L. 92-225.

[6]Federal Election Campaign Act Amendments of 1974, P.L. 93-443.

Valeo,[7] Congress amended FECA in 1976,[8] and again in 1979, in an effort to make the law less burdensome to participants and to foster greater grassroots activity.[9]

B. Overview of 1976 Seminal Campaign Finance Supreme Court Decision: *Buckley v. Valeo*

In the landmark 1976 decision, *Buckley v. Valeo*,[10] the Supreme Court considered the constitutionality of FECA, as amended in 1974, and the Presidential Election Campaign Fund Act.[11] The Court upheld the constitutionality of certain provisions, including (1) contribution limits to federal office candidates,[12] (2) disclosure and record-keeping provisions,[13] and (3) public financing of presidential elections.[14] The Court found other provisions unconstitutional, including (1) expenditures limitations on candidates and their political committees,[15] (2) the $1,000 limitation on independent expenditures,[16] (3) expenditure limitations by candidates from their personal funds,[17] and (4) the method of appointing members to the Federal Election Commission.[18] In general, the Court struck down expenditure limitations, but upheld reasonable contribution limitations, disclosure requirements, and public financing provisions, so long as participation is voluntary, not compelled.

In considering the constitutionality of these statutes, the *Buckley* Court applied the standard of review known as "exacting scrutiny," which is a standard applied by a court when presented with regulations that burden core First Amendment activity. "Exacting scrutiny" requires a regulation to be struck down unless it is narrowly tailored to serve a compelling governmental interest.

1. Contribution and Expenditure Limits.

When analyzing First Amendment claims, a court will generally first determine whether the challenged government action implicates "speech" or "associational

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[7]424 U.S. 1 (1976).

[8]Federal Election Campaign Act Amendments of 1976, P.L. 94-283.

[9]Federal Election Campaign Act Amendments of 1979, P.L. 96-187. For further discussion of the history of campaign finance law, *see* CRS Report 97-1040, *Campaign Financing: Highlights and Chronology of Current Federal Law,* by Joseph E. Cantor.

[10]424 U.S. 1 (1976).

[11]26 U.S.C. § 9001 *et seq.*

[12] 2 U.S.C. § 441a.

[13] 2 U.S.C. § 434.

[14]Subtitle H of the Internal Revenue Code of 1954, codified at 26 U.S.C. § 9001 *et seq.*

[15]Formerly 18 U.S.C. § 608(c)(1)(C-F). The Court made an exception for presidential candidates who accept public funding.

[16]Formerly 18 U.S.C. § 608e.

[17]Formerly 18 U.S.C. § 608a.

[18]Formerly 2 U.S.C. § 437c(a)(1)(A-C).

activity" guaranteed by the First Amendment. Notably, the *Buckley* Court held that the spending of money, whether in the form of contributions or expenditures, is a form of "speech" protected by the First Amendment. A number of principles contributed to the Court's analogy between money and speech. First, the Court found that candidates need to amass sufficient wealth to amplify and effectively disseminate their message to the electorate.[19] Second, restricting political contributions and expenditures, the Court held, "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of the exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money."[20] The Court then observed that a major purpose of the First Amendment was to increase the quantity of public expression of political ideas, as free and open debate is "integral to the operation of the system of government established by our Constitution."[21] From these general principles, the Court concluded that contributions and expenditures facilitated this interchange of ideas and could not be regulated as "mere" conduct unrelated to the underlying communicative act of making a contribution or expenditure.[22]

However, according to the Court, contributions and expenditures invoke different degrees of First Amendment protection.[23] Recognizing contribution limitations as one of FECA's "primary weapons against the reality or appearance of improper influence" on candidates by contributors, the Court found that these limits "serve the basic governmental interest in safeguarding the integrity of the electoral process."[24] Thus, the Court concluded that "the actuality and appearance of corruption resulting from large financial contributions" was a sufficient compelling interest to warrant infringements on First Amendment liberties "to the extent that large contributions are given to secure a *quid pro quo* from [a candidate.]"[25] Short of a showing of actual corruption, the Court found that the appearance of corruption from large campaign contributions also justified these limitations.

Reasonable contribution limits, the Court remarked, leave "people free to engage in independent political expression, to associate [by] volunteering their services, and to assist [candidates by making] limited, but nonetheless substantial [contributions."][26] Further, according to the Court, a reasonable contribution limitation does "not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties." Finally, the

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[19]*See* Buckley, 424 U.S. at 21.

[20]*Id.* at 19.

[21]*Id.* at 15.

[22]*Id*. at 17.

[23]*See id.* at 24.

[24]*Id.* at 59.

[25]*Id.* at 27.

[26]*Id.* at 28.

Court found that the contribution limits of FECA were narrowly tailored insofar as the Act "focuses precisely on the problem of large campaign contributions."[27]

On the other hand, the Court determined that FECA's expenditure limits on individuals, political action committees (PACs), and candidates imposed "direct and substantial restraints on the quantity of political speech" and were not justified by an overriding governmental interest. The Court rejected the government's asserted interest in equalizing the relative resources of candidates and in reducing the overall costs of campaigns. Restrictions on expenditures, the Court held, constitute a substantial restraint on the enjoyment of First Amendment freedoms.[28] As opposed to reasonable limits on contributions, which merely limit the expression of a person's "support" of a candidate, the "primary effect of [limitations on expenditures] is to restrict the quantity of campaign speech by individuals, groups and candidates." "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached," the Court noted.[29]

The Court also found that the government's interests in stemming corruption by limiting expenditures were not compelling enough to override the First Amendment's protection of free and open debate because unlike contributions, the risk of *quid pro quo* corruption was not present, as the flow of money does not directly benefit a candidate's campaign fund.[30] Upon a similar premise, the Court rejected the government's interest in limiting a wealthy candidate's ability to draw upon personal wealth to finance his or her campaign and struck down the personal expenditure limitation[31]

2. Reporting and Disclosure Requirements.

In *Buckley*, the Supreme Court generally upheld FECA's disclosure and reporting requirements, but noted that they might be found unconstitutional as applied to certain groups. While compelled disclosure, in itself, raises substantial freedom of private association and belief issues, the Court held that these interests were adequately balanced by the state's regulatory interests. The state asserted three compelling interests in disclosure: (1) providing the electorate with information regarding the distribution of capital between candidates and issues in a campaign, thereby providing voters with additional evidence upon which to base their vote; (2) deterring actual and perceived corruption by exposing the source of large expenditures; and (3) providing regulatory agencies with information essential to the election law enforcement. However, when disclosure requirements expose members or supporters of historically suspect political organizations to physical or economic

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[27] *Id.* at 29.

[28] *Id.* at 39.

[29] *Id.* at 19.

[30] *Id.* at 55.

[31] *Id.* at 51-54.

reprisal, then disclosure may fail constitutional scrutiny as applied to a particular organization.[32]

3. Issue and Express Advocacy Communications.

The Supreme Court's language in Buckley prompted analysts to label election-related communications as either "issue" or "express advocacy" communications. In order to pass constitutional muster and not be struck down as unconstitutionally vague, the Court ruled that FECA could only apply to non-candidate "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office," *i.e.*, expenditures for express advocacy communications.[33] In a footnote to the *Buckley* opinion, the Court further defined "express words of advocacy of election or defeat" as, "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject."[34]

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[32]*See* National Association for the Advancement of Colored People (NAACP) v. Alabama, 357 U.S. 449 (1958). The reasoning in Buckley and Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982), has historical roots in NAACP v. Alabama. In NAACP, the Court addressed whether a non-profit organization's associational rights were abridged by a state statute compelling disclosure of its members and agents without regard to their position and responsibilities in the association. The organization did not comply with the disclosure requirement. Finding for the NAACP, the Court held that the freedom of association is an "inseparable aspect" of the freedoms guaranteed by the First and Fourteenth Amendments, *see id.* at 460-61; that compelled disclosure of the association's membership would effectively restrain that freedom, *see id.* at 461-463; and that, under strict scrutiny, the state's interests in disclosure were insufficient to overcome the association's deprivation of right, *see id.* at 463-366. The Court stressed that the "vital relationship between freedom to associate and privacy in one's associations" was unduly burdened by the disclosure requirement, as past revelation of membership identity resulted in economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. *Id.* at 462. *See also* McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995)(further defining the scope of Buckley's disclosure jurisprudence to proscribe disclosure requirements that infringe on the right of an individual to publish and distribute leaflets anonymously, expressing a political point of view, in a referenda or other issue-based election).

[33]*Id.* at 44.

[34]*Id.* n. 52. Many lower courts have held that these specific terms of advocacy, commonly referred to as the "magic words," are mandatory in order for a communication to be considered express advocacy and therefore fall under the scope of federal regulation. *See, e.g.*, Maine Right to Life Comm. v. Federal Election Comm'n, 914 F.Supp. 8, 12 (D. Maine 1996), *aff'd per curiam* 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S.Ct. 52 (Oct. 6, 1997)(holding that the FEC had surpassed its authority when it included a "reasonable person" standard in its definition of "express advocacy" and that the expanded standard threatened to infringe on First Amendment protected issue advocacy); Vermont Right to Life Comm. v. Sorrell, 216 F.3d 264 (2d Cir. 2000)(striking down a disclosure requirement triggered by speech "expressly or implicitly" advocating the election or defeat of a candidate and finding that the Supreme Court in Buckley had established an "express advocacy standard" to insure that campaign finance regulations were neither too vague nor intrusive on First Amendment protected issue advocacy). *But see*, Federal Election Comm'n v. Furgatch, 807 F.2d 857 (9th Cir. 1987), *cert. denied*, 484 U.S. 850, 864 (1987)(upholding a (continued...)

Communications not meeting the express advocacy definition in that footnote became commonly referred to as issue advocacy communications.[35] In its rationale for establishing such a bright line distinction between issue and express advocacy, the Court noted that the discussion of issues and candidates as well as the advocacy of election or defeat of candidates "may often dissolve in practical application." That is, according to the Court, candidates (especially incumbents) are intimately tied to public issues involving legislative proposals and governmental actions.[36]

C. Developments Leading to Enactment of BCRA

In the years following the 1976 landmark decision in *Buckley*, various developments persuaded Congress that further legislation was necessary to regulate the role of corporations, labor unions, and wealthy contributors in the electoral process. The Supreme Court in *McConnell v. FEC* outlined changes in three specific areas over the years that led to the enactment of BCRA: the increased use of party soft money, soft money spent on issue advertising, and the 1998 Senate investigation into the 1996 federal elections.[37]

1. Increased Use of Party Soft Money.

In general, the term "hard money" or "federal money" refers to funds that are raised and spent according to the contribution limits, source prohibitions, and disclosure requirements of FECA, while the term "soft money" or "non-federal money" is used to describe funds raised and spent outside the federal election

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[34](...continued)
more expansive definition of express advocacy by including a "reasonable person" standard).

[35]For further discussion of Buckley and related decisions, including decisions regarding issue and express advocacy, *see* CRS Report RL30669, *Campaign Finance Regulation Under the First Amendment: Buckley v. Valeo and Its Supreme Court Progeny*, by L. Paige Whitaker.

[36]Buckley, 424 U.S. at 42. In Buckley, the Court also upheld the constitutionality of the system of voluntary presidential election expenditure limitations linked with public financing, through a voluntary income tax checkoff, codified at 26 U.S.C. § 9001 *et seq.* The Court found that restricting taxpayers from being able to earmark their $1.00 "checkoff" to a candidate or party of the taxpayer's choice did not violate the First Amendment. As the checkoff constituted an appropriation by Congress, it did not require outright taxpayer approval, as "every appropriation made by Congress uses public money in a manner to which some taxpayers object." The Court also rejected a number of Fifth Amendment due process challenges, including a challenge contending that the public financing provisions discriminated against minor and new party candidates by favoring major parties through the full public funding of their conventions and general election campaigns, and by discriminating against minor and new parties who received only partial public funding under the Act. *Id.* at 85-86. The Court held that "[a]ny risk of harm to minority interests ... cannot overcome the force of the governmental interests against the use of public money to foster frivolous candidacies, create a system of splintered parties, and encourage unrestrained factionalism." *Id.* at 101.

[37]McConnell v. FEC, 124 S. Ct. 619, 648-54 (2003).

regulatory framework, but which may have at least an indirect impact on federal elections. Since FECA narrowly defines the term "contribution" to include only a gift of anything of value "for the purpose of influencing any election for Federal office,"[38] donations with the purpose of influencing only state and local elections are unregulated by FECA. Therefore, prior to the enactment of BCRA, federal law permitted corporations, unions, and individuals to contribute soft money to political parties for activities with the intent of influencing state or local elections.

After the *Buckley* decision was issued, questions arose regarding contributions that were intended to influence both federal and state elections. As the *McConnell* Court observed, a literal reading of FECA's definition of "contribution" would have required such mixed-purpose activities to be funded with hard money.[39] However, in 1977, the FEC ruled that political parties could fund mixed-purpose activities – including get-out-the-vote drives and generic party advertising – in part with soft money.[40] Extending its ruling, in 1995, the FEC ruled that parties could also use soft money to defray the costs of "legislative advocacy media advertisements," even if the ads mentioned a federal candidate, so long as they did not expressly advocate election or defeat.[41]

As a result of the increase in the permissible uses of soft money, the amount of soft money raised and spent by the national political parties increased dramatically, from 5% ($21.6 million) of total party receipts in 1984 to 42% ($498 million) of total party receipts in 2000. The national parties transferred large amounts of their soft money receipts to the state parties, which were permitted to use a larger percentage of soft money to fund mixed-purpose (federal and state) election activities.[42] As the *McConnell* Court noted, many soft money contributions were "dramatically" larger than the hard money contributions permissible under FECA; indeed, in the 2000 election cycle, the parties raised almost $300 million from just 800 donors, each of whom contributed a minimum of $120,000. Often such soft money contributions were solicited by the candidates, who directed potential donors to party committees and tax-exempt organizations that could legally accept soft money, after a donor had already contributed the hard money maximum to the candidate's committee. Moreover, the Court recognized that the largest corporate donors often made significant contributions to both parties, thereby bolstering the perception that such contributions were made with the purpose of gaining access to elected officials and avoiding being placed at a disadvantage in the legislative process, rather than being based on ideological support. Such solicitations, transfers, and uses of soft money,

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[38]2 U.S.C. § 431(8)(A).

[39]McConnell, 124 S. Ct. at 648 (2003).

[40]*See* 11 CFR § 102.6(a)(2)(1977)(permitting parties to allocate their administrative expenses "on a reasonable basis" between accounts containing non-federal funds, including corporate and union donations); FEC Advisory Op. 1978-10; FEC Advisory Op. 1979-17.

[41]FEC Advisory Op. 1995-25.

[42]McConnell, 124 S. Ct. at 649.

according to the Court, enabled the parties and candidates to "circumvent" FECA's source restrictions, disclosure requirements, and contribution limits.[43]

2. Soft Money Spent on Issue Advertising.

In *Buckley v. Valeo*, the Supreme Court construed FECA's disclosure and reporting requirements and expenditure limits "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."[44] A strict reading of FECA subsequently resulted in the origin of issue and express advocacy. The use or omission of express words of advocacy, often referred to as "magic words," such as "vote for" or "vote against," marked a bright statutory line between express advocacy communications and issue advertisements. Express advocacy communications were subject to FECA regulation and could only be financed with hard money. However, if a communication avoided using express terms of advocacy, federally unregulated soft money could be used to finance such advertisements, also known as issue ads.

The *McConnell* Court acknowledges that, at first blush, the distinction between issue and express advocacy appears meaningful. However, the two categories of advertisements have proven "functionally identical in important respects." That is, both types of ads have been used "to advocate the election or defeat" of clearly identified candidates even though issue ads steadfastly avoid using the "magic words" of express advocacy. There is little difference, the Court found, between an ad that urged voters to "vote against Jane Doe" and one that condemned Jane Doe's record on a given issue and urged viewers to "call Jane Doe and tell her what you think."[45] The conclusion that such ads were designed to influence elections, according to the Court, was confirmed by the fact that nearly all of them were broadcast within 60 days of a federal election.

Since such ads could be legally financed with federally unregulated soft money, they were attractive to organizations and candidates. Indeed, according to the *McConnell* Court, when the candidates and parties were running out of money, they would "work closely with friendly interest groups to sponsor so-called issue ads."[46] Moreover, the amount of spending on the ads increased significantly: in the 1996

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[43]*See, id.* at 648-650.

[44]Buckley, 424 U.S. at 80.

[45]McConnell, 124 S.Ct. at 650-51. As the Court noted, campaign professionals testified before the district court that the most effective campaign ads, similar to the most effective commercials for products such as Coca-Cola, should, and did, avoid the express words of advocacy. *Id.* at 651.

[46]*Id.* at 651 (citing McConnell v. FEC, 251 F. Supp. 2d 176, 540 (D.D.C. 2003)(Kollar-Kotelly, J.)(quoting internal AFL-CIO Memorandum from Brian Weeks to Mike Klein, "Electronic Buy for Illinois Senator," (Oct. 9, 1996), AFL-CIO 005244). Furthermore, the Court found that because FECA's disclosure requirements did not apply to so-called issue ads, sponsors of these ads often used misleading names to conceal their identity. For example, "Citizens for Medicare" was not a grassroots citizens organization but instead was a platform for the Pharmaceutical Research and Manufacturers of America (PhRMA), a drug manufacturers' association. *Id.*

election cycle, $135 to $150 million was estimated to have been spent on multiple broadcasts of approximately 100 ads, as compared with an estimated $500 million spent on more than 1,100 different ads in the 2000 cycle. As with the case of soft money contributions to the political parties, the Court concluded that candidates and parties used the availability of issue ads to "circumvent FECA's limitations," soliciting donors who had already contributed their federally permissible hard money quota to donate additional soft money funds to non-profit corporations to spend on "so-called issue ads."[47]

3. 1998 Senate Investigation of 1996 Federal Elections.

In 1998, the Senate Committee on Governmental Affairs issued a six-volume Report outlining the results of its comprehensive investigation into the 1996 federal election campaigns, focusing in particular on the impact of soft money and the practice by federal officeholders of granting special access in exchange for political donations.[48] As the Court in *McConnell v. FEC* noted, the Senate Report concluded that the "soft money loophole" had resulted in a "meltdown" of the federal campaign finance regime that had been designed "to keep corporate, union, and large individual contributions from influencing the electoral process." The Report criticized the methods by which both parties raised and spent soft money and concluded that both parties promise and provide special access to candidates and senior government officials in exchange for large soft money donations.[49] Proposals for reform were included in the Report, including a recommendation for the elimination of political party soft money donations and restrictions on "sham" issue advocacy by non-party groups.[50]

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[47]*Id.* at 651-52 (citing McConnell v. FEC, 251 F. Supp. 2d 176, 303-04 (D.D.C. 2003)(Henderson, J.)(citing Annenberg Public Policy Center, Issue Advertising in the 1999-2000 Election Cycle 1-15 (2001)).

[48]S. Rep. No. 105-167 (1998).

[49]McConnell, 124 S. Ct. at 652 (citing *id.* vol. 4, at 4611). The Court quoted one Senator from the Senate Report stating that "the hearings provided overwhelming evidence that the twin loopholes of soft money and bogus issue advertising have virtually destroyed our campaign finance laws, leaving us with little more than a pile of legal rubble." *Id.* (*citing id.* vol. 5, at 7515).

[50]*Id.* at 653-54.

II. *McConnell v. FEC*

The following section of this report provides an overview of the lower court litigation and an analysis of the Supreme Court's major holdings in *McConnell v. FEC.*

A. Lower Court Litigation

On March 27, 2002, the President signed into law BCRA, P.L. 107-155.[51] Most provisions of the new law became effective on November 6, 2002. Shortly after President Bush signed BCRA into law, Senator Mitch McConnell filed suit in U.S. District Court for the District of Columbia against the Federal Election Commission (FEC) and the Federal Communications Commission (FCC) arguing that portions of BCRA violate the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution. Likewise, the National Rifle Association (NRA) filed suit against the FEC and the Attorney General arguing that the new law deprived it of freedom of speech and association, of the right to petition the government for redress of grievances, and of the rights to equal protection and due process, in violation of the First and Fifth Amendments to the Constitution. Ultimately, eleven suits challenging the law were brought by more than 80 plaintiffs and were consolidated into one lead case, *McConnell v. FEC.*[52]

On May 2, 2003, the U.S. District Court for the District of Columbia issued its decision in *McConnell v. FEC,* striking down many significant provisions of the law.[53] The three-judge panel, which was split 2 to 1 on many issues, ordered that its ruling take effect immediately.[54] After the court issued its opinion, several appeals were filed and on May 19 the U.S. district court issued a stay to its ruling, leaving

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[51]For further information regarding BCRA, *see* CRS Report RL31402, *Bipartisan Campaign Reform Act of 2002: Summary and Comparison with Previous Law,* by Joseph E. Cantor and L. Paige Whitaker.

[52]No. 02-CV-0582 (D.D.C., consolidated May 13, 2002).

[53]McConnell v. FEC, 251 F. Supp. 2d 176, (D.D.C., 2003). In brief, the three-judge district court panel struck down BCRA's blanket prohibition on the raising of soft money by national parties and the use of soft money by state and local parties, but retained the ban on using soft money for public communications that mention clearly identified federal candidates. The panel also retained the prohibition on the raising of soft money by federal candidates and officials. Regarding "electioneering communications," which BCRA prohibits from being financed with corporate and union treasury funds, the three-judge panel struck down the regulation of all broadcast ads that refer to clearly identified federal candidates in the last 30 days of a primary or 60 days of a general election, but upheld a portion of BCRA's secondary definition, thus allowing regulation of advertisements that supported or opposed federal candidates, regardless of when they were disseminated. For further discussion regarding the district court ruling, *see,* CRS Report RS21511, *Campaign Finance: Brief Overview of District Court Opinion in McConnell v. FEC,* by L. Paige Whitaker.

[54]Section 403(a) of BCRA provides that if an action is brought for declaratory or injunctive relief challenging the constitutionality of any provision of the Act, it shall be brought in the U.S. District Court for the District of Columbia and shall be heard by a 3-judge court.

BCRA, as enacted, in effect until the Supreme Court ruled. Under the BCRA expedited review provision, the court's decision was directly reviewed by the U.S. Supreme Court. On September 8 the Supreme Court returned to the bench a month before its term officially began to hear an unusually long four hours of oral argument in the case.

B. U.S. Supreme Court Opinion

The Supreme Court's decision in *McConnell v. FEC*,[55] issued on December 10, 2003, is its most comprehensive campaign finance ruling since *Buckley v. Valeo*[56] in 1976. Most notably, the *McConnell* Court upheld, by a 5 to 4 vote, against facial constitutional challenges two critical BCRA provisions, titles I and II. In the first 119 pages of the 248 page majority opinion, coauthored by Justices Stevens and O'Connor and joined by Justices Souter, Ginsburg, and Breyer, the Court upheld the limits on raising and spending previously unregulated political party soft money and the prohibition on corporations and labor unions using treasury funds – which is unregulated soft money – to finance directly electioneering communications. Instead, BCRA requires that such ads may only be paid for with corporate and labor union political action committee (PAC) funds, also known as hard or federally regulated money.

In upholding BCRA's "two principal, complementary features," the Court readily acknowledged that it is under "no illusion that BCRA will be the last congressional statement on the matter" of money in politics. The Court observed, "money, like water, will always find an outlet." Hence, campaign finance issues that will inevitably arise and the corresponding legislative responses from Congress "are concerns for another day."[57]

The following section of this report provides an analysis of the Court's opinion upholding titles I and II and a discussion of the Court's ruling with regard to several other BCRA provisions.

1. Restrictions on Political Party Soft Money Upheld.

Title I of BCRA prohibits national party committees and their agents from soliciting, receiving, directing, or spending any soft money.[58] As the Court notes, title I takes the national parties "out of the soft-money business."[59] In addition, title I prohibits state and local party committees from using soft money for activities that affect federal elections; prohibits parties from soliciting for and donating funds to tax-exempt organizations that spend money in connection with federal elections;

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[55]124 S. Ct. 619 (2003). In addition to the 248 page majority opinion, the decision also contains six separate opinions concurring in part and dissenting in part.

[56]424 U.S. 1 (1976). For discussion of the Court's ruling in Buckley, *see* previous section.

[57]*Id.* at 706.

[58]2 U.S.C. § 441i(a).

[59]McConnell, 124 S. Ct. at 654.

prohibits federal candidates and officeholders from receiving, spending, or soliciting soft money in connection with federal elections and restricts their ability to do so in connection with state and local elections; and prevents circumvention of the restrictions on national, state, and local party committees by prohibiting state and local candidates from raising and spending soft money to fund advertisements and other public communications that promote or attack federal candidates.[60] Plaintiffs challenged title I based on the First Amendment as well as Art. I, § 4 of the U.S. Constitution, principles of federalism, and the equal protection component of the Due Process Clause of the 14th Amendment. The Court upheld the constitutionality of all provisions in title I, finding that its provisions satisfy the First Amendment test applicable to limits on campaign contributions: they are "closely drawn" to effect the "sufficiently important interest" of preventing corruption and the appearance of corruption.

Rejecting plaintiff's contention that the BCRA restrictions on campaign contributions must be subject to strict scrutiny in evaluating the constitutionality of title I, the Court applied the less rigorous standard of review – "closely drawn" scrutiny. Citing its landmark 1976 decision, *Buckley v. Valeo*, and its progeny, the Court noted that it has long subjected restrictions on campaign expenditures to closer scrutiny than limits on contributions in view of the comparatively "marginal restriction upon the contributor's ability to engage in free communication" that contribution limits entail.[61] The Court observed that its treatment of contribution limits is also warranted by the important interests that underlie such restrictions, *i.e.* preventing both actual corruption threatened by large dollar contributions as well as the erosion of public confidence in the electoral process resulting from the appearance of corruption.[62] The Court determined that the lesser standard shows "proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise."[63] Finally, the Court recognized that during its lengthy consideration of BCRA, Congress properly relied on its authority to regulate in this area, and hence, considerations of *stare decisis* as well as respect for the legislative branch of government provided additional "powerful reasons" for adhering to the treatment of contribution limits that the Court has consistently followed since 1976.[64]

Responding to plaintiffs' argument that many of the provisions in title I restrict not only contributions but also the spending and solicitation of funds that were raised outside of FECA's contribution limits, the Court determined that it is "irrelevant" that Congress chose to regulate contributions "on the demand rather than the supply side." Indeed, the relevant inquiry is whether its mechanism to implement a contribution limit or to prevent circumvention of that limit burdens speech in a way

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[60]2 U.S.C. §§ 441i(b), 441i(d), 441i(e), 441i(f).

[61]McConnell, 124 S. Ct. at 647 (quoting FEC v. Beaumont, 123 S. Ct. 2200 (2003)).

[62]*Id.* at 656 (quoting FEC v. National Right to Work, 459 U.S. 197, 208 (1982)).

[63]*Id.* at 656-57. The Court further noted that "closely drawn" scrutiny provides Congress with sufficient room to anticipate and respond to circumvention of the federal election regulatory regime, which is designed to protect the integrity of the political process. *Id.*

[64]*Id.*

that a direct restriction on a contribution would not. The Court concluded that title I only burdens speech to the extent of a contribution limit: it merely limits the source and individual amount of donations. Simply because title I accomplishes its goals by prohibiting the spending of soft money does not render it tantamount to an expenditure limitation.[65]

In his dissent, Justice Kennedy criticized the majority opinion for ignoring established constitutional bounds and upholding a campaign finance statute that does not regulate actual or apparent *quid pro quo* arrangements.[66] According to Justice Kennedy, *Buckley* clearly established that campaign finance regulation that restricts speech, without requiring proof of specific corrupt activity, can only withstand constitutional challenge if it regulates conduct that presents a "demonstrable *quid pro quo* danger." The *McConnell* Court, however, interpreted the anti-corruption rationale to allow regulation of not only "actual or apparent *quid pro quo* arrangements," but also of "any conduct that wins goodwill from or influences a Member of Congress." Justice Kennedy further maintained that the standard established in *Buckley* defined undue influence to include the existence of a *quid pro quo* involving an officeholder, while the *McConnell* Court, in contrast, extended the *Buckley* standard of undue influence to encompass mere access to an officeholder. Justice Kennedy maintained that the Court, by legally equating mere access to officeholders to actual or apparent corruption of officeholders, "sweeps away all protections for speech that lie in its path."[67]

Unpersuaded by Justice Kennedy's dissenting position, that Congress' regulatory interest is limited to only the prevention of actual or apparent *quid pro quo* corruption "inherent in" contributions made to a candidate, the Court found that such a "crabbed view of corruption" and specifically the *appearance* of corruption "ignores precedent, common sense, and the realities of political fundraising exposed by the record in this litigation."[68] According to the Court, equally problematic as classic *quid pro quo* corruption, is the danger that officeholders running for re-election will make legislative decisions in accordance with the wishes of large financial contributors, instead of deciding issues based on the merits or constituent interests. Since such corruption is neither easily detected nor practical to criminalize, the Court reasoned, title I offers the best means of prevention, *i.e.*, identifying and eliminating the temptation.[69]

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[65] *Id.* at 657-58.

[66] *Id.* at 742-59 (Kennedy, J., concurring, in part, dissenting, in part) (joined by Chief Justice Rehnquist, Justices Scalia (except to the extent it upholds FECA § 323(e) and BCRA § 202) and Thomas (only with respect to BCRA § 213).

[67] *Id.* at 746.

[68] *Id.* at 665.

[69] *Id.* at 666.

2. Prohibition on Using Corporate and Labor Union Treasury Funds to Finance "Electioneering Communications" Upheld.

Title II of BCRA creates a new term in FECA, "electioneering communication," which is defined as any broadcast, cable or satellite communication that "refers" to a clearly identified federal candidate, is made within 60 days of a general election or 30 days of a primary, and if it is a House or Senate election, is targeted to the relevant electorate.[70] Title II prohibits corporations and labor unions from using their general treasury funds (and any persons using funds donated by a corporation or labor union) to finance electioneering communications. Instead, the statute requires that such ads may only be paid for with corporate and labor union political action committee (PAC) regulated hard money.[71] The Court upheld the constitutionality of this provision.

In *Buckley v. Valeo*, the Court construed FECA's disclosure and reporting requirements, as well as its expenditure limitations, to apply only to funds used for communications that contain express advocacy of the election or defeat of a clearly identified candidate.[72] Numerous lower courts have since interpreted *Buckley* to stand for the proposition that communications must contain express terms of advocacy, such as "vote for" or "vote against," in order for regulation of such communications to pass constitutional muster under the First Amendment. Absent express advocacy, lower courts have held, a communication is considered issue advocacy, which is protected by the First Amendment and therefore may not be regulated.[73]

Effectively overturning such lower court rulings, the Supreme Court in *McConnell* held that neither the First Amendment nor *Buckley* prohibits BCRA's regulation of "electioneering communications," even though electioneering communications, by definition, do not necessarily contain express advocacy. The Court determined that when the *Buckley* Court distinguished between express and issue advocacy it did so as a matter of statutory interpretation, not constitutional command. Moreover, the Court announced that, by narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, it "did not suggest that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line."[74] "[T]he presence or absence of magic words

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[70]2 U.S.C. § 434(f)(3)(A)(i). "Targeted to the relevant electorate" is defined as a communication that can be received by 50,000 or more persons in a state or congressional district where the Senate or House election, respectively, is occurring. 2 U.S.C. § 434(f)(3)(C).

[71]2 U.S.C. § 441b(b).

[72]Buckley, 424 U.S. at 80.

[73]For further discussion regarding lower court rulings holding that express words of advocacy are the constitutional minima in order for a communication to be subject to regulation, *see,* CRS Report RL30669, *Campaign Finance Regulation Under the First Amendment: Buckley v. Valeo and Its Supreme Court Progeny*, by L. Paige Whitaker.

[74]McConnell, 124 S. Ct. at 688.

cannot meaningfully distinguish electioneering speech from a true issue ad," the Court observed.[75]

While title II prohibits corporations and labor unions from using their general treasury funds for electioneering communications, the Court observed that they are still free to use separate segregated funds (PACs) to run such ads. Therefore, the Court concluded that it is erroneous to view this provision of BCRA as a "complete ban" on expression rather than simply a regulation.[76] Further, the Court found that the regulation is not overbroad because the "vast majority" of ads that are broadcast within the electioneering communication time period (60 days before a general election and 30 days before a primary) have an electioneering purpose.[77] The Court also rejected plaintiffs' assertion that the segregated fund requirement for electioneering communications is under-inclusive because it only applies to broadcast advertisements and not print or internet communications. Congress is permitted, the Court determined, to take one step at a time to address the problems it identifies as acute. With title II of BCRA, the Court observed, Congress chose to address the problem of corporations and unions using soft money to finance a "virtual torrent of televised election-related ads" in recent campaigns.[78]

In his dissent, Justice Kennedy criticized the majority for permitting "a new and serious intrusion on speech" by upholding the prohibition on corporations and unions using general treasury funds to finance electioneering communications. Finding that this BCRA provision "silences political speech central to the civic discourse that sustains and informs our democratic processes," the dissent further noted that unions and corporations "now face severe criminal penalties for broadcasting advocacy messages that 'refer to a clearly identified candidate' in an election season."[79]

In upholding BCRA's extension of the prohibition on using treasury funds for financing electioneering communications to non-profit corporations, the *McConnell* Court found that even though the statute does not expressly exempt organizations meeting the criteria established in its 1986 decision in *FEC v. Massachusetts Citizens for Life (MCFL)*,[80] it is an insufficient reason to invalidate the entire section. Since

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[75]*Id.* at 689.

[76]*Id.* at 695.

[77]*Id.* at 696.

[78]*Id.* at 697.

[79]*Id.* at 762 (Kennedy, J., concurring, in part, dissenting, in part)(joined by Chief Justice Rehnquist and Justices Scalia (except to the extent it upholds FECA § 323(e) and BCRA § 202) and Thomas (only with respect to BCRA § 213). While Justice Kennedy's opinion served as the primary dissent for the minority, in a separate dissent, Justice Scalia wrote, "[t]his is a sad day for the freedom of speech," further commenting that "[i]f the Bill of Rights had intended an exception to the freedom of speech in order to combat this malign proclivity of the officeholder to agree with those who agree with him, and to speak more with his supporters than his opponents, it would surely have said so." *Id.* at 720, 726.

[80]479 U.S. 238 (1986)(holding that the following characteristics exempt a corporation from regulation: (1) its organizational purpose is purely political; (2) its shareholders have no (continued...)

MCFL had been established Supreme Court precedent for many years prior to enactment of BCRA, the Court assumed that when Congress drafted this section of BCRA, it was well aware that this provision could not validly apply to MCFL-type entities.[81]

3. Requirement that Sponsors of Election-Related Advertisements Self-Identify ("Stand-By-Your-Ad Provision") Upheld.

By an 8 to 1 vote, the Court upheld section 311 of BCRA, which requires general public political ads that are "authorized" by a candidate clearly indicate that the candidate or the candidate's committee approved the communication.[82] Rejecting plaintiffs' assertion that this provision is unconstitutional, the Court found that this provision "bears a sufficient relationship to the important governmental interest of 'shedding the light of publicity' on campaign financing."[83]

4. Requirement that Political Parties Choose Between Coordinated and Independent Expenditures After Nominating a Candidate Invalidated.

By a 5 to 4 vote, the Court invalidated BCRA's requirement that political parties choose between coordinated and independent expenditures after nominating a candidate,[84] finding that it burdens the right of parties to make unlimited independent expenditures.[85] Specifically, section 213 of BCRA[86] provides that, after a party nominates a candidate for federal office, it must choose between two spending options. Under the first option, a party that makes any independent expenditure is prohibited from making any coordinated expenditure under this section of law; under the second option, a party that makes any coordinated expenditure under this section of law — one that exceeds the ordinary $5,000 limit — cannot make any independent expenditure with respect to the candidate. FECA, as amended by BCRA, defines "independent expenditure" to mean an expenditure by a person "expressly advocating the election or defeat of a clearly identified candidate" and that is not made in cooperation with such candidate.[87]

According to the *McConnell* Court, the regulation presented by section 213 of BCRA "is much more limited than it initially appears." A party that wants to spend

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[80](...continued)
economic incentive in the organization's political activities; and, (3) it was neither founded by nor accepts contributions from business organizations or labor unions).

[81]*Id.* at 699.

[82]2 U.S.C. § 441d.

[83]McConnell, 124 S. Ct. at 710.

[84]2 U.S.C. § 315(d)(4).

[85]McConnell, 124 S. Ct. at 703.

[86]2 U.S.C. § 315(d)(4).

[87]2 U.S.C. § 301(17).

more than $5,000 in coordination with its nominee is limited to making only independent expenditures that contain the magic words of express advocacy. Although the Court acknowledges that "while the category of burdened speech is relatively small," it is nonetheless entitled to protection under the First Amendment. Furthermore, the Court determined that under section 213, a party's exercise of its constitutionally protected right to engage in free speech results in the loss of a longstanding valuable statutory benefit. Hence, to pass muster under the First Amendment, the provision "must be supported by a meaningful governmental interest" and, the Court announced, the interest in requiring parties to avoid the use of magic words does not suffice.[88]

5. Prohibition on Campaign Contributions by Minors Age 17 and Under Invalidated.

By a unanimous vote, the Court invalidated section 318 of BCRA, which prohibited individuals age 17 or younger from making contributions to candidates and political parties.[89] Determining that minors enjoy First Amendment protection and that contribution limits impinge on such rights, the Court determined that the prohibition is not "closely drawn" to serve a "sufficiently important interest."[90]

In response to the government's assertion that the prohibition protects against corruption by conduit – that is, parents donating through their minor children to circumvent contribution limits – the Court found "scant evidence" to support the existence of this type of evasion. Furthermore, the Court postulated that such circumvention of contribution limits may be deterred by the FECA provision prohibiting contributions in the name of another person and the knowing acceptance of contributions made in the name of another person.[91] Even assuming, *arguendo*, that a sufficiently important interest could be provided in support of the prohibition, the Court determined that it is over-inclusive. According to the Court, various states have found more tailored approaches to address this issue, for example, counting contributions by minors toward the total permitted for a parent or family unit, imposing a lower cap on contributions by minors, and prohibiting contributions by very young children. The Court, however, expressly declined to decide whether any alternatives would pass muster.[92]

6. Challengers to "Millionaire Provisions" Held to Lack Standing.

By a unanimous vote, the Court determined that the challenges to sections 304, 316, and 319 of BCRA, also known as the "millionaire provisions," were properly

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[88]McConnell, 124 S. Ct. at 702.

[89]2 U.S.C. § 441k.

[90]McConnell, 124 S. Ct. at 711.

[91]*See*, 2 U.S.C. § 441f.

[92]McConnell, 124 S. Ct. at 711.

dismissed by the district court due to lack of standing.[93] The millionaire provisions, which therefore remain in effect, provide for a series of staggered increases in otherwise applicable limits on contributions to candidates if a candidate's opponent spends a certain amount in personal funds on his or her own campaign.[94]

III. Conclusion

McConnell v. FEC is a sweeping decision upholding pivotal aspects of BCRA's comprehensive overhaul of the federal campaign finance law. Most notably, the Supreme Court upheld restrictions on the raising and spending of previously unregulated political party soft money and a prohibition on corporations and labor unions using treasury funds to finance "electioneering communications," requiring that such ads may only be paid for with corporate and labor union political action committee (PAC) funds. As some commentators have observed, the fact that the Court upheld both key provisions of BCRA was unexpected and many experts continue to sort out the implications of this complex decision on the regulated community as well as on the Court's campaign finance jurisprudence.[95]

A. Implications for Future Cases Involving Issue and Express Advocacy

One important question that has been raised in the wake of *McConnell v. FEC* is whether the line between issue and express advocacy retains any constitutional significance. On the one hand, some have interpreted *McConnell* to mean that the Court has rejected the constitutional protection of issue advocacy and the attendant requirement that campaign finance laws can only regulate election-related, (and uncoordinated with any candidate), communications that contain terms of express advocacy.[96] However, a recent development appears to revive the issue of whether and under what circumstances issue advocacy can be regulated.

On January 16, 2004, in *Anderson v. Spear*, the U.S. Court of Appeals for the Sixth Circuit found that the Supreme Court in *McConnell v. FEC* "left intact the ability of courts to make distinctions" between issue and express advocacy "where such distinctions are necessary to cure vagueness and overbreadth in statutes which regulate more speech than that for which the legislature has established a significant

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[93] *Id.*

[94] 2 U.S.C. § 315(a).

[95] Kenneth P. Doyle, *BCRA Supporters Meet to Assess Impact of Sweeping Court Decision Upholding Law*, MONEY AND POLITICS REPORT, Jan. 20, 2004 (quoting former U.S. Solicitor General Seth Waxman, a defendant's attorney before the Supreme Court in McConnell v. FEC: "[a]lmost no one thought this law was simply going to be upheld.")

[96] Kenneth P. Doyle, *Federal Court Strikes Kentucky Laws, Ruling Issue Advocacy Still Protected*, MONEY AND POLITICS REPORT, Jan. 21, 2004 (reporting that McConnell was "widely viewed as eliminating constitutional protection for issue advocacy").

governmental interest."[97] Reversing a district court decision, the Sixth Circuit ruled unconstitutional a Kentucky statute prohibiting "electioneering" within 500 feet of a polling place. The statute defines "electioneering" to include "the displaying of signs, the distribution of campaign literature, cards, or handbills, the soliciting of signatures to any petition, or the solicitation of votes for or against any candidate or question on the ballot in any manner, but shall not include exit polling."[98] The plaintiff in this case, Hobart Anderson, who filed to run as a write-in candidate in Kentucky's 1999 gubernatorial election, challenged the definition of "electioneering" on the grounds that it would regulate constitutionally protected issue advocacy, including the distribution of write-in voting instructions.

In striking down the statute, the Sixth Circuit found that *McConnell v. FEC* "in no way alters the basic principle that the government may not regulate a broader class of speech than is necessary to achieve its significant interest." According to the court, unlike the record in *McConnell,* the record in *Anderson* lacks evidence that such a broad definition of electioneering is necessary to achieve the state's interest in preventing corruption. Further distinguishing this case from *McConnell,* the court noted that unlike BCRA, there is no evidence that "an express advocacy line would be 'functionally meaningless' as applied to electioneering proximate to voting places."[99]

B. Supreme Court Deference to Congressional Findings

A notable aspect of the Supreme Court's ruling in *McConnell v. FEC* is the extent to which the majority of the Court deferred to Congressional findings and used a pragmatic rationale in upholding BCRA. According to the Court, the record before it was replete with perceived problems in the campaign finance system, circumstances creating the appearance of corruption, and Congress' proposal to address these issues. As the Court remarked at one point, its decision showed "proper deference" to Congress' determinations "in an area in which it enjoys particular expertise."[100] Furthermore, "Congress is fully entitled," the Court observed, "to consider the real-world" as it determines how best to regulate in the political sphere.[101]

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[97]Anderson v. Spear, 2004 U.S. App. LEXIS 586, 36 (2004).

[98]*Id.* at 31 (citing KY. REV. STAT. ANN. § 117.235(3)).

[99]*Id.* at 36-37. Attorney James Bopp, who represented the plaintiff in this case, is reported as stating that this decision is of "national importance" because it is the first lower court opinion interpreting the Supreme Court's ruling in McConnell v. FEC, demonstrating that the express advocacy standard articulated in Buckley was not overruled by McConnell. Kenneth P. Doyle, *Federal Court Strikes Kentucky Laws, Ruling Issue Advocacy Still Protected,* MONEY AND POLITICS REPORT, Jan. 21, 2004

[100]McConnell, 124 S. Ct. at 656-57.

[101]*Id.* at 686.