The Impact of *McConnell v. FEC* on Corporate Political Activity

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I want to thank the American Conference Institute for inviting me to speak today on the impact of *McConnell v. FEC* on corporate political activity.

Now and then the Supreme Court issues a decision that cries out to the public, "We don't know what we're doing!" *McConnell* is such a decision. I hasten to add that one needn't disagree with *McConnell* to reach this conclusion. One can agree with the results in *McConnell*, and consider the opinion to be well reasoned and persuasive, yet recognize that something has gone seriously wrong in our First Amendment jurisprudence. For if it was unclear before, it is now a fact that the court gives less Constitutional protection to the right to criticize the voting record of an incumbent congressman close to an election, than it does to virtual child pornography, cross burning, sexually explicit cable television programming, topless

dancing, tobacco advertising, flag burning, defamation, and the dissemination of illegally acquired information.[1]

McConnell is, quite obviously, an extremely important case. It not only reshapes the landscape of campaign finance law, but it may have serious ramifications across the entire scope of First Amendment law. The results of *McConnell* can be praised or lamented, depending on one's perspective. But besides the incoherence it illustrates in the Supreme Court's overall First Amendment jurisprudence, what most leaps out of the majority opinion, to me anyway, is its lack of consideration for the real world application and consequences of the law. This lack of pragmatism was betrayed early, at oral argument, when Justice Breyer literally waved off attorney Bobby Burchfield's point that under BCRA, billionaire George Soros could continue to spend millions to influence elections, even as, that very day, the headlines told of Soros's plan to spend such millions. This lack of real-world perspective permeates the opinion.

Thus, the Court majority waxed on about the "special expertise" of members of Congress, even as, a year after the law took effect, members of Congress were asking the FEC to explain the law. The Court spoke of Congress's "steady improvement of the national election laws," leaving it to

[1] See *McConnell* at 720, 730, 768 and cites therein.

the dissent to point out that at every step the law favored incumbents over challengers. Again and again the Court simply assumed to be true, as matters of Constitutional law, precisely that which was challenged and which it was asked to consider. For example, the Court began its discussion of the constitutionality of contribution limits by declaring that such limits "tangibly benefit public participation in political debate," and thus there is "no place" for a presumption of unconstitutionality. Of course, that's what the challenge was all about. And the court, perhaps naively, described BCRA as a law "designed to purge national politics of … the pernicious influence of 'big money' campaign contributions;" something I now repeatedly hear reformers argue was never its intention.

But if BCRA does not purge national politics of big money, what does it do? Primarily, it rearranges political power, benefiting some and harming others. And that is both the good news and the bad news for corporate America, because BCRA doesn't affect all corporations equally.

The question for today is: what has changed in the world we live in as far as the regulation of corporations in politics? The details of corporate compliance, I think, you will find in the many excellent panels and workshops of this conference. But as for the big picture, I submit to you that, for large corporations, life will continue more or less as before, and

such corporations will have more political influence; but smaller businesses will find themselves at a disadvantage due to the Court's affirmation of McCain-Feingold.

McConnell certainly has the corporate world's attention. It seems like I'm getting invited to address a conference such as this every week. But why? What is it about the decision that makes things look different than before?

It cannot be the core proposition that corporate political activity can be regulated, or even banned in some situations. Since the Progressive era the federal government and many states have enacted such laws. The Court, with some exceptions, has upheld these limits. To be sure, the law is a bit of a patchwork, in which the government regulates contributions and communications to the public, but leaves corporations free to sponsor PACs, to communicate with certain employees and members, and - at least I think this is still constitutionally protected - to advocate regarding ballot measures. But nonetheless, the basic idea of limiting speech by citizens who have organized themselves in the corporate form is not new.

Perhaps the Court's embrace of new speech limits was surprising. The Court in *McConnell* seemed at ease with the broad prohibition on electioneering communications, and the notion, which it expressed

explicitly, (at 124 S. Ct. 694) that the ability to speak through a PAC is "constitutionally sufficient" for any corporation.

Perhaps people were surprised at the Court's contention that a PAC's funds – raised from individuals for political purposes, were somehow the "corporation's," and that PAC activities satisfied whatever rights the corporation has in the political realm. The notion that management is free to make decisions for the corporate shareholders regarding contributions to the symphony, or to the Boy Scouts, or to 501(c) groups with political agendas – such as for example, the pro-campaign finance regulation Brennan Center for Justice, which has received support from companies including Coca Cola, Phillip Morris, and Enron -- but that the corporation cannot speak in a unified voice on candidates, is somewhat puzzling. I almost want to ask the Court what part of the phrase "separate segregated fund" they did not understand.

Maybe it was surprising to see a Court that in modern times has been extraordinarily solicitous of the freedom of expression -- especially politically charged expression such as cross burning and simulated child pornography – be so facile in concluding that incumbents could restrict criticism of officeholders about issues they support or oppose. Also surprising perhaps was the fact that Congress picked some but not other

modes of speech to restrict, and this did not raise suspicions among the Justices in the majority of an ulterior purpose.

Whatever the explanation, the conventional wisdom in many circles is that BCRA and the *McConnell* opinion are bad news for corporate political activity. This is because the Court affirmed the law's restrictions on electioneering communications paid for with corporate funds – those broadcast ads that run within thirty days of a primary or caucus, or sixty days of a general election, featuring a clearly identified federal candidate and targeted to the candidate's voters. As you no doubt know, electioneering ads may no longer be funded by corporate general treasury funds.

[PACs can run them, of course, but could also use their hard-earned "hard" dollars for explicit campaign advocacy. People generally think that given the choice, PACs would use explicit language in advertising, and there wouldn't be much call for issue advertising. Why would a PAC say indirectly what it may say directly?]

The other provision of the law that hurts corporate political activity, arguably, is the law's ban on soft money to national parties. Corporations may no longer give nonfederal funds to the national parties for use in party-building activities, or for party "issue advertising."

As an observer, I am not sure this conventional wisdom - that corporate influence will suffer - is correct. Rather, I see a world in which large corporations benefit, while small corporations and membership organizations lose influence.

Let's start by thinking about what it means to talk about the impact of BCRA on "corporate political activity."

Professor Lillian BeVier of the University of Virginia points out that according to the IRS, as of 1999:

> There were about 948,000 wholesale and retail trade corporations with assets under $10 million, but only 684 with assets over $250 million; there were about 657,000 professional, scientific, and technical services corporations with assets under $10 million, but only 163 with assets over $250 million. *(Source:. U.S. Internal Revenue Service, Statistics of Income, Corporation Income Tax Returns, annual (No. 709: Corporations by Asset-Size Class and Industry: 1999)*

Ten million dollars in assets, frankly, is not that much. In places like suburban Washington DC, a company with some equipment, vehicles and a building could reach that level without much difficulty. Remember, we're talking just assets, not net worth. I would venture a guess that there are

individuals in this room with personal assets of $10 million. So that kind of business is hardly in a position to exert undue political pressure in society.

[Among nonprofit corporations, the numbers are even more striking. Bevier noted that:

> *In 2003, there were about a million registered nonprofit organizations with total assets of less than $100,000 and only 3,844 with assets more than $100 million.* (Source: Internal Revenue Service, Exempt Organizations Business Master File (Nov. 2003), The Urban Institute, National Center for Charitable Statistics, http://nccsdataweb.urban.org/)*]*

Remember, the corporate contribution and expenditure ban in federal law applies equally to small and large companies, and with rare exceptions to nonprofit and for-profit entities alike. To suggest that it impacts all these types of companies in the same way is, I think, clearly incorrect.

There are reasons to think that the new law provides advantages to larger companies who already have the trappings of a presence in Washington, such as government affairs representatives and PACs. Most obviously, there was evidence that some large companies felt strong political pressure to make soft money contributions to political parties. Of course

corporate America typically devotes about 100 times as much money to charities as it does to political contributions, so I think the alleged agony that these solicitations caused corporate managers may be overstated.

Nevertheless, I don't doubt that it was sometimes true, and that such pressure is not a good thing. I think it is fair to say that the companies likely to feel targeted in this fashion were not small corporations, but rather Fortune 100 types. These large corporations will no longer be subject to solicitations from both sides for party committees and nonfederal leadership PACs. Big corporations were, perhaps for this reason, always more likely to support BCRA than smaller companies.

In terms of political influence, the new limitations on electioneering communications run within 60 days of an election will probably have little effect on corporate America. Few for-profit corporations ever engaged directly in such issue advertising. Rather, these ads were run almost entirely by the political parties and by 501(c)(4) membership organizations, such as the NRA and the Sierra Club. Thus these provisions do relatively little to restrict the political influence of big business, but do restrict the activity of many membership organizations. They also reduce the relative reliance of candidates on political parties, which have traditionally played the role of brokers among interests such as large corporations. These party committees

are now, to a typical campaign, little different than any corporate PAC. Correspondingly, then, large corporate PACs are more important than they were before. Personally I regret these developments. I believe that robust debate from a variety of sources is much healthier for our democracy. But that is not the way the sponsors of BCRA saw the issue, and the Court deferred to their alleged expertise.

The increased importance of hard money, including PAC contributions, should help old-line, traditional companies – publicly held corporations with large numbers of white-collar employees. First, as we are already seeing, the ability of many managers in such companies to solicit individual contributions from the names in their rolodexes is becoming increasingly important in campaigns. Thus, support from corporate CEOs and high level managers is as important as ever. Additionally, PAC contributions are more important than before. Large companies have large solicitable classes who can be approached for PAC contributions. They are also in a good position to devote corporate resources to support of PAC activities. They have large classes of shareholders and employees to whom the corporation can advocate directly.

The legal hazards that corporations and PACs face in this area are ones that most experienced PAC directors and treasurers understand already. Most of them were already violations before BCRA. To the extent the law has changed, these large corporations are well equipped to adapt.

Indeed, generally larger corporations have the ability to learn how to comply with, and manipulate, the complex regulations that govern PAC administration and corporate political activity generally. They can afford the expertise to stay within the confines of our regulations, and defense lawyers who work with regulators to settle those transgressions that occur. With that assistance, they are better able to manage the byways of the Commission's arcane facilitation regulations for instance, so that activities featuring candidates and officeholders at corporate offices do not trigger impermissible corporation contributions. They can afford employee education and policy manuals. Corporations with ample compliance budgets are also better equipped to file reports electronically – required of committee with activity exceeding $50,000 in a calendar year. Generally, the more complex the regulatory system, the more large corporations benefit at the extent of small corporations (and grassroots organizations). And BCRA is nothing if not a complex system, grafted onto an already complex Federal Election Campaign Act.

Thus the effect of McConnell on larger companies is pretty straightforward. Corporations interested in being involved in federal elections must look to PACs, and direct communications to shareholders and others in the exempt class, to make that happen. Large corporations are well prepared and well structured for that role.

I've discussed how I believe *McConnell* affects larger companies, but how does it relate to smaller companies? The future there seems more cloudy. Whatever the result, given the sheer numbers of small corporate entities that I mentioned earlier, BCRA's impact on them is worth thinking about.

In my experience, small companies face greater risks when considering political involvement, and also face several inherent disadvantages in a complex regulatory scheme such as we have. These smaller capitalized companies probably do not have established government affairs representatives or lobbying programs, and may not have PACs. Even if they do have PACs, they lack substantial numbers of executive and administrative personnel or individual shareholders to solicit for a PAC, so their PACs are smaller and less influential. Consider, for example, a typical small manufacturing or retailing corporation, closely held, with 150 employees. It is likely that the organization's solicitable class will be fewer

than a dozen people. It simply will not have the numbers to participate meaningfully through a PAC. In the past, however, the company, or its owner/CEO, might have been able to make a significant soft money contribution.

In the new, hard-money world such owners and executives may be interested in finding ways to contribute to candidates and party committees, and to form PACs, but will usually lack the experience to avoid common pitfalls. In enforcement matters at the FEC, it is not uncommon to see smaller companies where executives reward contributors to the company PAC, or executives who write a personal check at a fundraiser, with bonuses or reimbursements -- an obvious no-no that is routinely detected internally in a larger, more experienced company. Importantly, when such conduct is "knowing and willful," it may trigger criminal sanctions, which were enhanced in BCRA. Also, executives at these smaller companies may decide to do volunteer work for a campaign at the office, unaware that federal laws contain specific rules on how this may be done. New PAC treasurers who wait until the last minute to master the Commission's filing system can be, and often are, fined when reports are hung up on computer glitches and are filed late. We also see individuals with subchapter-s corporations use those corporate funds in campaigns, not understanding that

the Commission views such activity as a corporate disbursement, regardless of whether that person could have taken a distribution and make the same expenditure legally from his own funds.

The ban on soft money also may disproportionately affect small companies. Since these entities do not have extensive solicitable classes of employees and shareholders, they cannot speak with much force through a PAC. Before, if an issue in a campaign was important enough, the company CEO could use the treasury to speak directly to voters, or to contribute to an interest group that might use the funds for an issue campaign. No more. Alternatively, he could make a corporate or large personal contribution to a party committee. To the extent large contributions really granted "access," -- a key issue for the *McConnell* majority -- such bought access would matter most not to the Fortune 500, with their big lobbying budgets and hired guns, but to the small business owner, whose personal contribution of $50,000 or $100,000 to the party might get him a few minutes face time with a senator at a reception. For the most part, those avenues are no longer available. In other words, if soft money was rewarded with access - and certainly there is evidence that it was - this was of less benefit to the AT&Ts and GEs and GMs of the world, than to the small company. Even if the predicate of BCRA is accurate, the fact is that AT&T, GE, and GM will be heard

regardless. It is the small business voice that is more likely to be excluded from the system.

This last point is worth exploring further. Let's take a moment to think about how large corporations wield, or attempt to wield, political influence. Campaigns and elections are not the be-all of any large company's involvement in government or advocacy. Corporations spend money on lobbying, too – in fact, considerably more on lobbying than on hard and soft money expenditures combined.

According to *Political Money Line*, in the 2003-04 cycle so far –

- The health care sector has spent almost $147 million on lobbying but only about 5% of that, or $8 million through PACs to candidates.
- The finance and insurance sector spent almost $122 million on lobbying but about 11% of that, or $14 million through PACs to candidates.
- The communications and technology sector spent over $120 million on lobbying but about 4% of that, or $5.5 million through PACs to candidates.

You might think the differential is due in part to the fact we are in the middle of the election cycle, and PAC spending could catch up. Not if

history is any indication. In the 2001-02 cycle, the health care industry spent almost $500 million on lobbying but just $26 million through PACs to candidates, or 5% -- and the differences in the other sectors were similarly consistent.

Note further that the health care industry alone spent $500 million on lobbying in the last cycle, whereas total soft money contributions in that cycle, from all industrial sectors, and including all soft money from unions, non-profit advocacy groups, and individuals, was just $496 million.

So large corporations spend far more - about 10 times as much - on lobbying as they do on campaign contributions, soft and hard money combined. At the peak of the Enron scandals, Representative Chris Shays, one of the primary sponsors of BCRA, made, perhaps unwittingly, a most telling point, when he noted that an Enron would always have access, "by the fact of what it is and what it does."[2] Rep. Shays was quite correct. Indeed, I would suggest that it would be legislative malpractice for an elected official to refuse to even hear from such a major employer and economic player. Similarly, Edward Kangas, formerly the head of Deloitte Touche and Chairman of the Council for Economic Development, an interest group made up of America's largest businesses, wrote an op-ed in 1999

[2] Quote from Stuart Taylor, *Cash Cure?,* Legal Times, Jan. 28, 2002, p. 54.

calling for a ban on soft money. Wasn't he afraid that this would cut into the political influence of CED's members? No, wrote Kangas, noting, "We have lobbyists and trade associations, and we provide many jobs, all of which helps us to be heard."[3]

In *McConnell*, the Court majority took the view that Congress could approach the question of undue influence on a piecemeal basis. It was not necessary to address all problems at once, and it was specifically not required that Congress's solution actually have much likelihood of achieving the goal - the prevention of corruption or the appearance of corruption - that gave it its constitutional justification. In that scenario, is it at all surprising that big business seems to have come out with its position enhanced, while small businesses and membership corporations - weaker going into the fight - were nicked harder in the process?

Nevertheless, even big business ought not celebrate too long. An indirect effect of *McConnell* may be worth watching in this area. The *McConnell* majority, as I noted earlier, made much of the idea that "access" is itself a form of corruption. The Court said essentially that federal officeholders' fundraising for party committees could constitutionally be prohibited, because donors obtained access to those officeholders in return

[3] Kangas, Soft Money, Hard Bargains, NYT, 10/22/99, p. A27.

for donations, and with that access could discuss with them the merits of legislation and other government decisions.

> This is what the majority decision in *McConnell* stated:
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> Mere political favoritism or opportunity for influence alone is insufficient to justify regulation. As the record demonstrates, it is the manner in which parties have *sold* access to federal candidates and officeholders that has given rise to the appearance of undue influence . . . It was not unwarranted for Congress to conclude that the selling of access gives rise to the appearance of corruption.
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> 124 S. Ct. at 666.

But wait – what about lobbying? Lobbyists and government affairs representatives make their living in large measure because of "access." Does *McConnell* show a path toward increased restrictions on lobbying? Of course, the court expressed concern about access being "sold," but what does it mean to say access is "sold?" Won't PACs still contribute to candidates? Can't this be interpreted as "selling access?" What about other forms of campaign support? Shouldn't we expect officeholders to grant preferential access to those who have supported their campaigns? If so, isn't the endorsement of a union, with the attendant press coverage and the union's

ability to conduct a get-out-the-vote drive, a form of purchasing access? What if a corporate executive hosts a fund-raiser? Isn't he buying access?

Indeed, isn't lobbying itself a form of access that is unfair, unequally distributed, and that creates an "appearance of corruption?" After all, not everyone can afford a lobbyist, or to pay for their own visits to a distant capital in the hope of getting a few minutes with a congressman. I think it fair to say that the average American views paid lobbying as at least as great a form of "corruption" as ads runs independently of a candidate that mention his voting record within 60 days of an election. To be sure, the right to petition one's government is enshrined in the Constitution, but so are the freedoms of speech and assembly, and yet we have *McConnell*, and a Supreme Court willing to tolerate, as I noted at the outset, greater restrictions on political speech than on topless dancing, tobacco advertising, cross burning, flag burning, sexually explicit cable TV programming, simulated child pornography, defamation, and the dissemination of illegally received communications.

Under *McConnell's* sweeping rationale, is there any particular reason why lobbying should be protected any more than campaigning? I think not. The confidence of people such as the CED's Mr. Kangas, whom I quoted

earlier, that campaign finance restrictions were OK with him because his constituency would always have its lobbyists, may be misplaced.

With *McConnell*, the Court in a bold stroke has changed, at least for the near future, the presumption that speech about issues and candidates was protected from regulation. For the immediate future, until and unless Congress and the Court also decide that the right to lobby - i.e. petition the government for redress of grievances - can and should also be restricted, I expect that the practical effect of BCRA is that big companies will continue to thrive, while smaller businesses will have a tougher time, and the public will, quite rightly, continue to perceive that something is amiss. In short, I think the world of corporate influence will be much the same as it has been – only more so.

[May take questions, time and inclination providing]