

'More Loophole than Law': A Case for the Repeal of I.R.C. § 527¹

Abstract:

This note advocates the repeal of I.R.C. § 527, which provides a tax exemption for organizations involved in election-related activity. The groups which operated under § 527 in the 2004 election include the Swift Boat Veterans for Truth, MoveOn.org, and American Coming Together. The note discusses how § 527 escaped regulation under both the Federal Election Campaign Act of 1971 and the Bipartisan Campaign Reform Act of 2002 (popularly known as McCain-Feingold). It examines the political reasons why the Federal Election Commission has not attempted to reform § 527. As a result, 527 groups have acted largely without federal oversight in the last two Presidential elections. The note argues that the recent activities of 527 groups meet the Supreme Court's evolving definition of corruption. It also argues that, despite the objections of critics of campaign finance reform, the repeal of § 527 would not violate the First Amendment. The note concludes with a discussion of the political realities which will drive the regulation (or repeal) of § 527 in the second Bush administration.

I. Introduction

This paper will analyze I.R.C. § 527, which was passed by Congress in 1975 to provide a tax exemption to organizations involved in election-related activity.² Due to the inertia of legislators and aggressive fundraising of partisan organizations, § 527 has now become the single largest conduit for election-related soft money contributions. In the 2003-2004 election cycle, 527 groups raised and spent over half a billion dollars.³ The groups which flourished under § 527 in the 2004 election are familiar to most voters: MoveOn.org, America Coming Together (ACT), and the Swift Boat Veterans for Truth, to name but a few.

I will argue that Congress should repeal § 527 for three reasons: (i) the Supreme Court has become increasingly willing to view the expenditures of 527 groups as a form of corruption; (ii) since the Court last spoke on § 527, these groups have become more central to the fundraising process, and more unscrupulous in their tactics; and (iii) § 527 has survived as an unintended loophole under not one but two major campaign finance

laws: the Federal Election Campaign Act of 1971 ("FECA")⁴, and the Bipartisan Campaign Reform Act ("BCRA") of 2002⁵, popularly known as McCain Feingold. In order to prevent § 527 from becoming an outlet for the corrupt practices so recently outlawed by the BCRA, Congress should repeal it before the 2008 election.

Any discussion of campaign finance law must begin with a short definition of soft money. The FEC defines soft money as "funds raised and/or spent outside the limitations and prohibitions of the FECA... Soft money often includes corporate and/or labor treasury funds, and individual contributions in excess of the federal limit, which cannot legally be used in connection with federal elections, but can be used for other purposes."⁶ By contrast, hard money is that received and spent in accordance with FECA regulations.

The 1996 election illustrates some of the typical uses of soft money. Both parties spent millions of dollars in soft money on pro-candidate "issue ads", which were not subject to FECA simply because they avoided an explicit "electioneering message."⁷ In addition, the national parties took advantage of the fact that while they could only allocate 35% of the cost of issue ads to soft money accounts,⁸ most states could allocate a far higher percentage--⁹ up to 67%, for example, in the case of Ohio.¹⁰ The DNC saved some \$8M in hard money between 1995-6 by transferring funds to the state parties to run ads promoting President Clinton.¹¹

FECA and the Origin of 'Issue Advocacy'

FECA, enacted in 1971 and amended in 1974, required political committees to disclose: (i) the identity of their contributors; (ii) the dollar amount they contributed; (iii) the size of their expenditures or disbursements; and (iv) the recipients of these funds.¹² When Congress drafted § 527, it simply assumed that the political organizations it

covered would be subject to these FECA regulations.¹³ Yet in the 1976 decision *Buckley v. Valeo*, the Supreme Court held that FECA requirements apply only to “expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.”¹⁴ Such communications contain “express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”¹⁵

These terms are often referred to as *Buckley*’s ‘magic words.’ Political advocacy containing the magic words is known as “express advocacy”, while advocacy not containing the magic words is, by default, known as “issue advocacy”—called thus because it typically promotes issues associated with a candidate, without endorsing the individual directly.¹⁶ By simply avoiding the magic words, § 527 groups remain narrowly within the bounds of issue advocacy and escape regulation under FECA.¹⁷ The BCRA did nothing to change this fact, since it outlawed other forms of soft money while leaving § 527 untouched. As a result, § 527 became the outlet of choice (in fact, one of the only choices left) for organizations wishing to practice political advocacy in the 2004 election. Before discussing their activities, I will outline the complex rules governing § 527 groups and their contributors.

Rules for § 527 Political Organizations

Section 527 covers the tax treatment of all political organizations (for example, parties or committees) that are organized for the primary purpose of accepting contributions, or make expenditures, for an exempt function.¹⁸ An exempt function is defined as the practice of “influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local

public office.”¹⁹ All contributions made to the organization for its exempt function are “exempt function income”, and excluded from its taxable income.²⁰ 527 groups are taxed on their investment income and any expenditures on non-exempt activities.²¹ In addition, amendments to § 527 passed in 2000 and 2002 require the groups to disclose their contributions and expenditures over certain limits. Groups that fail to do so must pay an amount equal to the highest corporate tax rate multiplied by the amount to which the failure relates.²²

Rules for § 527 Donors

Donors to 527 organizations enjoy two principal advantages. First, their contributions are not subject to gift tax.²³ And second, there is no limit to the amount that donors may contribute to such groups, in contrast to the strict \$2,000 limit on hard money contributions by individuals to federal candidates.²⁴ Donors do not receive an income tax reduction, however, for the amount of their contribution.

Rules for 501(c)(3) Organizations

Although this paper will concentrate on § 527, it will also make occasional reference to groups organized under I.R.C. §§ 501(c)(3) and (c)(4). These provisions are less appealing to organizations engaged in political advocacy, but could become more widely used (and abused) following the repeal or curtailment of § 527. This section will briefly outline the rules governing these groups, while Section V will discuss the ways in which (c)(3) and (c)(4) groups can be manipulated to promote political advocacy.

Section 501(c)(3) provides a tax exemption for charitable organizations which “do not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public

office.”²⁵ Such organizations must be engaged in religious, charitable, scientific, literary, or educational activities, among others.²⁶ The I.R.S. has made contributions to 501(c)(3) groups free from gift tax, by allowing donors to include contributions in the total amount of taxable gifts made during the year, but then deduct them from the gift total under I.R.C. § 2522.²⁷ In addition, donors can deduct contributions to a 501(c)(3) group under I.R.C. § 170(c)(1).

Rules for 501(c)(4) Organizations

Section 501(c)(4) provides an exemption to:

Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.²⁸

Under I.R.C. § 2503(b), donors may exclude the first \$11,000 of gifts to be made during the year to each recipient—including gifts to 501(c)(4) groups.²⁹ Donations to (c)(4) groups in excess of this amount are presumably subject to gift tax. However, the law remains unsettled on this question, and the IRS consequently does not enforce gift taxes on contributions to (c)(4) groups.³⁰ Donors cannot deduct their contributions to a (c)(4) group.

The Birth of § 527

Congress added § 527 to the Internal Revenue Code in 1975 to clarify the tax treatment of political organizations.³¹ According to the 1974 Senate Report, Congress determined that encouraging political activities was an important policy goal, because they represent “the heart of the democratic process.”³² Congress sought to encourage such activities by granting a preferred tax status to qualifying political organizations.³³ It

chose to treat political organizations as tax-exempt because, in the view of legislators, their activities do not represent a trade or business.³⁴ At the same time, the drafters of § 527 were concerned that candidates would use their campaign committees to earn investment income free of tax.³⁵ As a result, they provided that 527 organizations should be taxed on their investment income and expenditures on non-exempt activities.³⁶

Many of the advantages enjoyed by 527 groups are purely accidental. There is no evidence, for example, that Congress intended to shelter such groups from FECA disclosure requirements; this was an unanticipated result of *Buckley*'s decision to treat express advocacy separately from issue advocacy.³⁷ Trevor Potter, a former Chairman of the FEC, has noted that 527 groups are protected by an "unintended misconnection" of federal laws:

These laws were written by different Congressional committees, for different purposes, and are administered by different federal agencies with different administrative priorities. As a result, the existence of 527s engaged in candidate-related political activity but not registered and reporting anywhere as political committees is accidental, rather than the result of Congressional policy.³⁸

It is clear that Congress never intended to permit 527 groups to operate with the freedoms they now enjoy. As a result, I will argue that Congress can repeal § 527 without undermining its own legislative policies.

The Explosive Growth of 527 Groups

527 groups grew markedly in size and influence between the 1996 and 2000 elections. Individuals, political parties, interest groups, labor unions and corporations spent \$150M on issue ads in the 1996 election, \$275M in the 1998 mid-term elections, and \$509M in the 2000 election.³⁹ Liberal 527 groups have outperformed conservative ones in the last three elections. The Center for Public Integrity reported that 527 groups

supporting John Kerry spent \$186M in the 2004 cycle, while groups supporting President Bush spent \$61M.⁴⁰

Three of the largest left-leaning 527s are the Media Fund (run by former Clinton staffer Harold Ickes), America Votes, and America Coming Together (ACT). These organizations spent a combined \$133M in the recent election.⁴¹ A number of liberal groups coordinated in the 2004 election to divide labor and maximize resources. America Votes served as a traffic cop between these organizations to prevent them from duplicating their efforts.⁴² Financier George Soros recently divided more than \$23M in donations between several organizations dedicated to defeating President Bush.⁴³ Other liberal 527 donors decided that they could exert maximum leverage by looking past Kerry altogether. They view themselves as “political venture capitalists”, supporting an infrastructure of organized 527 groups rather than an individual:

These groups aren't loyal to any one candidate, and they don't plan to disband after the election; instead, they expect to yield immense influence over the party's future, at the very moment when the power of some traditional Democratic interest groups, like the once mighty manufacturing unions, is clearly on the wane... The new political venture capitalists see themselves as true progressives, unbound by any arcane party structure. If their investment ends up revitalizing the Democratic Party, so be it. If they end up competing with the party to control its agenda, or even pushing the party toward obsolescence -- well, that's fine, too.⁴⁴

Politician 527s

Politicians have been just as enterprising in creating their own 527 groups. Virtually every Congressional leader has formed one.⁴⁵ By setting up a ‘politician 527’, members of Congress can raise unlimited soft money from individuals, corporations and unions. In a 2002 study cited by the Supreme Court in *McConnell v. FEC*⁴⁶, Public Citizen scrutinized the 527s controlled by six Congressional leaders. These six (three Democrats, three Republicans) collected significantly more in contributions than the 527s

affiliated with other individual members of Congress. The study demonstrates that politicians have largely bypassed individual voters of average means in this 527 'arms race.' Ninety-four percent of their total receipts were derived from contributions of \$5,000 or more, a figure that varied little across parties and positions. Between July 1, 2000 and June 30, 2001, the six groups received 81 percent of their total contributions from corporations.⁴⁷

One of the most heavily criticized politician 527s has been TRMPAC (Texans for a Republican Majority Political Action Committee), originally founded by House Majority Leader Tom DeLay (R-Texas).⁴⁸ TRMPAC was highly successful in promoting Republican candidates running for state representative in 2002: all but 3 of 21 won, allowing the party to take control of the Texas House.⁴⁹ Texas prosecutors have launched a grand jury investigation to determine whether the group laundered \$190,000 through the RNC during the 2002 campaign.⁵⁰

II. The Growth of 527 Abuses

This section will describe the mounting 527 abuses that have occurred between 1990 and the 2004 election cycle, and the Congressional attempts to curb them. As the New York Times aptly summarized the elections since 1988, "With each new presidential election, the amounts of soft money raised by the political parties grew like a nuclear arms race. The loophole came to overshadow the law."⁵¹

Crossing the Line from Issue to Express Advocacy

Buckley unfortunately did not clarify whether its list of magic words was an exhaustive, or merely representative, description of express advocacy.⁵² As a result, many

527 groups obey the letter but not the spirit of *Buckley*, by avoiding the magic words but in all other respects practicing express advocacy on behalf of candidates. The Supreme Court acknowledged this practice in the recent *McConnell* decision, stating that there is “overwhelming evidence that the line between express advocacy and other types of election-influencing expressions is, for Congress’ purposes, functionally meaningless.”⁵³ The Court also stated that issue ads run within the final one to two months of an election are the functional equivalent of express advocacy, regardless of their precise language.⁵⁴

The Court’s remarks only confirm what reform advocates have complained of for years: that 527 advertisements are clearly designed to support specific candidates, despite the fact that they avoid the language of express advocacy. Commentators frequently refer to 527 organizations as “stealth PACs”, running “sham issue ads” that unmistakably promote their candidate of choice.⁵⁵ The Brennan Center notes that “90 percent of candidate ads—which are by definition considered express advocacy whether they use the magic words or not—did not employ magic words. The fact that so few candidate ads incorporate magic words highlights how unnecessary explicit words are to convey an explicit electioneering message.”⁵⁶

The Republican National Committee underscored this point when it asked television stations to stop running ads by the 527 group MoveOn.org that criticized President Bush.⁵⁷ The RNC claimed that the spots violated federal law prohibiting the use of unregulated soft money for advertisements advocating the election or defeat of a candidate.⁵⁸ MoveOn.org attorney Joseph Sandler responded that, “The federal campaign laws have permitted precisely this use of money for advertising for the past 25 years.”⁵⁹ The RNC letter quoted from recent FEC Advisory Opinion 2003-37, which stated that,

“Communications that promote, support, attack or oppose a clearly identified Federal candidate have no less a ‘dramatic effect’ on Federal elections when aired by other types of political committees, rather than party committees or candidate committees.”⁶⁰ This point was not lost on supporters of President Bush, who began aggressively developing their own 527s in the final months of the election.

Accountability and Reporting

Prior to the 2000 amendments to § 527, donors could make unlimited political donations to 527 groups without having to disclose their identity to the public. The most notorious example of this was a series of ads run in the 2000 election by “Republicans for Clean Air”, a 527 created by Bush supporter Sam Wyly. The ads promoted George W. Bush’s environmental record while attacking that of Senator McCain. It remained unclear who had organized the ads until Wyly acknowledged that he funded them through a \$2.5M donation.⁶¹

Senator Lieberman (D-Connecticut), one of the most outspoken figures on 527 reform, has denounced groups that adopt neutral-sounding names in order to mislead the public.⁶² One example is the generically named Citizens for Reform, incorporated as a 501(c)(4) group in 1996 by Triad Management Services, a conservative consulting firm in Virginia. The group spent \$1.4M on ads during the October 1996 Congressional races, including one criticizing Democratic Congressional candidate Bill Yellowtail of Montana for striking his wife.⁶³ The group switched to § 527 status in 1997 after its activities as a 501(c)(4) group were questioned.⁶⁴ In response to such practices, Senator Lieberman charged that the § 527 loophole not only deprives voters of critical information, it “threatens the very heart of our democratic political process.”⁶⁵

The Swift Boat Veterans for Truth vividly illustrated this threat when it launched its anti-Kerry campaign in the summer of 2004. The 527 group's controversial television commercials charged that Kerry did not earn his Purple Heart medals in Vietnam.⁶⁶ The media and other veterans present during the incidents largely discredited these claims in the weeks after they first appeared.⁶⁷ Further controversy developed when the counsel for President Bush's re-election campaign, Benjamin Ginsberg, acknowledged that he had advised the group.⁶⁸ The Veterans received significant funding from Texas Republicans associated with the Bush family and presidential strategist Karl Rove.⁶⁹

Kerry responded by filing a complaint with the FEC, charging that the 527 group was illegally coordinating its activities with the Bush administration.⁷⁰ Whether or not this charge is ever substantiated, the episode demonstrates how effectively unprincipled 527 groups can serve their chosen candidate. In a campaign season of unprecedented spending by 527s, the Veterans achieved their goals at a very modest cost. The commercials which the group initially sponsored cost only a reported \$500,000, suggesting that spending limits on 527 groups would do little to deter their effectiveness.⁷¹ The Veterans succeeded not because they were able to raise large amounts of soft money, but because they were willing to make false accusations. Their example raises the concern that in future elections, partisan groups will create 'disposable' 527 groups to circulate false information, with the expectation that their message will be discredited after a few weeks. This would be a highly effective strategy posing little risk to their candidate, who can simultaneously denounce and benefit from their advertising.

2000 and 2002 Amendments

Previous attempts to regulate 527 groups have done little to prevent such corrupt tactics. In 2000, Senator Lieberman introduced an amendment adding a number of disclosure provisions to §527, which became §§ 527(i) and (j).⁷² Members of Congress were alarmed by the fact that no one even knew how many 527s existed, since they were not required to report their existence.⁷³ As Scott Harshbarger of Common Cause remarked in 2000, “These committees are throwbacks to the off-the-books slush funds of the Watergate era.”⁷⁴

Under § 527(i), an organization must give formal notice to the Secretary of the Treasury in order to receive tax-exempt treatment for campaign-related income.⁷⁵ Section 527(j) requires organizations to disclose the name and address of each contributor who gives more than \$200 in the aggregate, as well as the name and address of each recipient of more than \$500 in aggregate expenditures.⁷⁶ The new provisions were widely criticized from the start, because their disclosure requirements created a vast amount of duplicative paperwork at the state and federal level.⁷⁷ In addition, the bill exempted political committees established for state and local candidates from its periodic disclosure requirements.⁷⁸ Non-compliance among 527s was widespread.⁷⁹

These problems led Congress to introduce further amendments to § 527 in 2002.⁸⁰ The changes were intended to reduce duplicative reporting while adding electronic filing requirements to track stealth PACs.⁸¹ Despite these new requirements, the IRS’s Internet disclosure system for 527s remains extremely difficult to search.⁸² Public Citizen has compared the system to “an electronic file cabinet with 14,800 different, unlinked folders in it.”⁸³ While the site allows one to search the paper and electronic filings of 527 groups by organization name and date, results appear in PDF format. More advanced searches

are only available for electronic filings.⁸⁴ These limitations became frustratingly evident to the media, watchdog groups and congressional investigators looking into Enron contributions.⁸⁵ None of them has yet identified all the contributions that Enron made to 527 groups. The only way to do so would be to open all 72,000 records of 527s on file.⁸⁶

In addition, one must ask whether sunlight is really the best disinfectant for the problems associated with 527 groups. The premise of disclosure, which Justice O'Connor has called an "essential cornerstone" of effective campaign finance reform, is that voters will adjust their preferences after learning who is paying for the issue advocacy of candidates.⁸⁷ Yet how many voters are likely to inform themselves about the sources of issue advocacy financing, even when 527 records become more available? Is the average voter able to distinguish the Media Fund from America Coming Together, to name just two of the innumerable 527 groups now operating? We can analogize from party-sponsored attack ads, which most voters recognize as unfair, and often inaccurate. Yet attack ads have proven highly effective, despite attempts by the media to report on their deficiencies. If voters are not motivated to research the context of attack ads sponsored by the candidates themselves, how likely are they to sift through the disclosure statements of 527 groups?

Bipartisan Campaign Reform Act Upheld in *McConnell v. FEC* (2003)

The Bipartisan Campaign Reform Act ("BCRA") of 2002 amended FECA to prohibit the use of soft money by national parties and federal officeholders. The Act did not extend FECA to regulate § 527. However, it did require that no organization can use corporate or union money to finance broadcast ads that feature federal candidates within

60 days of the national election.⁸⁸ This includes 527 groups using corporate or union money to finance such ads.⁸⁹

The Supreme Court upheld the major features of the BCRA in *McConnell v. FEC*, 124 S.Ct. 619 (2003). Notably, the Court upheld an amendment to FECA § 323(d), which now states that national, state, and local party committees and their agents cannot “solicit any funds for, or make or direct any donations” to 527 organizations “other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office.”⁹⁰ The Court held that it “narrowly construes § 323(d)'s ban to apply only to donations of funds not raised in compliance with FECA.”⁹¹ In other words, the Court interpreted this section of the BCRA as simply reaffirming existing FECA guidelines. The Court also cited the 2002 Public Citizen account, previously introduced, which states that virtually every member of Congress has his or her own 527 group.⁹² The majority expressed concern that, “Given BCRA's tighter restrictions on the raising and spending of soft money, the incentives for parties to exploit such organizations will only increase.”⁹³

2004 FEC Response

Frustrated by the lack of legislative clarity on § 527, several groups appealed to the FEC for guidance during the election. Americans for a Better Country, a pro-Republican 527 organization, asked the FEC in November of 2003 to issue an advisory opinion outlining the permissible uses of § 527.⁹⁴ And campaign finance watchdog groups, alarmed by the explosive growth of 527 groups, announced in January of 2004 that they would file their own complaint with the FEC.⁹⁵ They charged that three voter

outreach organizations-- America Coming Together, the Leadership Forum, and The Media Fund-- were schemes to avoid the federal ban on soft money.⁹⁶

In response, the FEC issued a limited ruling in February, which covered only those 527s that raise soft money but also register as PACs with the FEC and raise hard money. The commission decided these organizations could not use soft money to fund mail, phone, broadcast or other communications that promote, support, attack or oppose federal candidates by name. However, the groups could use a mixture of hard and soft money to pay for communications that name candidates for federal and nonfederal office.⁹⁷

More significantly, on May 13, 2004 the FEC announced that it would not impose new regulations on 527s for the remainder of the campaign season.⁹⁸ "It's a complex issue and a big expansion of the regulations, and it needs to be done right," said Bradley Smith, the Commission's Republican chairman.⁹⁹ Ed Gillespie, chairman of the RNC, presciently responded that, "The 2004 elections will now be a free-for-all... the battle of the 527's is likely to escalate to a full scale, two-sided war."¹⁰⁰

Smith added that the rulemaking process for 527s should be terminated altogether, because in his view lawmakers did not intend to limit these groups when they passed campaign-finance reforms.¹⁰¹ Reform watchdog groups vigorously objected. Fred Wertheimer, President of Democracy 21, acidly remarked that Smith was acting out of principle, "if you recognize that his principle is to do everything he can to undermine the campaign finance laws."¹⁰²

Smith has made no secret of his disdain for campaign finance regulation. He recently told Reason Magazine that his ideal system of campaign finance would be "the

system we had that elected Abraham Lincoln and Grover Cleveland, which is no regulation.”¹⁰³ He has incensed proponents of campaign finance reform by advocating the repeal of FECA-- the very law the FEC is charged to administer.¹⁰⁴ Senator McCain called on Smith to resign in response to such statements, and threatened to replace the Commission with a group more compliant with recent Court decisions.¹⁰⁵ As McCain stated in April of 2004, “One of the problems the FEC faces today is that some Commissioners, and in particular Chairman Smith, refuse to accept the Supreme Court’s conclusions in the area of campaign financing.”¹⁰⁶

In response to the FEC decision, conservative groups-- which had long protested that liberal 527s were acting illegally-- quickly switched gears and began to form their own 527 organizations.¹⁰⁷ The conservative group Progress for America immediately announced that it would convert from § 501(c)(4) to § 527 status and challenge liberal groups for control of the 527 field.¹⁰⁸ Despite their determination, pro-Republican 527s found risk-adverse corporations less willing to contribute than pro-Democratic donors.¹⁰⁹ The Washington Post reported in July of 2004 that pro-Republican 527 groups were “getting their clocks cleaned by their rivals.”¹¹⁰ By the end of October 2004, pro-Democratic 527 groups had raised nearly three times as much as their Republican counterparts.¹¹¹ Republican groups, however, eventually found their footing: Progress for America spent \$16.8M in the final three weeks of the campaign, more than all other Democratic groups combined.¹¹²

III. The Evolving Definition of Corruption

One of the central legal and ideological disputes surrounding 527s (and campaign finance reform in general) is whether unlimited soft money contributions represent a form of electoral corruption. Senator Mitch McConnell (R-Kentucky) has vigorously argued that they do not, stating in 1998 Senate hearings, “The European Court of Human Rights ruled that laws banning ordinary citizens from spending money to promote or denigrate candidates in an election campaign was a breach of human rights.”¹¹³ Most objections to campaign finance reform are not this melodramatic. Rather, opponents typically argue that the original *Buckley* decision did not legitimate the increasingly broad anti-corruption regulations that have been proposed in the last ten years. However, a close inspection of the Court’s evolving definition of corruption will demonstrate that the Court is today squarely opposed to the practices of 527 groups.

***Buckley* On Corruption**

In *Buckley* (1976), the Court stated that the essential purpose of campaign finance law is to prevent corruption and the appearance of corruption.¹¹⁴ The Court’s benchmark example of corruption is a large contribution given to arrange a quid pro quo favor from a political candidate or officeholder.¹¹⁵ Equally troublesome is “the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”¹¹⁶ The Court upheld contribution limits, reporting and disclosure requirements, and the public financing of presidential campaigns as a check upon corruption and the appearance of corruption.¹¹⁷

At the same time, *Buckley* struck down § 608(e)(1) of FECA, a proposed restriction on independent expenditures, because the vagueness of the provision undermined its ability to prevent influence-buying.¹¹⁸ In a prescient remark, the Court

noted that the provision could be easily circumvented: “It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign.”¹¹⁹

Nonetheless, *Buckley* did not perceive a serious danger of corruption from independent expenditures. “Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent... undermines the value of the expenditure to the candidate.”¹²⁰ The Court would revise this assertion in later cases, as it began to formulate a broader definition of corruption and apply it to independent expenditures.

In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Court upheld campaign finance restrictions on the political activities of the Michigan State Chamber of Commerce, a nonprofit corporation. It found that the State of Michigan had a compelling interest in preventing the corruption that would result from “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”¹²¹ The decision shows the Court moving beyond the narrow definition of corruption advanced in *Buckley*, which focused on the quid pro quo corruption of elected officials. With *Austin*, the Court recognized that, “The integrity of the electoral process itself can be corrupted—by large independent expenditures on express advocacy.”¹²² There is no question that the independent expenditures of 527

groups now effectively function as express advocacy, which would place them within the Court's expanding definition of corruption.

In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the Court addressed the danger to the electoral process posed by soft money, and laid the foundation for its decision, three years later, to sustain the BCRA. In *Shrink PAC*, as it is commonly known, the Court upheld a Missouri statute limiting contributions to candidates for state office. It indicated its willingness to defer to a legislative finding of corruption, since the proposition that large contributions corrupted the political process was, by this point, "neither novel nor implausible."¹²³ In his concurrence, Breyer states that *Buckley* left the legislature "broad authority" to regulate soft money, adding that if *Buckley* does not permit Congress "sufficient leeway to enact comprehensive solutions to the problems posed by campaign finance... I believe the Constitution would require us to reconsider *Buckley*."¹²⁴

In dissent, Kennedy states that *Buckley* has not worked because it created a new dialect of "covert speech": "What the Court does not do is examine and defend the substitute it has encouraged, covert speech funded by unlimited soft money. In my view that system creates dangers greater than the one it has replaced."¹²⁵ Echoing Breyer's point, Kennedy states that the Court should "defer to [the legislature's] political judgment that unlimited spending threatens the integrity of the electoral process."¹²⁶ Richard Hasen notes that *Shrink PAC* ultimately accepted the government's anti-corruption rationale "on faith, not on evidence, believing that the point was virtually self-evident."¹²⁷ Another commentator interprets *Shrink PAC* as an indication that "given the right facts, the Court will 'lower' the standard to uphold regulations furthering different, although significant,

government interests. A lower standard would allow regulation of soft money and issue ads that, because of their nature, could not pass the corruption standard."¹²⁸

'Electoral Strategy' and Distortion

Before turning to *McConnell*, the Court's most recent decision on soft money and corruption, I will review the recent academic discussion of independent expenditures and their potential to undermine the electoral process. The attempt to influence the identity of the person elected is commonly known as an 'electoral strategy', as opposed to a 'legislative strategy' designed to influence the voting decisions of candidates once in office.¹²⁹ Kathleen Sullivan refers to the electoral strategy as a 'distortion' in the system-- a form of corruption in which "the unequal deployment of resources in electoral campaigns causes the wrong people to get elected, distorting the true preferences of voters."¹³⁰ Given their unrestricted fundraising capabilities, 527s are uniquely capable of distorting voting preferences by swamping their opponents with negative advertising.

Some commentators have dismissed the possibility that such distortion can lead to electoral corruption. Bruce Cain, discussing the problem of voter ignorance about candidates, objects to limits on campaign finance because "anything that lessens the amount of information in the system only makes that problem worse."¹³¹ But this assumes that the information in the system is uniformly accurate and fair. It doesn't address the problem that issue advocacy, particularly by 527s, may represent a glut of *misinformation* in the system, overwhelming more accurate information disseminated by the media. Nothing illustrates this problem more convincingly than the Swift Boat Veterans campaign. Supporters of Cain's view might counter that the solution to the Swift Boat dilemma is not to eliminate § 527, but to ensure the accuracy of ads run by

527 groups. Yet it is difficult to imagine that a private or government agency could perform this function better than the media, which itself struggled to counteract the Veterans' distortions.

Sullivan questions distortion theory by arguing that a candidate's ability to attract donations is, at least to some extent, an indicator of popularity.¹³² Expanding this theme, Bradley Smith writes that, "The ability to raise money is evidence of political prowess and popularity that would normally translate into votes, regardless of spending."¹³³ In other words, Smith reverses the typical complaint that a candidate won simply because he outspent his opponent-- i.e., that he purchased victory. In Smith's view, the winning candidate is able to outspend his opponents because his supporters wanted him to win badly enough that they funded that outcome.

This argument overlooks the fact that many voters cannot afford to contribute large sums to their candidate, yet are still committed to voting for him. Recognizing this fact, Cain suggests that a "better measure of intensity would weight the size of a monetary contribution according to the giver's initial level of resources."¹³⁴ We can illustrate Cain's model with a hypothetical incorporating elements of the Dean campaign. Suppose that Candidate X is supported by 100 wealthy voters who donate the maximum contribution of \$2,000. He will raise more money than Candidate Y, supported by 1,000 voters of modest means, who each give \$10 over the Internet. Smith's theory would indicate that Candidate X should receive more votes, since he was able to raise more money. Yet Candidate Y would win by 900 votes in this scenario. Cain's model is more effective at measuring the intensity of Candidate Y's supporters, who are fiercely dedicated to their candidate yet make only small donations to his campaign.

In addition to this shortcoming, Smith's theory cannot explain why so many individuals contributed to 527 groups, rather than the candidate of their choice, during the 2004 election. Stephen Moore, president of the conservative 527 group Club for Growth, suggests an answer: "One way you can help persuade donors that their donations are being spent in an impactful way is by having them see an ad on TV that they helped pay for."¹³⁵ With so many 527 groups running their own ad campaigns, voters were able to fund the message they found most resonant or effective. Voters who supported Kerry but wanted to steer him in a more progressive direction could support MoveOn.org; those who supported Bush, and felt that Kerry was most vulnerable on his service in Vietnam, could support the Swift Boat Veterans. The 527 field offered a diverse menu of advertising messages, many of which were more more effective and hard-hitting than those aired by the national campaigns.

Smith concludes that, "The problem, if it exists, is not that some candidates 'buy' elections by spending too much, but that other candidates spend too little to reach the mass of voters."¹³⁶ This assumes that there is a financial threshold-- which Smith does not define-- above which the 'problem' of under-funding ceases to exist. This proposal, however, runs counter to the *Buckley* definition of corruption, which stated that large financial expenditures raise the appearance of corruption.¹³⁷ The Court only underscored this connection when it acknowledged in *McConnell* that *Buckley* did not go far enough in defining corruption, and approving the means to combat it.

***McConnell* on Corruption**

McConnell recognized what had been apparent for some time: that the distinction between express and issue advocacy, unclear from the start, was no longer meaningful.

The majority held that, “*Buckley's* express advocacy line has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system.”¹³⁸ The Court remarked that its decision to uphold the BCRA was part of a larger pattern. Since *Buckley*, “We have consistently applied less rigorous scrutiny to contribution restrictions aimed at the prevention of corruption and the appearance of corruption.”¹³⁹ The Court therefore upheld the Act’s broad regulation of soft money, because it creates an appearance of corruption and improper influence—even if it did not in fact secure such influence.¹⁴⁰

Given the Court’s willingness to accept the government’s anticorruption interest, why didn’t the architects of the BCRA seek to ban 527 expenditures along with other forms of soft money? David Broder suggests a simple reason: its drafters “did not anticipate that the ban would simply divert the flow of big contributions into other channels.”¹⁴¹ But others argue that the BCRA was intended as a sort of legislative triage. Fred Wertheimer of Democracy 21 says that reform leaders “had to focus on solving the most dangerous campaign finance problems facing America.”¹⁴² Commentators from the Brookings Institution agree, suggesting that the BCRA didn’t address 527s because its principal goal was to “prohibit elected officials and party leaders from extracting unregulated gifts from corporations, unions and individual donors in exchange for access to and influence with policymakers.”¹⁴³

IV. Repeal Is the Logical (and Only) Solution

Whatever the reason for its absence, one thing is clear: the BCRA did not overlook § 527 because 527 groups engage in a less damaging form of corruption than

corporations, unions, and individual donors. No one has argued this point more insistently than the co-author of the BCRA, Senator McCain. He has denounced the activities of 527 groups in the 2004 election cycle, remarking in Congress that, “Some groups... have recently been set up for the sole purpose of raising or spending tens of millions of dollars in soft money to influence the 2004 Presidential and congressional elections... This blatant end run around the campaign finance laws should not be tolerated.”¹⁴⁴

McCain’s description of a legal “end run” is an appropriate one. The activities of 527 groups in the 2004 election, while legal, fell within the Court’s modern definition of corruption. The Swift Boat campaign represents an even more extreme form of corruption, not previously reviewed by the courts, in which a 527 group temporarily hijacks the campaign with false accusations. In order to complete the unfinished work of the BCRA, and stage a comprehensive attack on electoral corruption, Congress should repeal § 527.

Repeal of § 527 Would Not Violate the First Amendment

This section will review the cases which establish that Congress can elect not to subsidize activities involving free expression, without violating the underlying First Amendment rights of the speakers. Opponents of 527 reform often claim that the regulation of issue advocacy violates the First Amendment, relying on the Court’s long-established rule that political speech is at the core of the First Amendment.¹⁴⁵ *National Federation*, discussed below, echoed these concerns when it ruled that § 527(j) has a “chilling effect” on First Amendment rights.¹⁴⁶

Bradley Smith argued in a 1998 article that, “Issue advocacy does not pose a sufficiently dangerous threat to justify the burdens that its regulation would impose on First Amendment rights. Or, in *Buckley*’s own language, contributions may only be limited for speech ‘advocating the election or defeat of a candidate.’”¹⁴⁷ The Court rejected this reasoning in *McConnell*, however: “Congress has a fully legitimate interest in maintaining the integrity of federal officeholders and preventing corruption through the means it has chosen. Indeed, our above analysis turns on our finding that those interests are sufficient to satisfy First Amendment scrutiny.”¹⁴⁸

There are other reasons why Smith’s argument is no longer persuasive. As demonstrated by the previous discussion of corruption, the modern issue ad effectively *does* advocate the election or defeat of a candidate. The boundary that Smith draws between issue and express advocacy, artificial even when *Buckley* was decided, has become “functionally meaningless” in the view of the Court.¹⁴⁹ But more importantly, the regulation and even repeal of § 527 does not require the courts to perform a constitutional balancing in the first place. Even if the issue advocacy of 527 groups did not raise a significant danger of corruption, the provision could be eliminated without violating the First Amendment rights of groups practicing such advocacy.

Cammarano v. United States, 358 U.S. 498 (1959) offers the clearest support for this proposition. In *Cammarano*, the Court rejected a First Amendment challenge to a tax statute which prohibited individual or corporate taxpayers from deducting amounts they spent on lobbying to promote or defeat legislation. The Cammaranos, individual taxpayers, argued that the statute violated their First Amendment rights, because it was based on the content of their speech. But the Court held that they were not being denied a

deduction because they were engaging in constitutionally protected activities; rather, they were simply being required to pay for the activities out of their own pocket.¹⁵⁰ The Court rejected the notion that “First Amendment rights are somehow not fully realized unless they are subsidized by the State.”¹⁵¹ *Regan v. Taxation With Representation of Washington*, discussed below, reaffirmed this principle, and added that strict scrutiny is not required whenever Congress subsidizes some, but not all, speech.¹⁵²

Such cases express a constitutional theory that is conventionally referred to as the “greater powers doctrine.”¹⁵³ This doctrine holds that it is constitutional for the government to condition the grant of a nonmandatory benefit on the recipient’s willingness to comply with restrictions that might otherwise be unconstitutional.¹⁵⁴ In order for the doctrine to apply it is necessary, of course, for the recipient to have the choice to opt-out of the restrictions, thereby forgoing the government benefit.

Rust v. Sullivan, 500 U.S. 173 (1991) demonstrates how the presence of an opt-out reinforces the constitutionality of such government restrictions. In *Rust*, recipients of family planning funds under Title X of the Public Health Service Act challenged regulations promulgated by the Department of Health and Human Services. The regulations prohibited projects receiving Title X funds from offering abortion counseling. The Court held that although the regulations limited the speech of fund recipients in return for the subsidy, they did not violate their First Amendment rights.¹⁵⁵ If they chose not to follow the government’s abortion counseling strictures, recipients could opt out by financing their own unsubsidized program.¹⁵⁶ The Court remarked that, “We have never held that the Government violates the First Amendment simply by offering that choice.”¹⁵⁷

Similar to the regulation in *Rust*, § 527(i) contains an implicit opt-out. It requires groups that wish to be treated as 527s to give notice to the Secretary of the Treasury. Groups which do not wish to make disclosure will simply not provide notice, and relinquish their tax-exempt status under § 527. If they opt out, they still have the option of disseminating their message through other channels—for example, they can convert to § 501(c)(3) or (4) status. Since Congress has no obligation to subsidize 527s in order to protect their First Amendment rights, it would not be violating those rights by repealing § 527 altogether.

Section 527 Is a Tax Subsidy That Can Be Withdrawn

It is evident from these decisions that the courts view § 527 as a Congressional subsidy which the legislature is free to restrict or repeal. However, opponents of 527 reform have responded with two theories which argue that § 527, either directly or indirectly, imposes a penalty.

The first argues that by not subsidizing constitutionally protected political speech, Congress automatically penalizes it. The plaintiffs in *Rust*, for example, claimed that, “Because Title X continues to fund speech ancillary to pregnancy testing in a manner that is not evenhanded with respect to views and information about abortion, it invidiously discriminates on the basis of viewpoint.”¹⁵⁸ The Court however dismissed this claim, stating, “A refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.”¹⁵⁹

The second theory argues that the disclosure requirements of § 527(j) represent a penalty on the exercise of protected speech.¹⁶⁰ Yet courts and commentators have typically rejected this view, arguing instead that Congress is simply qualifying its

legislative grace when it places restrictions on § 527.¹⁶¹ They do not dispute that political speech is constitutionally protected. Rather, they rely on the premise, discussed previously, that it is constitutional for the government to condition the grant of a nonmandatory benefit on the recipient's willingness to comply with restrictions that might otherwise be unconstitutional. *Cammarano v. U.S.* upheld this principle when it ruled that the ordinary and necessary business deduction is a Congressional subsidy.¹⁶² As a result, *Cammarano* held that if Congress chooses to deny a deduction, it does not impose a penalty on the taxpayer.¹⁶³ "Congress has not undertaken to penalize taxpayers for certain types of advocacy; it has merely allowed some, not all, expenses as deductions. Deductions are a matter of grace, not of right."¹⁶⁴

This reasoning was extended to tax exemptions in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1997). Although this case focused on § 501(c), its analysis can be easily transferred to the 527 subsidy. Suit was brought in *Regan* by a nonprofit organization seeking a declaratory judgment that it qualified for tax-exempt status under § 501(c), after its application was denied by the IRS. The IRS had concluded that a substantial part of its activities would consist of attempting to influence legislation. The Court held that the legislature's decision not to subsidize the exercise of a First Amendment right such as freedom of speech did not infringe that right.¹⁶⁵

The Code does not deny TWR the right to receive deductible contributions to support its non-lobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public monies. This Court has never held that the Court must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right.¹⁶⁶

This is particularly true of tax subsidies, the Court noted, because legislatures have considerable freedom in creating classifications and other distinctions in the tax code.¹⁶⁷

A lower court rejected that argument in a case frequently cited by opponents of § 527 reform, *National Federation of Republican Assemblies v. U.S.*, 148 F.Supp.2d 1273 (S.D.Ala. 2001). The plaintiffs sought a preliminary injunction against the enforcement of §§ 527(i) and (j), added in 2000.¹⁶⁸ They argued that § 527(j) represented a penalty rather than a tax, because it imposes a “penalty” in the event of a “failure to make the required disclosures... [or] a failure to include any of the information required to be shown by such disclosures or to show the correct information.”¹⁶⁹ The court agreed, noting that Revenue Ruling 2000-49 and Form 1120-POL, the tax form filled out by 527 organizations, both identified § 527(j) as a penalty.¹⁷⁰ The court rejected the government’s argument that organizations can opt out of its requirements by simply choosing not to disclose, and surrendering the tax benefits of § 527.¹⁷¹ In a case the following year (2002), the same Alabama court ruled that § 527(j) was unconstitutional to the extent it required disclosure of expenditures in connection with federal electoral advocacy.¹⁷² Opponents of § 527 reform often cite both cases when arguing that the disclosure requirements of § 527(j) represent a penalty on free speech.

The 2002 case, which held § 527(j) unconstitutional, was overruled by *Mobile Republican Assembly v. U.S.*, 353 F.3d 1357 (11th Cir. 2003). The court held that § 527(j) is part of the overall tax scheme, rather than a separate penalty.¹⁷³ It stated that the interpretation of § 527(j) was controlled by *Regan*, which defined § 501(c) as a tax subsidy.¹⁷⁴ By enacting § 527(j), Congress did not establish barriers to the appellees’ exercise of their free-speech rights.¹⁷⁵ Instead, Congress set forth certain requirements

that must be met in exchange for a tax subsidy.¹⁷⁶ Political organizations can opt-out, choosing not to register under § 527(i), and avoid these requirements.¹⁷⁷ As Donald Tobin has correctly noted, § 527(j) only punishes organizations that agree to comply with the statute, but then fail to do so.¹⁷⁸ The provision does not impose an absolute penalty, but a contingent one. Under the reasoning of *Mobile Republican*, Congress is free to repeal the 527 subsidy without penalizing groups which previously relied on it.

V. The Likely Outcome of Repeal

The last section of this paper will focus on the likely outcome of repeal. It is probable that many 527 groups would convert to § 501(c)(3) or (4) status following repeal, although these provisions are not as attractive to political organizations as § 527 for reasons that will be made clear.

As discussed previously, 501(c)(3) groups must be engaged in religious, charitable, scientific, literary, or educational activities, among others. Because education is an exempt activity for (c)(3) groups, some have successfully argued that “they are not intervening in a campaign, but educating the public with respect to certain important issues.”¹⁷⁹ Acknowledging this overlap between educational and political activity, the IRS has stated that, “Sometimes... the activity is both—it is educational but it also constitutes intervention in a political campaign.”¹⁸⁰ One such ill-defined electioneering activity is the distribution of voter guides, for which the Service has not issued guidance in two decades.¹⁸¹

501(c)(4) organizations are allowed to have limited involvement in political campaigns so long as they are primarily engaged in nonpolitical activities advancing

social welfare.¹⁸² For this reason, § 501(c)(4) would be more attractive than § 501(c)(3) to organizations forced to switch from § 527 status. However, donors to (c)(4) groups are subject to gift tax—a major drawback in comparison to the current § 527, which exempts donors from gift tax. This has not discouraged advocacy groups from exploiting § 501(c)(4) in the past, however.

501(c)(4) groups were extensively used to promote issue advocacy in the 1996 campaign cycle.¹⁸³ One example was the Better America Foundation, a (c)(4) group founded in 1993 by Senator Bob Dole (R-Kansas).¹⁸⁴ The group's articles of incorporation stated that it was created to “promote and advocate values and principles espoused by the Republican Party.”¹⁸⁵ The BAF told donors that there was no limit on individual contributions, and no requirement for public disclosure of contributors' names. The group became embroiled in controversy after spending \$1.2M on a television ad featuring Senator Dole, leading him to close down the group in 1995 and return contributions to donors.¹⁸⁶ Despite such misfires, 527 groups began converting en masse to § 501(c)(4) status after the 2000 disclosure requirements were added. “We'd be running out of fingers and toes” trying to count the number, remarked GOP election lawyer Benjamin Ginsberg at the time.¹⁸⁷ The migration to § 501(c)(4) proved short-lived, since 527 groups quickly adapted to the disclosure provisions. But it is conceivable that if § 527 were repealed, § 501(c)(4) would emerge as the next-best alternative.

Political organizations have discovered a number of ways to capitalize on § 501(c)(4). They can channel political advocacy through a social welfare organization organized under section (c)(4), while shielding contributors from FECA disclosure requirements.¹⁸⁸ 501(c)(4) groups can also piggy-back onto the § 501(c)(3) education

exemption. Although education is not a listed exemption for (c)(4) groups, “The Service has so blurred the distinction between section (c)(3) and section (c)(4) that it treats the section (c)(3) exempt purposes as exempt purposes for section (c)(4) organizations as well.”¹⁸⁹ Candidates often create a complicated shell game of (c)(3) and (c)(4) groups to evade restrictions on exempt activities. For instance, a corporate contributor may transfer money to a (c)(3) group claiming to be involved in exempt educational activity. This group may then transfer some of the money to a (c)(4) group, which can contribute it directly to the candidate.¹⁹⁰

If the previous attempts to reform § 527 are any guide, the repeal of § 527 would likely cause groups to reconstitute under § 501(c)(3) or (c)(4). Congress should learn from its own failure to include § 527 in the BCRA by restricting (c)(3) and (c)(4) at the same time it repeals § 527. It should analyze the ways in which they have been used in the past as vehicles for soft-money political spending, and explicitly prohibit these practices. In particular, the IRS should narrow the definition of educational activity available to 501(c)(3) groups, given that “the distinction between non-partisan education... and biased education intended to influence the outcome of an election is anything but clear.”¹⁹¹ In addition, charitable organizations seeking exemption under § 501(c)(4) should be prohibited from participating in political campaigns.

Would Repeal of § 527 Cripple the Democratic Party?

This paper will conclude with a brief discussion of the political ramifications of repeal. While the legal arguments previously introduced would supply ammunition to both Democrats and Republicans, there is no doubt that repeal of § 527 would be fought on a political rather than legal battlefield. Both sides would be keenly aware that repeal

could disable the fundraising ability of the Democratic Party. If the soft money flow were extinguished by the repeal of § 527 (in conjunction with McCain Feingold), the 2008 election would occur in a hard money world. In every election cycle between 1976 and 2000, the GOP raised far more hard money than the DNC. The 1999-2000 cycle was typical in that respect: the RNC raised \$377M, the DNC \$260M.¹⁹²

The recent election cycle reversed this trend, however. The DNC raised \$389M between January 1, 2003 and November 22, 2004, and the RNC \$385M.¹⁹³ As RNC Chairman Ed Gillespie acknowledged, the DNC succeeded in broadening their net and attracting small donors.¹⁹⁴ It is impossible to predict whether the DNC will again outperform the RNC in 2008. However, it seems unlikely that the 'perfect storm' conditions of the 2004 election-- in terms of voter mobilization, and the political passions ignited-- will repeat themselves. Looking to 2008, Republicans can reasonably expect that they will raise more hard money than Democrats but less soft money through 527 groups, in the absence of repeal.

As a result, the Republican Party would have the greatest incentive to repeal § 527, shielding their 2008 nominee from the renewed efforts of MoveOn.org and George Soros. President Bush, in fact, agreed in late August of 2004 to join John McCain in a suit against the FEC, intended to force the agency to take action against 527s.¹⁹⁵ This would seem to be a largely symbolic election-year proposal; it is unclear why a lawsuit would be preferable to Congressional action repealing § 527. Nonetheless, it is conceivable that some of the same Republican figures who fought so hard against the BCRA will soon champion the repeal of § 527. While the Republican Party could try to

develop their own network of 527 groups, it would be more logical for it to cut off the flow of soft money, and outspend the Democrats in hard money.

While the repeal of § 527 could leave the Democrats temporarily underfunded, the alternative would be more damaging to the political process. With pro-Republican groups now beginning to proliferate, the 2008 election promises an even more pitched and unscrupulous battle between liberal and conservative 527 groups. Both sides may be tempted to adopt the corrupt practices of the Swift Boat Veterans, the 527 group which had arguably the greatest impact on the 2004 race. It is unrealistic to expect the media, Senator McCain, and others watchdogs to restrain 527 groups as the national parties grow increasingly dependent on them. Congress should repeal 527 well in advance of the 2008 election, in order to give both parties time to readjust their fundraising strategies. The longer a serious debate on repeal is deferred, the more deeply politicized it is likely to become.

¹ Lyndon B. Johnson, Special Message to Congress on Election Reform: The Political Process in America (referring to the campaign finance laws preceding FECA), *available at* <http://www.presidency.ucsb.edu/site/docs/pppus.php?admin=036&year=1967&id=236> (May 25, 1967).

² Pub. L. No. 93-625, § 10(a), 88 Stat. 2108 (1975).

³ *527s in 2004 Shatter Previous Records for Political Fundraising*, The Center for Public Integrity, *available at* <http://www.publicintegrity.org/527/report.aspx?aid=435&sid=300> (Dec. 16, 2004).

⁴ Pub. L. No. 92-225, 86 Stat. 3 (1972), *amended by* Pub. L. No. 93-443, 88 Stat. 1263 (1974).

⁵ Pub. L. No. 107-155, 116 Stat. 81 (2002).

⁶ Fed. Election Comm'n, Twenty Year Report, ch. 3, *available at* <http://www.fec.gov/pages/20year.htm> (1995).

⁷ FEC AO 1985-14 (May 30, 1985).

⁸ 11 C.F.R. § 106.5(b) (1990) (stating that, "In presidential election years, national party committees other than the Senate or House campaign committees shall allocate to their federal accounts at least 65% each of their administrative expenses and costs of generic voter drives.").

⁹ Note, *Soft Money: The Current Rules and the Case for Reform*, 111 Harv. L. Rev. 1323, 1336 (1998).

¹⁰ Darrel Rowland, *Contributions Diverted to Ohio Parties*, Columbus Dispatch, Mar. 2, 1997, at 1A.

¹¹ *Soft Money*, *supra* note 9, at 1336.

¹² Trevor Potter, *Buckley v. Valeo, Political Disclosure and the First Amendment*, 33 Akron L. Rev. 71, 73 (1999).

¹³ Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 Ga. L. Rev. 611, 624 (2003).

¹⁴ *Buckley v. Valeo*, 96 S.Ct. 612, 646-47 (1976).

¹⁵ *Buckley*, 96 S.Ct. at 647 n.52.

¹⁶ A number have cases have upheld *Buckley's* magic words formulation. *See Fed. Election Comm'n v. Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir. 1997) (calling for bright-line test using "magic words", stating, "the Federal Election Campaign Act could be applied consistently with the First Amendment only if it were limited to expenditures for communications that literally include words which in and of themselves advocate the election or defeat of a candidate."); *Fed. Election Comm'n v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 52-53 (2d Cir. 1980).

¹⁷ Richard Briffault, *Issue Advocacy: Redrawing the Elections/ Politics Line*, 77 Tex. L. Rev. 1751, 1752-54 (1999) (discussing the relationship between *Buckley's* magic words and campaign finance regulations).

¹⁸ I.R.C. § 527(e)(1) (2003).

¹⁹ I.R.C. § 527(e)(2) (2003).

²⁰ I.R.C. § 527(c)(3), (e)(2) (2003).

²¹ I.R.C. §§ 527(b)(2), (c)(1) (2000).

²² I.R.C. § 527(j)(1) (2003).

²³ I.R.C. § 2501(a)(5) (1997).

²⁴ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 307(a)(1), 116 Stat. 81 (2002) (codified at 2 U.S.C. § 441a(a)(1)(A)).

²⁵ I.R.C. § 501(c)(3) (2004).

²⁶ *See id.*

²⁷ Barbara K. Rhomberg, *The Law Remains Unsettled on Taxation of Section 501(c)(4) Contributions*, 15 Tax'n of Exempts 62, 64 (2003).

²⁸ I.R.C. § 501(c)(4)(A) (2004).

²⁹ Rhomberg, *supra* note 27, at 64.

³⁰ Rhomberg, *supra* note 27, at 62. *See also* Gregory L. Colvin & Miriam Galston, *Report of Task Force on Section 501(c)(4) and Politics*, 39 *Exempt Org. Tax Rev.* 432, 435 (2003) (noting lack of IRS gift tax enforcement on donations to 501(c)(4) groups).

³¹ Pub. L. No. 93-625, 88 Stat. 2108 (1975). *See generally* Marie B. Morris, 527 *Organizations: How the Differences in Tax and Election Laws Permit Certain Organizations to Engage in Issue Advocacy Without Public Disclosure and Proposals for Change*, CRS Report No. RL30582, National Council for Science and the Environment, available at <http://www.ncseonline.org/nle/crsreports/risk/rsk-41.cfm?&CFID=14708582&CFTOKEN=69580066> (updated June 26, 2000).

³² S. Rep. No. 93-1357, at 7502 (1974).

³³ *See id.*

³⁴ *See id.*

³⁵ 146 Cong. Rec. S5994-03, S5998 (2000) (testimony of James Bopp, Jr.).

³⁶ *See id.*

³⁷ Tobin, *supra* note 13, at 625.

³⁸ *Disclosure of Political Activities of Tax Exempt Organizations: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 106th Cong. (2000), available at 2000 WL 852659 (statement of Trevor Potter, former Commissioner of the Federal Election Commission).

³⁹ Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 *Minn. L. Rev.* 1773, 1777 (2001).

⁴⁰ *527s in 2004 Shatter Previous Records*, *supra* note 3 (see chart entitled 'Group Effort').

⁴¹ *See id.* (chart entitled 'Race to the White House').

⁴² Dan Balz & Thomas B. Edsall, *Democrats Forming Parallel Campaign; Interest Groups Draw GOP Fire*, *Wash. Post*, Mar. 10, 2004, at A1.

⁴³ *Let Donors Openly Give to Politicians*, *Indianapolis Star*, Dec. 18, 2004, at 12A.

⁴⁴ Matt Bai, *Wiring the Vast Left-Wing Conspiracy*, *N.Y. Times*, July 25, 2004, § 6, at 30.

⁴⁵ *Congressional Leaders' Soft Money Accounts Show Need for Campaign Finance Reform Bills: Full Report*, Public Citizen Congress Watch, at 6, available at <http://www.citizen.org/congress/campaign/issues/nonprofit/articles.cfm?ID=7188> (press release dated as of Feb. 26, 2002).

⁴⁶ *McConnell v. FEC*, 124 S.Ct. 619, 679 (2003).

⁴⁷ *Congressional Leaders' Soft Money Accounts Show Need for Campaign Finance Reform Bills: Executive Summary*, Public Citizen Congress Watch, available at <http://www.citizen.org/congress/campaign/issues/nonprofit/articles.cfm?ID=7188> (press release dated as of Feb. 26, 2002).

⁴⁸ R. Jeffrey Smith, *DeLay's Corporate Fundraising Investigated; Money Was Directed to Texas GOP to Help State Redistricting Effort*, *Wash. Post*, July 12, 2004, at A1.

⁴⁹ Richard A. Oppel, Jr., *Inquiry Focuses on Group DeLay Created*, *N.Y. Times*, Feb. 16, 2004, at A15.

⁵⁰ Lee Hockstader, *DeLay PAC Is New Focus Of Texas Probe; Prosecutors Examine Possible Illegal Use of Funds by GOP*, Wash. Post, Feb. 28, 2004, at A3.

⁵¹ Jill Abramson, *Campaign Finance; A Law Survives. Now, Let's Subvert It*, N.Y. Times, Dec. 14, 2003, § 4, at 1.

⁵² Joe W. Brown & Andrew Spalding, *Grass Roots Democracy, or Free Speech Abridged? Nevada Politics and the Bipartisan Campaign Reform Act of 2002*, 10 Nev. Law. 8, 9 (2002).

⁵³ *McConnell*, 124 S.Ct. at 703.

⁵⁴ *See id.* at 696.

⁵⁵ Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. Rev. 265, 268 (2000).

⁵⁶ Craig B. Holman & Luke McLoughlin, *Buying Time: the Fallacies of Campaign Reform and Our Advertising Laws*, Brennan Center for Justice at NYU School of Law Press Center, available at http://www.brennancenter.org/presscenter/oped_2002/oped_2002_0402.html (Apr. 1, 2002).

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⁵⁸ *See id.*

⁵⁹ *RNC Tells TV Stations Not to Run Anti-Bush Ads*, CNN Inside Politics, Mar. 6, 2004, at <http://www.cnn.com/2004/ALLPOLITICS/03/06/moveon.ads/>

⁶⁰ FEC AO 2003-37 (Feb. 19, 2004), at <http://www.fec.gov/aos/linkfiles/2003-37.doc>

(quoting *McConnell*, 124 S.Ct. at 675).

⁶¹ Richard A. Oppel, Jr. & Richard Perez-Pena, *The Power Broker; Role in Ads Puts Focus on Bush Friend*, N.Y. Times, Mar. 6, 2000, at A16.

⁶² 146 Cong. Rec. S5994-03,S5995 (2000).

⁶³ Greg Gordon, *Turning Nonprofits Into Powerful Political Tools*, Star Trib. (Minneapolis, MN), Oct. 29, 1997, at A11.

⁶⁴ Michael Trister, *The Rise and Reform of Stealth PACs*, 9/25/00 Am. Prospect 3235 (2000).

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⁶⁶ Jodi Wilgoren, *Vietnam Veterans Buy Ads to Attack Kerry*, N.Y. Times, Aug. 5, 2004, at A16.

⁶⁷ Michael Dobbs, *Records Counter a Critic of Kerry; Fellow Skipper's Citation Refers to Enemy Fire*, Wash. Post, Aug. 19, 2004, at A1. *See also* Elisabeth Bumiller & Kate Zernike, *President Urges Outside Groups To Halt All Ads*, N.Y. Times, Aug. 24, at A1.

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