

## COMMENTARIES

### FEDERAL CAMPAIGN FINANCE REFORM BASED ON VIRGINIA ELECTION LAW: THE CARSON ACT AS A SIMPLE, EFFECTIVE, AND CONSTITUTIONAL MEANS TO CURB CORRUPTION IN THE FINANCING OF FEDERAL CAMPAIGNS

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#### I. INTRODUCTION

The United States Congress has recognized that actual and apparent corruption exists in the federal campaign finance system and has passed campaign finance reform legislation in an attempt to curb that corruption.<sup>1</sup> The Supreme Court of the United

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1. In 1972 Congress passed the Federal Election Campaign Act of 1971 ("FECA") and it went into effect upon the President's signature. See Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-455 (2000 & Supp. IV 2004)). FECA was most recently and significantly amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"). See Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified at 2 U.S.C. §§ 431-455 (Supp. IV 2004)). BCRA is commonly referred to as the McCain-Feingold legislation, named after the two United States Senators who introduced the legislation—John McCain and Russ Feingold. See CNN.com, *McCain, Feingold Plan to Introduce Campaign Finance Bill*, Jan. 4, 2001, <http://archives.cnn.com/2001/ALLPOLITICS/stories/01/04/mccain.camp.finance/> (last visited Sept. 23, 2007). John McCain, a Republican, is the senior Senator

States also has recognized the existence of such corruption and, accordingly, has upheld much of the campaign finance legislation enacted by Congress.<sup>2</sup> Nevertheless, actual and apparent corruption still exists in the federal system, largely because as new reforms are enacted, new loopholes are found and exploited by contributors, candidates, and political parties. Indeed, “[c]ampaign contributions flow like water: whenever one obstacle appears, the stream is simply diverted until it finds another way to proceed.”<sup>3</sup> Or as the Supreme Court recognized in *McConnell v. FEC*, “Money, like water, will always find an outlet.”<sup>4</sup>

#### A. *The Existence of Actual or Apparent Corruption*

While the term “corruption” can take on myriad meanings in a multitude of contexts, *Buckley v. Valeo*<sup>5</sup> and its progeny seem to have established that “corruption” generally exists in three forms: “*quid pro quo*, monetary influence, and distortion.”<sup>6</sup> Regardless of the form it takes, corruption often thrives in the context of financing campaigns.<sup>7</sup> For this reason, Congress has attempted to regu-

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from Arizona. Russ Feingold, a Democrat, is the junior Senator from Wisconsin.

2. See *McConnell v. FEC*, 540 U.S. 93 (2003); *Buckley v. Valeo*, 424 U.S. 1 (1976).

3. John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 70 (2000).

4. *McConnell*, 540 U.S. at 224; see also Marty Jezer et al., *A Proposal for Democratically Financed Congressional Elections*, 11 YALE L. & POL'Y REV. 333, 333 (1993) (describing campaign finance reform legislation as a “pattern” of “insufficient provisions for administration and enforcement and sufficient loopholes to undermine the regulations on campaign contributions”).

5. 424 U.S. 1 (1976).

6. See Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127, 131 (1997).

7. BCRA’s supporters in the Senate recognized that campaign finance reform could not be achieved without addressing corruption. According to Senator Feingold:

[T]he choice of the word “corruption” is not my choice. It is the standard that the U.S. Supreme Court has said we have to deal with if we are going to legislate in this area. It is not John McCain’s word. It is not my word. It is the word of the Court. The Court said, in *Nixon v. Shrink Missouri Government PAC*: “*Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible. The opinion noted that the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem of corruption is not an illusory one.” I am sorry the Senator from Kentucky does not want us to talk about it, but the Court says we can’t do a bill about it unless we do talk about it. So we are going to talk about it. We are going to talk about corruption, but, more importantly, what is much more obvious and much more relevant is the appearance of corruption. It is what it does to our Government and our system when people think there may be corruption even if it may not exist.

late the manner in which Americans contribute to campaigns in order to reduce the actual and apparent corruption.

This commentary focuses on reforming the law that currently governs campaign finance at the federal level by building on the laws currently being employed in Virginia. First, this commentary surveys the current culture at the federal level in the campaign finance context, and then examines the constitutional limits on regulating in that arena. Next, the commentary reviews the legislation that is currently in place to eradicate corruption. The commentary then evaluates the major shortcomings of these laws: complexity, ineffectiveness, and infringement on First Amendment rights.

The focus then turns to the Commonwealth of Virginia: contrasting the level of corruption inherent at the federal level with the culture in Virginia; surveying the laws in place that govern campaign finance in Virginia; and assessing the key attributes of Virginia's current laws: simplicity, effectiveness, and harmony with First Amendment rights.

After evaluating the corruption and the laws designed to impede it at the federal level and in Virginia, the commentary proposes a reform measure that builds on Virginia law in an attempt to provide simpler, more effective, and less constitutionally offen-

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147 CONG. REC. S2433, 2444 (daily ed. Mar. 19, 2001) (statement of Sen. Feingold).

Senator McCain also acknowledged that corruption was the justification for campaign finance reform: "In 1974, we enacted a law to limit contributions from individuals and political action committees directly to the candidates. Those laws were not found unconstitutional and vacated by the courts. They were judged lawful for the purpose of preventing political corruption or the appearance of corruption." 147 CONG. REC. 3135, 3854 (2001).

Furthermore, BCRA's supporters asserted that the appearance of corruption could have as much, if not more, of a deleterious effect on the electoral process than actual corruption. Summing up this sentiment, Senator Dodd explained:

The exploding use of soft money that permeates our campaign system is, of course, having, in the minds of many, a corrupting influence, suggesting that large contributions by donors to officeholders, candidates, and political parties provide those donors with preferred access and influence over public policy. Whether or not that is the case is immaterial, I have never suggested, I have never known of a particular Member whom I thought cast a ballot because of a contribution. In the minds of most people—a sad commentary, maybe not most, but many people, that is the case. That is what they think happens. So it then becomes a fact to them. Whether or not the reality lines up with that perception is something else. But if in the minds of Americans, our public citizens at large, in whom we must maintain the confidence of an electoral democratic process, our campaign financing system is so corrupted by large contributions, that is a stark reality with which we have to contend.

148 CONG. REC. S2096, 2099 (daily ed. Mar. 20, 2002) (statement of Sen. Dodd).

sive reform at the federal level—the Corruption Abatement Reform Statute of Necessity (“CARSON Act”).<sup>8</sup>

### B. *Corruption Defined*

Even though the phrase is central to its holding, the Supreme Court in *Buckley v. Valeo* never expressly identified what constitutes the “actuality and appearance of corruption” in the funding of political campaigns.<sup>9</sup> Going a little further to define the term, the majority in *McConnell* stated:

More importantly, plaintiffs conceive of corruption too narrowly. Our cases have firmly established that Congress’ legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing “undue influence on an officeholder’s judgment, and the appearance of such influence.” Many of the “deeply disturbing examples” of corruption cited by this Court in *Buckley* to justify FECA’s contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials. Even if that access did not secure actual influence, it certainly gave the “appearance of such influence.”

The record in the present cases is replete with similar examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations.<sup>10</sup>

The word “corruption” has not been established as a legal term of art, and it has diverse meanings to the disparate players who are engaged in all aspects of campaign finance. “Even the dictionary definitions of corruption suggest that it is a tricky term. The *Oxford English Dictionary* gives nine basic definitions of corruption, but there is an element common to all: a notion that something pure, or natural, or ordered has decayed or become degraded.”<sup>11</sup>

As stated above, the Supreme Court seems to identify three forms of corruption in campaign finance cases: *quid pro quo ar-*

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8. This commentary does not address ethics rules or tenets governing gifts in Virginia or at the federal level, nor does it address rules that directly govern lobbyists.

9. See *Buckley*, 424 U.S. at 26 (“It is unnecessary to look beyond the Act’s primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation.”).

10. *McConnell v. FEC*, 540 U.S. 93, 150 (2003) (citations omitted).

11. Burke, *supra* note 6, at 128 (citing THE OXFORD ENGLISH DICTIONARY 973–74 (2d ed. 1989)).

rangements, monetary influence, and distortion.<sup>12</sup> The term “quid pro quo” refers to the exchange of votes for money; an exercise of “turning yarn into cloth”<sup>13</sup> by contributors. The Court in *Buckley* opined, “To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.”<sup>14</sup>

In *FEC v. National Conservative Political Action Committee*,<sup>15</sup> the Court provided an actual definition of corruption. The definition includes “quid pro quo,” but the Court goes further and addresses monetary influence more concretely than it did in *Buckley*:

Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.<sup>16</sup>

By classifying “quid pro quos” as the mere “hallmark” of corruption and by alluding to the influence that money places on elected officials, the Court adopted a broader definition of corruption that includes “monetary influence.”<sup>17</sup>

In 1990, the Court in *Austin v. Michigan Chamber of Commerce*<sup>18</sup> added distortion to its definition of corruption:

Regardless of whether [the] danger of “financial *quid pro quo*” corruption may be sufficient to justify a restriction on independent expenditures, Michigan’s regulation aims at a different type of corruption in the political arena: 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.<sup>19</sup>

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12. See *supra* note 6 and accompanying text.

13. *Active Wear, Inc. v. Parkdale Mills, Inc.*, 331 B.R. 669, 670 (W.D. Va. 2005).

14. *Buckley*, 424 U.S. at 26–27.

15. 470 U.S. 480 (1985).

16. *Id.* at 497.

17. See *Burke*, *supra* note 6, at 133.

18. 494 U.S. 652 (1990) (upholding a Michigan statute that prohibited corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, state candidates).

19. *Id.* at 659–60 (citations omitted).

The *Austin* Court was thus concerned about large corporate contributions distorting the political process by compelling elected officials to govern on behalf of their large corporate contributors as opposed to their constituents. In expressing this concern in its opinion, the Court added “distortion” to its definition of corruption.<sup>20</sup>

## II. THE STATUS OF CORRUPTION IN WASHINGTON

The current body of federal campaign finance law is largely designed to mitigate corruption by placing limits on the amounts that may be contributed to, and received by, candidates for federal office or the committees that support their candidacy. In spite of the volume of laws in place,<sup>21</sup> the length of the Supreme Court opinions interpreting those laws,<sup>22</sup> and the manner in which those laws infringe on the First Amendment rights of campaign contributors,<sup>23</sup> the laws have been largely futile in mitigating corruption at the federal level.

Campaign finance has been at the very root of the largest scandals to shake Washington, D.C. in modern times.<sup>24</sup> Ironically, one of the arguments against passage of the Bipartisan Campaign Reform Act of 2002 (“BCRA”) by its congressional foes was that the legislation was unnecessary for want of corruption.<sup>25</sup>

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20. See Burke, *supra* note 6, at 133–34.

21. See 2 U.S.C. §§ 431–455 (2000 & Supp. IV 2004).

22. See, e.g., *McConnell v. FEC*, 540 U.S. 93 (2003) (153-page opinion); *Buckley v. Valeo*, 424 U.S. 1 (1976) (144-page per curiam opinion).

23. See *Buckley*, 424 U.S. at 23 (noting that “contribution and expenditure limitations both implicate fundamental First Amendment interests”).

24. See, e.g., CNN.com, *House Panel Votes to Expel Traficant*, July 18, 2002, <http://archives.cnn.com/2002/ALLPOLITICS/07/18/traficant.ethics/index.html> (last visited Sept. 23, 2007); FoxNews.com, *Cunningham Quits House in Bribery Flap*, Nov. 28, 2005, <http://www.foxnews.com/story/0,2933,176885,00.html> (last visited Sept. 23, 2007).

25. See 148 CONG. REC. S2119 (daily ed. Mar. 20, 2002) (statement of Sen. McConnell) (“Although the facts about the provisions of this bill are almost always misrepresented, the driving mantra behind the entire movement is that we are all corrupt or that we appear to be corrupt. We have explored corruption and the appearance of corruption [sic] before in this Chamber. You cannot have corruption unless someone is corrupt. At no time has any Member of either body offered evidence of even the slightest hint of corruption by any Member of either body. As for the appearance of corruption, our friends in the media who are part and parcel of the reform industry continue to make broad and baseless accusations.”).

Since the passage of BCRA, the “buying” of Washington has been prominent in the news. Many observers claim that, after the war in Iraq, corruption in Washington was a leading cause of the Democratic takeover of both houses of Congress in the 2006 mid-term elections.<sup>26</sup> The biggest scandals to plague Congress over the last two years have all started with financing campaigns.

Many examples of this type of corruption exist, but none is bigger than the scandal involving lobbyist Jack Abramoff. On March 29, 2006, lobbyist Jack Abramoff was sentenced to five years and ten months in prison after pleading guilty to fraud, tax evasion, and conspiracy to bribe public officials.<sup>27</sup> As part of his deal with federal prosecutors, Abramoff agreed to cooperate in the investigation of his relationships with members of Congress.<sup>28</sup>

Abramoff weaved an intricate web of contacts on Capitol Hill and engaged in schemes to move money between organizations over which he had control or in which he had contacts as a means of pressuring elected officials or buying influence from them.<sup>29</sup> The Abramoff scandal was far-reaching in Congress, as it implicated many influential elected officials and staff members. The two most prominent elected officials to be investigated were Representative Tom DeLay, a Republican from Texas, and Representative Robert Ney, a Republican from Ohio.<sup>30</sup>

For DeLay, the focus in the Abramoff scandal was on his former deputy chief of staff, Tony C. Rudy.<sup>31</sup> In his plea agreement,

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26. Barack Obama, *A Chance to Change the Game*, WASH. POST, Jan. 4, 2007, at A17 (“After a year in which too many scandals revealed the influence special interests wield over Washington, it’s no surprise that so many incumbents were defeated and that polls said ‘corruption’ was the grievance cited most frequently by the voters. It would be a mistake, however, to conclude that this message was intended for only one party or politician.”); see, e.g., CNN.com, *Corruption Named as Key Issue by Voters in Exit Polls*, Nov. 7, 2006, <http://www.cnn.com/2006/POLITICS/11/07/election.exitpolls/> (last visited Sept. 23, 2007) (“By a wide margin, Americans who voted Tuesday in the midterm election say they disapprove of the war in Iraq. But when asked which issue was extremely important to their vote, more voters said corruption and ethics in government than any other issue, including the war, according to national exit polls.”).

27. Washingtonpost.com, *Investigating Abramoff—Special Report*, <http://www.washingtonpost.com/wp-dyn/content/linkset/2005/06/22/LI2005062200936.html> (last visited Sept. 23, 2007).

28. *Id.*

29. Susan Schmidt & James V. Grimaldi, *How a Lobbyist Stacked the Deck*, WASH. POST, Oct. 16, 2005, at A1.

30. See Jonathan Weisman, *Abramoff Prober Turns Focus on Delay Aide*, WASH. POST, Jan. 8, 2006, at A1.

31. *See id.*

Abramoff cited “Staffer A,” who has come to be known as Rudy. Abramoff admitted that in two instances he sought Rudy’s help to stop legislation that would, if passed, prohibit forms of Internet gambling and effect a postal rate increase.<sup>32</sup> The plea agreement stated that, “With the intent to influence those official acts,’ . . . Abramoff provided ‘things of value, including but not limited to . . . ten equal monthly payments totaling \$50,000’ to Rudy’s wife, Lisa.”<sup>33</sup> Representative DeLay was involved in both of these legislative matters.<sup>34</sup> The Choctaw Indian tribe and eLottery, two Abramoff clients, underwrote a “lavish golfing trip” to Scotland on which Abramoff took both Rudy and DeLay in May 2000.<sup>35</sup> “Rudy and Abramoff worked furiously to shoot down the bill prohibiting Internet gambling, with Rudy firing off e-mails to the lobbyist using the pronoun ‘we’ as though he belonged to Abramoff’s team.”<sup>36</sup>

DeLay ultimately retired from Congress. He made the announcement three days after Tony Rudy pleaded guilty to conspiracy and corruption charges and told federal prosecutors of a “criminal enterprise being run out of DeLay’s leadership offices.”<sup>37</sup> Rudy’s plea agreement did not allege that DeLay engaged in any illegal activity, but it placed the “influence-buying efforts of . . . Jack Abramoff directly in DeLay’s operation.”<sup>38</sup>

The Abramoff scandal also prompted Representative Robert Ney to resign from his powerful leadership position as Chairman of the House Administrative Committee.<sup>39</sup> Ney was the first elected official to be convicted and sentenced in the larger Abramoff scandal.<sup>40</sup> Ney admitted that while he was Chairman of the House Administrative Committee, “he performed official acts

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32. *Id.*

33. *Id.* (“The Post had previously reported that \$25,000 had come from eLottery, Inc., an Internet gambling firm, which sent the money to a Seattle-based Orthodox Jewish foundation, Toward Tradition, that then paid fees to Rudy’s wife.”).

34. *Id.*

35. *Id.*

36. *Id.*

37. Jonathan Weisman & Chris Cillizza, *DeLay to Resign from Congress*, WASH. POST, Apr. 4, 2006, at A1.

38. *Id.*

39. See Susan Schmidt & James V. Grimaldi, *Ney Pleads Guilty to Corruption Charges*, WASH. POST, Oct. 14, 2006, at A1 (“Ney announced in August that he would not seek reelection and resigned as chairman of the House Administration Committee; the head of that panel is known as the mayor of Capitol Hill.”).

40. Susan Schmidt & James V. Grimaldi, *Ney Sentenced to 30 Months in Prison for Abramoff Deals*, WASH. POST, Jan. 20, 2007, at A3.

for Abramoff's lobbying clients between 2001 and 2004, receiving in exchange luxury vacation trips, skybox seats at sporting events, campaign contributions and expensive meals."<sup>41</sup> Ney also admitted that he received "tens of thousands of dollars in gambling chips from a businessman who sought his help with the State Department."<sup>42</sup> For his involvement in corruption, Ney received thirty months in federal prison.<sup>43</sup> The federal district judge who sentenced Ney "handed down a tougher sentence than the 27 months recommended by prosecutors," and told Ney that "as a member of Congress, you had the responsibility above all else to set an example and to uphold the law."<sup>44</sup>

Much could be written about the Abramoff scandal and those in Washington, D.C. who have been caught in its web. Representative "Ney [was] the eighth person convicted in the continuing federal investigation into Abramoff's activities."<sup>45</sup> A federal task force consisting of twelve Justice Department prosecutors continues to investigate dealings between Abramoff and other congressional offices, including those of former Senator Conrad Burns, a Republican from Montana, and Representative John Doolittle, a Republican from California.<sup>46</sup> The Abramoff scandal makes it clear that restricting campaign contributions to elected officials is not enough to thwart corruption.

It is noteworthy that corruption goes beyond elected officials, as it did in the Abramoff scandal—staff members for elected officials are often found to be more corrupt than the elected officials they serve. Additionally, corruption is usually complex and transcends political parties. Furthermore, a great deal of apparent or actual corruption occurs legally—that is, in technical compliance with the law. Whatever form the actual or apparent corruption takes, it is a real-world problem that almost always finds its roots in the financing of federal campaigns.

An example of legal apparent corruption can be found in the actions of Democratic House members shortly after they took their oath as the majority party early in 2007. The Democratic

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41. *Id.*

42. *Id.*

43. *See id.*

44. *Id.*

45. Schmidt & Grimaldi, *supra* note 39.

46. *See id.*

majority almost instantly began exploiting its new committee chairmen for fundraising purposes.<sup>47</sup> In a ten-day stretch beginning in late February 2007, Democratic fundraisers featured the chairmen of the House's financial services panel and the House and Senate tax-writing committees.<sup>48</sup>

Critics have challenged the aggressive fundraising practice of giving interest groups access to committee chairmen in exchange for sizable donations, a practice which polls show was rejected in the midterm elections in the fall of 2006.<sup>49</sup> Regardless, Democrats have remained unapologetic.<sup>50</sup>

Nancy Pelosi, the Democratic Speaker of the House from California, headlined a fundraiser with the chairmen of House committees shortly after assuming her new role. The fundraiser benefited the Democratic Congressional Campaign Committee ("DCCC"), and the price of \$28,500 per couple made it the highest priced fundraiser of its type since the new campaign finance laws were enacted in 2002.<sup>51</sup> The thirst for giant volumes of campaign cash in Washington, and the inevitable apparent and actual corruption that emanates from it, are true signs that reform is needed.

At the federal level, scandals certainly occur that are not rooted in campaign finance,<sup>52</sup> but the corruption inherent in the scan-

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47. See Jeffrey H. Birnbaum & John Solomon, *Democrats Offer up Chairmen for Donors*, WASH. POST, Feb. 24, 2007, at A1.

48. *Id.*

49. See *id.*

50. Barney Frank, a Democrat from Massachusetts and the new Chairman of the House Banking Committee who hosted a breakfast in Washington for which donations ranged from \$1,000 to \$15,000, stated: "Financial services companies are inclined to give to me because I'm chairman of the committee important to their interests." When asked if banking interests feel obligated to contribute when he asks, Frank answered: "Obligated? No. Incentivized? Yes." Frank did attempt to qualify his answer by stating that those donating "understand, and others do, too, that there are no guarantees of my doing what they want, or even my being pleasant." *Id.*

51. *Id.*

52. An example would be the scandal involving Mark Foley, a six-term Republican Representative from Florida, which occurred in the fall of 2006. One day after ABC News reported that he had sent sexually explicit Internet messages to at least one underage male former page, Mr. Foley resigned from Congress. See ABC World News Tonight (ABC television broadcast Sept. 29, 2006), available at 2006 WLNR 17014166. Scandals also certainly exist in the Executive Branch that are not rooted in campaign finance. An example is President Clinton's scandal with White House intern Monica Lewinsky, or the Bush Administration's scandal involving the outing to the media of Valerie Plame as a CIA agent. These scandals do not involve corruption as it has been defined by the Supreme Court in its campaign finance jurisprudence—quid pro quo, monetary influence, and dis-

dals that are grounded in campaign finance are the most invidious and do the most damage to the reputation of the federal government as an institution. This reality underscores the need for reform that can simply and effectively deal with this pressing problem. The current culture in Washington, D.C. illustrates that in spite of the complexity of current regulation, and its infringement on First Amendment rights, it is essentially ineffective at curbing actual or apparent corruption in the context of campaign finance.

### III. FEDERAL LAWS GOVERNING CAMPAIGN FINANCE

In an attempt to provide a brief history of federal campaign finance regulation and its current status, this commentary begins with the Federal Election Campaign Act of 1971 (“FECA”)<sup>53</sup> and ends with a description of the campaign finance regulations currently in place. The historical reach and focus of this discussion is from 1971 to the present.<sup>54</sup>

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tortion are not usually involved. Additionally, most scandals like those in the Clinton and Bush administrations that are not rooted in campaign finance do not infer actual or apparent corruption on Congress as a whole or on the Executive branch as an institution. For instance, when Americans hear about the schemes of Jack Abramoff to employ client money to buy influence with willing elected officials and their staffs, those Americans are hearing about actual corruption, and they will often infer, whether founded or not, that such corruption must also be occurring elsewhere in Congress. However, when a scandal is not rooted in campaign finance, like the sex scandals involving Mark Foley and Bill Clinton, people tend to judge the individual and not the institution. These examples are scandals for sure, and the individual may be seen as corrupt, but the incident is confined to that one individual, and does not imply far-reaching institutional corruption like those scandals rooted in campaign finance.

53. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–455 (2000 & Supp. 2006)).

54. Congress passed the Federal Election Campaign Act of 1971 and amended that Act in 1974 in response to the campaign improprieties surrounding the Watergate scandal. Pub. L. No. 93-443, 88 Stat. 1272 (1974). In 1976, FECA was challenged by candidates for federal offices, political organizations, and political parties in the landmark Supreme Court case of *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the Court made significant changes to FECA. *Id.* Additionally, in March 2002, Congress passed the Bipartisan Campaign Reform Act (“BCRA”), Pub. L. No. 107-155, 116 Stat. 81 (2002), which makes major alterations to the effect FECA had on federal elections. In December 2003, the Supreme Court largely upheld BCRA in *McConnell v. FEC*, 540 U.S. 92 (2003).

A. *Buckley's Limitations on Campaign Finance Before the Bipartisan Campaign Reform Act of 2002*

1. Contributions

In *Buckley*, the supporters of the contribution and expenditure limitations codified in FECA argued that those limitations regulate only conduct, and that their “effect on speech and association [are] incidental at most.”<sup>55</sup> The supporters also argued that restrictions on campaign contributions are justified because they prevent “corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office.”<sup>56</sup> Those challenging the limits of FECA argued that its contribution and expenditure restrictions “are at the very core of political speech, and . . . thus constitute restraints on First Amendment liberty that are both gross and direct.”<sup>57</sup>

In *Buckley*, the Supreme Court paid otiose homage to the importance of protecting First Amendment rights:

Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order “to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . [I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.”<sup>58</sup>

The Court stated, “The First Amendment protects political association as well as political expression,”<sup>59</sup> and “[i]n view of the fundamental nature of the right to associate, governmental ‘action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.’”<sup>60</sup> The Court qualified this, however, by adding that “[n]either the right to associate nor the right

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55. *Buckley*, 424 U.S. at 15.

56. *Id.* at 25.

57. *Id.* at 15.

58. *Id.* at 14–15 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957) and *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

59. *Id.* at 15.

60. *Id.* at 25 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460–61 (1958)).

to participate in political activities is absolute,”<sup>61</sup> and by stating that “[e]ven a ‘significant interference with protected rights of political association’ may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.”<sup>62</sup>

The *Buckley* Court concluded that “although the Act’s contribution and expenditure limitations both implicate fundamental First Amendment interests, its *expenditure* ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial *contributions*.”<sup>63</sup> The Court also stated that expenditure limits “represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech,”<sup>64</sup> but that contribution limits “entail[] only a marginal restriction upon the contributor’s ability to engage in free communication” because a “contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.”<sup>65</sup> Restriction of contributions, therefore, “involves little direct restraint on [the contributor’s] political communication.”<sup>66</sup> Accordingly, the Court found that Congress met its burden and held: “It is unnecessary to look beyond the Act’s primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation.”<sup>67</sup>

Based on the verbiage employed by the Court to justify its decision to uphold the contribution limits, the Court was compelled, at least in part, by its belief that those restrictions would actually “limit the actuality and appearance of corruption.”<sup>68</sup> It is impossible to know whether the Supreme Court would have upheld the restrictions had it known they would ultimately prove ineffective,

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61. *Id.* (quoting *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 567 (1973)).

62. *Id.* (quoting *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975)).

63. *Id.* at 23 (emphasis added).

64. *Id.* at 19.

65. *Id.* at 20–21.

66. *Id.* at 21.

67. *Id.* at 26.

68. *Id.*

but such a realization would have, at least, taken this justification away from the Court.

## 2. Expenditures

The *Buckley* Court took no time in striking down the FECA expenditure restrictions because they unduly infringed on First Amendment rights:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.<sup>69</sup>

## 3. Disclosure

Under FECA, political action committees ("PAC") are required to keep reports of contributions and expenditures, and to file such reports quarterly with the Federal Election Commission ("FEC").<sup>70</sup> The *Buckley* Court applied a strict scrutiny test to determine whether the disclosure requirements of FECA are constitutional "because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights."<sup>71</sup> The Court recognized that it had previously "acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved."<sup>72</sup> Ultimately, the Court held that "[t]he governmental interests sought to be vindicated by the disclosure requirements are of this magnitude."<sup>73</sup>

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69. *Id.* at 19.

70. *See id.* at 63–64. The reports must include the name and address of each individual contributing in excess of \$10, and his occupation and principal place of business if his contribution exceeds \$100. The reports also must include the contribution recipient and purpose of expenditures over \$100. Every individual or group that is not a candidate or a political committee must file a statement with the FEC if it makes a contribution or expenditure over \$100 other than by contribution to a political committee or candidate. *See id.*

71. *Id.* at 66.

72. *Id.* (quoting *Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)).

73. *Id.* According to the *Buckley* Court, the government's sufficiently important inter-

The Court agreed with the concession made by the challengers of FECA “that disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.”<sup>74</sup>

However, the Court also recognized that “[i]n some instances, disclosure may even expose contributors to harassment or retaliation,” that “[t]hese are not insignificant burdens on individual rights, and [that] they must be weighed carefully against the interests which Congress has sought to promote by [the] legislation.”<sup>75</sup> The Court further declared that “[t]here could well be a case . . . where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act’s requirements cannot be constitutionally applied.”<sup>76</sup> The *Buckley* Court then described the type of disclosure requirements that should be constitutionally rejected—

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ests fell into three categories. “First, disclosure provides the electorate with information ‘as to where political campaign money comes from and how it is spent by the candidate’ in order to aid the voters in evaluating those who seek federal office.” *Id.* at 66–67 (quoting H.R. REP. NO. 92-564, at 4 (1971)). The Court continued: “The sources of a candidate’s financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.” *Id.* at 67. The Court’s argument was one for democracy: educate the voter about the candidate’s sources of campaign contributions, and allow the voter to determine if such a candidate is worthy of the voter’s support.

The *Buckley* Court found the government’s second sufficiently important interest to be that “disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.” *Id.* The Court continued by pointing out that “[t]his exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate’s most generous supporters is better able to detect any post-election special favors that may be given in return.” *Id.* The Court even pointed out that “Congress could reasonably conclude that full disclosure during an election campaign tends ‘to prevent the corrupt use of money to affect elections.’” *Id.* (quoting *Burroughs v. United States*, 290 U.S. 534, 548 (1933)). To further its position, the Court cited Justice Sutherland on the issue, who said, “[I]nformed public opinion is the most potent of all restraints upon misgovernment.” *Id.* n.79 (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)).

The Court endorsed the government’s third sufficiently important interest when it granted that “recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations.” *Id.* at 67–68.

74. *Id.* at 68.

75. *Id.*

76. *Id.* at 71.

“where . . . the type of chill and harassment identified in *NAACP v. Alabama* can be shown.”<sup>77</sup>

The *Buckley* opinion, therefore, left the door open for contributors to challenge the FECA disclosure laws when such disclosure leads to real “harassment or retaliation.”<sup>78</sup> In *NAACP v. Alabama*, NAACP members challenged Alabama’s organization disclosure laws.<sup>79</sup> In that case, the Supreme Court struck down the Alabama disclosure law insofar as it required the NAACP to provide the Alabama Attorney General with a complete list of its members.<sup>80</sup> The Supreme Court held that because of the fundamental nature of the right to associate, “state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”<sup>81</sup>

The *Buckley* Court, however, held that serious threats stemming from disclosure had not been identified by the challengers, and declared that threats serious enough to deem disclosure requirements unconstitutional would be extremely rare:

[N]o appellant in this case has tendered record evidence of the sort proffered in *NAACP v. Alabama* . . . . At best they offer the testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure. On this record, the substantial public interest in disclosure identified by the legislative history of this Act outweighs the harm generally alleged.<sup>82</sup>

Finally, the Court concluded that it could “find no constitutional infirmities in the recordkeeping, reporting, and disclosure provisions of the Act.”<sup>83</sup> The Court said the disclosure requirements of FECA have “the *potential* for substantially infringing the exercise of First Amendment rights,”<sup>84</sup> that the requirements have “the *possibility* of infringement,”<sup>85</sup> and that the requirements may be a “*threat* to the exercise of First Amendment

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77. *Id.* at 74 (citing *NAACP v. Alabama*, 357 U.S. 449 (1958)).

78. *Id.* at 68.

79. *NAACP*, 357 U.S. 449.

80. *Id.* at 466.

81. *Id.* at 460–61.

82. *Buckley*, 424 U.S. at 71–72.

83. *Id.* at 84.

84. *Id.* at 66 (emphasis added).

85. *Id.* (emphasis added).

rights.”<sup>86</sup> But the Court never said the disclosure requirements actually *do* infringe on First Amendment rights. It follows from the manner in which the Court upheld the disclosure requirements that a system of full disclosure, without further restrictions, would not infringe on the First Amendment rights of citizens, except in rare cases. Furthermore, the *Buckley* Court seemed to endorse disclosure as an effective weapon against the actuality and appearance of corruption in politics associated with the financing of federal campaigns.

### B. *Supreme Court Action After Buckley and Before McConnell*

The Supreme Court dealt with many cases challenging FECA between the time it decided *Buckley* and the time it heard *McConnell v. FEC*.<sup>87</sup> The Supreme Court also had ample opportunity to review cases challenging state campaign finance laws in those same years.<sup>88</sup> While the focus of this commentary is clearly on the Supreme Court’s seminal review in *Buckley* and *McConnell*, the Court’s action in two related cases in the interim is also worth noting.

In *Colorado Republican Federal Campaign Committee v. FEC*, the petitioner, prior to selecting its candidate for the Senate, bought radio advertisements attacking the Democratic Party’s

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86. *Id.* at 71 (emphasis added).

87. *See, e.g.*, *FEC v. Beaumont*, 539 U.S. 146 (2003) (holding that provisions of the Act barring direct corporate campaign contributions to nonprofit advocacy group were consistent with the First Amendment); *Bread Political Action Comm. v. FEC*, 455 U.S. 577 (1982) (holding that political action committee did not have standing to challenge constitutionality of Act); *Cal. Med. Ass’n v. FEC*, 453 U.S. 182 (1981) (holding that the Act’s campaign contribution limit does not violate the First Amendment).

88. *See Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000) (upholding Missouri law that placed limits on the contributions that could be made to state candidates on the ground that there was a legitimate state interest in limiting those contributions as a way of curbing the apparent or actual corruption that flows from large contributions); *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87, 88 (1982) (overruling the Ohio Campaign Expense Reporting Law as a violation of the First Amendment and holding that the disclosure requirements could not be constitutionally applied to the Socialist Party activists because their minor party had historically been the subject of harassment by government officials and private parties); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) (striking down California law that limited contributions to committees established to advocate for or against ballot initiatives to \$250 as a violation of First Amendment rights); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (striking down a Massachusetts law that prevented banks and corporations from making certain expenditures for the purpose of influencing the vote on a referendum proposal).

candidate.<sup>89</sup> The FEC brought charges alleging that the Colorado Republican Federal Campaign Committee had violated FECA by exceeding the limit on campaign contributions.<sup>90</sup> The Supreme Court reversed the Tenth Circuit, holding that the First Amendment prohibited the application of FECA's campaign contribution limits to expenditures that the political party made without having coordination with any candidate.<sup>91</sup>

Five years later, in *FEC v. Colorado Republican Federal Campaign Committee*, or *Colorado II* as it became known, the Supreme Court addressed whether FECA's contribution restrictions could constitutionally apply to expenditures made by the Colorado Republican Federal Campaign Committee in coordination with a candidate.<sup>92</sup> The Court again reversed the Tenth Circuit in holding that, unlike truly uncoordinated expenditures, coordinated expenditures by the party could be constitutionally restricted to minimize abuse of the contribution limits.<sup>93</sup>

The Supreme Court reviewed several cases in the realm of campaign finance between *Buckley* and *McConnell*, but its holdings in *Colorado I* and *II* provided some of the clearest guidance for future legislation. Campaign finance laws evolved a great deal in the thirty-one years after the original passage of FECA, mostly by way of Supreme Court opinion, but in 2002 the BCRA provided an evolution in campaign finance law by way of legislation.

### C. *Limits on Campaign Finance After McConnell's Review of the Bipartisan Campaign Reform Act of 2002*

#### 1. Overview of the Bipartisan Campaign Reform Act of 2002

The Supreme Court in *Buckley* limited the scope of FECA to forbid corporations and unions from using money from their corporate treasuries to fund political advertisements that employed express (or "magic") words of advocacy, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against,"

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89. Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 608 (1996).

90. *Id.*

91. *Id.*

92. FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 437 (2001).

93. *Id.* at 465.

‘defeat,’ [or] ‘reject.’”<sup>94</sup> However, corporations and unions could easily circumvent these regulations by funding advertisements that advocated for or against a given candidate, but which did not employ the express words prohibited by law. This ease of circumvention led to an increase in corporate and union spending on advertisements designed to influence federal elections.<sup>95</sup> Additionally, contributions were being made in great quantities to organizations that, under FECA, could accept contributions of any amount and spend those contributions on behalf of a candidate or candidates as long as there was no coordination between the source and the candidate(s). These unregulated contributions are referred to as soft money.

BCRA was designed to prevent such circumvention and profiteering from soft money. To do this, BCRA sought to restrict all corporate and union spending on political advertisements that reference a federal candidate and that are broadcast in the weeks immediately leading up to a federal election, regardless of the verbiage employed in the advertisements.<sup>96</sup>

BCRA contains five titles, but the first two are the most relevant to this commentary. Title I prohibits national political parties, federal officeholders, and candidates from raising and spending soft money.<sup>97</sup> Title II places restrictions on corporations and unions and their ability to influence federal elections, primarily by prohibiting them from funding campaign advertisements.<sup>98</sup> Title II also provides a new definition of “electioneering communication” to address candidate-specific issue ads.<sup>99</sup>

BCRA created the term “electioneering communication,” and defined it as any television or radio advertisement that clearly identifies a candidate or candidates seeking federal office in the

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94. *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976).

95. Spencer Overton, *Restraint and Responsibility: Judicial Review of Campaign Reform*, 61 WASH. & LEE L. REV. 663, 671 (2004).

96. *See id.* at 672 (citing Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended at 2 U.S.C. §§ 431-455 (Supp. IV 2004))).

97. 2 U.S.C. § 441i; *see also* Frank J. Favia, Jr., Note, *Enforcing the Goals of the Bipartisan Campaign Reform Act: Silencing Nonprofit Groups and Stealth PACs in Federal Elections*, 2006 U. ILL. L. REV. 1081, 1085.

98. 2 U.S.C. § 441b(b)(2); *see also* Michael Saxl & Maeghan Maloney, *The Bipartisan Campaign Reform Act: Unintended Consequences and the Maine Solution*, 41 HARV. J. ON LEGIS. 465, 468 (2004).

99. 2 U.S.C. § 434(f)(3); *see also* Favia, *supra* note 97, at 1085.

viewing area where the advertisement is broadcast.<sup>100</sup> An advertisement constitutes an “electioneering communication” if it is broadcast “60 days before a general, special, or runoff election” or “30 days before a primary or preference election.”<sup>101</sup> Though BCRA placed a novel term and definition in play, it did not expressly reject the magic words test that the Supreme Court created in *Buckley*.<sup>102</sup>

Congress provided an alternative definition of “electioneering communication” in BCRA as insurance in case the first definition is deemed unconstitutional by the courts: “any television or radio advertisement that, regardless of express advocacy, promotes, supports, attacks, or opposes a candidate, and cannot be construed in any manner other than to urge the public to vote for or against a candidate;” this definition included no time restriction.<sup>103</sup> Furthermore, BCRA delegates authority to the FEC to create its own exemptions to the definition of “electioneering communication” as long as those exemptions do not allow advertisements that “promote, support, attack, or oppose a Federal candidate.”<sup>104</sup>

BCRA bans any “electioneering communication” that is funded by corporations or unions, directly or indirectly.<sup>105</sup> Other organizations, however, are left untouched and unregulated by BCRA. For example, 501(c)(3) corporations, Qualified Nonprofit Corporations (“QNCs”), unincorporated 501(c)(4) organizations, and 527 organizations are not covered by BCRA.<sup>106</sup> Still, BCRA prohibits such organizations from making “electioneering communications” if they accept corporate or union funds, intermingle those funds with contributions made by individuals, or use those funds to make “targeted communications”—which encompasses all “electioneering communications.”<sup>107</sup>

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100. 2 U.S.C. § 434(f)(3)(A)(i); see also Daniel B. Roth, Comment, *Campaign Finance Reform, Electioneering Communications, and the First Amendment: Resuscitating the Third Exception*, 38 J. MARSHALL L. REV. 1315, 1320–21 (2005).

101. 2 U.S.C. § 434(f)(3)(A)(i)(II).

102. See *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976).

103. Roth, *supra* note 100, at 1321 (citing 2 U.S.C. § 434(f)(3)(A)(ii)).

104. *Id.* (citing 2 U.S.C. § 434(f)(3)(B)(iv)).

105. 2 U.S.C. § 441b(b)(2).

106. See 2 U.S.C. § 441b(c)(2); see also Saxl & Maloney, *supra* note 98, at 468–69.

107. See 2 U.S.C. § 441b(c)(3), (6); see also Roth, *supra* note 100, at 1322.

In short, BCRA place greater limits on how corporate and labor treasury funds can be used in federal elections, on the sources and sizes of political party contributions, and on the type of funds that may be used for campaign advertising.<sup>108</sup> BCRA's limitations require that national party committees use only hard money—money governed by federal contribution limits—to finance their political activities.<sup>109</sup>

## 2. The *McConnell* Court's Upholding of BCRA

Immediately after President Bush signed BCRA into law, Senator Mitch McConnell filed suit, with a bevy of other plaintiffs, challenging the constitutionality of several provisions of the Act.<sup>110</sup> The plaintiffs' suit was based primarily on the theory that the definition of "electioneering communications," and the ban on such communications when paid for with corporate money, was vague and violated fundamental First Amendment rights.<sup>111</sup>

In *McConnell*, the Supreme Court upheld the provision of BCRA that prohibits corporate and union funding of political advertisements in the weeks preceding an election.<sup>112</sup> The Court determined that the number of such advertisements that posed no threat of corruption was small in comparison to the number of corrupting activities that would occur without the restriction.<sup>113</sup> In rejecting the plaintiffs' overbreadth claims, the majority voiced its concern about corporate and union expenditures influencing elected officials and the real or potential corruption that could result.<sup>114</sup>

The Court ruled that Congress's interest in preventing corporations and unions from unduly influencing an election is significant enough to outweigh any First Amendment infringement caused by BCRA.<sup>115</sup>

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108. See Favia, *supra* note 97, at 1085.

109. *Id.*

110. Favia, *supra* note 97, at 1086.

111. Roth, *supra* note 100, at 1322–23 (citing Neil A. Lewis & Richard A. Oppel Jr., *Campaign Finance: The Overview; Mixed Ruling on Constitutionality of New Campaign Finance Law*, N.Y. TIMES, May 3, 2003, at A1).

112. *McConnell v. FEC*, 540 U.S. 93, 141–85 (2003).

113. Overton, *supra* note 95, at 668.

114. *See id.*

115. *See McConnell*, 540 U.S. at 207 (“We are therefore not persuaded that plaintiffs

In his dissent, Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, opined that Congress's interest in preventing the appearance of corruption did not outweigh First Amendment interests.<sup>116</sup> Justice Kennedy's dissent noted that the laws which regulate the spending on express advocacy are easy to circumvent,<sup>117</sup> and he agreed with the majority's decision to uphold the provisions of BCRA which require the disclosure of electioneering communications.<sup>118</sup> However, the dissent ultimately concluded that BCRA's restrictions on corporate and union electioneering expenditures were over-inclusive, describing the electioneering communication "provision, 'with its crude temporal and geographic proxies,' as 'a severe and unprecedented ban on protected speech' because reference to an elected official often facilitates communication about pending legislation and other matters that pose no threat of corruption."<sup>119</sup>

Ultimately the Kennedy dissent concluded:

In defending against a facial attack on a statute with substantial overbreadth, it is no answer to say that corporations and unions may bring as-applied challenges on a case-by-case basis. When a statute is as out of bounds as [the restriction on corporate and union electioneering], our law simply does not force speakers to "undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation." If they instead "abstain from protected speech," they "harm not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." Not the least of the ill effects of today's decision is that our overbreadth doctrine, once a bulwark of protection for free speech, has

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have carried their heavy burden . . . . Even if we assumed that BCRA will inhibit some constitutionally protected corporate and union speech, that assumption would not 'justify prohibiting all enforcement' of the law unless its application to protected speech is substantial, 'not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications.' Far from establishing that BCRA's application to pure issue ads is substantial, either in an absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion." (quoting *Virginia v. Hicks*, 539 U.S. 113, 119–20 (2003)).

116. *Id.* at 291–98 (Kennedy, J., dissenting); see also Overton, *supra* note 95, at 681.

117. *McConnell*, 540 U.S. at 323 (Kennedy, J., dissenting) ("The Government and the majority are right about one thing: The express-advocacy requirement, with its list of magic words, is easy to circumvent."); see also Overton, *supra* note 95, at 681.

118. *McConnell*, 540 U.S. at 321; see also Overton, *supra* note 95, at 681.

119. Overton, *supra* note 95, at 681 (quoting *McConnell*, 540 U.S. at 334 (Kennedy, J., dissenting)).

now been manipulated by the Court to become but a shadow of its former self.<sup>120</sup>

Justice Scalia, writing separately in dissent, took a similar tone in describing the extent to which BCRA infringes on First Amendment rights:

It should be obvious, then, that a law limiting the amount a person can spend to broadcast his political views is a direct restriction on speech. That is no different from a law limiting the amount a newspaper can pay its editorial staff or the amount a charity can pay its leafletters. It is equally clear that a limit on the amount a candidate can *raise* from any one individual for the purpose of speaking is also a direct limitation on speech. That is no different from a law limiting the amount a publisher can accept from any one shareholder or lender, or the amount a newspaper can charge any one advertiser or customer.<sup>121</sup>

Thus, the dissenters in *McConnell* concluded that the restrictions were overly broad because they would limit many advertisements that would not pose a threat of corruption.

The *McConnell* dissenters would be vindicated four years later by the Court's decision in *FEC v. Wisconsin Right to Life, Inc.*<sup>122</sup> In *Wisconsin Right to Life*, the BCRA restrictions on advertising were tested as applied to advertisements being aired by Wisconsin Right to Life. The ads were aired, and scheduled for further airing, within thirty days of a primary election. The ads stated that Senate filibustering during the judicial nominating process was merely a delay tactic, named specific Senators, and advocated that people contact those Senators. While admitting that the ads violated BCRA, the organization contended that BCRA was unconstitutionally overbroad, as applied to the ads, because the ads were directed at a specific political issue and not at the election of specific candidates. The Court held that BCRA was unconstitutional in its blocking of the ads, but the Court could not form a consensus on the grounds for its unconstitutional finding.<sup>123</sup>

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120. *McConnell*, 540 U.S. at 336 (Kennedy, J., dissenting) (citations omitted).

121. *Id.* at 254–55 (Scalia, J., concurring in part and dissenting in part).

122. 127 S. Ct. 2652 (2007).

123. Announcing the judgment of the Court, Chief Justice Roberts wrote:

Last Term, we reversed a lower court ruling, arising in the same litigation before us now, that our decision in *McConnell* left “no room” for as-applied challenges to § 203 [of BCRA]. We held on the contrary that “[i]n upholding §

In *McConnell*, the Court also considered whether the appearance of corruption is sufficient to justify the First Amendment infringement that comes with regulating expenditures of campaign contributions.<sup>124</sup> As stated above, the *Buckley* Court held that regulating expenditures represented an unconstitutional infringement on First Amendment rights.<sup>125</sup> Without expressly overruling *Buckley*, the *McConnell* Court held that Congress's interest in regulating expenditures was sufficient, where *Buckley* had found it to be insufficient.<sup>126</sup>

Finally, the *McConnell* Court held that the definition of "electioneering communication" was not unconstitutionally vague because a reasonable person could determine what the definition does and does not entail.<sup>127</sup> The Court refused to address the sufficiency of the second definition of "electioneering communication" because it upheld the first.<sup>128</sup>

In sum, the *McConnell* majority upheld BCRA almost in its entirety. The Court upheld: BCRA's ban on national party commit-

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203 against a facial challenge, we did not purport to resolve future as-applied challenges."

We now confront such an as-applied challenge. Resolving it requires us first to determine whether the speech at issue is the "functional equivalent" of speech expressly advocating the election or defeat of a candidate for federal office, or instead a "genuine issue ad." We have long recognized that the distinction between campaign advocacy and issue advocacy "may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." Our development of the law in this area requires us, however, to draw such a line, because we have recognized that the interests held to justify the regulation of campaign speech and its "functional equivalent" "might not apply" to the regulation of issue advocacy.

In drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it. We conclude that the speech at issue in this as-applied challenge is not the "functional equivalent" of express campaign speech. We further conclude that the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy, and accordingly we hold that BCRA § 203 is unconstitutional as applied to the advertisements at issue in these cases.

*FEC v. Wisconsin Right to Life, Inc.* 127 S. Ct. 2652, 2659 (2007) (citing *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 546 U.S. 410, 411–12 (2006) (per curiam); *McConnell*, 540 U.S. at 206; *Buckley v. Valeo*, 424 U.S. 1, 42 (1976) (per curiam); *McConnell*, 540 U.S. at 206 n.88 (internal citations omitted)).

124. See *McConnell*, 540 U.S. at 156.

125. See *Buckley v. Valeo*, 424 U.S. 1, 39–59 (1976).

126. Roth, *supra* note 100, at 1323 n.69 (citing *McConnell*, 540 U.S. at 156).

127. *McConnell*, 540 U.S. at 194.

128. *Id.* at 190 n.73.

tees and their agents soliciting, receiving, or spending soft money;<sup>129</sup> BCRA's ban on donors "contributing nonfederal funds to state and local party committees to help finance 'federal election activity,'"<sup>130</sup> and Congress's ability to "prohibit national, state, and local political party committees, and their agents or subsidiaries, from soliciting any funds for, or making or directing any donations to, certain tax-exempt organizations that make expenditures in connection with elections for federal office."<sup>131</sup>

The Court also upheld BCRA's prohibition against federal candidates and officeholders "soliciting, receiving, directing, transferring or spending soft money in connection with federal elections," along with its limits on "the ability of federal candidates and officeholders to solicit, receive, direct, transfer, or spend soft money in connection with state and local elections."<sup>132</sup> Additionally, the *McConnell* Court upheld BCRA's prohibition against state and local officeholders and candidates "spending soft money to fund communications that refer to a clearly identified candidate for federal office and that promote, support, attack or oppose a candidate for that office."<sup>133</sup>

Furthermore, the court upheld the "electioneering communications" provisions of BCRA that prevent corporations and unions from funding "broadcast communications that refer to clearly identified candidates for federal office, made within sixty days of a general election or thirty days of a primary," and that target the area where the candidate is seeking federal office.<sup>134</sup> Significantly, the Court upheld the disclosure rules outlined by BCRA with regard to "electioneering communications."<sup>135</sup>

In upholding BCRA, the Court expressly stated that "the statute's two principal, complementary features—Congress's effort to

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129. See Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 47 (2004) (citing *McConnell*, 540 U.S. at 142–61).

130. *Id.* (citing *McConnell*, 540 U.S. at 161–73).

131. *Id.* (citing *McConnell*, 540 U.S. at 181).

132. *Id.* (citing *McConnell*, 540 U.S. at 181–84).

133. *Id.* at 48 (citing *McConnell*, 540 U.S. at 184–85).

134. *Id.* (citing *McConnell*, 540 U.S. at 203–09).

135. *Id.* at 48 n.90 (citing *McConnell*, 540 U.S. at 194–202).

plug the soft-money loophole and its regulation of electioneering communications—must be upheld in the main.”<sup>136</sup>

### 3. The Status of Contribution Restrictions After *McConnell*

Under BCRA, an individual is permitted to contribute up to \$2,300 to the committee of any federal candidate per election cycle.<sup>137</sup> This amount and the amounts that follow are the maximums for the 2008 election cycle.<sup>138</sup> An individual can contribute up to \$28,500 per year to any national political party committee, \$10,000 per year to any state or local political party committee, and \$5,000 per year to a federal PAC or other federal political committee.<sup>139</sup> An individual is also limited in the aggregate total he may contribute in a two-year election cycle.<sup>140</sup>

An individual can contribute up to an aggregate of \$108,200 per two-year election cycle by contributing up to \$42,700 per election cycle to the committees of federal political candidates, and up to \$65,500 per election cycle to national party committees and/or federal PACs—of which no more than \$40,000 can go to federal PACs per election cycle.<sup>141</sup> BCRA allows opponents of self-financing candidates to raise money in larger quantities.<sup>142</sup>

BCRA did not alter the FECA contribution limits on multi-candidate committees.<sup>143</sup> These committees can contribute up to

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136. Favia, *supra* note 97, at 1086 (paraphrasing *McConnell*, 540 U.S. at 224).

137. See Opensecrets.org, Federal Campaign Finance Law: Contribution Limits, <http://www.opensecrets.org/basics/law/index.asp> (last visited Sept. 23, 2007). A primary election cycle is counted separately from a general election cycle. That is, contribution limits defined per election allow the given amount to be contributed once before the primary election is held and again after the primary but before the general election is held. See *id.* at n.1.

138. Some of the individual contribution limits under BCRA are indexed for inflation and adjust accordingly each election cycle. For instance, an individual could contribute up to \$2,100 to the committee of any federal candidate in the 2006 election cycle that ended on mid-term election day November 7, 2006. See *id.* at n.4.

139. *Id.*

140. *Id.*

141. *Id.*

142. See 2 U.S.C. § 441a(i) (Supp. IV 2004).

143. A multi-candidate committee has more than fifty contributors, has been registered for at least six months, and has contributed to five or more federal candidates. A state political party committee does not have to contribute to five or more federal candidates to qualify as a multi-candidate committee. The amount that may be contributed by a multi-candidate committee is not indexed for inflation and therefore does not adjust per election cycle. See Opensecrets.org, *supra* note 137.

\$5,000 to any federal candidate's committee per election cycle; \$15,000 to any national political party committee per year; and \$5,000 to any PAC, state or local political party, or other political committee per year.<sup>144</sup> No aggregate spending limits, per year or per election cycle, are in place for multi-candidate committees.<sup>145</sup>

Under BCRA, other political committees may contribute \$2,300 to any federal candidate's committee per election cycle and \$28,500 to any national political party committee per year.<sup>146</sup> The committees may contribute \$10,000 per year to a state or local political party committee and \$5,000 per year to a federal PAC or other political committee.<sup>147</sup> These political committees are subject to the two-year election cycle aggregate maximum of \$108,200, of which no more than \$42,700 may be contributed to a single candidate's committee per election cycle.<sup>148</sup>

In placing limits on the amounts that may be contributed, BCRA also places limits on the amounts and manner in which contributions may be received. National political parties are prohibited from accepting contributions in excess of the statutory limits, but they also cannot "solicit, receive or direct" contributions to other organizations.<sup>149</sup> The FEC interprets this language to prohibit a national political party from asking a contributor to contribute to another organization.<sup>150</sup>

#### *D. The Most Significant Shortcomings of Current Federal Campaign Finance Laws*

##### 1. The Complexity of Current Regulation

Not only do loopholes make legislating against campaign finance corruption difficult, but the complexity of the enacted laws makes both compliance and enforcement onerous. Federal campaign finance legislation consumes hundreds of pages of the United States Code and has been amended frequently since

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144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. Saxl & Maloney, *supra* note 98, at 467 (quoting 2 U.S.C. § 441i(a)).

150. *Id.*

FECA was enacted. Adding additional complexity, the two most prominent Supreme Court cases that have dealt with constitutional challenges to federal campaign finance legislation, *Buckley* and *McConnell*, have opinions of 144 and 153 pages, respectively.<sup>151</sup>

The complexity of the current scheme places a great burden on a candidate for federal office. Understanding campaign finance laws may be the greatest challenge for a candidate who seeks federal office for the first time. If a new candidate solicits contributions without a sound understanding of the law, he can subject himself and his campaign to serious penalties and to serious embarrassment that can be exploited by his opponent. Citizens who wish to seek federal office should be able to readily understand the campaign finance laws enacted by their government. However, the current laws are often too complex and convoluted for even the most sophisticated candidate to decipher. It is unfair to candidates, to the public, and to democracy to place such a great burden on a person who merely wishes to become involved in the political process.

## 2. The Ineffectiveness of Current Regulation

Despite the complexity of federal campaign finance restrictions, the actual and apparent corruption that is grounded in campaign finance is not being curbed at the federal level. As stated above, actual or apparent corruption generally exists in three forms: quid pro quo, monetary influence, and distortion. To be effective, the current federal scheme should curb these three forms of corruption in their actual and apparent forms. Even with its complexity, broad reach, and infringement on core First Amendment rights, the current federal scheme has done little to hold down actual and apparent corruption.

FECA was in effect the entire time (and BCRA was in effect most of the time) that Representative Robert Ney was engaging in a quid pro quo arrangement with Jack Abramoff.<sup>152</sup> Ney's actions are an example of actual quid pro quo, but the fact that

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151. See *McConnell v. FEC*, 540 U.S. 93 (2003); *Buckley v. Valeo*, 424 U.S. 1 (1976).

152. See Schmidt & Grimaldi, *supra* note 39. (Bob Ney admitted that as Chairman of the House Administrative Committee "he performed official acts for Abramoff's lobbying clients between 2001 and 2004, receiving in exchange luxury vacation trips, skybox seats at sporting events, campaign contributions and expensive meals.").

American citizens assume that other federal politicians are engaging in similar acts illustrates that apparent quid pro quo is also occurring under the watch of current law.

Nor does it seem that FECA, BCRA, or the Supreme Court cases interpreting them, with all of their complexities, have in any way cut down on monetary influence at the federal level. The Abramoff scandal again provides evidence of the corruption, by way of monetary influence, that is grounded in campaign contributions at the federal level. Tom DeLay's deputy chief of staff, Tony Rudy, and Representative Ney certainly fell prey to monetary influence; the current federal campaign finance laws could not prevent it.

Finally, the current federal campaign finance laws have not prevented contributions from distorting the way business is done in Washington, D.C. An example of such distortion in current practice is the fundraising antics of the House Democrats. Almost instantly after taking over as the Congressional majority in 2007, they began exploiting their committee chairmen for fundraising purposes.<sup>153</sup> It is ironic that the actions of the new Democratic majority would serve as an example of the distorting effect of campaign contributions when many commentators cite corruption as one of the main issues that led voters to pick the new majority in November 2006.<sup>154</sup> Nonetheless, there can be no question that distortion of the political process at the federal level is borne in the sizable contributions solicited by the new Democratic majority, the special interests that make those contributions, and the access those special interests garner with their contributions.

### 3. The First Amendment Constitutional Infringement of Current Regulation

When the constitutionality of FECA was tested in *Buckley*, the Supreme Court struck down the limits placed on campaign expenditures, holding that such limits unconstitutionally infringe on First Amendment rights because they "place substantial and direct restrictions on the ability of candidates, citizens, and asso-

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153. See *supra* notes 47–48 and accompanying text.

154. See *supra* note 49 and accompanying text.

ciations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.”<sup>155</sup>

At the same time, the *Buckley* Court held that contribution limits also infringe on First Amendment rights: “[C]ontribution and expenditure limitations both implicate fundamental First Amendment interests.”<sup>156</sup> However, the Court upheld the contribution limits: “It is unnecessary to look beyond the Act’s primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the . . . contribution limitation[s].”<sup>157</sup>

This restriction of contributions, a recognized limit on political speech and association, was found to be constitutional in spite of the First Amendment’s express language: “*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>158</sup> *McConnell* sustained this way of thinking:

In *Buckley* and subsequent cases, we have subjected restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions. In these cases we have recognized that contribution limits, unlike limits on expenditures, “entai[l] only a marginal restriction upon the contributor’s ability to engage in free communication.”

....

Our treatment of contribution restrictions reflects more than the limited burdens they impose on First Amendment freedoms.

....

Considerations of *stare decisis*, buttressed by the respect that the Legislative and Judicial Branches owe to one another, provide additional powerful reasons for adhering to the analysis of contribution limits that the Court has consistently followed since *Buckley* was decided.<sup>159</sup>

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155. *Buckley*, 424 U.S. at 1, 58–59.

156. *Id.* at 23.

157. *Id.* at 26.

158. U.S. CONST. amend. I (emphasis added).

159. *McConnell v. FEC*, 540 U.S. 93, 134–38 (2003) (citations omitted).

The *McConnell* Court also recognized the First Amendment infringement of BCRA when it dealt with the plaintiffs' overbreadth claims:

We are therefore not persuaded that plaintiffs have carried their heavy burden. . . . Even if we assumed that BCRA will inhibit some constitutionally protected corporate and union speech, that assumption would not "justify prohibiting all enforcement" of the law unless its application to protected speech is substantial, "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." Far from establishing that BCRA's application to pure issue ads is substantial, either in an absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion.<sup>160</sup>

The Court in *McConnell* and *Buckley* relied on Congress's primary purpose in implementing contribution restrictions, "to limit the actuality and appearance of corruption resulting from large individual contributions—in order to find constitutionally sufficient justification" for those restrictions.<sup>161</sup> It is important to note, as outlined above, that this very "justification" on which the Court relies to allow this constitutional infringement to occur has proven ineffective in practice at curbing actual or apparent corruption in the federal system.

Thus, the Supreme Court held in *Buckley*, and reaffirmed in *McConnell*, that current federal campaign contribution limitations, in FECA and BCRA, infringe on the fundamental First Amendment rights of free speech and political association that are guaranteed to every American by the First Amendment to the United States Constitution. While the Court held in both cases that this infringement was justified as a means by which to curb actual or apparent corruption, and is therefore a constitutional infringement, the Court's holdings nonetheless recognize that infringement is occurring.<sup>162</sup>

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160. *Id.* at 207.

161. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976).

162. George Will, *Fending Off the Speech Police*, JEWISH WORLD REV., Mar. 12, 2001, available at <http://www.jewishworldreview.com/cols/will031201.asp> ("Today Internet pornography is protected from regulation, but not Internet political speech. And campaign finance 'reformers' aspire to much, much more regulation because, they say, there is 'too much money in politics.'").

## IV. THE STATUS OF CORRUPTION IN VIRGINIA

Unlike Washington, D.C., Virginia has been home to few modern corruption scandals arising from campaign finance. As discussed above, the funding of campaigns in Virginia operates under a system that does not rely on contribution limits, but merely requires the full disclosure of contributions exceeding \$100.<sup>163</sup>

In the last two Virginia statewide elections held in 2001 and 2005, there have been only two situations where campaign contributions were called into question. Neither situation rose to the level of being an important issue in its respective campaign, and both situations involved an issue with disclosure.

The campaign finance situation that occurred at the outset of the 2001 gubernatorial election had more public relations implications than legal implications.<sup>164</sup> In the spring of 2001, former Virginia Attorney General Mark L. Earley held a press conference with supporters to officially announce his candidacy for governor. At the press conference, Earley was asked by a reporter if he was aware that one of his largest contributors, Thruport Technologies, was managing ads for a pornographic portal site called Sex.com.<sup>165</sup> Earley, labeled as a Christian conservative, was unaware of the tenuous relationship between Thruport and the pornography industry and ultimately returned the contributions.<sup>166</sup>

In 2005, the Republican nominee for attorney general, Robert F. McDonnell,<sup>167</sup> received contributions totaling over one million dollars from the Republican State Leadership Committee ("RSLC"), a political action committee based in Washington, D.C.

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163. See VA. CODE ANN. § 24.2-947.4(B) (Repl. Vol. 2006).

164. The 2001 Gubernatorial election in Virginia was between Mark L. Earley, a former Republican Virginia Senator and former Attorney General from Chesapeake, and Mark Warner, a Democrat from Alexandria who had never previously held elected office. Warner won the election by a count of 984,177 (52%) votes to 887,234 (46%) votes. See Virginia State Board of Elections, Election Results, Nov. 6, 2001, [http://www.sbe.state.va.us/web\\_docs/election/results/2001/nov2001/html/index.htm](http://www.sbe.state.va.us/web_docs/election/results/2001/nov2001/html/index.htm).

165. See Martin Kady II, *Spat Over Online Porn a Moot Point*, WASH. BUS. J., June 22, 2001, <http://washington.bizjournals.com/washington/stories/2001/06/25/story2.html>.

166. See *id.*

167. Robert F. McDonnell, a Republican and previous Delegate to the Virginia General Assembly from Virginia Beach, defeated R. Creigh Deeds, a Democratic Senator from Hot Springs, by a count of 970,886 to 970,563, or 323 votes out of 1.94 million votes cast. This 2005 statewide race for Attorney General of Virginia was the closest statewide race in modern Virginia history. See Michael D. Shear, *McDonnell Declared Attorney General; State Board Finds 323-Vote Victory; Deeds Fights On*, WASH. POST, Nov. 29, 2005, at B1.

that contributes to candidates for state office.<sup>168</sup> McDonnell's campaign disclosed, pursuant to Virginia law, that the contributions were made by the RSLC, but he was called on by his opponent and others to disclose whose contributions to the RSLC had funded the contributions to his campaign.<sup>169</sup> At the time, under both Virginia and federal law, the RSLC had no duty to disclose its contributors to the Virginia Board of Elections. The only duty of the RSLC was to disclose its contributors to the Internal Revenue Service when it made its filings for fiscal year 2005 in the spring of 2006—months after the November election.<sup>170</sup>

The Virginia Board of Elections opined, to no avail, that the Virginia committee for the RSLC had a duty to itemize those contributions exceeding \$100 and to report any contributions exceeding \$10,000 to the Board of Elections' website within three days.<sup>171</sup>

Mere months after the 2005 election, the Virginia General Assembly enacted the Campaign Finance Disclosure Act of 2006.<sup>172</sup> The Act made few substantive amendments to Virginia campaign finance law, save some penalty increases, but included a section entitled: "Certain contributions received from federal political action and out-of-state political committees; campaign committee responsibilities."<sup>173</sup> The code section states in full:

Prior to accepting contributions of \$10,000 or more in the aggregate in any calendar year from any one federal political action committee or out-of-state political committee, the candidate campaign committee shall (i) request the federal political action committee's or out-of-state political committee's State Board of Elections registration number from the committee and (ii) verify that number with the State Board.<sup>174</sup>

By ensuring that out-of-state or federal committees are registered with the State Board of Elections, the law assures that con-

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168. See Editorial, *Mr. McDonnell's Dodge*, WASH. POST, Oct. 28, 2005, at A22.

169. See *id.*

170. See *id.*

171. See *id.*

172. Act of Apr. 19, 2006, ch. 892, 2006 Va. Acts 1469 (codified in scattered sections of VA. CODE ANN. titles 2.2, 19.2, 24.2, and 30).

173. VA. CODE ANN. § 24.2-947.3:1 (Repl. Vol. 2006).

174. *Id.*

tributors to those committees will be disclosed to the State Board of Elections.<sup>175</sup>

The refusal by the RSLC to disclose the identities of its contributors could be seen as a detour from the historic commitment of disclosure in Virginia. This isolated and largely unnoticed incident does not appear to indicate that more candidates in Virginia will begin looking for loopholes in Virginia's disclosure requirements, but only time will tell. Additionally, the rapid response by the Virginia General Assembly to close the loophole—within months of it being exploited by the McDonnell campaign—illustrates Virginia's commitment to an effective system based on full disclosure.

## V. VIRGINIA LAWS GOVERNING CAMPAIGN FINANCE

### A. *Full Disclosure*

Virginia campaign finance law demands full disclosure by those making and those receiving political contributions without limiting the amount a contributor may contribute.

In Virginia, “any person, candidate campaign committee, or political committee that makes independent expenditures, in the aggregate during an election cycle, of \$1,000 or more for a statewide election or \$500 or more for any other election shall maintain records and report” to the state Board of Elections.<sup>176</sup> Additionally, “[a]ll contributions and expenditures received or made by any candidate, or received or made on his behalf . . . shall be paid over or delivered to the candidate's treasurer . . . in such detail . . . as to allow him” to make reports to the State Board of Elections in compliance with the Virginia Code.<sup>177</sup>

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175. The new law governing out-of-state political committees assesses stiff fines on committees that fail to register with the State Board. If an out-of-state political committee contributes \$10,000 in the aggregate in a calendar year to a campaign committee and fails to register, it will be assessed a civil penalty equal to the amount of the contributions made to a Virginia candidate's campaign committee. These same penalties are applicable to both out-of-state political committees and federal political action committees, and are in addition to any other penalties to which the committees may be subject under other portions of the Act. *See id.* § 24.2-953.5 (Repl. Vol. 2006).

176. VA. CODE ANN. § 24.2-945.2 (Supp. 2007).

177. *Id.* § 24.2-947.3(D) (Repl. Vol. 2006).

The reports must contain “[t]he total number of contributors, each of whom has contributed an aggregate of \$100 or less, including cash and in-kind contributions.”<sup>178</sup> The reports also must contain the name, amount, aggregate amount to date, and other personal information for any contributor who has contributed more than \$100 in the aggregate to any one candidate.<sup>179</sup>

Generally, “[a]ny person who violates, or aids, abets, or participates” in violating the reporting laws “shall be subject to a civil penalty not to exceed \$100.”<sup>180</sup> If a candidate’s committee files its report with the Board of Elections after the codified deadlines,<sup>181</sup> it will “be assessed a civil penalty not to exceed \$500.”<sup>182</sup> The candidate’s committee will “be assessed a civil penalty of \$1,000” for a second or any subsequent late filing.<sup>183</sup> If the committee files no report at all, it “shall be assessed a civil penalty not to exceed \$500.”<sup>184</sup> Lastly, “[i]n the case of a second or any subsequent such violation pertaining to our election cycle, the candidate campaign committee or political committee shall be assessed a civil penalty, of \$1,000 for each such failure to file.”<sup>185</sup>

In addition to the penalties just stated, any candidate for governor, lieutenant governor, or attorney general who fails to file a complete report by the given deadline, and who continues to be delinquent after a seven-day grace period following notification of delinquency in writing by the State Board of Elections, could be assessed additional civil penalties of \$500 for each day of delinquency.<sup>186</sup> The statute holds the candidate and the candidate’s committee treasurer jointly and severally liable.<sup>187</sup>

The Virginia statute that acts most like a campaign contribution restriction prohibits members of the General Assembly, statewide officials, and campaign committees of General Assembly members and statewide officials, from soliciting or accepting contributions “on and after the first day of a regular session of the

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178. *Id.* § 24.2-947.4(B)(1) (Repl. Vol. 2006).

179. *See id.* § 24.2-947.4(B)(2)(a)–(h) (Repl. Vol. 2006).

180. *Id.* § 24.2-953(C) (Repl. Vol. 2006).

181. *See id.* §§ 24.2-947.6 to -947.8 (Repl. Vol. 2006).

182. *Id.* § 24.2-953.2(B) (Repl. Vol. 2006).

183. *Id.*

184. *Id.* § 24.2-953.1(B) (Repl. Vol. 2006).

185. *Id.*

186. *See id.* § 24.2-953.4(A)–(C) (Repl. Vol. 2006).

187. *Id.* § 24.2-953.4(C) (Repl. Vol. 2006).

General Assembly through adjournment sine die of that session.”<sup>188</sup> Additionally, “[n]o person or political committee shall make or promise to make a contribution to a member of the General Assembly or statewide official” during a regular session of the General Assembly.<sup>189</sup> This restriction does not apply to contributions made by a General Assembly member from his personal funds or contributions made to the campaign committee of a candidate in a special election.<sup>190</sup>

### B. *Virtues of the Virginia System of Full Disclosure*

Virginia campaign finance laws, which rely almost wholly on full disclosure, are simple, effective, and pose little threat to First Amendment rights.

A system of full disclosure without restrictions is easier to administer than a more complex system because there are no loopholes to police or to close, and there are virtually no laws to circumvent. Participants in the political process can more readily understand and comply with Virginia’s more simplistic system than with its more complex federal counterpart. The sheer size of Virginia’s body of law pales in comparison to the voluminous body of statutory and common law that governs the funding of federal campaigns.

As stated above, the laws currently in place in Virginia have been effective at curbing apparent and actual corruption in the context of campaign contributions.<sup>191</sup> Conversely, at the federal level—where restrictions abound—actual and apparent corruption steeped in campaign finance has recently been prominent.

Myriad grounds can be cited for the fact that Virginia confronts less corruption in the campaign finance context. A romanticized theory urges that Virginia operates under a prevailing ethic that is more hostile to corruption than other states and the federal government. At the opposite end of the spectrum, a cynical theory advocates that corruption cases are fewer in Virginia because enforcement is more relaxed.

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188. *Id.* § 24.2-954(A) (Repl. Vol. 2006).

189. *Id.* § 24.2-954(B) (Repl. Vol. 2006).

190. *Id.* § 24.2-954(C) (Repl. Vol. 2006).

191. *See supra* Part IV.

Another factor keeping corruption at bay may be the public support for Virginia's system of full disclosure. For example, the Virginia Public Access Project ("VPAP") is a non-partisan, non-profit organization that maintains an internet database of Virginia campaign finance disclosure information.<sup>192</sup> Founded in 1997, VPAP has made campaign contributions and expenditures information publicly accessible. This information has armed people with the knowledge of who is contributing to whom, making the funding of Virginia campaigns transparent and curbing actual and apparent corruption.<sup>193</sup> VPAP is funded with donations from private organizations that support full disclosure as a means to regulate campaign finance.<sup>194</sup> VPAP exposes the campaign finance information disclosed by candidates to empower voters to consider that information before casting their votes.

Many complex and interwoven factors undoubtedly account for Virginia's greater success in preventing corruption in the context of campaign finance. While these factors may be too varied and complicated to fully discern, the fact remains that in comparison to its federal counterpart, Virginia's political landscape enjoys a history less scarred by campaign finance scandals. History shows that the Virginia system is more effective at curbing corruption than the federal system.

Finally, a system primarily based on full disclosure does not offend the First Amendment rights of political participants. With the exception of disallowing elected officials to solicit or accept contributions during the General Assembly session,<sup>195</sup> Virginia campaign finance law places no limits on persons who wish to engage in the political process. While Congress and the Supreme Court have repeatedly stated that federal restrictions on campaign contributions infringe on First Amendment rights, the federal government's interest in curbing actual and apparent corruption has taken precedence.

Under Virginia's system, however, such infringement does not occur. Virginia's system of full disclosure is a more democratic

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192. Virginia Public Access Project, [www.vpap.org](http://www.vpap.org) (last visited Oct. 19, 2007).

193. Virginia Public Access Project, About VPAP, [www.vpap.org/vpap/about.cfm](http://www.vpap.org/vpap/about.cfm) (last visited Oct. 19, 2007).

194. Virginia Public Access Project, Friends of Public Access, [www.vpap.org/vpap/sponsors.cfm](http://www.vpap.org/vpap/sponsors.cfm) (last visited Oct. 19, 2007).

195. See VA. CODE ANN. § 24.2-954(A) (Repl. Vol. 2006).

system than the federal government's—instead of limiting contributions and participation in the process, it informs voters from where candidates are receiving contributions. The Virginia system empowers the voter to decide for himself if actual or apparent corruption is present, and it compels the voter to use this information to decide whether the candidate is worthy of the voter's support.

The Virginia system of campaign finance law, which relies almost wholly on disclosure, has been effective at curbing actual and apparent corruption in the funding of state campaigns without infringing on the First Amendment rights of Virginians.

## VI. THE NEED FOR REFORM

The federal system of statutory and common law that currently governs campaign finance needs immediate reform. The complexity of the current system makes it extremely difficult for participants in the political process to understand and comply with its demands. The system has been ineffective at curbing the corruption, grounded in campaign finance, that exists in the federal system. The Abramoff scandal, other recent scandals, and the manner in which business is done has created a culture of apparent and actual corruption in Washington, D.C. Finally, the First Amendment infringement inherent in the current system must give way to a system that does not infringe, but instead encourages citizens to use their constitutional rights to become immersed in the political process.

Virginia's system of full disclosure provides a tempting alternative to the current federal scheme—it is simple, effective, and does not infringe on the First Amendment rights of Virginians. However, reining in the apparent and actual corruption now occurring at the federal level will require more than a system of wholesale disclosure. For instance, Virginia's system of full disclosure would not have stopped any of the apparent or actual corruption, cited above, that has plagued the federal system in recent years. Jack Abramoff could have engaged in the same, or perhaps worse, practices had he been operating under a system that did not restrict contributions but merely required full disclosure. For these reasons, this commentary proposes novel legislative reform which relies on Virginia's system of full disclosure,

but that goes further to curb actual and apparent corruption in the funding of federal campaigns.

## VII. THE CARSON ACT

### A. Overview

The remainder of this commentary proposes an alternative to the scheme that currently governs campaign finance at the federal level. The Corruption Abatement Reform Statute of Necessity (“CARSON Act” or the “Act”),<sup>196</sup> builds on Virginia’s system of full disclosure to provide a body of law that would more simply and more effectively curb actual and apparent corruption grounded in campaign finance without infringing on the First Amendment rights of Americans.<sup>197</sup>

The statutory and judicial approaches historically employed to curb actual or apparent corruption in federal campaigns have remained largely because they attempt to repress the actual or apparent corruption from the wrong angle—by attempting to limit the amount that may be contributed by the contributor. The CARSON Act provides a different approach, which could cut down on the actual and apparent corruption associated with campaign finance by focusing not on what the contributor may give to

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196. The CARSON Act invokes the memory of William E. Carson (1870–1942). Carson was the manager of Harry F. Byrd’s 1925 campaign for Governor of Virginia. Carson was responsible for the fundraising campaign that would lead to Byrd’s victory, and to the creation of the most prominent political machine in Virginia history. Carson was also responsible for establishing the Shenandoah National Park and Virginia’s Skyline Drive through his efforts in lobbying the state government, the federal government, and by leading a fundraising drive that raised more than two million dollars from private contributors during the Great Depression. For more on William E. Carson, perhaps the most prolific fundraiser in Virginia history, see American Academy for Park and Recreation Admin., Pugsley Award Recipients, William E. Carson, <http://www.rpts.tamu.edu/pugsley/Carson.htm> (last visited Sept. 23, 2007).

197. While historically the Commonwealth of Virginia and the federal government have not always worked well together, the hope is that by building on Virginia’s campaign finance laws, the CARSON Act will provide much needed reform at the federal level. *See, e.g.,* *United States v. Virginia*, 766 F. Supp. 1407, 1408 (W.D. Va. 1991) (holding that the Virginia Military Institute’s policy of refusing to admit females did not violate the Equal Protection Clause of the Fourteenth Amendment). (“It was in May of 1864 that the United States and the Virginia Military Institute (VMI) first confronted each other. That was a life-and-death engagement that occurred on the battlefield at New Market, Virginia. The combatants have again confronted each other, but this time the venue is in this court. Nonetheless, VMI claims the struggle is nothing short of life-and-death confrontation—albeit figurative.”).

the candidate or elected official, but on what the elected official may give to the contributor.

Generally, the Act allows a candidate to accept contributions of any amount while requiring him to report all contributions he receives. However, the Act disqualifies him from debates or votes on issues in which a qualified contributor—one that has contributed to him above a given threshold in any election cycle—has an interest. The CARSON Act would “addresses the influence of money, rather than money itself.”<sup>198</sup>

The CARSON Act also builds on the laws already at work in Virginia by requiring campaign committees to fully disclose information concerning contributions and expenditures, and by penalizing those committees that do not fully disclose. The CARSON Act goes further than the current Virginia laws by requiring contributors to disclose more information to the candidate campaign committees, and by subjecting contributors, candidates, and elected officials to penalties for failing to comply with the Act.

Thus, the CARSON Act provides a sound alternative to current federal law because it is less complex, more effective at curbing actual or apparent corruption, and does not infringe on First Amendment rights.

#### B. *Text of the CARSON Act*

The text of the proposed reform measure is terse considering its far-reaching effects. The CARSON Act reads: “No elected federal official, in his official capacity, may consider any issue in which any qualified contributor has an interest.”

#### C. *Definitions of Terms in the CARSON Act*

Clearly, the text of the CARSON Act is full of terms requiring definition.

A *qualified contributor* is a contributor that has made a contribution in excess of \$1,000 to that *elected federal official* during any single election cycle in which the *elected federal official* was a candidate for Congress, or a contribution in excess of \$10,000 to that *elected federal official* during any single election cycle in

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198. Nagle, *supra* note 3, at 103.

which the *elected federal official* was a candidate for President or Vice President.

Under the Act, an individual is never considered a *qualified contributor*, no matter the size of his contribution; individuals can contribute to any *elected federal official* in any amount without recourse under the Act. The Act requires full disclosure by both the individual and *elected federal official*. Additionally, under the Act no individual can make a contribution or expenditure on behalf of another individual or a *qualified contributor*.

An *elected federal official* refers to any member of Congress, the Vice President, and the President. The phrase *in his official capacity* refers to any action taken by an *elected federal official* when acting not as a citizen, but as an *elected federal official*.

The phrase, *consider any issue*, is defined by borrowing language from the portion of the Virginia Code which concerns the registration and regulation of lobbyists. *Consider[ing] any issue* encompasses all *executive action* and *legislative action*. *Executive action* includes: “the proposal, drafting, development, consideration, amendment, adoption, approval, promulgation, issuance, modification, rejection, or postponement by an executive agency or official of legislation or executive orders issued by the President.”<sup>199</sup> *Executive action* also would include the drafting of regulations and all appointments to boards, commissions, or any other posts to which the President has the authority to make appointments. *Legislative action*, also based on the Virginia Code, would include:

Preparation, research, drafting, introduction, consideration, modification, amendment, approval, passage, enactment, tabling, postponement, defeat, or rejection of a bill, resolution, amendment, motion, report, nomination, appointment, or other matter by Congress or a legislative official. Action by the President in approving, vetoing, or recommending amendments for a bill passed by Congress; or action by Congress in overriding or sustaining a veto by the President, considering amendments recommended by the President, or considering, confirming, or rejecting an appointment of the President.<sup>200</sup>

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199. VA. CODE ANN. § 2.2-419 (Cum. Supp. 2007).

200. *Cf. id.*

In addition to its ban on *elected federal officials consider[ing] any issue* in which a *qualified contributor* has an *interest*, the CARSON Act also proscribes an *elected federal official* from discussing or debating proposed legislation in which a *qualified contributor* has an *interest*.

Under the Act, the term *interest* is defined by borrowing verbiage from the definition of “personal interest in a transaction” codified in the Virginia General Assembly Conflicts of Interests Act (“GACIA”).<sup>201</sup> Under the CARSON Act:

*A qualified contributor shall have an interest when the qualified contributor’s association, association member, association constituent, corporation, corporation officer, corporation employee, or family member of a corporation officer or employee, corporation subsidiary officer, corporation subsidiary employee, or family member of a corporation subsidiary officer or employee, clients, contributors, or when the qualified contributor itself has a “special interest” in property or a business, or represents an individual or business and such property, business or represented individual or business (i) is the subject of the consideration of the issue or (ii) may realize a reasonably foreseeable direct or indirect benefit or detriment as a result of the consideration of the issue by the elected federal official.*

*The qualified contributor will have “special interest” in an issue only if the qualified contributor or an individual or business represented by the qualified contributor is affected in a way that is substantially different from the general public.*<sup>202</sup>

The CARSON Act, once again borrowing verbiage from GACIA, defines *special interest* as:

[A] financial benefit or liability accruing to a *qualified contributor* . . . Such interest shall exist by reason of (i) ownership in a business if the ownership interest exceeds three percent of the total equity of the business; (ii) annual income that exceeds, or may reasonably be anticipated to exceed, \$10,000 from ownership in real or personal property or a business; (iii) salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, paid or provided by a business that exceeds, or may reasonably be anticipated to exceed, \$10,000 annually; (iv) ownership of real or personal property if the interest exceeds \$10,000 in value and excluding ownership in a business, income, or salary, other compensation, fringe benefits or benefits from the use of property; or (v) per-

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201. *See id.* § 30-101 (Repl. Vol. 2004).

202. *Cf. id.* (parsing definitions of “personal interest” and “personal interest in a transaction”).

sonal liability incurred or assumed on behalf of a business if the liability exceeds three percent of the asset value of the business.<sup>203</sup>

The Act borrows language from the Virginia Campaign Finance Disclosure Act of 2006 (“CFDA”) to define *contribution*:

*Contribution* means money and services of any amount, in-kind contributions, and any other thing of value, given, advanced, loaned, or in any other way provided directly to a federal candidate’s campaign committee for the purpose of influencing the outcome of a federal election or defraying the costs of the inauguration of a President or Vice President. “*Contribution*” includes expenditures made on behalf of a federal candidate when coordination with the federal candidate does not occur. “*Contribution*” also includes expenditures made on behalf of a federal candidate when coordination with the federal candidate does occur.<sup>204</sup>

In referencing a *single election cycle*, the CARSON Act employs the same time frame as the CFDA:

The candidate’s election cycle shall be deemed to begin on January 1 of the year that the candidate first seeks election for the office through December 31 immediately following the election for such office. The next election cycle, and any subsequent election cycles, for the candidate who seeks election for successive terms in the same office shall begin on January 1 immediately following each election for the same office and continue through December 31 immediately following the next successive election for the same office.<sup>205</sup>

It is important to note, however, that the CARSON Act applies to the relationship between an *elected federal official* and any *qualified contributor* who has ever contributed more than the threshold amount in any federal election cycle in which the *elected federal official* was either a candidate for Congress, President, or Vice President, regardless of whether the (now) *elected federal official* was the winner of the previous election or how long ago that election occurred. If an *elected federal official* was ever a candidate for state office before seeking federal office, the CARSON Act does not consider contributions made to the *elected federal official* by an otherwise *qualified contributor* in any state campaign.

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203. *Cf. id.*

204. *Cf. id.* § 24.2-945.1 (Repl. Vol. 2006).

205. *Cf. id.* § 24.2-947 (Repl. Vol. 2006).

Under the CARSON Act, any *qualified contributor* or individual can make *expenditures* on behalf of any *elected federal official* without those expenditures preventing the *elected federal official* from *considering* an *issue* in which the *qualified contributor* has an *interest*. However, as made evident in the CARSON Act's definition of *expenditure* below, the Act prohibits coordination between any *elected federal official* and any contributor that makes expenditures on his behalf; an *expenditure* must be made independent of any coordination with the elected federal official, or the *expenditure* is deemed a *contribution*. If uncoordinated *expenditures* made on behalf of *elected federal officials* could work to prevent an *elected federal official* from *considering* an *issue* in which the spender has an *interest*.

Furthermore, the CARSON Act demands that *expenditures* made on behalf of a candidate by a *qualified contributor* or individual, like *contributions*, be disclosed to the FEC when the expenditure is in excess of \$100. The CARSON Act relies heavily on the CFDA to define *expenditure*:

Money and services of any amount, and any other thing of value over \$100, paid, promised, loaned, provided, or in any other way disbursed by any candidate, qualified contributor, or individual for the purpose of influencing the outcome of an election for Congress, President, or Vice President, without the coordination of that candidate, or defraying the costs of the inauguration of a President or Vice President.<sup>206</sup>

The CARSON Act also relies on the CFDA to define *coordination*:

*Coordinated or coordination* refers to an expenditure that is made (i) at the express request or suggestion of a candidate, a candidate's campaign committee, or an agent of the candidate or his campaign committee or (ii) with material involvement of the candidate, a candidate's campaign committee, or an agent of the candidate or his campaign committee in devising the strategy, content, means of dissemination, or timing of the expenditure.<sup>207</sup>

Additionally, the CARSON Act demands that the *qualified contributor* disclose to the FEC all the contributions in excess of \$100 made to it, whether from an individual or from another *qualified contributor*. *Contributions* made to a *qualified contributor* are defined the same way as *contributions* made directly to a candidate,

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206. Cf. *id.* § 24.2-945.1 (Repl. Vol. 2006).

207. Cf. *id.*

and disclosed to the FEC in the same manner as a candidate discloses the *contributions* he receives. For example, if the Republican National Committee (“RNC”) receives a *contribution* in excess of \$100 from the National Rifle Association (“NRA”), the RNC must disclose that contribution to the FEC.

It is important to note that by definition, under the CARSON Act, an *elected federal official* is prevented from *considering* an *issue* in which a *qualified contributor* has an *interest* if that *qualified contributor* were to contribute in excess of \$1,000 to another *qualified contributor* who ultimately contributes in excess of \$1,000 to that *elected federal official* in any single election cycle. In the example used above, if the NRA contributed \$2,000 to the RNC, and the RNC contributed \$2,000 to a candidate in the same election cycle, once elected, the federal official would be ineligible to *consider any issue* in which the NRA has an *interest*.

#### D. *Personal Interest*

The CARSON Act requires *elected federal officials* to disclose their *personal interests*, as required by GACIA.<sup>208</sup> The CARSON Act also follows Virginia law in proscribing *elected federal officials* from voting on *issues* in which they have a *personal interest*.<sup>209</sup> However, *elected federal officials* maintain the ability to discuss or debate issues in which they have a *personal interest* as long as they verbally disclose their interests before the discussion commences:

An *elected federal official* who has a *personal interest* in an *issue* shall disqualify himself from *considering the issue*. This disqualification shall not prevent an *elected federal official* from participating in discussions and debates, provided (i) he verbally discloses the fact of his *personal interest* in the *issue* at the outset of the discussion or debate or as soon as practicable thereafter and (ii) he does not vote on the *issue* in which he has a *personal interest*.<sup>210</sup>

#### E. *Qualified Contributor Interest*

As outlined above, the CARSON Act prevents an *elected federal official* from *considering an issue* in which a *qualified contributor*

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208. See *id.* § 30-110 (Repl. Vol. 2004 & Cum. Supp. 2007).

209. See *id.* § 30-108 (Repl. Vol. 2004).

210. Cf. *id.* (emphasis added).

has an *interest*; this proscribes discussing, debating, and voting on that *issue*. In effect, the CARSON Act is more restrictive in governing the *consideration* by an *elected federal official* of an *issue* in which a *qualified contributor* has an *interest* than of *issues* in which the *elected federal official* himself has a *personal interest*.

The rationale behind this distinction is that an *elected federal official* should be allowed to discuss or debate *issues* in which he has a *personal interest* because all involved will know he is personally interested, per his verbal declaration, and because other *elected federal officials* may depend on his knowledge of the *issue*. However, if an *elected federal official* is allowed to discuss or debate *issues* in which a *qualified contributor* is *interested*, even if the *official* must verbally declare his association, the *official* would be free to influence his fellow *officials* on behalf of the *qualified contributor*. This is the type of activity that the CARSON Act is specifically designed to prohibit. Ending this type of activity would go far in curbing the actual and apparent corruption associated with campaign contributions made to *elected federal officials*.

#### F. Greater Disclosure Under the CARSON Act

The CARSON Act requires a greater level of disclosure than the CFDA. The CARSON Act requires all *contributors* to disclose more information, accurately and timely, to the treasurer of the *campaign committee* who receives their *contribution* when the *contribution* exceeds \$100 per election cycle. Borrowing from the CFDA, the CARSON Act defines *campaign committee* as “the committee designated by a candidate to receive all contributions and make all expenditures for him or on his behalf in connection with his nomination or election.”<sup>211</sup>

The CARSON Act requires *qualified contributors* to disclose more information to the campaign committee treasurer than individual contributors. Treasurers are required to file disclosure reports, accurately and timely, with the FEC, and are required to include the additional information required from the *contributors*. A copy of the report the treasurer files with the FEC, containing all the disclosed information, would be retained by the *elected*

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211. Cf. *id.* § 24.2-945.1 (Repl. Vol. 2006).

*federal official* and used by him to determine what *issues* he may *consider* once elected.

### 1. Qualified Contributor Disclosure

The CARSON Act requires every *qualified contributor* that makes a *contribution* in excess of \$100 to a *campaign committee* in a single election cycle to make a disclosure to the treasurer of that *campaign committee* within ten days of making the *contribution*. The disclosure should include: the name, business address, and telephone number of the *qualified contributor*; the names, business addresses, and telephone numbers of all subsidiaries of that *qualified contributor* along with a brief description of the types of activities performed by that *qualified contributor* and its subsidiaries; the name, business address, and telephone number of any lobbyists for that *qualified contributor* along with an identification of the subject matter about which the lobbyists will engage in lobbying; the names, business addresses, and telephone numbers of any entity that is represented by the *qualified contributor* along with a brief description of the type of business performed by each of those entities.

The same disclosures should be made by a *qualified contributor*, within ten days, when it makes an uncoordinated expenditure on behalf of a federal candidate in excess of \$100, but the disclosure should be made to the FEC, not the treasurer of the *campaign committee* of the candidate.

### 2. Individual Disclosure

Following the language of the CFDA, any individual who contributes more than \$100 to a *campaign committee* in a *single election cycle* is required to make a disclosure to the treasurer of that *campaign committee* within ten days of making the *contribution*.<sup>212</sup> The disclosure should contain: the name of the *contributor*, his mailing address, the amount of his contribution, the aggregate amount of contributions he has made to date, the date of his contribution, the name of his employer or principal business,

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212. Cf. *id.* § 24.2-947.4(B)(2) (Repl. Vol. 2006).

and the city and state where he is employed or where his business is located.<sup>213</sup>

The same disclosures should be made by an individual, within ten days, when he makes an uncoordinated expenditure on behalf of a federal candidate in excess of \$100, but the disclosure should be made to the FEC, not the treasurer of the *campaign committee* of the candidate.

### 3. Failure of Elected Federal Officials to Disclose

The penalties codified in the CFDA, as outlined in Part V.A above, are also employed by the CARSON Act.<sup>214</sup> Under the CARSON Act, those penalties are levied against federal candidates or *elected federal officials* when they fail to file campaign finance disclosure reports with the FEC in an accurate and timely manner.

### 4. Failure of Contributors to Disclose

Borrowing language from the CFDA applicable to candidates,<sup>215</sup> the CARSON Act extends those penalties to *contributors* when they fail to make accurate and timely disclosures to the campaign committees to which they contribute more than \$100, or to the FEC upon making an uncoordinated expenditure in excess of \$100.

Any *contributor* that violates, aids, abets, or participates in violating the reporting laws shall be subject to a civil penalty not to exceed \$100. However, if a *contributor* fails to file a complete report within ten days after making a *contribution* of more than \$100, a *contribution* that causes its aggregate *contribution* for that election cycle to exceed \$100, an uncoordinated expenditure of more than \$100, or an uncoordinated expenditure that causes its aggregate uncoordinated expenditures for that election cycle to exceed \$100, the *contributor* will be subject to a civil penalty not to exceed \$500. If the *contributor* files no report at all by the given deadline, it will be assessed a civil penalty not to exceed \$500 for each failure to file. Willful violators of the disclosure

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213. *Cf. id.* § 24.2-947.4(B)(2)(a)–(h) (Repl. Vol. 2006).

214. *See* VA. CODE ANN. §§ 24.2-953 to -953.5 (Repl. Vol. 2006).

215. *See id.*

laws will be guilty of a Class 1 misdemeanor. Additionally, any *contributor* that fails to file a complete report by the given deadline, and that continues to be delinquent after a seven-day grace period following notification of delinquency in writing by the *campaign committee* treasurer or the FEC, may be assessed an additional civil penalty. The civil penalty would be an additional \$500 assessed for all subsequent delinquent days after the seven-day grace period, and would hold the *contributor* solely liable.

#### G. *Knowing Violation by an Elected Federal Official*

The portion of the CARSON Act proscribing an *elected federal official* from *considering* an *issue* in which a *qualified contributor* has an *interest* is self-policing. It is the responsibility of the *elected federal official* to maintain records of every *qualified contributor* who has contributed in excess of \$1,000 to his campaign committee during any *single election cycle* in which the *elected federal official* was a candidate for Congress, or in excess of \$10,000 during any single election cycle in which the *elected federal official* was a candidate for President or Vice President. The *elected federal official* could compile such a list by retaining copies of the campaign contribution disclosure reports that his treasurer files with the FEC. These reports would reveal to the *elected federal official* the *issues* in which a *qualified contributor* has an *interest* and would therefore indicate the *issues* that the *elected federal official* would be barred from *considering*.

#### 1. Penalties

If an *elected federal official* knowingly violates the provisions of the CARSON Act, he is subject to criminal penalties. The Act borrows liberally from the Virginia State and Local Government Conflict [sic] of Interests Act in establishing how a knowing violation is penalized.<sup>216</sup> Under the CARSON Act, there is a rebuttable presumption that any violation by an *elected federal official* is a knowing violation. The underlying rationale here is that the disclosure reports filed with the FEC by the treasurer of the *elected federal official's* campaign committee should reveal to him the *issues* in which *qualified contributors* have an *interest*. A knowing violation under the CARSON Act would be one in which the

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216. *See id.* §§ 2.2.3120–3124 (Repl. Vol. 2005).

*elected federal official* engages in conduct, performs an act, or refuses to perform an act when he knows that conduct is prohibited or required by the CARSON Act. The *elected federal official* would have the burden of providing clear and convincing evidence to rebut the presumption that he knowingly violated the Act; if successful, the *elected federal official* would not be penalized.

Any *elected federal official* who knowingly violates any provision of the CARSON Act is guilty of a Class A misdemeanor. Additionally, any *elected federal official* who knowingly violates any provision of the Act is guilty of malfeasance in office or employment. Upon conviction thereof, the judge or jury trying the case, in addition to any other fine or penalty provided by law, may order the forfeiture of such office or employment.<sup>217</sup> In addition to any other penalty or fine provided by law, when the *elected federal official* has been convicted of knowingly *considering* an issue in which a *qualified contributor* has an *interest*, the *elected federal official* becomes liable for a civil penalty of an amount three times the value of the *contribution* made by the *qualified contributor* in any election cycle.

The statute of limitations for the criminal prosecution of an *elected federal official* for violation of any provision of the CARSON Act is five years from the time the violation is discovered, or ten years from the date of the violation, whichever occurs first. Any prosecution for malfeasance in office is governed by the statute of limitations provided by law.<sup>218</sup>

## 2. Enforcement

The powers of enforcing the Act are delegated to and carried out by the FEC. Any U.S. citizen may file a written complaint with the FEC claiming a violation of the CARSON Act. In addition to any other powers and duties prescribed by law, the FEC has additional powers and duties under the CARSON Act to advise *elected federal officials* on appropriate procedures for complying with the Act. The FEC may review any disclosure statements, without notice to the *elected federal official*, for the purpose of determining satisfactory compliance, and will investigate matters that come to its attention that reflect possible violations of the

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217. Cf. *id.* § 2.2-3122 (Repl. Vol. 2005).

218. Cf. *id.* § 2.2-3125 (Repl. Vol. 2005).

Act. If the FEC determines that there is a reasonable basis to conclude that the *elected federal official* has knowingly violated any provision of the CARSON Act, the FEC will turn the matter over to the Office of the United States Attorney for the District of Columbia. The U.S. Attorney's Office will have complete and independent discretion to prosecute the *elected federal official*.

### 3. Advisory Opinions

The FEC may render advisory opinions to any *elected federal official* who seeks advice as to whether the facts in a particular case would constitute a violation of the provisions of the CARSON Act. The FEC will determine which opinions or portions thereof are of general interest to the public and may, from time to time, be published. Irrespective of whether an FEC opinion has been requested and rendered, any *elected federal official* has the right to seek a declaratory judgment or other judicial relief as provided by law. An *elected federal official* will not be prosecuted for a knowing violation of the CARSON Act if the alleged violation resulted from his good faith reliance on a written opinion of the FEC, provided that the opinion was issued after a full disclosure of the facts.<sup>219</sup>

## VIII. THE BENEFITS OF THE CARSON ACT

Though based on current Virginia law and developed and explored in the context of the Virginia political system, the CARSON Act could be employed at the federal level as a sound alternative to the current body of federal campaign finance law. The CARSON Act would be less complex than current federal campaign finance law, more effective at curbing the actual and apparent corruption that exists in the financing of federal campaigns, and would not infringe on the First Amendment rights of individual Americans.

The CARSON Act would be easier to understand than the current body of federal campaign finance law. Any portions of the CARSON Act that are arguably complex or confusing would deal merely with the definitions of terms in the Act or the administra-

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219. *Cf. id.* § 2.2-3121 (Repl. Vol. 2005).

tion of the Act. Unlike current federal campaign finance law, however, the requirements of the CARSON Act would be clear: if a qualified (non-individual) contributor has ever contributed more than \$1,000 to an elected federal official in any single election cycle in which the elected federal official was a candidate for Congress, or \$10,000 in any single election cycle in which the elected federal official was a candidate for President or Vice President, that elected federal official cannot discuss, debate, or vote on issues in which that qualified contributor has an interest. An individual seeking office for the first time could more readily comprehend and comply with the CARSON Act than with the current body of federal campaign finance law.

The CARSON Act would also be much more effective at curbing actual and apparent corruption in the financing of campaigns than current federal law. Corruption can mean many things to many people, but most who feel actual or apparent corruption exists in the context of campaign contributions find that it exists in the relationship between non-individual contributors and elected officials. By preventing elected officials from considering issues in which qualified (non-individual) contributors have an interest, the CARSON Act seeks to neutralize most of the inherent corruption that might exist in such relationships.

As discussed in Part I.B above, the Supreme Court has recognized that, in the context of campaign finance, corruption essentially exists in three forms: “*quid pro quo*, monetary influence, and distortion.”<sup>220</sup> When an elected official is barred from considering issues in which a qualified contributor has an interest, it is difficult for that contributor to receive a *quid pro quo*, to influence an elected official with a monetary contribution, or to distort the political process with the contribution.

Unlike current federal law, the CARSON Act would not infringe on the First Amendment rights of individual contributors. While the Supreme Court in *Buckley* and *McConnell* found that contribution limits infringe on First Amendment rights, albeit constitutionally, the *Buckley* Court found “no constitutional infirmities in the recordkeeping, reporting, and disclosure provisions” that are still embodied in federal law.<sup>221</sup> The *Buckley* Court

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220. See *supra* note 6 and accompanying text.

221. *Buckley v. Valeo*, 424 U.S. 1, 84 (1976).

commented that disclosure requirements do have “the potential for substantially infringing the exercise of First Amendment rights,” but the Court stopped short of finding such infringement.<sup>222</sup> By not limiting individual contributions in any way, but by merely requiring candidates, elected federal officials, and contributors to fully disclose information about contributions received and expenditures made, the CARSON Act would not infringe on the First Amendment rights of individual contributors. Similarly, by not expressly limiting contributions of qualified contributors, but by merely requiring candidates, elected federal officials, and contributors to disclose information about contributions received and expenditures made, the CARSON Act would not infringe on the First Amendment rights of qualified contributors.

In addition to making campaign finance law simpler, more effective, and less offensive to constitutional rights, the CARSON Act would make other improvements to current federal law. Without expressly limiting contributions, the Act would certainly have a chilling effect on contributions from non-individuals. Under the Act, qualified contributors would be less generous with their contributions because, by contributing, they would effectively be tying the hands of the elected officials.

However, by placing no restrictions whatsoever on individual contributions, the Act provides individuals with the option of becoming more engaged in the political process than current law allows. That is, individuals may employ their contributions to speak as loudly and freely as they desire in support of the federal issues and candidates they support.

The intent of the CARSON Act is to set forth no express restriction on contributions of any kind by any type of contributor. While the Act may have the unintended effect of discouraging contributions by qualified contributors, the hope is that the Act would have the intended effect of encouraging greater contributions and greater political involvement from individual contributors.<sup>223</sup>

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222. *Id.* at 66.

223. See George F. Will, Editorial, *Second Thoughts About Soft Money*, WASH. POST, Mar. 8, 2001, at A21 (“Arguments for more regulation of political speech are fueled by hyperbole about supposed ‘torrents’ of money pouring into politics. Such hyperbole probably has been heard ever since George Washington, at age 25, first ran for the Virginia House of Burgesses in 1757, spending 39 pounds for 160 gallons of rum and other beverages for

Under current law, the federal candidate who convinces the most individual contributors to contribute up to \$2,300 in an election cycle will raise the most money in that election cycle from individual contributors. The current federal scheme, therefore, disadvantages candidates who could solicit greater contributions from wealthier individual contributors. By placing no express restriction on contributions from any source, and instead restricting the action of all elected federal officials to the same degree after they have received those contributions, the CARSON Act gives no candidate a fundraising advantage. Candidates would be free to solicit and accept, and contributors would be free to contribute, at any level.

By not placing limits on contributions, the CARSON Act could also have the effect of saving candidates and elected federal officials time in fundraising. That is, candidates and elected federal officials would have the option of funding their campaigns with fewer large contributions, from individuals or other entities, as opposed to spending time soliciting many smaller contributions subject to the current limits.

If the Act does have a chilling effect on contributions from non-individuals, then the Act would change the very manner in which candidates compete for public office in America. The cost of seeking office would seemingly decrease, meaning that more participants could be drawn to the task. Campaigns would have to be more strategic, more creative, and more cost effective in disseminating their campaign messages. Presumably more elections would turn on the strength of a candidate's message as opposed to his ability to garner the greatest contributions and his craftiness in employing those contributions to control the airwaves.

The development of a thoughtful fundraising strategy by candidates and qualified contributors would be another welcomed effect of the Act. If a qualified contributor wants a candidate, once

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the 391 eligible voters—more than a quart of drink, at a cost of (in today's currency) \$2 per voter. However, since the Voting Rights Act (1965) and the 26th Amendment (1971) greatly expanded the electorate, spending per eligible voter in congressional races, in today's dollars, has hovered in a range from approximately \$2.50 to \$3.50 per eligible voter, inching up slightly in the highly competitive elections of 1994 and 1996 and reaching approximately \$4 in the competitive elections of 1998—a bit more than the cost of one video rental. If spending in the two-year 1999–2000 cycle for all candidates for all offices—federal, state and local—reached the “obscene” (as critics call it) total of \$3 billion, that was \$15 per eligible voter. And \$3 billion—\$2 billion less than Americans spend annually on Halloween snacks—is five-one-hundredths of one percent of GDP.”)

electd, to have the ability to consider issues in which it has an interest, then the contributor cannot contribute more than \$1,000 or \$10,000 to that candidate. On the other hand, if a candidate, once elected, wants to reserve the right to consider issues in which a qualified contributor has an interest, the candidate must refuse contributions from that contributor in excess of \$1,000 or \$10,000. Such decisions made by qualified contributors and candidates would need to be balanced against the candidate's need for those contributions to secure victory. If the candidate does not have the contributions that he must have to win, the types of issues that he is legally allowed to consider, once elected, make no difference. In this way, the CARSON Act would work to curb actual and apparent corruption in two contexts: during campaign season leading up to election day and after election day when the governing starts.

An additional attribute of the CARSON Act is the cover it can provide for elected officials. The norm seems to be that contributors contribute to a candidate, not because they necessarily expect something in return, but because they see the candidate as one who furthers their political beliefs. However, instances obviously exist where contributors make contributions with the expectation that they will receive something in return from the elected official. Under the CARSON Act, the elected federal official may accept contributions at any level he chooses. However, if a qualified contributor expects special consideration or a political payback from the elected federal official, the elected federal official can cite the CARSON Act as his affirmative defense for providing no such special treatment.

In this situation, it seems less likely that the qualified contributor would hold the inaction of the elected federal official against him—the qualified contributor would know that the elected federal official must obey the charge of the law. The qualified contributor may contribute at a lower level, or ultimately cease contributing, upon realizing that it can receive no special consideration from the elected federal official in spite of the contribution. Furthermore, once the qualified contributor contributes above the threshold, the elected federal official becomes barred from considering an issue in which that qualified contributor has an interest. While this may damage the ability of the candidate or elected federal official to solicit contributions, it would have the

effect of driving the most corrupt players out of the game almost immediately.

Another advantage of the CARSON Act would be its leveling of the playing field for special interests. A special interest cannot contribute at a high level to a candidate or an elected federal official if the special interest ultimately wants the official in its corner. Likewise, a candidate or elected federal official cannot accept a contribution over \$1,000 if he desires to ultimately advocate for that special interest once elected. This dilemma gives underfunded special interests the chance to compete with their well-heeled cohorts. By either removing large contributions made by a special interest or the elected officials' ability to act on behalf of that special interest, the real contest in the federal government would no longer be over which interest can write the biggest check. Instead, the contest would be based on ideas, and some of the favor that elected federal officials have for affluent special interests could be replaced with concern for less affluent special interests or individual constituents.

By attempting to directly govern the interaction between qualified contributors and elected federal officials, the CARSON Act could do away with many of the rules and regulations that exist in the current system. If elected federal officials are barred from acting on behalf of qualified contributors, rules and regulations that attempt to anticipate every scenario that may lead to apparent or actual corruption in the federal government become unnecessary.

While qualified contributors would not be eligible to simultaneously contribute to and be represented by an elected federal official under the Act, they would be eligible to make unsolicited, uncoordinated, and fully disclosed expenditures on behalf of an elected federal official. This policy goes along with the Act's spirit of encouraging political expression and abolishes the prohibition, under current law, of certain entities making expenditures or paying for advertisements as a way of supporting the election of federal candidates. Furthermore, these expenditures do not prevent the ultimate elected federal official from considering issues in which the qualified contributor has an interest.

As previously stated, because the Act allows qualified contributors to make uncoordinated expenditures on behalf of candidates, the Act must not allow such expenditures to prevent federal

elected officials from considering issues in which the entity making those expenditures has an interest. If disqualification did occur based on such expenditures, a qualified contributor could be compelled to make an expenditure on behalf of a candidate with which it disagrees on an issue as a means to prevent that candidate from considering that issue once he becomes an elected federal official.

Furthermore, qualified contributors can take solace in the fact that, under the CARSON Act, elected federal officials would not be prevented from acting on issues that are of general interest to the public. For instance, if a qualified contributor has contributed in excess of \$1,000 to an elected federal official, and that qualified contributor has a significant interest at stake in the appropriations act, the elected federal official is nonetheless eligible to debate and vote on that legislation.

The CARSON Act would improve the current federal system by reforming campaign finance law from a non-traditional angle. By restricting the actions of elected federal officials, and not the actions of contributors, the CARSON Act would provide a simpler and more effective body of law that does not infringe on First Amendment rights.

## IX. THE CHALLENGES OF THE CARSON ACT

As with any proposed legislation or major reform, the CARSON Act would be subject to valid criticism. Perfect legislation does not exist in an area where governing is so difficult, and the CARSON Act would certainly have vulnerabilities.

### A. *Issues of Interest*

One of the greatest challenges to the practical application of the CARSON Act is attempting to define the issues in which a particular qualified contributor may have an interest. Obviously the issues in which individual contributors have an interest are irrelevant because elected federal officials are free to consider those issues, regardless of the level at which those individuals contribute.<sup>224</sup> The Act would attempt to deal with the challenge of

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224. The effect of the CARSON Act on individual contributors is discussed in Part

defining the issues in which a qualified contributor has an interest in several ways. First, the Act's disclosure requirements would require all contributors that contribute in excess of \$100 in an election cycle to make a disclosure to the treasurer of that campaign committee within ten days of making the contribution. Qualified contributors are required to disclose, in addition to other personal information:

the names, business addresses, and telephone numbers of all subsidiaries of that *qualified contributor* along with a brief description of the types of activities performed by that *qualified contributor* and its subsidiaries; the name, business address, and telephone number of any lobbyists for that *qualified contributor* along with an identification of the subject matter about which the lobbyist(s) will engage in lobbying; and the names, business addresses, and telephone numbers of any entity that is represented by that *qualified contributor* along with a brief description of the type of business performed by each of those entities.

The hope is that the disclosure would provide the elected federal official with enough information to enlighten him about the issues in which the qualified contributor has an interest. Once enlightened, under the CARSON Act's directive of self-policing, the elected federal official must determine whether he wants to return the contribution or be disqualified from considering those issues in which the qualified contributor is interested. Pursuant to the charge of the Act, if the elected federal official is unable to determine the issues in which the qualified contributor has an interest, he may request an opinion from the FEC.

Furthermore, the breadth of the disclosure required by the Act should help address the challenge of identifying the issues in which a qualified contributor is interested. The body politic and the media will have access to information detailing the names of those that have contributed in excess of \$100 to elected federal officials and the ultimate amount they have contributed. If an elected federal official considers an issue in which a qualified contributor has an interest, the informed public and the media would serve to hold him accountable based on the information available to them through full disclosure.

The Act would also attempt to address this challenge in its definition of "interest." The Act would disqualify an elected offi-

cial from considering an issue in which a qualified contributor is interested only if that issue is “substantially different” from an issue in which the public has an interest. Under the Act, if an elected federal official concludes that an issue in which a qualified contributor has an interest is an issue of general public concern, he could consider that issue. If the official is unclear whether the issue is of general public concern, he could request an opinion from the FEC. This would address the concern because many groups that represent diverse interests would have interests in many issues, but those interests would also be of concern to the general public.

For instance, the two major political parties would likely contribute well in excess of the thresholds to candidates and elected federal officials. These contributions would certainly deem the political parties qualified contributors. Most of the issues furthered by the two major political parties, however, are issues of general concern to the public. The parties would certainly pick a side on most issues, zealously advocate for those positions, and no doubt be heavily invested in furthering those positions, but many of the issues would nonetheless be of general public concern.

The CARSON Act attempts to address one of its greatest challenges and most exploitable loopholes by employing a system of full disclosure and by narrowly defining the issues in which a qualified contributor can have an interest.

#### *B. Individual Contributors*

Under the CARSON Act, an individual would never be deemed a qualified contributor. That is, an elected federal official may consider any issue in which any individual has an interest regardless of how much the individual has contributed to the elected federal official. Entities, both public and private, legitimately transfer large amounts of wealth to individuals in the United States every day. These entities have a vested interest in supporting elected federal officials who support their causes. Those individuals who have been made wealthy by those entities also have a vested interest in supporting elected federal officials who support the causes of those entities.

Exempting individuals from the scope of the CARSON Act may indeed hamper the reform that the Act pursues, but two major rationales underlie the exemption.

First, if individuals were not exempted, the CARSON Act would infringe on their First Amendment rights. As stated throughout this commentary, the CARSON Act avoids First Amendment infringement by restricting what the elected federal official can give the contributor, instead of restricting what the (qualified or individual) contributor can give the elected federal official. As also stated throughout this commentary, the CARSON Act seeks to encourage contributors of all types to become more involved in the political process by not placing limits on the amount that may be contributed to elected federal officials.

Secondly, individuals are exempted under the CARSON Act because it is impossible to define the issues in which they have an interest. The issues in which a contributing corporation, union, or association has an interest are more readily definable than those issues in which an individual has an interest. For instance, a chief executive officer of a major pharmaceutical company, in his individual capacity, may contribute at a high level to elected federal officials whose votes can affect the pharmaceutical industry; issues that affect the pharmaceutical industry are certainly issues in which the individual has an interest. However, that same individual may also be interested in Second Amendment rights, reproductive rights, and trade issues. Defining the issues in which the individual has an interest, in order to prevent the elected federal officials to whom he has contributed from considering those issues, is impossible, whereas defining the issues in which the Pharmaceutical Research and Manufacturers of America has an interest, while certainly not an easy task, is more achievable.

Even though an individual may contribute to an elected federal official at any level without affecting that official's ability to consider an issue, the CARSON Act still requires the full disclosure of contributions made by that individual. The consolation under the Act for exempting individual contributors is that the public will still be armed with the information about to whom and at what level the individual is contributing.

Furthermore, it seems that non-individuals are more to blame for the actual and apparent corruption that currently exists in the campaign finance context. In *McConnell*, the Supreme Court stated:

Many of the “deeply disturbing examples” of corruption cited by this Court in *Buckley* to justify FECA’s contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials. Even if that access did not secure actual influence, it certainly gave the “appearance of such influence.”<sup>225</sup>

Additionally, in *Austin v. Michigan Chamber of Commerce*, the Supreme Court stated:

Regardless of whether [the] danger of “financial *quid pro quo*” corruption may be sufficient to justify a restriction on independent expenditures, Michigan’s regulation aims at a different type of corruption in the political arena: 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.<sup>226</sup>

The Court has pointed more to non-individuals as the cause of actual and apparent corruption. Furthermore, Congress has targeted non-individuals to a greater degree with its campaign finance legislation, presumably at the urging of the public or because Congress feels that such targeting meets a public need.

The CARSON Act exempts individuals to avoid trespassing on their First Amendment rights and because the issues in which they have an interest are not readily definable. Additionally, the Act focuses its reform on contributions made by non-individuals because the Supreme Court, Congress, and the American public seem to agree that non-individuals breed more actual or apparent corruption in the context of campaign finance than individuals.

### C. *First Amendment Infringement*

It would be difficult, if not politically impracticable, for an elected federal official to argue that the CARSON Act would infringe on his First Amendment rights. Such an argument would essentially require an elected federal official to claim that the First Amendment guarantees him the right to consider issues in which a contributor has an interest. It seems unlikely that the Supreme Court would find such a relationship to qualify as “political association,” and it also appears unlikely that any politi-

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225. *McCConnell v. FEC*, 540 U.S. 93, 150 (2003) (citations omitted).

226. 494 U.S. 652, 659–60 (1990).

cian would make such an argument. If an elected federal official were to pose such a stance, it seems certain that a savvy opponent in the next election cycle could claim that the official believes he has a First Amendment right to grant political paybacks to his contributors.

In *Republican Party of Minnesota v. White*, a political party and a judicial candidate sued Minnesota state actors over the constitutionality of a Minnesota state law that prohibited judicial candidates from announcing their views on certain controversial or legally disputed issues during a campaign.<sup>227</sup> The state actors proffered two compelling state interests in an attempt to justify the restriction: preserving both the actual impartiality of the state judiciary and “the appearance of impartiality of the state judiciary.”<sup>228</sup> The Supreme Court applied strict scrutiny in overturning the Eighth Circuit and holding that the restriction was not narrowly tailored to achieve impartiality.<sup>229</sup> The Court also found the restriction to be underinclusive because it permitted judicial candidates to make statements and announcements at certain times while prohibiting those same statements and announcements at other times.<sup>230</sup>

The Supreme Court in *Republican Party of Minnesota* established a First Amendment right for political candidates of all types to speak on behalf of themselves during a political campaign. Presumably, during the campaign season, a candidate is speaking on behalf of himself and not his (potential) constituents. No indication is given by the Court in *Republican Party of Minnesota* that it would go a step further to strike down a restriction limiting the ability of a public official, once elected, to speak, act, or vote on behalf of his constituents, i.e., someone other than himself. Conversely, the Supreme Court in *Republican Party of Minnesota* stated: “It is simply not the function of government to select which issues are worth discussing or debating *in the course of a political campaign*.”<sup>231</sup>

In another somewhat related Supreme Court case, *Wood v. Georgia*, an elected sheriff challenged a Georgia Court of Appeals

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227. 536 U.S. 765, 768, 770 (2002).

228. *Id.* at 775.

229. *See id.* at 788.

230. *Id.* at 779–80.

231. *Id.* at 782 (quoting *Brown v. Hartlage*, 456 U.S. 45, 60 (1982)) (emphasis added).

decision affirming his conviction for contempt of court.<sup>232</sup> The sheriff had issued two press releases and submitted a letter to the grand jury criticizing a judge's actions and criticizing the charges brought against candidates for public office who had allegedly paid money to black leaders in exchange for votes from black citizens.<sup>233</sup> The sheriff's contempt conviction was upheld by the Georgia Court of Appeals because the statements posed a clear and present danger to the court and grand jury proceedings.<sup>234</sup>

The Supreme Court overturned the conviction, held that the contempt charge was not justified, and found that the evidence could not establish that the sheriff's communications actually disturbed the grand jury's proceedings.<sup>235</sup> The Court held that the contempt charges violated the sheriff's right to free speech because the evidence could not show that his speech created a clear and present danger.<sup>236</sup> Chief Justice Warren, writing for himself and four other Justices, wrote:

The petitioner was an elected official and had the right to enter the field of political controversy, particularly where his political life was at stake. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.<sup>237</sup>

Under the CARSON Act, in compliance with *Wood*, elected federal officials would be empowered to “express themselves on matters of current public importance.”<sup>238</sup> Unlike the local court in *Wood*, the CARSON Act would not proscribe the speech of elected federal officials, but instead disqualify them from considering issues in which a qualified contributor has an interest—and that interest must be substantially different from an interest of general public concern.

In addressing another First Amendment concern—limitations on contributions—the Act would not restrict the amount that a qualified contributor may contribute to a candidate. Therefore, to make a First Amendment argument against the Act, a qualified

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232. 370 U.S. 375, 376 (1962).

233. *See id.* at 376, 379–80.

234. *Id.* at 389.

235. *Id.* at 395.

236. *Id.* at 394.

237. *Id.* at 394–95 (citation omitted).

238. *See id.* at 395.

contributor likely would have to argue that it has a First Amendment right to have elected federal officials vote on issues in which it has an interest. It seems unlikely that a federal court would agree with such a position.

Furthermore, qualified contributors are non-individuals who usually do not have the same constitutional relationship to elected federal officials as individuals. That is, an individual contributor is a citizen of one state and is represented by one Representative, two Senators, one President, and one Vice President. It is conceivable that the individual contributor has a constitutional right to representation by those who directly represent him in the political process. This is one basis for the CARSON Act permitting elected federal officials to consider issues in which individual contributors have an interest regardless of the size of their contributions. On the other hand, a qualified contributor may not be the resident of a single state; it may be a corporation doing regular business in every state and having multiple principal places of business. It seems that the qualified contributor in this example would have a difficult time arguing that it has a First Amendment right to be represented by all the elected federal officials who represent all of the areas in which the qualified contributor is a resident, regularly does business, or has a principal place of business.

#### *D. Influence of Contributions*

Elected federal officials may argue that they should retain their ability to consider issues in which a qualified contributor has an interest because they are not influenced by contributions. This argument against the Act is porous. First, contributions must influence elected federal officials; otherwise, contributing at a high level would be futile for the contributor. It is difficult to believe that large private sector companies, known for their fiscal prudence, would make large contributions if they believed such contributions would have no impact on elected federal officials. Whether contributions are innocently made by contributors to further their own political beliefs, or are made to gain access to an elected federal official, contributions do influence their recipients.

Secondly, the comments made by Senator Mitch McConnell on the floor of the Senate arguing against the passage of BCRA,

when contrasted with the events that have occurred in Washington since the passage of BCRA, provide a real example of this argument's lack of merit. On March 20, 2002, Senator McConnell stated:

Although the facts about the provisions of this bill are almost always misrepresented, the driving mantra behind the entire movement is that we are all corrupt or that we appear to be corrupt. We have explored corruption and the appearance of [corruption] before in this Chamber. You cannot have corruption unless someone is corrupt. At no time has any Member of either body offered evidence of even the slightest hint of corruption by any Member of either body. As for the appearance of corruption, our friends in the media who are part and parcel of the reform industry continue to make broad and baseless accusations.<sup>239</sup>

On March 29, 2006, Jack Abramoff was sentenced to five years and ten months in prison after pleading guilty to fraud, tax evasion, and conspiracy to bribe public officials.<sup>240</sup> As stated above, Representative Robert Ney and other members of Congress have been caught up in Abramoff's circle of corruption.<sup>241</sup> This chain of events illustrates that contributions do influence public officials, that corruption is often grounded in campaign contributions, that corruption does exist in spite of current laws that seek to curb it, and that reform is needed.

Finally, it seems politically impracticable for a federal candidate or an elected federal official to argue against the Act because he wishes to retain the ability to consider issues in which a qualified contributor has an interest. Such an argument seems to be one for perpetuating the quid pro quo, monetary influence, and distortion that is currently associated with the financing of federal campaigns. Furthermore, because a vote against the Act could be interpreted as a vote for the continuation of the actual and apparent corruption that currently exists in campaign finance, it seems that such an interpretation could easily be exploited by a political opponent in a subsequent election cycle.

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239. 148 CONG. REC. 52096, 2119 (daily ed. Mar. 20, 2002) (statement of Sen. McConnell).

240. *See supra* note 26.

241. *See supra* notes 38–43 and accompanying text.

### E. *The Threshold Level*

The argument could be made that the CARSON Act would be too restrictive, and that the contribution thresholds which prevent an elected federal official from considering an issue in which a qualified contributor has an interest would be too low for both congressional and presidential candidates. The height of the threshold is always a debatable point as there is no correct place to draw the line, and certain factions involved in the debate will always argue that the threshold is either too high or too low—few will contend that its placement is just right.

As with many of the other arguments against the Act, it would be difficult for an elected federal official to publicly argue that the thresholds have been set too low. Under the Act, because an elected federal official retains the ability to solicit and accept contributions of any amount, it seems an argument against the severity of the thresholds is really an argument for greater flexibility to grant political paybacks to qualified contributors.

The Supreme Court addressed thresholds as recently as 2006 in *Randall v. Sorrell*, when it held that Vermont state limits on contributions and expenditures violated the First Amendment.<sup>242</sup> The Vermont campaign finance statute employed a two-year election cycle and applied restrictions based on the office sought by the candidate.<sup>243</sup> The restrictions governed the amount that candidates for state office could spend on their own elections and the amount that a contributor could contribute to a candidate.<sup>244</sup> The Supreme Court reversed the Second Circuit's upholding of the Vermont law, and while the Court could not agree on an opinion, six Justices held that the expenditure limits placed on candidates for state office, and the contribution limits placed on individuals, organizations, and political parties, were unconstitutionally offensive to the First Amendment.<sup>245</sup>

The Court held that Vermont's restrictions on a candidate's expenditures, and the justifications for it, were similar to the expenditure restrictions and justifications in FECA that were

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242. 126 S. Ct. 2479, 2485 (2006).

243. *Id.* at 2486.

244. *Id.* at 2486–87.

245. *Id.* at 2500.

struck down on First Amendment grounds in *Buckley*.<sup>246</sup> The Court found that the Vermont limits were substantially lower than the contribution limits it had previously upheld and were comparatively more restrictive than the limits imposed by other states.<sup>247</sup> The Court ultimately held that the Vermont law was not closely drawn to meet its objectives because every player in the political process was somehow inhibited by its restrictions.<sup>248</sup> Consequently, the Court held that Vermont's limits on contributions were unconstitutional because they burdened First Amendment interests in a manner disproportionate to the public purposes that the limits were codified to advance.<sup>249</sup>

The CARSON Act would not run afoul of the Court's holding in *Randall* because it places no express limits on contributions from any source and in no way limits expenditures. The CARSON Act would employ thresholds for disclosure and for disqualifying elected federal officials from considering issues in which a qualified contributor has an interest. However, the CARSON Act thresholds would not restrict political participation in the same manner, or to the same degree, as the Vermont limits that the Court deemed unconstitutional in *Randall*.

#### F. *Representation by Elected Officials*

Elected federal officials may argue that they should retain the ability to represent like-minded constituents even if those constituents have contributed more than \$1,000 or \$10,000. The officials could claim that they were elected because they hold certain beliefs shared by their constituents, that those constituents should be empowered to contribute to candidates or elected federal officials who share their beliefs, and that the elected federal officials who benefit from those contributions should be allowed to continue representing those interests. This argument would likely define "constituents" broadly to include those who reside in the elected federal official's home district as well as those willing to contribute to his campaign based on a shared political philosophy.

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246. *Id.* at 2490–91.

247. *Id.* at 2494.

248. *Id.* at 2499–2500.

249. *Id.* at 2500.

The counter-argument to this claim is that the elected federal official has a duty to be responsive to his constituents regardless of how much, if any, the constituents contribute to his campaign. Most officials are elected because they share a political philosophy with a majority of the voters in their district, or at least they share more in common with the voters than their opponent. Therefore, it seems that the elected federal official would represent this same philosophy regardless of contributions.

Additionally, as set out above, the CARSON Act permits an elected federal official to consider issues in which a qualified contributor has an interest, if that interest is not “substantially different” from an interest of the general public. This portion of the Act would allow elected federal officials to consider issues of general interest that broadly affect their constituents, even if a particular constituent has contributed in excess of \$1,000 or \$10,000 to a campaign in a single election cycle.

#### G. *Effect on Incumbents*

Incumbents and those in positions of leadership could argue that the CARSON Act would disproportionately affect their ability to solicit contributions and consider issues. An incumbent could argue that while the Act would severely restrain his ability to garner contributions from his larger base of contributors, a challenger with little initial support is largely unaffected by the Act because he would likely generate few large contributions. An incumbent, however, should not be able to cash in on his good will—merely because he serves in a leadership role, or because he has served one or more terms, does not entitle the incumbent to receive larger contributions with greater frequency. Thus, an incumbent would have a difficult time making the argument that he has a greater interest in receiving large contributions than does a challenger and that such interest deserves protection.

An incumbent also could argue that even if the challenger, whose chances of victory appear unlikely at the outset, were to generate large contributions, the challenger could more readily accept those contributions than could an incumbent. That is, the incumbent must be more cautious in accepting larger contributions to avoid disqualifying himself from considering issues in which qualified contributors have an interest, if re-elected. Again, it seems that an incumbent would be slow to admit that he makes

strategic decisions about which contributions to accept based on his desire to avoid disqualifying himself from considering issues in which a qualified contributor has an interest.

#### H. *Potential Inaction*

Opponents of the CARSON Act could argue that the Act would frequently create a situation where an issue comes before Congress, but because of the broad and generous contributions given by a contributor who has an interest in the issue, less than a quorum of the Congress would be able to consider the issue. Similar to GACIA, the CARSON Act allows an elected federal official to consider issues in which a qualified contributor has an interest if that interest is not “substantially different” from an interest of the general public.<sup>250</sup> This portion of the CARSON Act would ensure that all members of Congress could consider issues that have an impact on the general public.

If the CARSON Act, however, does create a situation where less than a quorum of Congress is able to consider an issue in which a common qualified contributor has an interest, but in which the general public does not have an interest, then the Act would be accomplishing its purpose. If effective, the Act would place the onus on qualified contributors and elected federal officials to ensure that this situation does not occur.

As with any proposed legislation, especially when proposed to govern something as elusive as campaign finance, there are valid arguments against the CARSON Act. For each conceived valid argument against the Act, however, there is a valid counterargument, and its inherent benefits would far outweigh its shortcomings.

#### X. THE MOST FORESEEABLE LOOPHOLES OF THE CARSON ACT

In its aim to reform current campaign finance laws, the CARSON Act would attempt to close potential loopholes that could be exploited by qualified contributors, candidates, and elected federal officials to negate the effectiveness of the Act. Unfortunately, the effectiveness of campaign finance laws will al-

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250. *Cf.* VA. CODE ANN. § 30-101 (Repl. Vol. 2004).

ways be subject to loopholes because it is impossible to account for all types of contribution transactions, all types of contribution schemes, and the creativity and perseverance which contributors, candidates, and elected officials will employ in an attempt to circumvent the laws.

One loophole with which the CARSON Act would attempt to deal exists where would-be contributors make uncoordinated expenditures on behalf of candidates to avoid making a contribution that would bar a candidate, once elected, from considering issues in which that would-be contributor has an interest. The CARSON Act, of course, would treat coordinated expenditures made on behalf of a candidate as contributions. The CARSON Act, however, would not ban or restrict supporters from making uncoordinated expenditures on behalf of candidates primarily because such bans and restrictions are constitutionally suspect.<sup>251</sup> However, the CARSON Act, in its spirit of full disclosure, would require that any expenditure made on behalf of a candidate in excess of \$100 be reported to the FEC. This requirement would not infringe on First Amendment rights because it would not limit the amount that can be spent on behalf of a candidate, but would merely require full disclosure of such expenditures.

Another potential loophole concerns entities that engage a third party to contribute money on their behalf so the candidate, once elected, can retain his ability to consider issues in which the source of the contribution has an interest. The CARSON Act would deal directly with this potential loophole in two ways. First, individuals would be barred from contributing or making expenditures on behalf of anyone but themselves. Second, the Act's disclosure and disqualification requirements would work together to close this loophole. That is, if an individual or qualified contributor contributes in excess of \$100 to a candidate or to an ultimate qualified contributor, the contributor and recipient both have to disclose that contribution.

Additionally, if a qualified contributor contributes in excess of \$1,000 or \$10,000 to an (ultimate) elected federal official or to a qualified contributor that ultimately contributes or makes an expenditure in excess of \$1,000 or \$10,000 to an (ultimate) elected federal official, the elected federal official would be disqualified

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251. See *Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976).

from considering an issue in which either the (source) qualified contributor or the ultimate contributing qualified contributor has an interest. In this way, the Act would bar individuals from channeling, funneling, or laundering money to elected federal officials, and the Act would employ disclosure requirements to ensure that an original contribution made by a non-individual, which finds its way to an elected federal official, disqualifies the elected federal official from considering an issue in which the original qualified contributor has an interest.

The CARSON Act would attempt to address another loophole through its reliance on full disclosure. Under the Act, qualified contributors may make contributions to other qualified contributors that support issues in which the general public has an interest. In turn, the qualified contributor that received the contribution can make contributions to, or make uncoordinated expenditures on behalf of, candidates so as to allow those candidates, once elected, to retain their ability to consider issues in which that original contributor has an interest. First, all contributions or expenditures in excess of \$100 must be disclosed. Second, if the qualified contributor that ultimately contributes to, or makes an uncoordinated expenditure on behalf of, the candidate does support issues of general interest, then the original contribution made to it by a qualified contributor with a special interest would be blended with contributions made by contributors that support general interests. That is, when a special interest attempts to funnel its contribution through a qualified contributor that supports general interests, the intensity of that contribution's influence is lessened.

The CARSON Act would attempt to anticipate and deal with the most glaring potential loopholes, but in doing so, the language of the Act would inevitably leave gaps that could be exploited by creative contributors, candidates, and elected federal officials.

## XI. CONCLUSION

The CARSON Act has been developed and explored in the confines of Virginia campaign finance law. However, the Act would provide an alternative to federal campaign finance law that is less complicated, is more effective at curbing actual and apparent corruption, and does not infringe on the rights of free speech and

political association guaranteed by the First Amendment to the United States Constitution.

The CARSON Act would deal directly with the three most fatal flaws in the current body of federal campaign finance law. In addition, the Act could have a chilling effect on the amount contributed in federal elections even though it neither entertains such a goal nor employs express contribution limits that would infringe on First Amendment rights. If the CARSON Act does have this chilling effect, because qualified contributors may contribute less to allow an elected federal official to retain his ability to consider issues in which they have an interest, it would change the entire landscape in which individuals seek public office in the United States. Campaigns would cost less, which should encourage more people to seek office; candidates would have to be more thoughtful when determining how to disperse their messages with less resources; presumably more candidates would be elected based on the strength of their message as opposed to the size of their campaign fund; and ideas could be assessed on their own merit without regard to the size of their supporter's contribution.

At the same time, the Act would empower candidates to solicit, and contributors to make, contributions above the current federal limits. This enabling spirit of the Act could instead increase the amount contributed in federal elections. The lack of contribution limits under the Act would encourage more political participation, by way of contributions and expenditures, from both individuals and qualified contributors. Furthermore, having this ability to solicit larger contributions could enable candidates and elected federal officials to spend less time soliciting contributions and more time doing the work of those who elected them. The full disclosure and disqualification requirements of the Act, however, will nonetheless curb corruption even if contributions do increase under the Act.

Like any campaign finance law, the CARSON Act is not free of flaws. However, its text and spirit would provide many sound counter-arguments to the most valid criticism that can be made against it. Furthermore, while no campaign finance law can be immune from loopholes, the CARSON Act would address those exploitable gaps that are the most conceivable and foreseeable.

The CARSON Act would effectively deal with the three most fatal flaws of current federal campaign finance law—complexity,

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ineffectiveness, and First Amendment infringement—while going further to improve the system. The Act would also offer effective answers to its critics and would attempt to close exploitable loopholes. The CARSON Act would provide a sound alternative to the current federal campaign finance system, not by preventing a contributor from giving to a politician, but by preventing a politician from giving to a contributor.