

**Republican National Lawyers Association
CLE Presentation
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I want to thank the Republican National Lawyers Association for inviting me here today.

Unfortunately, I bring bad news. I'm here before the *Republican* National Lawyers Association. Yet today, prominent *Republicans* are urging the FEC to take actions that could dramatically chill or even shut down this very group. Of course, you're not really their target – you're just innocent victims in a drive-by shooting, as it were. So what is going on?

It's been just three months since the Supreme Court upheld the constitutionality of the McCain-Feingold campaign finance bill, known colloquially by its acronym "BCRA," but it has already become cliché to pronounce at gatherings like this one that we have entered a new era in the regulation of politics. In fact, I think that's true, but perhaps not in the way most speakers mean it.

When others announce this is a “new era,” they are referring to a new attitude on the part of the Supreme Court toward the regulation of campaign finances. It is true that the *McConnell v. FEC* decision demonstrates new acceptance for the regulation of political activity. In *McConnell*, with rare exception, the Court deferred to Congress’s judgment on how to restrict federal political activity. The Court seemed to see little danger that Congressional incumbents might have interests in regulating politics not shared by challengers, other individuals and groups active in politics, or society in general; and little concern about the rights of the vast majority of political donors, who seek only to support candidates with whom they agree.

BCRA abolished “soft money” – that is, money raised outside of federal regulations -- for national party committees; placed numerous restrictions on the fundraising activities of federal officeholders and candidates; and restricted broadcast advertisements mentioning a federal candidate and run with corporate or labor union funds within 30 days of a primary election or 60 days of a general election.

Most scholars and practitioners were startled less by *McConnell’s* result than the ease with which the *McConnell* Court concluded that BCRA’s provisions were constitutionally tolerable. Although directed at laws restricting so-called “soft money” and so-called “issue ads,” the impact of

the *McConnell* decision will be felt in distant quarters. The Court made sweeping claims about the corruption addressed by the law, and broad conclusions about Congress's power to regulate itself. For example, the Court categorically concluded that merely providing a supporter with "access" to officeholders creates the appearance of corruption. According to the Court, to the extent that a campaign contributor receives "access," it may "give rise to the appearance of undue influence." Imagine – a world where supporters get to meet the candidates whom they helped to elect! One wonders with whom the Court thinks politicians ought to meet: Presumably, a random assortment of individuals who worked for their defeat.

In any case, under *McConnell*, political speech now clearly has less constitutional protection than virtual child pornography, tobacco advertising, sexually explicit cable programs, dissemination of illegally received communications, nude dancing, defamation, cross burning, and flag burning.¹ We need not analyze all of these cases here to grasp, intuitively, that something has gone seriously wrong in the Court's First Amendment jurisprudence.

¹ *McConnell*, at 720 (Scalia, J., concurring in part and dissenting in part); *id.* at 730 (Thomas, J., concurring in part and dissenting in part); *id.* at 768 (Kennedy, J. concurring in the judgment in part and dissenting in part).

All this is troubling, and it is new. Still, I see a new era in political regulation for slightly different reasons. Since joining the Commission, and before that during my academic career and when I was politically active personally, I observed that the argument about campaign regulation was a spirited battle. On one side were so-called reformers – maybe better called Utopians -- who believe strongly and sincerely in the ability of the government to enact and enforce regulations that would cleanse politics of special interest influence. These people see self-interested political activity as an impediment to good government, because underneath it all, in their view, policymaking must be an exercise in cold analysis and pure judgments of merit, removed from the passions of politics and the whims of an often ill-informed electorate. For them, the right answer to any question would be obvious, and irresistible, were it not for all these “special interests” – that’s in quotations marks, you know – who don’t see things their way. Thwart the political activity of these special interests, and progress will be inevitable. This is a view of politics that, in this country, can be traced back to the so-called “progressive era,” and the presidencies of Woodrow Wilson and Franklin Roosevelt.

On the other side of the reform debate I observed a group called by a variety of names – not all of them flattering. “Corrupt” and “nihilistic”

would only be a mild start. This group included advocates of a pure laissez faire approach, and many more who saw problems in unfettered campaign activity but still lamented the loss of political liberty, competition, and speech that campaign regulations caused. Implicit in their skepticism about regulating politics was a deeper point, which is that in any policy dispute there may be no objectively “right” choice, or such “right” answers may not be obvious, even to experts. In this view, the “right” answer – and that’s in quotations too, I’d note – may not be so obvious. We – meaning officeholders and other people in government -- may not have the answers or know what to do, and the give-and-take of ordinary politics may be the most legitimate way to come to a decision. Moreover, this group tends to believe that to the extent that we search for that “right” answer, that search will be assisted, not hindered, by political debate and competition.

Of course, some people lined up on the pro- or anti-regulation side for reasons of political gamesmanship rather than philosophy. So, Democrats traditionally sought greater limits on corporate political activity, while Republicans wanted limits on labor unions. But, for the most part, you could generally predict that individuals and organizations that favored free markets, deregulation, and limited government – that is, generally speaking, Republicans -- would advocate limited campaign finance restrictions, and

those that favored a big-government Leviathan -- that is, generally speaking, Democrats -- aligned with the Utopians favoring more invasive restrictions.

Today, it seems to me that the enactment of BCRA, and the *McConnell* decision, has so knocked the wind from the sails of the deregulators that many forget why we fought the fight. It is almost as though the constitutional defenses compromised by that decision were the only rationale for opposing campaign regulation, and that they existed for their own sake, rather than as reflections of wise public policy that the Founders placed in the Constitution. This loss of confidence by those who have favored free political discourse is the new era to which I refer, and the new attitude I think that we, as Republicans, as conservatives, and as people who believe in political liberty, must resist.

With the Supreme Court having decided that it will not be a barrier to the regulation of political speech, many Republicans seem to have decided that the cause of free political speech no longer has value. These Republicans have decided to depart from their usual moorings, and instead are attempting to make aggressive use of the *McConnell* opinion in an effort to obtain short-term political gain. In particular, they claim that the broad scope of *McConnell* requires campaign regulators – that is, we at the FEC –

to regulate and prosecute groups that engage in political activity but had not before been considered federal political committees.

The predicate for this reversal is the rise of so-called “527” organizations, that is, groups organized under Section 527 of the tax code for the purpose of engaging in electoral activity. While some Republicans spent much of the last year looking at hard money fund-raising numbers and gloating over the GOP advantage in that area, the Democrats spent that time carefully, methodically, and skillfully preparing themselves to live with the new law. As has been widely reported in the press, prominent Democrats are now planning to use these groups to pump tens, and perhaps hundreds, of millions of dollars into the 2004 campaign. The response of many Republicans has been to demand that the FEC aggressively regulate these groups – a response often being made with no reference whatsoever as to the Commission’s statutory authority to engage in such regulation. Merely because the Democrats are doing it doesn’t make it illegal. Indeed, the rise of 527s is exactly what Senator McConnell and other Republicans, during the legislative debates over McCain-Feingold, had said would happen – soft money would simply change its address. The Democrats prepared for this. It appears that perhaps some Republicans did not.

I can understand the superficial appeal of now trying to silence these pro-Kerry organizations. In a campaign, to paraphrase the old canard, “any stick will do” to beat your opponent,² and certainly there is some satisfaction in seeing those who supported these speech restrictions being hoisted on their own petard. The problem, as Christopher Hitchens has noted, is that when a man believes any stick will do, he tends to pick up a boomerang.³

I am convinced that if the enthusiasm for regulating these groups is pursued, it will likely come back to smack the Party in the head. We Republicans should be confident that our party has the right ideas, and when we present our platform clearly we win. When like-minded groups register new voters and speak to the people about their agenda, we benefit. Voters aren’t foolish. We should give them more credit for voting wisely, and give our Party credit for having the superior message. We will not win by adopting the big-government-knows-best message of the minority party.

Yes, some extremely wealthy liberals and certain leftist political staffers have rattled sabers about mobilizing anti-Bush legions in November. But we should remain confident that when it comes to a fight on the issues people care about – terrorism, taxes, education, and others -- we have the big

² Charles Hadden Spurgeon, *Notes on Psalm 75*.

³ Christopher Hitchens, *Reply to Letters to the Editor*, *Atlantic Monthly* (Jan./Feb. 2004).

stick already. Let's carry the big stick, not drop it to reach for the boomerang.

Of course, whether I am right or wrong in these political musings, we at the Commission cannot base our decisions on such perceived partisan advantage. Regardless of our personal views, we must follow the law. I am skeptical that the call for additional regulation is supported by BCRA or the *McConnell* decision, so as a lawyer I am skeptical of the pro-regulation argument.

In the landmark 1976 case, *Buckley v. Valeo*, the Supreme Court upheld 1974 amendments to the Federal Election Campaign Act, including provisions that limited all expenditures “for the purpose of influencing any election for Federal office.” Concerned about both vagueness and overbreadth in this provision, the Court, in order to preserve the constitutionality of the statute, interpreted this key phrase to apply only to what became known as “express advocacy,” that is words that explicitly advocated the election or defeat of a Federal candidate, such as “vote for,” or “defeat.” Over the next 28 years, critics of the *Buckley* decision argued that this narrow construction frustrated their efforts to eliminate the “appearance of corruption” in government, and argued that the decision should be overruled. But again and again they lost that argument in the courts.

BCRA, therefore, was an effort to craft a narrow expansion of regulation that stayed within the *Buckley* framework. BCRA built on fundamental concepts in federal campaign finance law, but as I see it, did not change the scope of these concepts, or the framework within which we regulate what were then and are now considered the nonfederal activities of political groups. BCRA does not change the definition of “contribution,” “expenditure,” or “political committee.” Rather, it added new, specific prohibitions on what it defined as “electioneering communications” and “federal election activity.” “Electioneering communications” were narrowly defined as broadcast ads that named a federal candidate within 60 days of a general election or 30 days of a primary, caucus, or convention. Limits on “federal election activity,” or “FEA,” were applied only to state and local political parties, and in certain circumstances to officeholders soliciting funds for other groups. In each case, the terms were narrowly applied in order to avoid the constitutional concerns of vagueness and overbreadth that were set forth in *Buckley*. A plain reading of BCRA does not show that it applies any new restrictions on FEA to independent political groups, yet we hear now that some Republicans demand just such an expansion of the law.

As far as I can tell, nothing in *McConnell v. FEC* changes this, either. The Supreme Court does not - and cannot -- broaden the scope of the statute

beyond what Congress passed and the President signed. I agree that the reasoning of the Court's opinion does strongly suggest that it may not find it unconstitutional if Congress were to broaden the definition of expenditure to include at least some of the activities defined as FEA or electioneering communications. But Congress did not do that, and as a result – even if it were a good idea – the FEC is not required to do so.

To be sure, in a draft rulemaking currently before the public for comment, the Commission asks whether it should apply the law this way. But if we do, I think it will render several parts of BCRA nonsensical. To do so in the manner proposed in these draft rules, I think that we must do violence to the statute. We must eviscerate 2 U.S.C. 441i(e)(4)(B) which allows officeholders to solicit up to \$20,000 from individuals for groups seeking to conduct Federal Election Activities – because if spending or receiving money for FEA made a group into a political committee, one could only accept \$5,000. Why would Congress pass a law specifically allowing an officeholder to solicit a contribution that could not be accepted? Hmm. I realize that the statute didn't go through the usual Committee process, where anomalies are often smoothed out, but that is still a puzzling result. Similarly, we must make superfluous the requirement (2 U.S.C. 441i(b)) that state and local parties use hard dollars for FEA because, if disbursements for

FEA were expenditures, hard money would have to be used anyway. We must render nonsensical 2 U.S.C. 441b, which requires that electioneering communications count as “expenditures” for that, but only that, section of the law, because under the interpretation being urged on the Commission, electioneering communications would already be “expenditures.” All of these oddities are easily remedied, however, simply by recognizing that the statute does not treat FEA and electioneering communications as “expenditures.”

Most of all, to regulate these 527 organizations, we would have to go well beyond the Supreme Court’s understanding of the Act. While I have criticized the sweeping scope of the *McConnell* opinion, the majority did explicitly recognize boundaries to its holding. To quote the Court’s majority: “Interest groups, however, remain free to raise and spend money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications.)”

To get around these problems, some Republicans, in their unholy alliance with the liberal regulators, claim that if a group’s “major purpose” is defeat a federal candidate, it must be regulated. But this is simply not supported by the statute. The phrase “major purpose” does not appear anywhere in the statute, either pre-BCRA or post-BCRA. Rather, the trigger

for regulation is specific activity. To illustrate this point with an example from another part of the law, an ambitious member of the House may have as his major purpose becoming a member of the Senate, but until he spends or receives \$5,000 for that Senate campaign, the law does not consider him to be a “candidate.” Similarly a group becomes a federal political committee for purposes of the FECA only when it has received contributions or made expenditures in excess of \$1,000. Its “major purpose” is irrelevant to that trigger. And both “contribution” and “expenditure” are defined terms under the Act. “Major purpose” comes into play only as a minor judicial gloss on the Act, found in *Buckley* and another case, *Massachusetts Citizens for Life*. It is not a separate basis for regulation. Quite the opposite, it was used in those cases to limit the scope of regulation even where a group otherwise meets the “contribution” or “expenditure” threshold.

Think about it, after all. How would we even determine “major purpose” in most situations? By pronouncements by the group? By whom? The President? Chairman? A majority of the board? Would it matter when they were made? What if later repudiated? Once this became the standard, how hard would it be just to avoid such “smoking gun” declarations? Others suggest we determine “major purpose” as a percentage of the group’s activity. So under this theory, if a group just raises and spends \$5 million to

attack the President, it is a political committee and limited, but if the group first spends \$6 million to generally promote legal abortion, higher taxes, and federal entitlements, then another \$5 million to attack the President for opposing abortion, higher taxes, and federal entitlements, it is OK. Another way to look at this theory: Planned Parenthood can spend unregulated funds to criticize the President; Americans for a Republican Majority PAC cannot spend unregulated funds to defend him.

To be fair, it is not just some Republicans who stand upon shifting sands. I must also note the shift in the rationale being offered by those reform groups now pressing for these rules – a shift that may bring back into play constitutional considerations. The argument being made now by some reformers is simply that outside groups must be regulated because they are spending money to influence an election, and that they should have to operate under the same rules as candidates and parties. But that theory – that interest groups must be treated as parties - was specifically rejected in *McConnell*, in the passage I just read. Still, the reformers press on. Senator McCain recently argued, “[t]he law prohibits anyone involved in partisan political activity to be outside the rules.” That, however, is simply not true as a statement of the law. The law clearly does not require everyone involved in partisan political activity to register as a “political committee”

under the Act. Take, for instance, the Republican National Lawyers Association. This is a partisan group that engages in partisan political activity. Yet it clearly is not a federal political committee, as defined by the law. It has never been defined as such. But as I noted at the outset, and let me point this out very clearly, if the FEC adopts the approach being urged upon it, the RNLA will be classified as a federal political committee, and unable to receive any corporate or union contributions, or personal contributions in excess of \$5,000, including contributions the organization has accepted for sponsoring CLE conferences such as this.

This new theory raises constitutional questions because the constitutionally permissible basis of regulation, according to the Supreme Court, is the “corruption” or “appearance of corruption” that takes place when officeholders raise funds or give access to campaign donors. The purpose of BCRA, most reformers had therefore argued, is to sever the link between officeholders and large contributions. But that link does not exist in the independent activity of 527 organizations, and thus regulation would be constitutionally suspect. There is no claim that the groups in question are contributing soft money – or hard money, for that matter -- directly to candidates or parties. There is no claim that they are selling access to officeholders, or that officeholders are soliciting the funds for them. There

is no claim that they are coordinating their activities with officeholders.

There is no claim that these groups are established, financed, maintained or controlled by officeholders or parties. To the extent anyone is making such claims and they are true, then the activity of these 527 groups is illegal regardless of any FEC rulemaking, and it is not necessary to redefine what constitutes a political committee for their activities to be regulated.

BCRA was not intended to get all money out of politics, as longtime supporters of the legislation such as Thomas Mann and Norman Ornstein reminded us in a recent op-ed in the *Washington Post*. They wrote, “Reformers did not want to drain money out of politics – and they didn’t....” “The new rules... simply apply to outside groups and parties the same standards that apply to candidates and political action committees *when it comes to a narrow group of electioneering broadcast ads.*” (emphasis added).⁴

Our obligation at the Federal Election Commission is to enforce the law. It is not to enforce the law as we wish Congress had written it, or as some members now wish that they had written it, or now claim to have written it, or as seems to serve the interests of a particular campaign.

⁴ Thomas E. Mann and Norman Ornstein, *So Far, So Good on Campaign Finance Reform*, Wash. Post, Mar. 1, 2004, p. A19.

I urge Republicans to embrace their deregulatory roots in the area of campaign finance regulation. Our natural skepticism for such limits fits our legacy, and our agenda, much better than the pro-regulatory departure I've described. As the party of freedom and limited government, Republicans thrive when the intellectual climate supports more freedom, personal responsibility, and smaller government. Campaign finance reform passed Congress, and was upheld by the Supreme Court, because groups hostile to freedom spent hundreds of millions of dollars to create an intellectual climate in which free political participation was viewed as somehow threatening to democracy. (I note that none of those groups will be limited regardless of what the FEC does on this matter). If we hope to ever restore these lost freedoms, we need to press the case that political speech is good and proper – even when remarkably unfair in its allegations, even when funded by George Soros. We should not contribute to this anti-freedom, pro-big government intellectual environment for some perceived, but wholly uncertain, political gain.

To close, let me quote a passage that Ronald Reagan wrote to a campaign supporter in 1979 – 25 years ago:

Maybe one day some sanity will return to government, and some of the more repressive campaign

laws will be repealed. Experiencing them from the inside as a candidate, I can assure you they are not helpful to the democratic process – namely in allowing the candidates to get their message to the greatest number of people.⁵

That, and not statutorily questionable, aggressive expansion of the regulatory regime, should be our objective.

Thank you for your time and attention.

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⁵ K. Skinner, et al., *Reagan: A Life in Letters*, at 274 (Free Press 2003).