THE OHIO STATE UNIVERSITY
Moritz
College of Law

Edward B. Foley
Robert M. Duncan/Jones Day
Designated Professor of Law
Direct Dial: (614) 292-4288
Fax: (614) 688-4202
Email: foley.33@osu.edu

April 5, 2004

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463
email: pcstestify@fec.gov

Re: Rulemaking on "Political Committee Status," 69 Fed. Reg. 11,736

Dear Ms. Dinh:

Pursuant to the Notice of Proposed Rulemaking issued on March 11, I hereby submit these comments and request to testify at the forthcoming hearing.

My comments draw upon academic work I have done on the definition of "political committee" under FECA, the constitutionality of enforcing that definition and related FECA rules with respect to non-party groups that operate independently from candidates and parties, the relationship of FECA to section 527 of the Internal Revenue Code, and other issues relevant to this rulemaking. This academic works includes an article I co-authored with my colleague Donald Tobin, *Tax Code Section 527 Groups Not an End-Run Around McCain-Feingold*, 70 U.S.L.W. 2403 (January 20, 2004), as well as a new paper, *The "Major Purpose" Test: Distinguishing Between Election-Focused and Issue-Focused Groups*, 27 Northern Kentucky L. Rev. ___ (forthcoming 2004), a copy of which is attached to these comments (and hereinafter cited as *The "Major Purpose" Test*). I also testified at the Senate Rules Committee hearing on these issues, held on March 10.

I submit these comments solely in my capacity as a professor of law who specializes in the fields of election law and constitutional law. These comments in no way purport to represent the views of the Moritz College of Law at the Ohio State

University, where I teach. And while I served as a consultant to the Intervenors in *McConnell v. FEC*, these comments in no way purport to represent the views of the Intervenors, but are solely my own.

Two Key Points

There are two key points in connection with this rulemaking, both emanating directly from *Buckley v. Valeo*. First, the definition of "political committee" under FECA must not be so broad as to encompass groups that do *not* devote themselves predominantly to seeking the election or defeat of federal candidates. Second, and conversely, the definition of "political committee" does reach – and, in order to serve the purposes of FECA, must reach – all groups that *are* predominantly devoted to the election or defeat of federal candidates.

These two key points have implications for the proposed rules. The first point entails that the Commission should reject any idea of a flat threshold disbursement amount, such as the $50,000 threshold in the proposed 11 CFR 100.5(a)(2)(iii), as a trigger for finding "political committee" status. Instead, the rulemaking should make clear that a group is susceptible to designation as a "political committee" *only* through a proportionality analysis, which determines whether the group devotes more than half its activities to influencing federal elections (unless of course the group's own public pronouncements forthrightly declare that its predominant mission is to influence one or more federal elections, in which case the group should be regulated as a "political committee" under the *Buckley* "major purpose" test for that reason alone).

Using this kind of "50 percent" rule, a version of which is contained in proposed 11 CFR 100.5(a)(2)(ii) – rather than the flat threshold in subsection (iii) – is necessary to protect groups that engage in election-related activities only as subsidiary endeavors, ancillary to their larger, non-electoral objectives. These issue-oriented groups do not present the same need for regulation under FECA as groups that are focused on winning elections, as *Buckley* itself recognized. (I discuss this point at greater length in Part II of the attached article, *The "Major Purpose" Test*.) Furthermore, because embracing these issue-oriented groups within the category of "political committee" would be far more intrusive upon First Amendment interests than designating all election-focused groups as "political committees" under FECA, these issue-focused groups must be left outside the "political committee" definition. Employing a 50 percent rule, but not a flat threshold, serves this purpose. Therefore, non-profit groups under 501(c)(4) of the Tax Code have no cause for concern with an FEC rulemaking that adopts a 50 percent rule and rejects a flat threshold. Indeed, to retain their tax-exempt status under (c)(4), groups cannot let their election-oriented activities exceed 50 percent, and thus no legitimate (c)(4) group would be subject to "political committee" designation under an FEC-adopted 50 percent rule.

The second key point requires that no group whose predominant focus is to elect or defeat a federal candidate should escape "political committee" designation on the ground that it refrains from "express advocacy," as *Buckley* defines that term. According

to some advocates who misread *Buckley*, a group could devote 100 percent of its activities to electing a particular candidate, or defeating that candidate's opponent, and yet escape regulation as a "political committee" as long as that group eschews "express advocacy," which – as we all know – is so easy to do without diluting the clear electoral import of a campaign message. But *Buckley* recognized that, "[t]o fulfill the purposes of [FECA]," it was necessary that the definition of "political committee" encompass all groups "the major purpose of which is the nomination or election of a candidate." (424 U.S. at 79.) Therefore, it would contradict *Buckley* to say that, even if a group has as its avowed overriding objective the election or defeat of a particular candidate, and even if that group devotes all of its activities to campaign messages praising one candidate or attacking the other, nevertheless this group cannot be regulated as a "political committee" under FECA.

Buckley adopted the "express advocacy" test, not to narrow the definition of "political committee" (a task already accomplished through the separate "major purpose" test), but instead to protect those groups that would *not* come within the definition of "political committee" under the "major purpose" test. If a group is *not* a political committee under FECA, then *Buckley* provides that its expenditures cannot be regulated under FECA unless they meet the "express advocacy" test. By contrast, under *Buckley*, the spending of a "political committee" is properly regulated under FECA without regard to whether it meets the "express advocacy" test.

Buckley makes this point clearly: it states that the "[e]xpeditures of candidates and 'political committees' so construed [i.e., as limited by the 'major purpose' test] . . . are, by definition, campaign related." (*Id.*) Then, having made this point, the *Buckley* opinion then immediately goes on to say: "But when the maker of the expenditure is not within these categories—when it is an individual other than a candidate or a group other than a 'political committee'—[FECA must be] construed to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." (*Id.* at 79-80.) The immediate juxtaposition of these two propositions in *Buckley* establishes that the "express advocacy" test applies *only* to those groups that are *not* "political committees" under the "major purpose" test. Simply put, "political committees" do not get the benefit of the "express advocacy" test. They do not need the protection of that stringent test because, by definition (under the "major purpose" test), their predominant focus is achieving an election victory or defeat.

Thus, a proper understanding of *Buckley* requires adoption of a 50 percent rule that designates a group as a "political committee" when more than 50 percent of its spending in any given year is devoted to election-motivated activities broadly conceived, without regard to the much narrower category of "express advocacy." This kind of 50 percent rule properly "fulfill[s]" what *Buckley* recognizes as the "core" regulatory function of FECA, whereas it would defeat FECA's core function to leave unregulated groups just because they do not devote more than 50 percent of their spending to express advocacy. Therefore, it is necessary *both* that the FEC adopt a 50 percent rule *and* that this 50 percent rule count not just spending for express advocacy, but spending for a

wider array of election-motivated activities, as is provided in proposed 11 CFR 100.5(a)(2)(ii).

The argument is sometimes made that, to be a "political committee" under FECA, it is not enough that an organization meet the "major purpose" test, but that it also make $1000 of "expenditures" (or receive $1000 of "contributions") as defined by FECA and that, even if the "major purpose" test looks to a category of electoral activities broader than "express advocacy," the definition of "expenditure" under FECA – 2 U.S.C. 431(9)(A)(i) – is separately constrained by the "express advocacy" test. But this argument makes the same mistake about *Buckley* as the one discussed above. Under *Buckley*, as the foregoing analysis shows, the "express advocacy" test constrains FECA's definition of "expenditure" only with respect to those groups that are not political committees by virtue of the "major purpose" test. When an organization has the election or defeat of a federal candidate as its major purpose, then all of its spending motivated by this objective is "for the purpose of influencing a [federal] election" and thus within the definition of "expenditure" under FECA without regard to whether it is express advocacy. By contrast, it is only when an organization is not a political committee under the "major purpose" test that its spending is not deemed to be "for the purpose of influencing a [federal] election" unless it is spent for express advocacy. Consequently, the "express advocacy" test poses no barrier to the regulation of a group as a "political committee" under FECA because, as established in *Buckley*, the interpretive gloss of the "major purpose" test on the definition of "political committee" obviates the need to apply the interpretive gloss of the "express advocacy" test on the definition of "expenditure." In other words, the interpretative glosses adopted in *Buckley* are mutually exclusive: the one applies when the other does not, and vice versa.

It bears emphasis, however, that the Commission has no power to expand the definition of "expenditure" under FECA beyond "express advocacy" for groups that are not political committees by virtue of the "major purpose" test. Consequently, the Commission should disavow any intent to do so. Regrettably, the Notice of Proposed Rulemaking contains an Alternative 1-B, including proposed section 100.116, which (as the Notice itself acknowledges) would significantly expand the definition of "expenditure" for "all persons, not just political committees," by encompassing, not just "express advocacy," but all public communications that "promote, support, attack or oppose a clearly identified federal candidate." 69 Fed. Reg. at 11,741. In adopting a final rule, the Commission should reject Alternative 1-B on the ground that it would be beyond the scope of the Commission's authority under FECA, as authoritatively construed in *Buckley*.

FECA, Not BCRA, Defines "Political Committee"

It is important to understand that the foregoing analysis concerning the definition of "political committee" – including the two key points and their implications for this rulemaking – is based entirely on FECA and *Buckley*, not on BCRA and *McConnell*. The proper understanding of the dichotomous relationship of the "major purpose" and "express advocacy" tests, described above, was as true in 1976 when *Buckley* was issued

as it is today and has remained the same throughout this entire period. In other words, in 1980, and in 1990, and again in 2000, all before BCRA was ever enacted or *McConnell* ever decided, the meaning of "political committee" under FECA – as authoritatively set forth in *Buckley* – entails that an organization is a political committee if the majority of its activities are devoted to electing or defeating a federal candidate, without regard to whether the organization confines these electoral activities to what counts as express advocacy.

Nothing in BCRA or *McConnell* in any way negates this correct understanding of FECA and *Buckley*. BCRA, quite clearly, did not purport to address the definition of "political committee." As has often be observed, it was concerned with the regulation of parties, not non-party groups designated as "political committees" under the "major purpose" test. BCRA also supplemented the restrictive category of "express advocacy" with the new category of "electioneering communications," but did so for all persons, not just political committees, imposing a disclosure requirement on any person spending more than $10,000 on these electioneering communications. (Congress, not the Commission, had the authority to expand the regulation of all persons under FECA in this way.) Thus, BCRA left in place exactly the same definition of "political committee" as preceded BCRA and that definition, properly understood, requires that all organizations that devote the major portion of their activities to winning federal elections be designated "political committees," not merely those organizations that devote the major portion of their activities to express advocacy.

Moreover, although *McConnell* does not directly involve an interpretation of the term "political committee" in FECA, it confirms that the "express advocacy" test does not operate as a constitutional constraint on the scope of that term. Prior to *McConnell*, the primary argument advanced by those believing that the "express advocacy" test must constrain the definition of "political committee" was a supposition that the express advocacy test, as a bedrock requirement of First Amendment law, established the outer boundary of all campaign finance regulation. But *McConnell* made clear that this supposition was an erroneous view of First Amendment law. Thus, there never was any reason to think that the express advocacy test limited the definition of political committee. Instead, all along, the correct understanding of FECA as interpreted in *Buckley* – consistent with the correct understanding of the First Amendment as articulated in *McConnell* – is that the "major purpose" test determines which groups come within the definition of "political committee" without regard to the separate "express advocacy" test, which applies to only those groups that fall outside this definition.

Some argue, however, that the enactment of BCRA was premised on the assumption that definition of political committee under FECA encompasses only those groups that spend the majority of their funds on express advocacy. To support this argument, they rely upon a provision in BCRA – 2 U.S.C. 441i(e)(4)(B) – which permits the solicitation of up to $20,000 per individual per year for tax-exempt groups "whose principal purpose" is to engage in certain forms of "federal election activities," as defined elsewhere in BCRA, 2 U.S.C. 431(20)(A)(i) & (ii). Invoking this provision, they observe that political committees under FECA are not permitted to receive more than *$5000* – not

$20,000 – per individual per year, and therefore the assumption of this provision must be that these tax-exempt groups with this "principal purpose" are not political committees. From this premise, they conclude that the category of political committee under FECA must be confined to solely those groups with a primary purpose of engaging in express advocacy and cannot extend to groups having a primary purpose of engaging in a broader array of election-related activities. But the conclusion does not follow from the premise.

BCRA enumerates three distinct kinds of "federal election activities." The first, subsection (i) of 2 U.S.C. 432(20)(A), is "voter registration activity" within 120 days of a federal election. The second, subsection (ii), is "voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot)." The third, subsection (iii), is a "public communication" that "promotes," "supports," "attacks", or "opposes" a clearly referenced federal candidate "regardless of whether the communication expressly advocates a vote for or against [the] candidate."

Notably, the solicitation provision in 2 U.S.C. 441(e)(4)(B) applies only to tax-exempt groups that engage in the first two kinds of "federal election activities" but not the third. This distinction makes sense because a group that devotes itself primarily to voter registration and/or voter mobilization is not necessarily a group that has as its major purpose the election or defeat of a candidate. Some groups genuinely are devoted to *nonpartisan* voter registration or get-out-the-vote drives, because they wish to encourage civic participation and the exercise of the franchise, without regard to which candidates or parties the voters choose to support (because increased voter registration and turnout results in a more robust democracy). Such truly nonpartisan groups, lacking a view on which side should win the election, clearly are not political committees under FECA.

By contrast, a group that devotes itself principally to the third kind of "federal election activity" is appropriately deemed a political committee under FECA. Public communications that "promote, support, attack, or oppose" a federal candidate clearly take a position with respect to the candidate. They are not neutral, indifferent to the voter's view of the candidate. Whereas a group that makes such communications only as a minor portion of its overall activities should not be regulated as a political committee (because this particular group does not have electing or defeating a candidate as its major focus), a group that does devote a majority of its spending in a given year on such candidate-approving or candidate-disapproving messages should be regulated as a political committee (because *this* group by the totality of its actions does display as its predominant objective the election or defeat of a candidate).

Thus, just because a group devoted primarily to *nonpartisan* voter participation efforts is not a political committee, it does not follow that a group is a political committee only if it is devoted primarily to express advocacy. Instead, a group devoted primarily to disseminating messages that "promote, support, attack, or oppose" a candidate deserve the political committee designation, whether or not its message contain express advocacy. The careful distinction between subsections (i) & (ii), one the one hand, and subsection

(iii), on the other, of 2 U.S.C. 431(20)(A) in BCRA's solicitation provision recognizes this truth. In any event, it certainly shows that BCRA is not predicated on a premise that the political committee category must be confined by the express advocacy test.

Since BCRA neither expanded nor contracted the definition of political committee under FECA, but simply left it as it was pursuant to *Buckley*, the Commission still faces the task under FECA of specifying the scope of election-motivated activities that count when applying the "major purpose" test and its ancillary 50 percent rule. This task is just the same after BCRA's enactment as it was before and, under *Buckley*, it calls for a functional approach so that the definition of "political committee," as *Buckley* mandated, "fulfill[s]" the "core" regulatory objectives of FECA. The proper inquiry here is to identify those kinds of activities that one would expect to be undertaken by a group dedicated to the election or defeat of a federal candidate. If a group devotes the preponderant share of its efforts to these sorts of activities, then it is acting just like any other group whose primary objective is to elect or defeat a federal candidate. In other words, this particular group would be functioning as a political committee and, accordingly, under FECA should be classified as one.

What sorts of activities are these? As just discussed above, they include not only express advocacy (even as supplemented by the new category of electioneering communications), but also the broader category of public messages that "support, promote, attack, or oppose" a candidate: any group that spends over 50 percent of its funds on these kinds of messages is acting as a political committee with the predominant objective of electing or defeating the candidate. Also included with the sorts of activities that we expect of political committees is *partisan* voter drives that reference a federal candidate and encourage potential voters to register to vote, or go to the polls, in order to support a particular federal candidate and that candidate's team. Some of the communicative activity that forms these partisan voter drives, including one-on-one conversations between the voters and the drive's campaign workers, is likely to constitute "express advocacy" – for example, the door-to-door message "you should register to vote so that you can help get rid of Bush" – but voter drives conducted with the declared purpose of supporting or opposing a particular federal candidate should count towards the 50 percent rule without regard to whether particular communications within the voter drive constitute express advocacy.

Thus, while we would not expect political committees dedicated to electing or defeating particular candidates to engage in *nonpartisan* voter drives, we would expect them to engage in *partisan* voter drives. The "major purpose" test, and its ancillary 50 percent rule, should take account of this distinction and include the latter, but not the former, when determining whether the majority of a group's spending is devoted to achieving electoral outcomes. The Notice of Proposed Rulemaking appropriately observes this distinction, but it is imperative that the final rule make clear that the consideration of partisan voter drives (without regard to the express advocacy test) to determine whether a group is a "political committee" does *not* mean that partisan voters drives can be considered "expenditures" under FECA when conducted by groups that are not political committees (unless the spending for these voter drives does meet the express

advocacy test). Again, the consideration of partisan voter drives as part of a broader category of election-motivated activities than express advocacy, just like the consideration of messages that "promote, support, attack, or oppose" a candidate, must be limited in use to implementing the "major purpose" test and its ancillary 50 percent rule and *cannot* be used to regulate the spending of groups that fall short of "political committee" status under this 50 percent rule.

There is, however, an additional wrinkle involving the consideration of partisan voter drives to implement the 50 percent rule. Some partisan voter drives are not specific to any federal candidate. Rather, they urge voters to register, or go to the polls, to support Democrats or Republicans generally. A group that devotes itself primarily to these generic partisan voter drives cannot necessarily be presumed to be a political committee under FECA, since its "major purpose" might be to support state party, rather than federal party, candidates. Of course, if a group declares that the purpose of a particular voter drive is to assist the election or defeat of a particular federal candidate, then the voter drive is not generic and it can be counted when implementing the 50 percent rule, even if the group's communications with the voters that form this drive refer only to seeking a "Democratic" or "Republican" victory (or defeat).

In this regard, it is worth recalling that the 50 percent rule is only one of two independent ways to determine whether a group's "major purpose" is to elect or defeat a federal candidate. The other is to examine whether the group has issued public pronouncements declaring its primary objective, or core mission (or "major purpose" in similarly equivalent terms), to be the election or defeat of a federal candidate. If so, then the group has self-declared that it meets the "major purpose" test, and it should be classified as a political committee without further inquiry. The Notice of Proposed Rulemaking reflects this important point, although proposed 11 CFR 100.5(a)(2)(i) should be revised to eliminate the $10,000 disbursement threshold: under *Buckley*, if a group declares its major purpose to be the election or defeat of a federal candidate, it is a political committee under FECA unless its spending for this purpose falls below $1000 per year. See *Buckley*, 424 U.S. at 79 n.107 (only if a group "primarily organized for political activities" spends less than $1000 per year is it not a "political committee" under FECA).

Once a group has self-declared that its predominant objective is to elect or defeat a federal candidate – and thus it is a political committee – then *any* voter drive conducted by that group is appropriately presumed to be motivated by the group's predominant objective. (This point relates to the allocation rules applicable to political committees.) In other words, the Commission need not look for evidence that the declared purpose of a particular voter drive is to assist the election or defeat of a federal candidate. Determination of the *group*'s purpose, rather than the *particular drive's* purpose, is enough. In this respect, the operation of FECA's regulations *once a group has been determined to be a political committee because of its own public pronouncement of its major purpose* differs from the implementation of the 50 percent rule in order to determine, in the absence of such a public pronouncement, whether the group in fact meets the major purpose test. With respect to the latter, but not the former, the

Commission must find evidence that the declared purpose of the particular voter drive is to assist the election or defeat of a federal candidate. Thus, some voter drives – even some partisan voter drives (those that are purported to be generic and for which there is no evidence otherwise) – do not count when applying the 50 percent rule to determine, without regard to the group's own public pronouncements, whether the group is functioning as a political committee and thus must be classified as one.

In sum, the category of election-motivated activities that count when applying the 50 percent rule is not precisely congruent with the category of "federal election activities" as specified in BCRA, although there is considerable overlap between the two categories. It is not surprising that they are not congruent, because they serve different regulatory purposes. BCRA's specification of "federal election activities" exists to define the scope of the soft-money ban applicable to state and local political parties. By contrast, the category of election-motivated activities that we have now been considering is necessary to determine whether a non-party group has electing or defeating federal candidates as its major purpose. Nor is it surprising that, even if not congruent, there is substantial overlap between the two categories. Political committees, by definition (as articulated in *Buckley*), are inherently electoral organizations, motivated primarily by the goal of winning elections. In this regard, they share important similarities with political parties – explaining why, like political parties, they are regulated under FECA. Thus, a test that is designed to examine a group's activities to see whether they are predominantly devoted to achieving electoral outcomes, so that the group is properly classified as political committee to fulfillFECA's regulatory objectives, is likely to have affinities with a statutory term that implements the regulation of political parties, which are also inherently electoral organizations. But the important point here remains that the category of election-motivated activities necessary to implement the "major purpose" test under *Buckley* would exist even if BCRA and its definition of "federal election activities" never existed. This *Buckley*-based category of election-motivated activities is dependent on a functional analysis of FECA's regulatory objectives with respect to political committees, as required by *Buckley*, and it is the same both before and after BCRA's enactment.

FECA and 527s

The Notice of Proposed Rulemaking raises the question whether reference to section 527 of the Tax Code, and groups qualifying under that provision, should be incorporated into the Commission's rules for implementing the "major purpose" test under *Buckley*. The answer is no. As the Commission itself recognizes, a group can qualify under 527 and have influencing state, rather than federal, elections as its major purpose. Likewise, as the Commission also recognizes, a 527 group can have influencing the *appointment* of individuals to *non-electoral* offices as its major purpose. Thus, the fact that a group qualifies as a 527 does not make it necessarily, or even presumptively, a political committee under FECA.

More importantly, FECA is an entirely separate statute from the Tax Code, serving entirely different governmental objectives. The designation of certain groups as political committees under FECA is a regulatory function pursuant to, and part of, the

overall reasons why FECA regulates campaign finance (to protect the integrity of elections and so forth). The designation of certain groups as tax-exempt under 527 is a tax-based subsidy that is pursuant to, and part of, the overall set of incentives and disincentives the government wishes to create at the same time as the government raises revenue through the Tax Code. The Commission, charged with the enforcement of FECA and its distinctive regulatory objectives, should implement the "major purpose" test to serve those regulatory objectives without regard to the tax status of a group under the Tax Code.

In other words, it should be a factor neither in favor or nor against political committee designation that a group is a 527. Instead, the Commission independently should determine whether the major purpose of the group is to elect or defeat one or more federal candidates by asking, in the alternative, whether the group's public pronouncements so demonstrate, or whether 50 percent of the group's spending is devoted to those election-motivated activities characteristic of groups with this major purpose. A positive answer to *either* branch of this inquiry should be enough to classify a group as a political committee, whatever its tax status. Likewise, a negative answer to both of these inquiries should be enough to exclude the group from the political committee classification, even if it is a 527 under the Tax Code. Thus, the Commission should adopt a final rule that embraces provisions along the lines of those contained in proposed subsections (i) and (ii) of 11 CFR 100.5(a)(2), as modified in some details by previous analysis in these comments, but should entirely jettison the approach reflected in either alternative of proposed subsection (iv) – as well as entirely rejecting the proposed subsection (iii) for reasons stated earlier.

It has been suggested by some that in recent years Congress has adopted new rules for 527 groups, specifically disclosure rules, premised on the view that 527 groups are not subject to regulation as political committees unless they voluntarily register as such. This suggestion is misplaced and cannot yield the results that those who advance it wish it would. True enough, Congress has adopted new rules for 527 group, but it has done so by amending the Tax Code and not FECA – and has imposed these new obligations on 527s whether or not they are political committees under FECA. (For example, under the new rules, a 527 group devoted solely to influencing state elections, and therefore undoubtedly not a political committee under FECA, must make certain disclosures to the IRS if not required to make equivalent disclosures under state law to a state agency.) These amendments to the Tax Code in no way constitute an implied repeal of the meaning of "political committee" under FECA. Thus, if the correct understanding of the definition of "political committee" under FECA entails a 50 percent rule that encompasses 527 groups when (but only when) they spend a majority of funds on election-motivated activities (without regard to the express advocacy test) – and, for the reasons already elaborated, *Buckley* mandates that this is the correct understanding – then this understanding was true before Congress tinkered with section 527 of the Tax Code, and this understanding remains true after these Tax Code amendments.

To be sure, Congress may have been motivated to amend the Tax Code in part because of regulatory inaction concerning the definition of political committee and this

Commission's failure to enforce FECA with respect to those 527 groups that meet the definition. Even so, this congressional frustration with the Commission's inaction under FECA is all the more reason for the Commission now to enforce the definition of political committee, as properly understood pursuant to *Buckley*. Amendments to the Tax Code, whatever their motivation, cannot and do not negate that proper understanding of FECA mandated by *Buckley*, and this proper understanding should be effectuated in this rulemaking, without further delay.

Timing of this Rulemaking

It has been suggested that the Commission should postpone this rulemaking until after this year's elections. This suggestion is predicated on the assumption that to adopt rules that implement the "major purpose" test under *Buckley* would be to "change the rules" in the middle of an election year, contrary to the will of Congress (as evidenced by the provisions in BCRA that delayed its effective date until after the 2002 elections and required expedited consideration of *McConnell* so that its validity could be finally determined in advance of this year). But this suggestion is based on a false premise: a rulemaking that implements the correct definition of "political committee" as mandated by *Buckley* does not "change the rules mid-election"; instead, it simply confirms what has been the law all along.

Even without this rulemaking, the Commission is required to enforce the proper definition of "political committee." And the proper definition of "political committee" under *Buckley* requires examination of a group's "major purpose," as revealed either by its own public pronouncements or by how the group spends the majority of its resources. Thus, to enforce the definition of "political committee" in the absence of this rulemaking – in response to a complaint, for example, that a particular group has not registered as a political committee when it is required to do so – the Commission would need to utilize the kinds of "public pronouncement" and "50 percent" rules that the Notice of Proposed Rulemaking discusses. Thus, the proposal to formally adopt these "public pronouncement" and "50 percent" rules simply confirms and clarifies what, under *Buckley* and prior to BCRA, the Commission would be required to do in any event.

Moreover, it is untenable to suggest that the enactment of BCRA precludes the completion of this rulemaking on the definition of "political committee" during this election year. The Commission began an earlier version of this rulemaking in 2001, shortly before BCRA's enactment, but suspended this rulemaking to await the enactment of BCRA and the resolution of the inevitable judicial challenges to its validity. Now that BCRA is in place and its validity confirmed by *McConnell*, it is time to resume what was already postponed, not time for further postponement.

When this rulemaking was postponed initially, there was a cloud hanging over all of campaign finance law. This cloud was the contention, advanced by many, that the "express advocacy" test constrained the entire structure of FECA as a constitutional roadblock set up by the First Amendment. *McConnell* has dispelled this cloud, and thus

the Commission should proceed with enforcing the definition of "political committee" as mandated in *Buckley*, unclouded by an erroneous view of the express advocacy test.

Allocation

The Notice of Proposed Rulemaking itself recognizes that, at the same time as adopting rules to implement the definition of "political committee," the Commission should address the related "allocation" question: how a political committee, which has influencing federal elections as its "major purpose," should allocate the money in receives between this purpose and other (secondary) purposes. I discuss this allocation question in Part III of the attached article, *The "Major Purpose" Test*, and I incorporate that discussion by reference. The essential point of that discussion is that all funds received by a "political committee" should be considered as having been given to advance the committee's major purpose, unless specifically designated for the committee's secondary purposes, and thus should be subject to the $5000 limit applicable under FECA to contributions given by individuals to political committees.

The Commission may also wish to consider rules concerning the affiliation of political committees with other organizations. When a political committee and a (c)(4) entity, or a "state" 527, exist side-by-side as two arms of the same overall organization, questions arise concerning whether the actions and objectives of the one should be attributed to the other. Obviously, if the (c)(4), or "state" 527, arm of the organization were itself to cross the line under the 50 percent rule, then it would need to register as a political committee in its own right. But what if the (c)(4), or "state" 527, stays below 50 percent, and yet its activities are undertaken at the direction of its affiliated political committee, which has publicly avowed purpose of electing (or defeating) a particular federal candidate? Should the public pronouncement of this electoral motivation be attributable to the affiliated (c)(4), or "state" 527, such that this affiliated entity must register as a political committee under the "public pronouncement" rule, without regard to an examination of its spending under the "50 percent" rule? Or, alternatively, under the "public pronouncement" rule should a political committee and all affiliated entities be considered a single unified organization, one that collectively is a single "political committee" under FECA, with the consequence that all funds received and spending undertaken by any arm of the organization is regulated as the activities of a single political committee?

These comments do not take a position on the exact rule the Commission should adopt to address such affiliation questions. In principle, it should be clear that an entity should not escape designation as a political committee when it is operating as part of a political committee, pursuant to the political committee's avowed primary goal of achieving an election victory. At the same time, however, any affiliation rule that the Commission were to adopt should make sure that it does not operate in practice as an excessively stringent "relationship" test, since legitimately operating (c)(4) and state-527 groups do not themselves become federal political committees simply because they have relations with such committees. Presumably, doctrines and principles within the law of agency, as well as the law of corporations, can assist the Commission in determining

when two purportedly separate entities are actually operating as divisions of the same overall organization.

Conclusion

For the foregoing reasons, this Commission should forthwith issue a final Rule that contains proposed 11 CFR 100.5(a)(2)(i) & (ii) – the "public pronouncement" and "50 percent" rules – as modified in some details: specifically, the Commission should reject the $10,000 threshold in subsection (1); and should modify subsection ii(C) so that, with respect to voter drives, it encompasses only those that have a declared purpose of seeking the election or defeat of a federal candidate.

The Commission, however, should reject proposed subsection (iii), as well as both alternatives of proposed subsection (iv) of section 100.5(a)(2).

Moreover, the Commission should adopt Alternative 1-A, and reject Alternative 1-B, making it clear that the meaning of "expenditure" extends beyond "express advocacy" *only with respect to those organizations that are determined to be political committees under the "major purpose" test.*

Request to Testify

As stated at the outset of these comments, I hereby request to testify at the hearing to be held in connection with this rulemaking. At the hearing, I would be happy to address any questions the Commission might have concerning these comments, the rulemaking, or my academic work relating to these topics.

Respectfully submitted,

Edward B. Foley
Robert M. Duncan/Jones Day
Designated Professor of Law

DRAFT: April 5, 2004
27 *Northern Kentucky Law Review* ___ (forthcoming 2004).
All rights reserved.

THE "MAJOR PURPOSE" TEST:
Distinguishing Between Election-Focused and Issue-Focused Groups

Edward B. Foley*

This essay addresses a constitutional question unresolved by McConnell v. FEC, *a question crucial to the current controversy over the regulation of non-party interest groups. The question is whether it is permissible to limit the contributions that non-party groups receive from individual donors to a specified amount – for example, $5000 per donor per year – when any electioneering activities undertaken by the group are conducted independently from the activities of political parties and their candidates. Drawing on the foundational* Buckley *precedent, this essay argues that the answer to this constitutional question should turn on whether the non-party group is either election-focused or issue-focused in the predominant portion of its activities.*[1]

Now that *McConnell v. FEC* has settled that it is constitutional for Congress to limit the amount of money an individual may contribute to a political party for activities designed to influence federal elections, questions remain concerning similar limits on contributions to other types of political or ideological groups. Political parties are hardly the only kind of organization interested in influencing

---

* Robert M. Duncan/Jones Day Designated Professor of Law, Moritz College of Law at the Ohio State University. This paper was presented the Law Review's symposium on *Campaign Finance Reform after FEC v. McConnell*, on Feb. 14, 2004. Many thanks to the editors of the Review and to Professors Ken Katkin and John Valauri for their helpful thoughts in connection with this paper. I should note that I served as a consultant to the attorneys representing the Intervenor-Defendant, Senator McCain et al., in their defense of the McCain-Feingold legislation in *McConnell*.

[1] This essay builds upon an article I co-authored with my colleague Donald Tobin. See Edward B. Foley and Donald Tobin, *Tax Code Section 527 Groups Not an End-Run Around McCain-Feingold*, 72 U.S.L.W. 2403 (January 20, 2004). I have endeavored to make this new essay a "stand-alone" piece, without repeating except as absolutely necessary points made in the earlier article. For readers interested in exploring more details concerning the statutory issues related to the regulation of non-party groups under federal campaign finance laws, including the treatment of "527 groups" (named after section 527 of the Tax Code), I recommend that they consult the earlier article.

the outcome of federal elections. Independent political committees, or PACs (as they are more colloquially called), by definition have influencing federal elections as their "major purpose," even if they do not coordinate their own election-motivated activities with a political party or a candidate's own campaign committee.[2] In other words, a group of citizens may form an organization for the avowed purpose of a defeating an incumbent candidate – "Citizens Seeking Change" they might call it – and yet remain unaffiliated with a political party or the campaign committee of the incumbent's opponent. Given its self-proclaimed purpose, this group would be a political committee under the Federal Election Campaign Act (FECA), as interpreted by the Supreme Court in *Buckley v. Valeo*. But it remains unsettled whether contributions from individuals to this group may be subject to the same kind of dollar limit that *McConnell* ruled permissible with respect to political parties.

Moreover, ideological groups that do not have influencing elections as their *major purpose* nonetheless may seek to influence a federal election as a secondary objective that is ancillary to their primary ideological purpose. Such ideological groups may be devoted to a single issue, like gun control or environmental protection, or an array of issues, like making America a more just society with respect to the availability of health care, education, and other basic needs. If an environmental group believes that winning a certain election is important to its

---

[2] In addition to addressing the statutory dimensions to the "major purpose" test in the article co-authored with Professor Tobin (see, supra, n.1), I also discuss these statutory details in comments submitted to the FEC in connection with its Notice of Proposed Rulemaking on "Political Committee Status," 69 Fed. Reg. 11,736 (March 11, 2004).

overarching goal of protecting the environment, then it will spend a portion of its resources on activities specifically designed to achieve this electoral result. Likewise, a group devoted to the general cause of making America more just – let's call it "Citizens for a Better America" – might believe that winning a particular election was crucial to its cause and, therefore, allocate a significant portion of its available assets to this specific purpose. For simplicity's sake, we can refer these ideological groups as "issue-focused" groups, to distinguish them from election-focused "political committees," while recognizing that these issue-focused groups will undertake some measure of election-specific activities.

Presumably, it would be impermissible to limit the amount of money that an individual may give to an issue-focused group to advance its ideological purpose, or to prohibit the group from using those contributions to promote its ideological objective, including by the specific means of activities designed to achieve a particular electoral result (if the group thought those specific electoral activities the best way to further its ideological mission). But there is no Supreme Court case that directly resolves this question,[3] and one might try to argue that any money that any group spends on a well-defined category of activities that are understood to be specifically electoral in aim – public messages supporting or opposing candidates, messages urging voters to go to the polls, and the like – should be paid for with

[3] *MCFL* comes closest, in holding that an issue-focused ideological group that meets certain conditions must be exempt from disclosure requirements applicable to election-focused political committees. See *Massachusetts Citizens for Life v. FEC*, ___ U.S. ___, ___ (1986). *MCFL*, however, did not directly address whether Congress could write a statute providing that all federal electioneering, clearly defined, must be paid for with "hard" money (i.e., funds raised in compliance with FECA's contribution limits and source requirements).

funds that have been subject to contribution ceilings. Yet such an argument would rub up against the fact that individuals can spend as much of their own money as they wish for these election-specific activities. Therefore, why should not individuals be entitled to get together in groups, and to pool their resources when they share an ideological objective, leaving it to the collective judgment of the group to determine when it can best serve the shared ideological objective by spending a portion of the group's assets specifically on electoral activities? The likelihood that the Supreme Court would wish to protect this associational freedom and the strong grounds in First Amendment jurisprudence the Court would have for doing so are reasons to take as a baseline proposition that it would be unconstitutional to limit the contributions that individuals may give to ideological groups to be used for electoral purposes.

But why then would it be constitutional to limit contributions that individuals make to political committees, like Citizens Seeking Change, with the avowed purpose of defeating an incumbent candidate? The individuals wishing to contribute to this group have a right to spend as much of their own money as they wish on independent activities designed to secure this electoral result. Why then should these individuals not be entitled to give as much of their money as they wish to this group, just as (we are presuming) they would be entitled to do with respect to an ideological group, like Citizens for a Better America, that decides to use these unlimited contributions to pay for activities specifically designed to achieve the same electoral result?

To answer this crucial question, we need to recall that individuals do not have a First Amendment right to give unlimited sums to political parties to spend on activities designed to secure an electoral result. They lack this right, even though they do have a First Amendment right, acting by themselves, to spend as much of their own money as they wish on the same activities. The reason for this distinction is twofold: first, according to longstanding Supreme Court doctrine,[4] their interest in giving money to a political party has less strength under the First Amendment than their interest in spending their own money for their own political activities; and, second, the risk that winning candidates will become improperly beholden to the financial largess of individuals is less when individuals spend their money acting on their own than when individuals gives the money to a political party (this second point being true in part because individual donors are less likely to be motivated by an improper desire to produce an indebted candidate when they pay for their own electoral activities undertaken on their own initiative than when they simply write checks to a political party).

The question, then, is whether contributions to a political committee are more like contributions to a political party or, instead, more like contributions to an ideological group that is not a political committee. In other words, should contributions to our hypothetical Citizens Seeking Change be grouped together with contributions to a political party, because Citizens Seeking Change has declared its primary purpose to be defeating an incumbent candidate? Or, alternatively, should contributions to Citizens Seeking Change be put in the same category as

[4] *Buckley, McConnell.*

contributions to Citizens for a Better America, which lacks the defeat of an incumbent as its primary purpose but nonetheless spends a significant portion of its resources on activities designed to secure this electoral result as a secondary objective that is derivative of its primary ideological mission?

For reasons I shall explain in Part One, in my judgment contributions to political committees should be classified under the First Amendment with contributions to political parties, rather than with contributions to ideological organizations that lack an electoral objective as their primary purpose. Maintaining this position, however, requires a sound basis for distinguishing political committees from these other ideological organizations, and I shall attend to that distinction in Part Two. Finally, even if there is a sound basis for distinguishing between these two kinds of groups, the distinction will be futile if political committees in practice are able to structure their operations to mimic the activities of these other ideological organizations. Therefore, in Part Three, I will discuss the kind of accounting rules that are necessary to make the regulation of political committees meaningful in practice.

I. The Constitutional Justifications for Distinguishing Between Political Committees and Issue-Focused Groups

Political committees differ from political parties in several basic respects. First of all, candidates run for office in the name of political parties: they appear on the ballot as the designated candidate of a particular political party. Second,

political parties form majority and minority caucuses in Congress that organize the structure and agenda of the legislative process. Third, political parties necessarily coordinate closely with their candidates, both during elections and (with respect to incumbents) during the legislative process. All this means that there are special reasons to believe that large-dollar contributions to a political party may result in improper leverage over the legislative activities of officeholders who ran as candidates of that party and benefited from the party's financial support[5].

Nonetheless, political committees – even those that operate independently from parties and their candidates – share an essential feature with political parties: they exist to win elections. By virtue of the Supreme Court's "major purpose" test, political committees necessarily have as their overriding objective the election or defeat of candidates running for federal office. They are not merely ideological organizations that happen to participate in election-specific activities incidental to their central ideological mission. Rather, their reason for being is specifically electoral: *their central mission* is to secure the election or defeat of a candidate.

Given the central electoral mission of political committees, two points are true. First, large-dollar contributions to political committees present risks of improper influence over elected candidates, comparable to the risks of large-dollar contributions to political parties, and greater than the risks of large-dollar contributions to ideological groups that are not political committees. Second, an individual's interest in giving a large-dollar contribution to a political committee is comparable to the individual's interest in giving a large-dollar contribution to a

[5] The Court in *McConnell* emphasized these points.

political party or a candidate's own official campaign committee, and quite distinct from an individual's interest in giving to an ideological organization that is not a political committee.

When an organization has as its central mission the election of a particular candidate, anyone who wishes to purchase improper influence over that candidate would naturally gravitate to that organization as a vehicle for bestowing influence-purchasing wealth. In other words, the individuals who donate large sums of money to a political committee may not all have the purely civic-minded desire to see the candidate win election because of a belief that the candidate is more likely to act in the public interest than the candidate's opponent. Instead, individuals who are blocked by campaign finance law from giving large sums directly to the candidate, but who wish to "invest" in the candidate's election solely in order to reap legislative favors from the candidate once elected to office, will see a political committee that exists to promote the candidate's election as an efficient "investment" opportunity. Because the political committee has the candidate's election as its main objective, money given to this committee is well spent if the donor's goal is to curry favor with the candidate.

Likewise, any candidate who might be tempted to bestow improper favors on large-dollar donors to the candidate's election efforts would be especially receptive to the large-dollar donors to political committees that were set up specifically to promote the candidate's election. Since there would be no large-dollar donors directly to the candidate's own campaign committee, the first place the influence-

peddling incumbent would look to identify big-money contributors to his electoral success would be the list of largest contributions to political committees established specifically to secure his victory. Accordingly, large-dollar contributions to political committees present risks of improper influence that are every bit as great as large-dollar contributions to political parties.

Indeed, large-dollar contributions to a single-candidate political committee are a much more direct means of obtaining improper influence over that candidate than large-dollar contributions to the candidate's political party. Because political parties exist to elect a wide array of candidates, any contribution to the party (without earmarking) is necessarily a somewhat inefficient means of obtaining improper influence over a particular candidate. By contrast, when a political committee is focused on electing one particular candidate (or defeating that candidate's opponent), a large-dollar gift to that political committee is almost as good as a large-dollar gift to the candidate's own campaign would be as a means to secure improper favoritism from that candidate once in office.[6]

In *McConnell*, the Court observed that "lobbyists, CEOs, and wealthy individuals alike all have candidly admitted donating substantial sums [to political parties] not on ideological grounds, but for the express purpose of securing influence

---

[6] This point depends, of course, on the ability of an independent political committee to stay "on message" with the candidates campaign. Although in *Buckley* the Court speculated that independent committees might often be counter productive, three decades later – in part because of technological innovations including the internet – the fact that it is extremely easy for an independent committee seeking to help a candidate to simply echo in broadcast advertising what the candidate says on its web page. Recent reports concerning the way in which purportedly independent groups have echoed the Kerry campaign confirm this fact. See, e.g., Jim Rutenberg, *Democrats' Ads in Tandem Provoke G.O.P.*, The New York Times (March 27, 2004), p. A10.

over federal officials."[7] The Court recognized, too, that these large-dollar contributions were successful in achieving their insidious purposes. Quoting one former Senator, the Court bluntly opined: "Who, after all, can seriously contend that a $100,000 donation does not alter the way one thinks about – and quite possibly votes on – an issue?"[8] What is more, the Court cited evidence in the record linking large-dollar contributions to parties with "manipulations of the legislative calendar, leading to Congress's failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation."[9]

What is true with respect to large-dollar contributions to parties would be equally or even more so with respect to large-dollar contributions to political committees. The same improper motive would underlie many such contributions. The same improper effect would result from such large-dollar gifts. And the public's business would be just as improperly derailed by officeholders acting "not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder."[10] As the Supreme Court itself realized in *McConnell,* once cut off from the ability to make large-dollar contributions to political parties, influence-seeking donors would turn to the next-best source, which would be political committees designed to secure the election of candidates. Consequently, "federal candidates would be just as indebted

---

[7] Slip op. at 37.
[8] Slip op. at 39 (quoting former Senator Alan Simpson of Wyoming).
[9] *Id.* at 40.
[10] Cite.

to these contributors as they had been to those who had formerly contributed to the [political] parties."[11]

Large-dollar donations to issue-focused groups are a different story. Money given to such a group does not directly benefit a federal candidate in the same way as money given to a political committee that exists to help that candidate win the election. This is true even if the issue-focused group does spend a significant portion of its funds to promote the candidate's election and, if the issue-focused group is a large one with considerable financial assets, this "significant portion" amounts to a large sum of money in absolute terms (for example, several million dollars).

Money given to the issue-focused group serves the group's ideological agenda generally. The group may use this money on election-specific activities, to be sure, but the group may also use this money on other ways to further its issue-focused mission – ways that are unrelated to elections specifically. An environmental group, for example, may spend the contributions it receives on a public awareness campaign designed to highlight the threat of global warming. This public awareness campaign may occur in an "off-year" during an election cycle (1997, 2001, 2005, etc.), and it may never mention the name of any politician. Large-dollar contributions to the environmental group that are used to pay for this kind of public awareness campaign quite obviously do not present the same risk of producing beholden officeholders as contributions to a political committee.

---

[11] *Id.* at 57.

The same point is true with respect to issue-focused groups, like our hypothetical Citizens for a Better America, that devote themselves to a wide spectrum of political issues. Large-dollar donations to CBA might be used for a public awareness campaign designed to highlight the plight of the "working poor" in America today, urging that these fellow Americans deserve better. This public awareness campaign might be unconnected to any election and omit references to any politicians, incumbent or otherwise. Obviously, large-dollar donations used for this purpose raise little or no risk of corrupting any officeholder.

When a donor gives a large contribution to an issue-focused group to use in whatever way the group thinks will best serve its ideological agenda, the donor does not know whether the group will use it for something like the public awareness campaigns just described, which are unconnected to elections, or instead will use it in elections-specific ways to promote candidates who support the group's ideological mission. Likewise, when a donor gives this kind of unrestricted contribution to an issue-focused group, a candidate cannot presume that the contribution was intended to benefit his election campaign, and this is true even when the group uses the contribution to promote his election. Accordingly, unrestricted contributions to an issue-focused group – even in large amounts – are not an efficient means for donors to signal their support for candidates, or for candidates to recognize their biggest financial backers. The connection between the contribution and the campaign spending is too diffuse.

To be sure, if a donor gives a large sum of money to an issue-focused group *specifically for the purpose of spending that money to support the election of a candidate who agrees with the group's ideological goals*, this kind of "earmarked" contribution raises the same risk of improper influence over the candidate as a contribution to a political committee that exists to promote that candidate's election. For that reason, an issue-focused group receiving such earmarked contributions should be required to put them in a separate account subject to the same regulations as contributions to a political committee, including caps on the amount an individual may give for such election-specific purposes.[12] But with respect to unrestricted contributions to an issue-focused group, they should remain uncapped in the amount an individual may give, and the issue-focused group should be free to spend this money in any way that serves its issue-focused agenda, including on election-specific activities (so long as those election-specific activities do not become so large as portion of the group's endeavors as to convert the group into a political committee, having influencing the election as its primary purpose).

It is not that unrestricted gifts to issue-focused groups raise no risk of improper candidate indebtedness at all. If an individual gives $10 million to Citizens for Better America to spend on its anti-poverty agenda as it sees fit, and CBA having an annual budget of $15 million spends $5 million on election-specific activities to support a particular Senate candidate who shares CBA's vision for an economically fairer America, it is indeed possible that the candidate will feel indebted to the individual who single-handedly provided two-thirds of CBA's annual

[12] cite to current FEC rules on such earmarking.

budget. Even so, this individual's support for the candidate's campaign is less direct – and therefore presents less risk of improper indebtedness – than if the individual gave $5 million to a political committee whose reason for being is to promote this candidate's election. In this latter situation, the individual gives the $5 million gift knowing that it will be used to promote the candidate's election, and the candidate knows that the individual knew this when giving the gift. The opportunity for an improper understanding between the donor and the candidate, where the donor gives with the expectation that it will produce favors in return and the candidate recognizes this expectation and feels obligated to reciprocate – is much more salient in the case of the large-dollar donation to the political committee than in the case of the large-dollar donation to the issue-focused group.

Not only are the risks of improper indebtedness greater with large-dollar gifts to political committees than (unrestricted) large-dollar gifts to issue-focused groups, but also the donor's First Amendment interests in giving the donation are somewhat more diminished. When donating to a political committee, the donor has only the specific First Amendment interest in contributing to an organization that seeks an electoral result. It is not that this interest counts for nothing. As the Supreme Court has recognized with respect to donations to political parties or to a candidate's own campaign committee, an individual citizen does have a First Amendment interest in contributing to organizations intent on winning elections.[13] But as the Court has also recognized, that First Amendment interest is less weighty than an individual's interest in either undertaking one's own personal political

[13] Cite.

activities or contributing to an organization that engages in a broader political mission that just seeking specific electoral results[14]. Moreover, this First Amendment interest in contributing to an organization that seeks a specific electoral result is largely (although not completely) satisfied by permitting the individual to make a contribution to the organization up to a certain generous, but not enormous, amount – for example, $5000 per year, as currently law provides. An individual who contributes $5000 to a political committee dedicated to electing a particular candidate to the Senate is able, through that contribution, to express support for the political committee's electoral objective, just as the individual is by giving $2000 directly to the candidate's own campaign. But any contribution to the political committee larger than $5000, while indicating only increased levels of support for the candidate's campaign (depending, of course, on the donor's overall available wealth), and thus adding relatively little on the First Amendment side of the equation, raises the risk of improper influence because of its increased size. Thus, permitting individuals to give $5000 to political committees enables them to express support for a candidate's election without threatening the integrity of the electoral process in the same way does permitting individuals to give $2000 to the candidate's official campaign committee.

But a rule that limited individuals to giving $5000 per year to issue-focused groups would be far more burdensome on an individual's First Amendment interests. It would curtail not only an individual's ability to express support for a candidate's election but also – and far more broadly – an individual's ability to

[14] Cite.

express support for ideological causes in general. If limited to giving $5000 a year to Citizens for a Better America, or Citizens for a Cleaner Environment, or Citizens for Gun Control, the ability of citizens to participate in political causes would be radically (and unjustifiably) restricted. Even if the rule were that these issue-focused citizen groups could not spend funds for election-specific activities unless those funds were raised in amounts not exceeding $5000 per gift (although these groups could use larger gifts for other non-electoral activities), the consequence would be too great a constraint on First Amendment freedoms. Individuals give to such issue-focused groups with the expectation that these groups will use these gifts in ways that best served their shared ideological objectives, and if these groups were not permitted to use these gifts for specifically electoral activities when doing so would best serve the group's ideological mission, then the ability of individuals to promote that ideological mission would be substantially curtailed. When the risks of candidate indebtedness from unrestricted donations to issue-focused groups is attenuated, it is too much of an intrusion on First Amendment to constrain such unrestricted giving and its use by these groups.[15]

By contrast, as we have seen, with respect to large-dollar gifts to political committees, the risks are much greater and the extent of the constraint much less. Accordingly, contributions to political committees should be treated under the First Amendment in the same way as contributions to political parties and candidates'

---

[15] If these citizen groups organize themselves as corporations, then the relevant considerations are different. Even so, if as non-profit corporations they refrain from accepting contributions from business corporations or labor unions, then presumably under *MCFL* they could not be subject to rule that requires them to spend for their election-specific activities only contributions limited to $5000 in amount.

campaign committees. Political committees, like these other election-focused organizations, exist to win elections. Therefore, gifts to them are necessarily election-specific in nature. These gifts may be limited in amount, in the interest of protecting the integrity of the electoral process from the direct and real threat that these election-specific gifts will secure improper influence over elected officeholders, without imposing excessive burdens on the ability of individuals to participate in political causes.

Indeed, it is precisely because we have already determined that individuals should have an unlimited right to give unrestricted funds to issue-focused groups that gives us ground for concluding that limits on contributions to political committees will not excessively burden First Amendment freedoms. Individuals are free to give as much as they wish to Citizens for a Better America, or comparable issue-focused groups, and these groups are free to use these unrestricted gifts to further their ideological missions. These First Amendment freedoms give individuals ample opportunities to associate together in political causes, including election-specific activities that further their shared ideological objectives. Given these robust associational freedoms, telling individuals that they can give only $5000 per year to political committees organized specifically to promote the election of candidates, just as they can give only $2000 per year to a candidate's official campaign committee, is not unduly restrictive. They still have the freedom to give to the election-specific organization up to the (rather generous) dollar amount, and their inability to give larger amounts to these election-specific organizations is

justified by the distinct and direct dangers of candidate indebtedness that result from large-dollar gifts to organizations devoted specifically to achieving election victories.

II. The "Major Purpose" Test as the Constitutional Dividing Line

Given the crucial difference between political committees and issue-focused groups, it is essential that there be a clear and principled test for distinguishing between these two categories. If a group does not know to which category it belongs, there is the chance that it could be deemed a political committee – subject to the extra regulatory constraints upon political committees, including the $5000 limits on the contributions it receives – when it intended instead to operate as an issue-focused group. The Federal Election Commission is currently considering rules that would specify when a group will be classified as a political committee, and it is important that the FEC adopt the correct set of specifications, both to protect issue-focused groups from erroneous classification as political committees and, at the same time, to correctly classify as political committees those groups that need to be regulated as such.[16]

The basic criterion of this dividing line has already been articulated by the Supreme Court. It is the "major purpose" test set forth in *Buckley v. Valeo* and subsequently referenced in *MCFL*. Under this test, a group is a political committee

---

[16] See, supra, n.2.

if its "major purpose" is to promote the election or defeat of a candidate for federal office.

Questions, however, inevitably arise concerning how to implement this "major purpose" test. How does one know whether a group has influencing a federal election as its "major purpose"? Must a group spend a *majority* of its efforts on this objective, or would a *plurality* suffice? May a group have more than one "major purpose," with something other than influencing elections being its *primary* purpose, and yet still have influencing elections as one of its "major purposes," so that the group falls within the category of political committees subject to the extra regulations applicable to such committees? The Supreme Court has never had occasion to answer such questions, but the reasons for distinguishing between political committees and issue-focused groups – including the relevant constitutional considerations – suggest answers to these questions.

The major purpose test should restrict itself to identifying whether the *primary* purpose of an organization is to influence a federal election. The reason is that the category of political committees should be confined to those groups that are devoted *primarily* to achieving the election or defeat of federal candidates. If the designation of being a political committee were to attach to groups devoted significantly but secondarily to influencing federal elections, then this designation would inappropriately capture issue-focused groups that seek to influence federal elections as a secondary objective ancillary to their primary ideological mission.

For this reason, it would be wrong for the FEC to set an absolute dollar figure – for example, $1 million – and say that any group that spends more than this amount per year on election-specific activities has influencing elections as a "major purpose," regardless of how much money the group spends on other non-electoral activities. To be sure, spending $1 million (or more) on election-specific activities is a significant sum – and will get the attention of the candidates in the race – but this $1 million expenditure may actually be a fairly modest portion of the organization's overall annual budget. A large environmental, civil rights, or other issue-focused group might spend ten or more times that amount on non-electoral ways to achieve its ideological agenda. Just because in absolute terms it spends a large sum of money on election-specific activities does not convert it into an election-focused political committee or require that it be treated as such. (Again, unrestricted gifts to an issue-focused group that spends most of its money on issue-focused activities unrelated to elections do not raise the risks of corruption associated with large-dollar gifts to election-focused political committees.) Thus, only if election-specific activities are the *primary* use to which a group puts its available resources should the group be classified as a political committee.

It is possible that a group could spend more on election-specific activities than other category of spending, and yet this election-specific spending still be less than a majority of the group's total spending. For example, a group might spend 40% on election-specific activities, 35% on non-electoral public awareness campaigns, and 25% on "public interest" litigation that promotes its ideological

mission – counting only its programmatic activities and putting aside administrative and other basic operating expenses. Under a plurality test for measuring a group's primary purpose, this group might be considered a political committee, since it spends more on election-specific activities than on any other particular category of programmatic activity.

Yet to employ such a plurality test would be out-of-step with the basic reason for distinguishing between political committees and issue-focused groups in the first place. The designation of political committee is supposed to be reserved for only those groups that have as their main objective the election or defeat of a federal candidate. The aforementioned group that hypothetically spends a plurality of its funds on election-specific activities is better characterized as an issue-focused rather than election-focused group. Yes, it spends the largest share of its resources on election-specific activities, rather than public awareness campaigns or public-interest litigation, as the best means to achieve its issue-focused agenda, but it still has an ideological objective rather than an electoral objective as its central mission. The category of political committee should be confined to those organizations that devote a majority of their programmatic spending on election-specific activities. That way the "major purpose" test will capture within this category those groups, but only those groups, that have influencing elections as their main objective. (Of course, if a group publicly acknowledges that its main objective is to influence a federal election, that self-declaration should suffice to categorize the group as a political committee without regard to its actual spending practices. An examination

of a group's actual spending practices is necessary only with respect to those groups that deny that influencing federal elections is their main purpose and yet their activities belie their denial.)[17]

Thus, a majority-of-programmatic-spending test, or what one could call the "50 percent rule," is the best means of implementing the dividing line between election-focused political committees and issue-focused ideological groups. Like any other bright-line test, it is not absolutely perfect. It will classify as political committees some groups, just above the 50 percent threshold, that are relatively unlikely to present the same risks of candidate indebtedness as a group that devotes 100 or 90 percent of its programmatic spending to election-specific activities. Likewise, it will fail to classify as political committees some groups that lurk just below the 50 percent threshold and whose non-electoral spending is just a camouflage for their primary electoral mission, which large-dollar donors seek to exploit in an effort to secure improper influence over the candidates benefited by these substantial electoral activities.

But no other rule can avoid such imperfections. Even some large-dollar contributions directly to a candidate's official campaign committee will be "pure of heart," given solely because of the donor's ideological agreement with the candidate and without any expectation of improper favors in return. Likewise, even independent spending by a wealthy individual acting alone to promote a candidate may be motivated by the impure desire to secure improper legislative favors for that

[17] I emphasize this distinction in testimony before the Senate Rules Committee on March 10, 2004, concerning the regulation of 527 groups (available at http://rules.senate.gov/hearings/2004/031004_foley.htm).

wealthy individual's business interests. The line between regulated and unregulated uses of an individual's wealth that may have the purpose or effect of influencing a federal election is necessarily an imperfect one. This line must reflect the inevitable balancing of competing considerations, weighing the relative risks of improper influence against the relative burden on an individual's expressive and associational freedoms.

For reasons we have seen, the line that divides an individual's gifts to election-focused groups from gifts to issue-focused groups is a sound one in principle, even though the issue-focused group might use the gift for election-specific activities, just as the individual acting alone might do. Moreover, for reasons we have also seen, this line is best implemented through a fifty-percent rule, which classifies an organization as election-focused when over fifty percent of its spending is for election-specific activities, but not when its election-specific spending falls below this majority threshold. In the main, this fifty percent rule will tend to treat as political committees those groups deserving of that designation because, given their election-specific focus, gifts to them present the greatest risk of improper candidate indebtedness. At the same time, this fifty percent rule will tend to leave in the category of issue-focused groups those that, because of their greater devotion to achieving their overall ideological objectives through non-electoral means, present relatively less opportunity for (and thus relatively less risk of) favoritism-inducing donations.[18]

---

[18] It is possible that the 50 percent could apply to time spent, rather than money spent, by a group to influence federal elections (or both). Yet measuring only the time a group spends, without

One point, however, should be absolutely clear about the implementation of this fifty-percent rule. The set of election-specific activities used to measure whether a group has crossed this fifty-percent threshold should be all those activities commonly undertaken by organizations devoted principally to securing the election of a candidate, and not just a subset of those activities. Thus, for example, as both the Congress and the Court has recognized, political parties intent on winning elections engage in such election-motivated activities as campaign advertisements that promote their candidates or attack their opponents. Likewise, in their efforts to win elections, political parties urge voters to go to the polls and urge citizens to register to vote (so that they can do the same). Indeed, if the record in *McConnell* made one fact clear, it is that political parties do not confine themselves to messages of "express advocacy" (such as "Vote for Smith" or "Vote against Jones") in order to achieve their electoral objectives.

Consequently, in determining whether a particular organization has achieving a candidate's election as its primary purpose, such that it should be classified as a political committee (even though it is unaffiliated with a political party), it makes no sense to examine only whether the organization spends a majority of its resources on "express advocacy" or some other narrow subset of

considering its monetary spending, to determine its major purpose would seem inadequate. The idea that a group could devote most of its money to winning federal elections and still escape regulation as a political committee because it devoted more time to other activities seems contrary to the basic purposes of campaign finance regulation, which is to prevent the use of *money* from corroding the integrity of the election process. Therefore, in fleshing out the details of the 50 percent rule, a determination of how much money a group spends to influence federal elections is an essential component of the inquiry. Moreover, for the sake of simplicity, it makes sense to limit the inquiry to money spent, without regard to time spent, unless and until there develops a regulatory need to put both into the equation.

election-specific endeavors. To do so would be to classify as an issue-focused ideological group, rather than as an election-focused political committee, an organization that devoted a full 100 percent of its programmatic spending on campaign advertisements that support or attack a particular candidate running for federal office. This absurd result – and I use the word "absurd" advisedly – would be to repeat precisely the same kind of mistake that the Supreme Court in *McConnell* condemned with respect to the use of the "express advocacy" test as the sole means of determining whether a political advertisement is election-focused or issue-focused.[19]

Instead, to tell if an organization is a political committee with the primary purpose of promoting a candidate's election (or defeat), one should look to see whether a majority of the organization's programmatic spending is for the same kinds of election-motivated activities undertaken by other organizations, like political parties and a candidate's own official campaign committee, that have winning elections as their central mission. As we have seen, these election-motivated activities include advertising that promotes or attacks a candidate even though it lacks "express advocacy," as well as voter mobilization and registration drives.[20] Classifying a group as a political committee if a majority of its resources is devoted to such election-specific activities imposes no inappropriate burden or risk of unfair surprise on issue-focused ideological groups. On the contrary, any group that spends a majority of its resources on these election-oriented activities is acting

[19] Cite.
[20] I discuss these election-motivated activities and their role in implementing the "major purpose" test in much greater detail in my comments submitted to the FEC. See, supra. n.2.

just like a political committee whose primary purpose is to achieve election victories – and therefore the group should be classified accordingly.

III. The Secondary Purposes of Political Committees

It is not enough to classify as a political committee a group that devotes the majority of programmatic spending to activities designed to influence federal elections. It is necessary also to assure that all donations to the group that are used to advance its primary electoral purpose comply with the dollar limit on these donations (currently $5000 per year, as we have seen).

One might think that enforcing this contribution cap would be a relatively straightforward task: the FEC simply could insist that all donations received by a political committee must be limited to this dollar amount. But problems and complexities have arisen on the supposition that political committees might have secondary purposes other than their primary purpose of influencing federal elections. Perhaps they might secondarily wish to influence *state* rather than *federal* elections. Or, alternatively, they might secondarily wish to advance issue-oriented ideological objectives, just as issue-focused groups have ideological objectives as *their* primary purpose might secondarily wish to engage in election-motivated activities. Either way, the FEC has assumed that political committees cannot be capped in the donations they receive to advance their secondary purposes, even as the FEC must enforce the $5000 cap on the contributions political

committees receive to advance their primary purpose of influencing federal elections. Problems and complexities have especially arisen as a result of the FEC believing that political committees may undertake some activities to serve both their primary and secondary purposes and, therefore, they may pay for these joint-purpose activities with a combination of funds, some of which comply with the contribution caps applicable to primary-purpose activities and some of which do not.

There should be no doubt that Congress could constitutionally limit *federal* political committees – those with the primary purpose of influencing *federal* elections – to receiving only funds that comply with the $5000 cap, just as Congress may limit *national* political parties to similarly capped contributions. It would be questionable whether Congress could impose the same kind of cap on all funds received by a *state* political committee having the primary purpose of influencing state elections. But we need not consider that question, because there would be no need for Congress to impose that kind of across-the-board contribution cap on state political committees, as long as Congress retains the constitutional authority to impose on state political committees the same kind of more circumscribed contribution cap that Congress has imposed on state political parties (and which the Court upheld in *McConnell*). Under this more circumscribed contribution cap, any political committee devoted primarily to securing the election of candidates for state office would need to comply with the $5000 cap only with respect to those activities advancing its secondary purpose of electing federal candidates.

Congress, however, has not adopted the same sort of "soft money" limits on political committees that it adopted for political parties in the Bipartisan Campaign Reform Act (BCRA). Thus, even with respect to *federal* political committees – those having the primary purpose of influencing *federal* elections – it must be acknowledged that they are entitled to receive money not subject to the $5000 cap in order to achieve whatever secondary objectives they might have besides seeking to influence federal elections. Still, it is mistake to think – as the FEC has – that, absent legislation of the kind adopted in BCRA, federal political committees must be permitted to use uncapped donations to pay a portion of the costs of those activities that advance both their primary and secondary objectives.

FECA, as it currently exists, already limits federal political committees to $5000 per donor with respect to donations *having the purpose of influencing federal elections* – in other words, those donations that share the political committee's primary purpose. Presumably, then, any unrestricted donations to a political committee are given with the knowledge of the committee's primary purpose and share that purpose. Money given to a political committee might be specifically designated for some secondary purpose, and set aside to pursue that secondary purpose, but unrestricted donations to a political committee should be deemed as sharing the political committee's primary objective of influencing federal elections – and thus all such unrestricted donations should be capped at $5000.

Similarly, any money used by a political committee to advance its primary purpose was presumably given to the political committee to pursue that purpose,

even if its use for that primary purpose also happens at the same time to advance the political committee's secondary purposes. In other words, unless specifically designated solely to advance the political committee's secondary purposes, money given to a political committee and is used to accomplish its primary objective is being used as intended, whatever else it might also accomplish. Thus, all money that a political committee uses to pursue its primary objective should be subject to the $5000 cap. The upshot, then, is that a political committee can receive specially designated funds for secondary purposes and use those earmarked funds for activities that promote those secondary purposes exclusively. Subject to this narrow exception, however, all money raised and spent by a political committee promotes – and was intended to promote – the political committee's primary purpose and thus should be subject to the statutory requirement that any money given to the committee for this purpose must be capped at $5000 per donor.

It imposes no hardship on prospective donors to deem their contributions to a political committee, unless specifically designated otherwise, as intended to advance the committee's primary purpose. After all, if the donor wishes to pursue some other purpose and wants to do so in a way that is unencumbered by this rule, the donor need only to make the required specific designation or else give an unrestricted donation to a group that is devoted to the purpose the donor wishes to achieve. Remember, here, that by hypothesis the donor wishes to advance some purpose other than the electoral objective that is the political committee's primary purpose. Suppose, for example, that the donor wishes to pursue the ideological

objective of improving environmental protection. Then the donor can give as much as she wishes to the myriad of issue-focused environmental groups that exist to promote this ideological cause, and the group of her choice can spend her unlimited donation to pursue that goal (including by means, if it sees fit, of supporting or opposing the election of specific candidates). If, for some reason, this donor wishes to advance the issue of environmental protection by giving to a political committee that is dedicated primarily to achieving the election of a particular federal candidate, then she may designate the gift as specifically for issue of environmental protection, so that the political committee can set aside this gift to use in ways that advance the issue of environmental protection through non-electoral means. If she so designates, then her pro-environment gift to the political committee may be unlimited in amount. Otherwise, her gift must comply with the $5000 cap applicable to political committees, because she has chosen to pursue her issue-focused goal of environmental protection through an organization devoted primarily to electing a candidate to federal office.

The same point holds true to a donor who wishes to promote a candidate running for state rather than federal office. This donor can give to a *state* political committee to pursue this purpose, without being subject to the special constraints that FECA imposes on *federal* political committees that exist primarily to promote federal candidates. If, however, a donor wishes to promote a state candidate by means of a gift to a federal political committee, then the donor should be expected to specifically designate that the donation is for this purpose, so that it can be set

aside from the money used to achieve the federal political committee's primary objective of electing federal candidates. If the donor does not so designate, then the donation should be subject to the $5000 limit, and no amount beyond that limit should be permitted to pay (even in part) for activities that advance the committee's primary purpose of promoting federal candidates.

Conclusion

There always will be those who are philosophically opposed to contribution limits of any sort, believing instead that disclosure rules should be the only form of campaign finance regulation. The majority of the Supreme Court, however, rejected that position in *Buckley* and rejected again in *McConnell*. Given those precedents, the question is where to draw the line between constitutionally permissible and impermissible forms of contribution limits. For reasons I have articulated, the line should be drawn between election-focused and issue-focused groups, with the consequence that contributions by individuals to the former may be capped, whereas contributions to the latter may not (unless contributions to the latter are earmarked specifically for electioneering purposes).

This line is preferable to one that would leave contributions to election-focused groups uncapped if these groups operate independently from a candidate's own campaign. Although drawing the line in either location involves a balancing of competing considerations under the First Amendment, the balance is better served ultimately if all election-focused groups operate under the constraint of contribution limits, leaving all issue-focused groups fully free to receive unlimited contributions

and to spend them (as they see fit) to pursue their ideological issues even by means of electioneering activities. This line recognizes the distinctive risks of corruption associated with unlimited financial contributions to any group whose main mission is to achieve a candidate's election, yet make sure that public debate on public issues remains entirely unfettered, with participation by individuals and groups limited solely by the extent of their desire to participate.