Electioneering by Corporations and Labor Unions Through "Issue Ads."

Just as 1996 saw the political parties pioneer the use of "issue advocacy" as a means of evading FECA's source and amount restrictions on campaign contributions, see supra at 28-36, it also saw a full-fledged effort by outside groups to use "issue advocacy" as a means of evading both FECA's limitations on corporate and union campaign spending as well as its disclosure requirements, beginning a trend that continued and accelerated through the 2000 election cycle.

Under the Supreme Court's construction of FECA in Buckley and, in 1986, MCFL, see supra at 21, so long as political communications did not include express advocacy, expenditures for those communications could go undisclosed under Buckley, and they could be financed directly from union or corporate treasuries. This significant limitation on FECA's application was not fully exploited for some time, however. In the years following MCFL, groups occasionally used "issue advocacy" as a means of electioneering,[24] but such practices did not become widespread until the 1996 election cycle. See Mann Expert Rep. at 19-20; see also Krasno & Sorauf Expert Rep. at 50. As chronicled by the Annenberg Public Policy Center, expenditures on "issue advocacy" in 1996 were wholly unprecedented, with corporations, unions, and interest groups spending approximately $75 million on ads that avoided express advocacy but "that looked and sounded like campaign ads." Annenberg Pub. Policy Ctr., Issue Advocacy Advertising During the 1996 Campaign ("Annenberg 1996 Study") at 3, 7-8 [DEV 38-Tab 21]; Thompson Comm. Rep. (Minority Views) at 5927 & n.4.

Most prominently in 1996, the AFL-CIO and a coalition of business groups ran competing multi-million dollar "issue advocacy" campaigns targeted at influencing the November

[24] For example, in the weeks preceding the 1992 presidential election, the Christian Action Network paid for television advertisements out of its general corporate treasury that, while not expressly advocating candidate Bill Clinton's defeat, negatively depicted Clinton in an altered photograph while representing that he supported a "radical" homosexual agenda. See FEC v. Christian Action Network, 894 F.Supp. 946, 948-49 (W.D. Va. 1995), aff'd, 92 F.3d 1178 (4th Cir. 1996); Craig B. Holman & Luke P. McLoughlin, Buying Time 2000 at 25 [DEV 46].

congressional elections. The AFL-CIO initiated the advertising battle in early 1996, with the announcement that it planned to spend $35 million in the coming year on a campaign to win back Democratic control of the House of Representatives. See Frank Swoboda, AFL-CIO to Target 75 House Districts, Wash. Post, Jan. 25, 1996 [DEV 10-Tab 40];

The campaign, funded from union dues, spent over $20 million on a series of television advertisements run from the end of June 1996 through Election Day. See Thompson Comm. Rep. at 3999; Annenberg 1996 Study at 11; FEC General Counsel's Rep. in In re AFL-CIO, MUR 4291 ("AFL-CIO MUR Rep.") at 5 [DEV 52-Tab 3].[25/] These advertisements uniformly criticized House Republican incumbents on their legislative records, often contrasting their voting behavior unfavorably with the positions of their Democratic challengers, while conspicuously avoiding express exhortations for their defeat. See AFL-CIO MUR Rep. at 6. An example is an ad run from September 26 to October 9 in the district of House Republican incumbent Steve Stockman:

The AFL-CIO's advertisements soon prompted a major counter-attack by a coalition of business organizations, operating under the nondescript pseudonym "The Coalition: Americans Working for Real Change" ("Coalition"). The founding members of the Coalition, including the U.S. Chamber of Commerce and National Association of Manufacturers, were members of the "Thursday Group," a variety of business organizations that regularly met on Thursdays to discuss legislative

[25/] "MUR" is an acronym for "Matter Under Review," which is how administrative enforcement proceedings under 2 U.S.C. 437g(a) are designated on the FEC's docket.

strategy with Representative John Boehner of Ohio, Chairman of the House Republican Conference, along with other Republican Members and party officials. FEC Gen. Counsel's Rep. in In re The Coalition, MUR 4624 ("Coalition MUR Rep.") at 12, 15 [DEV 53-Tab 6];

Following the AFL-CIO's announcement of its advertising campaign, Representative Boehner urged pro-business allies to respond, and the Coalition formed soon afterwards. Coalition MUR Rep. at 13-14, 16;

the Coalition eventually raised approximately $5 million in corporate funds

Coalition MUR Rep. at 18;

[26]

The Coalition used these funds to run advertisements from September through November 4, 1996, uniformly praising Republican incumbents targeted by the AFL-CIO, while stopping short of expressly calling for their re-election. See Coalition MUR Rep. at 26-27.[27]

[26]

[27]

Notwithstanding their lack of express advocacy, the timing, location, and candidate-specific focus of the dueling advertisements run by the AFL-CIO and the Coalition left unmistakable fingerprints of electioneering intent.

___ ; Coalition MUR Rep. at 26-27.

The targeted incumbents were all competing in tight races, indicating that they were selected for attack (and defense) on the basis of their electoral vulnerability. See Thompson Comm. Rep. at 4001 (AFL-CIO ads focused on "swing districts"); Coalition MUR Rep. at 27;

Moreover, while the ads discussed the incumbents' positions with respect to certain legislative issues, virtually none of these issues were pending before the House of Representatives at the time the ads were run, indicating that the ads were intended not to affect upcoming legislative votes, but rather to affect votes in the upcoming November elections. AFL-CIO MUR Rep. at 5-6. On the basis of such considerations, eventual investigation by the Thompson Committee found that the ads were made for the purpose of influencing federal elections. See Thompson Comm. Rep. at 4000 (AFL-CIO ads); Thompson Comm. Rep. (Minority Views) at 8944-45 (Coalition ads).[28/]

[28/] See also AFL-CIO MUR Rep. at 5-6; Coalition MUR Rep. at 35.

Not only were the ads run by the AFL-CIO and the Coalition intended to influence the 1996 elections, but they were also used to curry favor with policymakers. The Coalition in particular made a point of seeking credit for its ads from the legislators aided by them. After each wave of ads the Coalition aired, the Coalition forwarded tapes of the ads through Representative Boehner to the individual Members in whose districts the ads ran, to "show the Republican Members of the House that [their business allies] were, indeed, doing something" in response to the AFL-CIO's ads. Coalition MUR Rep. at 30-32;

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Hence, by the 1996 election, the longstanding prohibition on union and corporate campaign spending had become largely ineffective. Through the guise of "issue advocacy," the nation's largest union and an assemblage of some of its largest corporate interests had been able to spend tens of millions dollars on advertisements broadcast for the purpose of influencing federal elections. These ads, it was believed, served to create debts of gratitude among congressional allies providing the very sort of leverage over the legislative process, purchased with corporate or union "war chests," that the restriction upon corporate and union campaign spending was designed to eliminate.

The discovery of "issue advocacy" as an electioneering tool also enabled groups to evade FECA's disclosure requirements in 1996. Simply by avoiding express advocacy, groups were able to conceal the financing of their electioneering activities from public view. Magleby Expert Rep. at 18-19; Annenberg 1996 Study at 3; Thompson Comm. Rep. (Minority Views) at 5968. Many groups even took the further step of electioneering pseudonymously, like the business groups operating behind "The Coalition: Americans Working for a Real Change." Ads run under such opaque disclaimers left the public with no meaningful information regarding their funding source, compounding the secrecy gained from avoiding disclosure to the FEC. For example, "Citizens for

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32/ There is some evidence also that the AFL-CIO sought credit in this way for its ads, though from White House officials rather than members of Congress. The AFL-CIO informed the White House well in advance that it planned to run a $35 million campaign focused on the 1996 elections. Thompson Comm. Rep. at 4001. According to White House Chief of Staff Harold Ickes, the AFL-CIO wanted "to let the White House know the key points [of the AFL-CIO's efforts] and the amount of resources that labor was devoting to trying to take back the House." Id.

Reform" and "Citizens for the Republic Education Fund" together spent several million dollars in 1996 on attack ads against various Democratic candidates, such as the following "issue ad" run against Montana House candidate Bill Yellowtail:

> Who is Bill Yellowtail? He preaches family values, but took a swing at his wife. And Yellowtail's response? He only slapped her, but "her nose was not broken." He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.

Thompson Comm. Rep. at 4007; Lamson Decl. ¶ 11 [DEV 7-Tab 26]. Investigation by Congress eventually found that these two groups apparently were largely underwritten through a conduit by Koch Industries, the second largest privately held company in the nation, and were operated by Triad Management, a political consulting firm. Thompson Comm. Rep. (Minority Views) at 5982-83; see also Magleby Expert Rep. at 18. Due to lack of disclosure, much remains unknown to the public about the financing of the two groups. Id.;

Circumvention of FECA's requirements through the use of "issue advocacy" continued unabated following the 1996 election. Both the aggregate amounts expended on issue ads and the number of groups making such expenditures rose considerably from 1996 to 2000.[33/] Studies of the 1998 and 2000 elections by the Brennan Center for Justice at New York University Law School, and by a group of political scientists across the nation organized by Professor David Magleby, as supplemented by expert reports submitted in this case by the authors of those studies along with other political scientists, show that the vast majority of these ads that referred to candidates for federal office ran within 60 days of Election Day, that such ads were concentrated in competitive

[33/] Krasno & Sorauf Expert Rep. at 50; Annenberg Pub. Policy Ctr., Issue Advocacy Advertising During the 1997-1998 Election Cycle ("Annenberg 1998 Study") at 1-2 [DEV 66-Tab 6]; Annenberg Pub. Policy Ctr., Issue Advocacy Advertising During the 1999-2000 Election Cycle ("Annenberg 2000 Study") at 1, 4 [DEV 38-Tab 22]; see also Annenberg 2000 Study at 9 (explaining basis for Annenberg figures).

electoral races, and that they were overwhelmingly likely to be perceived as having an electioneering purpose.[34/]

The 2000 election featured much the same patterns of conduct as those seen in 1996. Labor and business again dominated the airwaves: the AFL-CIO, the pharmaceutical industry, and the Chamber of Commerce constituted three of the top four group sponsors of television ads referring to federal candidates within 60 days of the election. Kenneth H. Goldstein, Amended Expert Report at 14 & Tbl. 3 [DEV 3-Tab 7, hereinafter Goldstein Expert Rep.]; Annenberg 2000 Study at 7.

The AFL-CIO campaign met with return fire from the pharmaceutical industry, in the guise of a nonprofit organization dubbed "Citizens for Better Medicare."

[34/] See Jonathan S. Krasno & Daniel E. Soltz, Buying Time ("Buying Time 1998") Fig. 1.5 at 17, Fig. 2.8 at 38, Fig. 4.15 at 103, Fig. 4.22 at 110 [DEV 47]; Craig B. Holman & Luke P. McLoughlin, Buying Time 2000 Fig. 4-6 at 31, Fig. 6-8 at 56 [DEV 46]; Krasno & Sorauf Expert Rep. at 50-60 & App. Tbls. 2, 4-6; Kenneth H. Goldstein, Amended Expert Report at 17-19, 24-28 & Tbls. 2, 4, 8 [DEV 3-Tab 7, hereinafter Goldstein Expert Rep.]; Magleby Expert Rep. at 5-6, 13-15, 22, 26-33 & Tbls. 1, 2, 2A; see also Storyboards of Ads Referring to Candidates Within 60 Days of the 1998 and 2000 Elections [DEV 48-Tabs 3&4]. Findings from the Buying Time studies, the Krasno & Sorauf and Goldstein reports, and the work of Professor Magleby are discussed in greater detail below. See infra at 139-42, 161.

[35/]

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37/ On the other side of the equation, Elaine Bloom, who in 2000 ran unsuccessfully against Rep. Clay Shaw of Florida, credited ads aired by Citizens for Better Medicare with assisting Mr. Shaw's come-from-behind victory in that race. Bloom Decl. ¶¶ 4-6 [DEV 6-Tab 7].

While the air wars between business and labor constituted the largest and most direct influx of corporate and union money into the 2000 elections, corporate money also helped fund ads run by various interest groups, who, by virtue of avoiding express advocacy, could solicit corporate contributions to pay for their electioneering activities.

Evasion of FECA's disclosure provisions also proliferated in 2000. As Congress observed in June of 2000, numerous groups (including, e.g., Citizens for Better Medicare) were being

organized as tax-exempt "political organizations" under § 527 of the Internal Revenue Code which by statutory definition exist for the very purpose of influencing elections, see 26 U.S.C. 527(e)(1)-(2) yet they were not making any disclosures to the FEC, simply by virtue of avoiding express advocacy in their electioneering activities. See Disclosure of Political Activities of Tax-Exempt Organizations: Hearing Before the Subcomm. on Oversight of the Comm. on Ways and Means, 106th Cong. (2000).[38] Although Congress attempted to fix the problem by amending the tax code to require § 527 political organizations to publicly disclose the identities of their contributors,[39] these groups persisted in using "issue advocacy" to avoid disclosure.

Perhaps the most telling example of how groups had, by 2000, come cavalierly to rely on "issue advocacy" to evade FECA's strictures, is supplied by the National Rifle Association.

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[38] Many of these organizations even had specific provisions in their charter prohibiting them from engaging in express advocacy. Id. at 47.

[39] See Pub. L. 106-230, 114 Stat. 477 (codified at 26 U.S.C. 527(i)-(j)(2002)), (held unconstitutional by Nat'l Fed'n of Republican Assemblies v. United States, 218 F. Supp. 2d 1300 (S.D. Ala. 2002)).

In sum, by 2000, corporations, unions, and interest groups fully recognized that, through the trivial effort of avoiding express advocacy, they could make unrestricted and undisclosed expenditures to influence the outcome of federal elections while avoiding the reach of federal election law. As a result, a long-established regime intended to prohibit the use of corporate and union treasuries

[40] See also Selected Interest Group Electioneering Radio Ads, App. A to Defs.' Mem., Tab 6, Nos. 1&2 (audio);

for federal campaign spending, and to require disclosure of who finances federal campaign spending, had been eviscerated through the routine exploitation of the "issue advocacy" loophole.

Repairing the System: Legislative Debate and Enactment of the Bipartisan Campaign Reform Act

BCRA represents the culmination of an extraordinary amount of effort by Congress over several years to develop legislation to repair a federal campaign finance system that had been proven, over the course of the 1990s, to be increasingly dysfunctional. Scores of bills proposing an enormous variety of potential reforms were introduced in both the House and the Senate,[41] and the problems with the campaign finance system and various reform proposals have been considered by a panoply of congressional committees.[42] The provisions adopted in BCRA are those that Congress

[41] The bills introduced in the last three Congresses alone include, but are not limited to: "Bipartisan Campaign Reform Act of 1997," H.R. 493 (105th Cong.); "Campaign Reform and Election Integrity Act of 1998," H.R. 3485 (105th Cong.); "Campaign Finance Improvement Act of 1998," H.R. 3476 (105th Cong.); "Bipartisan Campaign Integrity Act of 1997," H.R. 2183 (105th Cong.); "Campaign Reporting and Disclosure Act of 1998," H.R. 3582 (105th Cong.); "Bipartisan Campaign Reform Act of 1997," S. 25 (105th Cong.); "Senate Campaign Financing and Spending Reform Act," S. 57 (105th Cong.); "Campaign Finance Reform and Disclosure Act of 1997," S. 179 (105th Cong.); "Clean Money, Clean Elections Act," S. 918 (105th Cong.); "Grassroots Campaign and Common Sense Federal Election Reform Act of 1998," S. 1689 (105th Cong.); "Voter Empowerment Act of 1999," H.R. 32 (106th Cong.); "Bipartisan Campaign Reform Act of 1999," H.R. 417 (106th Cong); "Clean Money, Clean Elections Act," H.R. 1739 (106th Cong.); "FEC Reform and Authorization Act of 1999," H.R. 1818 (106th Cong.); "Campaign Integrity Act of 1999," H.R. 1867 (106th Cong.); "Citizen Legislature and Political Freedom Act," H.R. 1922 (106th Cong.); "Campaign Reform and Election Integrity Act of 1999," H.R. 2668 (106th Cong); "PAC Limitation Act of 1999," H.R. 2866 (106th Cong..);"Open and Accountable Campaign Financing Act of 2000," H.R. 3243 (106th Cong.); "FEC Reform and Authorization Act of 2000," H.R. 4037 (106th Cong.); "Campaign Finance Improvement Act of 2000," H.R. 4685 (106th Cong); "Campaign Finance Disclosure on Sales of Personal Assets Act of 2000," H.R. 4989 (106th Cong.); "Informed Voter Act of 2000," H.R. 5507 (106th Cong.); "Campaign Finance Improvement Act of 2000," H.R. 5596 (106th Cong.); "Bipartisan Campaign Reform Act of 1999," S. 26 (106th Cong.); "Federal Election Enforcement and Disclosure Reform Act," S. 504 (106th Cong.); "Clean Money, Clean Elections Act," S. 982 (106th Cong.); "Bipartisan Campaign Reform Act of 1999," S. 1593 (106th Cong.); "Campaign Finance Integrity Act of 1999," S. 1671 (106th Cong.); "Open and Accountable Campaign Financing Act of 2000," S. 1816 (106th Cong.); "Campaign Finance Reform and Disclosure Act of 2000," S. 2565 (106th Cong.); "Bipartisan Campaign Reform Act of 2001," H.R. 2356 (107th Cong.); "Campaign Reform and Citizen Participation Act of 2001," H.R. 2360 (107th Cong.); and "Bipartisan Campaign Finance Reform Act of 2001," S. 27 (107th Cong.).

[42] These congressional hearings and and associated reports include, but are not limited to: Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rpt. 105-167 (6 vols.) (Comm. on Governmental Affairs), March 10, 1998 [Thompson Comm. Rep.]; Investigation of Political Fundraising Improprieties and Possible Violations of Law: Interim Report ("Burton Comm. Rep."), H.R. Rept. 105-829 (4 vols.) (Comm. on Gov't Reform and Oversight), November 5, 1998; Campaign Contribution Limits, S. Hrg. 106-19 (Comm. on Rules and Admin.), March 24, 1999; The Justice Department's Handling of the Yah Lin "Charlie" Trie Case, S. Hrg. 106-318 (Comm. on Gov'tal Affairs), Sep. 22, 1999; 1996 Campaign Finance Investigations, S. Hrg. 106-1059 (Subcomm. on Admin. Oversight and the Courts, Comm. on the Judiciary), May 24, June 6, and June 21, 2000; 1996 Campaign Finance Investigations, S. Hrg. 106-1072 (Comm. on Judiciary), June 27, 2000; Johnny Chung: Foreign Connections, Foreign Contributions, H.R. Hrg. No. 106-23 (Comm. on Gov't Reform), May 11, 1999; White House Insider Mark Middleton: His Ties to John Huang, Charlie Trie, and Other Campaign Finance Figures, H.R. Hrg. No. 106-93 (Comm. on Gov't Reform), August 5, 1999; Disclosure of Political Activities of Tax-Exempt Organizations, H.R. (continued...)

deemed most essential to combat the "biggest loopholes in the system: the soft money and the phony issue ads." 148 Cong. Rec. S2104 (Mar. 20, 2002) (Sen. Feingold).

Following the 1996 elections, Senators McCain and Feingold introduced legislation to address the eruption of soft money donations and unregulated electioneering disguised as "issue ads." See 143 Cong. Rec. S159 (Jan. 21, 1999); 143 Cong. Rec. S10106-12 (Sep. 29, 1997). Section 101 of this version of the McCain-Feingold bill would have prohibited national, state, district and local committees of political parties from soliciting or receiving any soft money donations. It also proposed to address electioneering issue advocacy by redefining "expenditures" subject to FECA's strictures to include public communications at any time of year, and in any medium, whether broadcast, print, direct mail, or otherwise, that a reasonable person would understand as advocating the election or defeat of a candidate for federal office. See 143 Cong. Rec. S10107, 10108.

In part to respond to concerns raised by the bill's opponents about its constitutionality,[43] Senators Snowe and Jeffords proposed an amendment to McCain-Feingold to draw a bright line between genuine issue advocacy and a narrowly defined category of television and radio advertisements, broadcast in proximity to federal elections, "that constitute the most blatant form of [unregulated] electioneering." 144 Cong. Rec. S906, S912 (Feb. 24, 1998). Senator Snowe explained that this approach had been developed in consultation with constitutional experts, to come up with "clear and narrow wording" which, in contrast to the earlier provisions of the McCain-Fein-

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[42] (...continued)
Hrg. No. 106-103 (Subcomm. on Oversight, Comm. on Ways and Means), June 20, 2000; The Role of John Huang and the Riady Family in Political Fundraising, H.R. Hrg. No. 106-142 (Comm. on Gov't Reform), December 15, 16 and 17, 1999; The Role of Yah Lin "Charlie" Trie in Illegal Political Fundraising, H. R. Hrg. No. 106-172 (Comm. on Gov't Reform), March 1, 2000; The Justice Department's Implementation of the Independent Counsel Act, H.R. Hrg. No. 106-231 (Comm. on Gov't Reform), June 6, 2000; Has the Justice Department Given Preferential Treatment to the President and Vice -President?, H.R. Hrg. No. 106-256 (Comm. on Gov't Reform), July 20, 2000; Campaign Finance Reform: Proposals Impacting Broadcasters, Cable Operators and Satellite Providers, H.R. Hrg. No. 107-42 (Subcomm. on Telecommunications and the Internet, Comm. on Energy and Commerce), June 20, 2001.

[43] See, e.g., 143 Cong. Rec. S9994, S10009-11, 10018-19 (Sep. 26, 1997); 143 Cong. Rec. S10719, 10726-27 (Oct. 9, 1997).

gold bill, supra, strictly limited the reach of the legislation to TV and radio advertisements that mention a candidate within 60 days of a general election, or 30 days of a primary, so as specifically to avoid the pitfalls of vagueness identified in Buckley.[44] Snowe-Jeffords was adopted as an amendment both to the McCain-Feingold bill, 144 Cong. Rec. S1000, and later to the companion legislation known in the House as Shays-Meehan. See 147 Cong. Rec. H3801, H3802 (June 28, 2001).

Congress continued to debate the wisdom, necessity and constitutionality of campaign finance reform legislation, and the scope of its various provisions, in some detail for the next four years. The Snowe-Jeffords provisions were the subject of extensive debate. Citing studies by the Annenberg Public Policy Center at the University of Pennsylvania showing the growing use of so-called "issue ads" by corporations, unions and other interest groups to promote or oppose the election of federal candidates while simultaneously evading regulation under FECA,[45] the legislation's sponsors maintained that the Snowe-Jeffords provisions represented necessary corrective legislation to "give the public the facts they need to better evaluate the candidates [and] the information they are receiving," 144 Cong. Rec. S918, and to "reinforce the traditional rules limiting the role of unions and corporations in elections." Id. at 914.[46]

In answer to assertions by McCain-Feingold's opponents that Buckley had flatly prohibited all regulation of independent political communications containing express advocacy,[47] the legislation's supporters explained that Snowe-Jeffords had been carefully constructed to pass constitu-

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[44] 144 Cong. Rec. S912-13; see also 144 Cong. Rec. S972, S974 (Feb. 25, 1998) ("We are replacing the issue advocacy provisions of the McCain-Feingold legislation . . . that could raise constitutional questions.").

[45] See 144 Cong. Rec. S875, S885, S913-14; 144 Cong. Rec. S972; 145 Cong. Rec. H8178, H8197 (Sep. 14, 1999); 147 Cong. Rec. S2433, S2455 (March 19, 2001).

[46] See also 144 Cong. Rec. S871, S895; 144 Cong. Rec. S993; 145 Cong. Rec. H8181, H8197; 147 Cong. Rec. S2421, S2456-57 (Mar. 19, 2001); 147 Cong. Rec. S3072 (Mar. 29, 2001).

[47] 144 Cong. Rec. S869-70, 873-75, 915-16; 144 Cong. Rec. S980-82; 144 Cong. Rec. H3722, 3732 (May 21, 1998); 145 Cong. Rec. 8188; 145 Cong. Rec. S12799, S12830-31 (Oct. 19, 1999).

tional muster by defining "electioneering communications" both narrowly and objectively, so as to avoid the vagueness that troubled the Supreme Court in Buckley,[48] a conclusion supported by two empirical studies conducted on political advertising by the Brennan Center for Justice at New York University Law School and additional research by Professor David Magleby of Brigham Young University.[49] Congress continued to debate the constitutionality of the Snowe-Jeffords provisions until final passage of the bill in 2002.[50]

Summary of Key Statutory Provisions

BCRA was thus enacted in response to the widespread abuse and circumvention of the existing statutory regime that regulates and limits permissible campaign contributions to federal candidates, federal officeholders, and political parties. As described above, the two largest loopholes of the statutory regime under FECA are the solicitation and use of soft money by political parties and the rise of corporate and union electioneering through issue advertisements. Congress has addressed these problems in Title I and Title II, Subtitle A, of BCRA, which are summarized below. In addition, Congress adopted several provisions designed to ensure the effectiveness of these reforms; these provisions are discussed further in the Argument section, infra.

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[48] 144 Cong. Rec. S869, S875-76, S898, S914; 144 Cong. Rec. 972-75, S993, S998-99; 147 Cong. Rec. S2845, S2848 (Mar. 26, 2001) (citing correspondence from 20 constitutional scholars endorsing the Snowe-Jeffords provisions, 147 Cong. Rec. S3036-37 (Mar. 28, 2001)).

[49] 147 Cong. Rec. S2456-58, S3040-43, S3072, S3251-52. See Buying Time: Television Advertising in the 1998 Congressional Elections ("Buying Time 1998") [DEV 47]; Buying Time 2000: Television Advertising in the 2000 Federal Elections ("Buying Time 2000") [DEV 46]. For example, Buying Time 1998 concluded that extending federal campaign finance and disclosure laws to advertisements mentioning a federal candidate within 60 days of a general election would have affected just 7 percent of the advertisements in 1998 that researchers determined to be genuine issue advocacy rather than advocacy intended to influence federal elections. Buying Time 1998 at 10, 109.

[50] See 147 Cong. Rec. S2421, 2422-24, 2455-58 (Mar. 19, 2001); 147 Cong. Rec. S2708-09 (Mar. 22, 2001); 147 Cong. Rec. S2846-50 (Mar. 26, 2001); 147 Cong. Rec. S3036-3037 (Mar. 28, 2001) (debates preceding initial Senate passage on April 2, 2001, 147 Cong. Rec. S3258); see also 148 Cong. Rec. H258-63 (Feb. 12, 2002); 148 Cong. Rec. H339-43, H348-49, H373, H412-15 (Feb. 13, 2002); 148 Cong. Rec. S2096, S2101, S2115, S2118, S2132, S2138 (Mar. 20, 2002).

In Title I of BCRA, Congress addressed the soft money system by adding, in § 101, a new § 323 to FECA, entitled "Soft Money of Political Parties" (to be codified at 2 U.S.C. 441i, see 116 Stat. 82). Section 323 contains several interrelated provisions designed to eliminate all solicitation, contribution, and use of unregulated soft money by federal candidates, federal officeholders, and national political parties, and to eliminate the use of soft money for federal election activity by any other political parties, officeholders, and candidates:

> Section 323(a) prohibits the national committee of a political party from soliciting, receiving, directing to another person, spending, or transferring soft money, i.e., any funds "that are not subject to the limitations, prohibitions, and reporting requirements of this Act."
>
> Section 323(b) addresses state and local parties' practice of using soft money to support federal campaigns, providing that, subject to certain exceptions, a State, district, or local committee of a political party may not use soft money to make expenditures or disbursements for "Federal election activity."
>
> Section 323(c) provides that the costs associated with fundraising for federal election activity must be made with hard money, i.e., "funds subject to the limitations, prohibitions, and reporting requirements of this Act."
>
> Section 323(d) addresses another avenue for circumvention by providing that parties may not solicit any funds for, or make or direct any donations to, certain tax-exempt organizations described in section 501(c) of the Internal Revenue Code and to organizations engaged in political activities described in section 527 of the Internal Revenue Code.
>
> Section 323(e) generally prohibits federal candidates and officeholders from soliciting, receiving, directing, transferring, or spending any soft money in connection with an election for federal office, making exceptions for attendance at fundraising events for state, district, or local committees of a political party and certain solicitations on behalf of nonprofit organizations.
>
> Section 323(f) prohibits a candidate for state or local office or a state or local officeholder from spending soft money for a "public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office."

Title II of BCRA prohibits labor unions and corporations from using general treasury funds to produce and air "electioneering communications," and places disclosure requirements on all persons that make large financial outlays for such communications. Section 201(a) of the statute amends FECA by adding a new subsection (f)(3) to 2 U.S.C. 434, defining an electioneering communication as a TV or radio communication that "refers to a clearly identified candidate for Federal office," and is made within the 60 days before a general election or the 30 days before a primary. Additionally, in the case of a communication that refers to a House, Senate or (under rules adopted by the FEC)[51/] presidential primary candidate, the communications must be "targeted to the relevant electorate," meaning that it can be received by at least 50,000 persons in the state or district where the election is being held.[52/] Under BCRA § 201(a), all persons making financial outlays in excess of $10,000 for the costs of electioneering communications must file statements with the FEC identifying the persons making the disbursements, those to whom these disbursements were made, and persons who contributed $1,000 or more to the person making the disbursement. BCRA, § 201(a) (adding 2 U.S.C. 434(f)(1), (2)(A)-(F)).

Section 203 of BCRA amends FECA 441b to prohibit corporations and labor unions from expending general treasury funds for electioneering communications. Prior to BCRA's enactment, § 441b(a) made it unlawful for any corporation or labor organization "to make a contribution or expenditure in connection with any [federal] election," the phrase "contribution or expenditure" being defined under subsection (b)(2). BCRA § 203(a) adds the term "applicable electioneering

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[51/] See Final Rule, Electioneering Communications, 67 Fed. Reg. 65,211 (Oct. 23, 2002) (to be codified at 11 C.F.R. 100.29(b)(3)).

[52/] Under a last-minute amendment to the Snowe-Jeffords provisions offered by Senator Specter and adopted by the full Senate on March 29, 2001, see 147 Cong. Rec. S3070, S3118-3123, paragraph (3)(A)(ii) states that if the above definition of electioneering communications "is held to be constitutionally insufficient," then the term "electioneering communication means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office . . . and which is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate."

communication" to the list of expenditures under § 441b(b)(2) that are prohibited to corporations and labor unions under the terms of subsection (a).[53] By the same token, however, the prohibition as applied to electioneering communications is subject to the same longtime exception, under § 441b(2)(C) and (b)(4), that allows corporations and labor unions to make expenditures for such political purposes from separated segregated accounts containing funds donated by individual shareholders, members, and executive or administrative personnel.[54]

Title II of BCRA also deals with the subject of coordination. Section 213 of BCRA amends FECA § 441a(d), regarding coordinated expenditures between candidates and their parties. Under § 441a(d)(1)-(3), political party committees are permitted to make coordinated expenditures on behalf of each of their candidates far exceeding the level of coordinated expenditures, $5,000, that other political committees are permitted to make with respect to a given candidate. 2 U.S.C. 441a(a)(2)(A), (7)(B)(i). Section 213 of BCRA amends § 441a by adding a new subsection (d)(4), which provides that, once a political party nominates a candidate, the party may choose during that election cycle either: (1) to forgo independent expenditures and make coordinated expenditures with respect to that candidate under the more generous terms of subsection (d)(1)-(3); or (2) to make unlimited independent expenditures with respect to that candidate, as defined by FECA § 431(17), see Colorado I, 518 U.S. at 618, but accept the $5,000 limit on contributions and coordinated

[53] An "applicable" electioneering communication is defined by a further amendment to § 441b as one "made by any entity described in subsection (a) of this section [i.e., a corporation or labor union] or by any other person using funds donated by an entity described in subsection (a) of this section" [same]. BCRA, § 203(b), adding 2 U.S.C. 441b(c)(1).

[54] Specifically, FECA § 441b(b)(2)(C) permits unions and corporations to use treasury funds to establish and administer "separate segregated fund[s] to be utilized for political purposes" (id.). Such a fund, which is a political committee under the Act (and commonly called a "PAC"), 2 U.S.C. 431(4)(B), can solicit and receive voluntary contributions from corporate employees and stockholders, from union members, from members of a membership corporation, and from their families. 2 U.S.C. 441b(b)(4)(A)-(C). These funds can be contributed to federal candidates or used to pay for independent expenditures or electioneering communications. Corporations and unions may also use treasury funds to finance communications with their stockholders, executive and administrative personnel, and their "members," on any subject. 2 U.S.C. 431(9)(B)(iii), 441b(b)(2).

expenditures applicable to all other multicandidate political committees. Section 214 of BCRA simply repeals the FEC's regulations on coordinated communications paid for by persons other than candidates or parties, and directs the Commission to promulgate new regulations on the subject that "shall not require agreement or formal collaboration to establish coordination." The statute further specifies that "the regulations shall address "(A) payments for the republication of campaign materials; (B) payments for the use of a common vendor; (C) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and (D) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party."

Title III of BCRA contains the so-called "millionaire provisions," which incrementally raise the limits on individual contributions to candidates applicable under 2 U.S.C. 441a, allowing greater individual contributions to be made to a House or Senate candidate when an opposing candidate's campaign expenditures made from his or her own personal funds (adjusted for the excess of the gross receipts of the candidate's campaign committee over the gross receipts of the opponent's committee), exceed a threshold amount. BCRA §§ 304, 316 (adding 2 U.S.C. 441a(i)); BCRA § 319 (adding 2 U.S.C. 441a-1). Title III also eliminates another means by which FECA's contribution limits can be and in the past have been evaded, by prohibiting individuals less than 18 years of age from making contributions to candidates or political parties. BCRA § 318 (adding 2 U.S.C. 441k).

Sections 305 and 504 of BCRA both amend § 315 of the Communications Act of 1934, 47 U.S.C. 315. Section 305 restricts eligibility for the "lowest unit charge" for air time to candidates who certify that they will not directly refer to another candidate for the same office in their