Where Are We Now? The Current State of Campaign Finance Law

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This selection is from *Campaign Finance Reform: A Sourcebook*, ed. Anthony Corrado, Thomas E. Mann, Dan Ortiz, Trevor Potter, and Frank Sorauf (Washington, D.C.: Brookings Institution Press, 1997), pp. 5–24. In this article Trevor Potter, former member and chairman of the Federal Election Commission and now a partner in a Washington law firm, provides a systematic and reliable review of existing campaign finance law—the statutes and the regulations of the Federal Election Commission.

The federal election laws were written broadly by Congress in 1971 and 1974 to cover all money spent "in connection with" or "for the purpose of influencing" federal elections. The intent of Congress was to regulate all funds that might be considered federal election related. However, the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), and subsequent cases, has defined these statutory phrases to have a much more limited reach. The Court held that the activity covered by the federal election laws must be narrowly and clearly defined so as not to "chill" speech protected by the First Amendment and to provide notice of regulation to speakers. This chapter describes the regulated portion of the federal campaign finance system (contribution limits) and the use of "soft" and "issue advocacy" money to influence federal elections beyond the reach of the federal election laws. It also describes the many entities engaged in political speech and spending, from party committees to labor unions to 501(c)(3) and (c)(4) organizations.

DIRECT CONTRIBUTIONS TO FEDERAL CANDIDATES AND NATIONAL COMMITTEES OF POLITICAL PARTIES

The Federal Election Campaign Act (FECA) defines "contribution" to include "anything of value" given to a federal candidate or committee.

TABLE 1. Campaign Finance Law: A Summary

Contributors	*May contribute to federal candidates*	*May contribute to party committees*	*May engage in independent expenditures*	*May engage in unlimited "issue advocacy"*
Individuals	Yes—$1,000 per election to candidates	Yes—limited (unlimited soft money)	Yes	Yes
Foreign nationals	No	No, except "building funds"	No	Yes
Corporations	No	No, except unlimited soft money	No (except to "restricted class")	Yes
Unions	No	No, except unlimited soft money	No (except to members)	Yes
PACs (including corporate and union)	Yes—generally $5,000	Yes—unlimited	Yes	Yes
Party committees	Yes—variable limits	Unlimited transfers between committees	Yes	Yes
501(c)(4)s	No	No	In some cases	Yes
501(c)(3)s	No	No	No	Some IRS restrictions

This encompasses not only direct financial contributions, loans, loan guarantees, and the like but also in-kind contributions of office space, equipment, fund-raising expenses, salaries paid to persons who assist a candidate, and the like: 2 U.S.C. § 431(8) (A). The act places limits on the amount individuals and other entities may contribute to candidates and federal committees, whether directly or in kind (see table 1).

Individuals

The act permits individuals to contribute up to $1,000 to a candidate per election: § 44la(a) (1) (A). The term *election* under the act includes "a general, special, primary, or runoff election": § 431 (1) (A). An individual may therefore contribute up to $1,000 to a candidate's primary and another $1,000 to the general election campaign. Each individual has his or her own limit, so a couple may give $4,000 in total per election cycle to each federal candidate. Additionally, minor children may give if it is their own money, is under their own control, and is voluntarily contributed by them—requirements sometimes ignored by politically active parents of infants and schoolchildren.

Individuals are also limited in the amounts that they can contribute to other political entities. Individuals are limited to $20,000 per year in contributions to the federal accounts of a national party committee, such as the Republican National Committee (RNC) or the Democratic National Committee (DNC): § 44 1 a (a) (1) (B). Additionally, individual contributions are limited to $5,000 a year to any other political committee, including a political action committee (PAC): § 441a(a) (1) (C). Contributions to state party committees are likewise limited to $5,000 a year. Local party committees are considered part of state party committees, so the $5,000 limit is a combined limit on the two.[1]

In addition to these specific limits to various candidates and committees, individuals have an aggregate annual federal contribution limit of $25,000 a year: § 44 1 a (a) (3).[2] Thus, individuals who give to one or more party committees and several candidates may easily reach this limit for a given calendar year. The *Los Angeles Times* routinely runs a

1. In certain circumstances, where a local committee can sufficiently demonstrate its independence, it will not be considered part of a state committee.

2. For purposes of calculating this limitation, a contribution to a candidate for an election in a year other than the year in which the contribution is made is considered to be made during the year in which that election is held. Thus, a $1,000 contribution made in 1997 to a candidate running for office in 1998 will count toward the contributor's annual limit for 1998. Contributions to multicandidate committees are always counted toward the limit of the year in which the contribution is made. 2 U.S.C. § 44la(a) (3).

list of individuals who appear to have violated this limit, based solely on publicly available FEC records. Because of the complex legal and accounting rules involved, there is often a factual dispute whether a violation has occurred. In many cases, however, it appears that the ability to make unlimited "soft money" contributions to nonfederal committees and accounts has resulted in a general case of amnesia about the $25,000 annual federal limit.

The act and FEC regulations contain a host of exceptions from the definition of "contribution" applicable to individuals. Among the principal ones are the donation of personal time to a candidate (unless it is time paid for by someone else, such as an employer), home hospitality up to $1,000 a candidate per election, and costs of personal travel of up to $ 1,000 a candidate per election and up to $2,000 a year for party committees.

Political Committees

Whether an organization is a "political committee" required to register with the FEC and subject to the federal limitations on amounts and sources of contributions is a crucial question for any entity engaged in political activity. The act defines "political committee" as

> (A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $ 1,000 during a calendar year; or
>
> (B) any separate segregated fund established under [the Federal Election Campaign Act]; or
>
> (C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definitions of contribution or expenditure as defined [by the act] aggregating in excess of $5,000 during a calendar year, or makes con-

> tributions aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $ 1,000 during a calendar year: 2 U.S.C. § 431(4).

Whether an organization (such as GOPAC or the American Israel Public Affairs Committee) is a political committee, and thus subject to all the federal election laws, or is instead an entity completely unregulated by the federal campaign finance laws, has been the subject of much litigation. The question is whether merely spending $1,000 on express advocacy is sufficient to qualify a group as a political committee, or whether its political activity must be significantly more extensive and pervasive.[3] The current legal standard is unclear, as a result of several recent conflicting court decisions. This is a crucial issue for the coverage of the election laws and will likely continue to be hard fought because groups that can successfully avoid qualifying as a federal political committee can spend unlimited sums, raised without restriction or disclosure, for activities often designed to influence federal elections.

Different forms of federal political committees face differing contribution limits. Political action committees are political committees that may qualify for multicandidate committee status. To so qualify, a PAC must demonstrate that it has been registered with the FEC for six months, receive contributions from at least fifty-one persons, and contribute to at least five federal candidates: 11 C.F.R. § 100.5(e)(3). A multicandidate committee may contribute up to $5,000 to a candidate per election and up to $5,000 to other separate PACs each year. Additionally, a multicandidate committee can contribute up to $15,000 a

3. The Federal Election Commission has required that a "committee, club, association, or other group of persons" as defined by section A of 2 U.S.C. § 431(4) have the "influencing of federal elections" as a major purpose in order to be considered a "political committee," based on the FEC's reading of Supreme Court rulings. However, the D.C. Circuit recently rejected this criterion, indicating that the $1,000 threshold for contributions is pertinent for evaluating political committee status (but "major purpose" is still the test if the group makes only expenditures). See *Akins v. FEC*, 10 1 F.3d 731 (D.C. Cir. 1996) (*en banc*) (*cert granted*) ~ 65 U.S.L.W. 3825 (U.S. June 16, 1997) (No. 96-1590).

year to a national party committee and has a combined limit of $5,000 a year to local and state party committees.

A PAC that does not qualify for multicandidate committee status is limited to contributions of $1,000 per candidate per election but may still contribute up to $5,000 a year to another PAC. Such PACs may contribute up to $20,000 a year to national party committees (more than multicandidate committees can) and have a combined limit of $5,000 a year to local and state party committees.

There are two types of noncandidate political committees: nonconnected (or independent) committees and corporate or labor PACs, finally called separate segregated funds. Corporations and labor unions may pay all the administrative and solicitation costs of their committees, whereas nonconnected PACs must pay such costs out of the funds they raise. Corporate and labor PACs, however, have strict rules on who they may solicit, while nonconnected committees may solicit the general public.

Leadership PACs

Beginning in the 1980s, a number of political committees were established that had an "association" with a member of the congressional leadership. These "leadership PACs" usually use the name of a member of Congress in an honorific capacity such as "honorary chair," and the committee treasurer is a close associate of the congressional member (sometimes an employee of the congressional office). Members of Congress often personally solicit contributions to "their" leadership PACs, and the news media report contributions and expenditures by the committees as if they were a component of the member's campaign apparatus.

The advantage of leadership PACs for members of Congress is twofold. Such committees may qualify as "multicandidate" committees and accept contributions of up to $5,000 from individuals (opposed to $1,000 for a candidate's campaign committee). In addition, since leadership PACs are not considered affiliated with their campaign accounts,

members of Congress may obtain contributions from the same sources for both committees (so that a single PAC could give $20,000 in an election cycle: $5,000 each for the primary and general elections to the campaign committee and $ 5,000 a year to the leadership PAC). Members of Congress also have in some instances established state leadership PACs, which are not covered by any of the federal contribution limits or disclosure requirements. Such accounts may therefore be considered a new form of soft money. These state PACs may often accept contributions of corporate or labor funds and unlimited personal funds otherwise banned by federal election law.

Leadership PACs have traditionally been used by legislative leaders to contribute to the campaigns of other members of Congress as a way of gaining a party majority and earning the gratitude of their colleagues. Leadership PACs may not expend more than $5,000 to elect or defeat a federal candidate (including their "honorary chair"). However, these committees may not be subject to the FEC's personal use rules (which prohibit the conversion of campaign funds for a candidate's personal expenses) and are now increasingly serving as a source for travel and other expenses of a political nature. Press articles noted that Senator Ted Kennedy's (D-Mass.) leadership PAC spent the vast majority of its funds for such purposes. This development is the latest in the forty-year cycle of regulating "office accounts" (pejoratively known as slush funds). Office accounts have historically allowed supporters of candidates to provide funds that can be used for a candidate's personal expenses related to political activity (member travel and the care and feeding of supporters, potential donors, and constituents). House and Senate rules both now ban "unofficial office accounts" but exempt political committees from that ban.

Various reformers have urged the FEC to find leadership PACs to be under the control of the members of Congress with whom they are associated. The federal election laws state that all contributions made by committees "established," maintained," or "controlled" by any person "shall be considered to have been made by a single political com-

mittee" because the committees are legally affiliated: 2 U.S.C. § 44la(a)(5). Thus, argue reformers, any contribution to a leadership PAC should also be considered a contribution to the candidate's campaign committee, subject to a common limit. However, the FEC has declined to adopt this approach to date.

Party Committees

FEC regulations define a party committee as "a political committee which represents a political party and is part of the official party structure at the national, state, or local level": 11 C.F.R. § 100.5 (e) (4). A party committee's contribution limits are the same as a multicandidate political committee's, with three major exceptions:

- For federal election law purposes (but not necessarily state law), party committees can transfer unlimited funds to other party committees, without such transfers being treated as contributions.
- A national party committee and the national senatorial committee may together contribute up to $17,500 to a candidate for the U.S. Senate. This $17,500 limit is for the entire election cycle, rather than for each separate election within the cycle: 11 C.F.R. § 110.2 (e).
- National and state party committees may spend an inflation-adjusted amount for coordinated spending supporting the party's House and Senate candidates, which differs by state depending on its voting age population.

In 1979, Congress amended the Federal Election Campaign Act to exempt from the definition of contribution and expenditure party spending on certain state party-building or volunteer activity, *provided* that it was paid for with funds raised under the act ("hard" or "federal" money) by state parties, and not from soft money or funds transferred from the national party committees. These exempted activities include

yard signs, bumper stickers and pins, get-out-the-vote programs, and volunteer mailings but not broadcast advertising or certain activities by paid staff. This exemption has generated years of FEC enforcement investigations and litigation—what is "volunteer" activity? what is a "mass mailing?" when is it paid for by a transfer of funds from a national party committee, using which accounting principles?—because such activity provides an important avenue for parties to support their federal candidates in priority races.

EXPENDITURES

The act defines an *expenditure* to include "(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and (ii) a written contract, promise, or agreement to make an expenditure": 2 U.S.C. § 431(9). "Expenditure" thus encompasses virtually every payment made in connection with the federal election, including contributions. However, expenditures are only considered contributions when there is some connection with the recipient committee. This concept is explained more fully below in the section discussing independent expenditures.

Party Committee Expenditures

Under the act, the national and state party committees may expend additional limited amounts for coordinated expenditures on behalf of their federal candidates. The amount is based on the population of the state (or, in the case of House candidates for states with more than one representative, is a fixed dollar amount). These expenditures may be made at any time but only for the benefit of general election candidates: see 2 U.S.C. § 441a(d).

These expenditures can pay for goods and services for candidates, but payments cannot be made directly to the candidates' campaigns—that is, the party committees may not simply give a candidate money. However, it is important to understand that these expenditures are

coordinated with the candidate: these are payments candidates can specifically request and direct. Where a committee makes expenditures independent of a candidate, they are not subject to limits, as explained below. The limits on coordinated party expenditures are being challenged in the *Colorado Republican Federal Campaign Committee v. Federal Election Commission* case on constitutional grounds (116 S. Ct. 2309 [19961]).

Independent Expenditures

Independent expenditures are just that—expenditures by individuals and committees involving elections for federal office that are not coordinated with the candidates seeking office. There are now no dollar limitations on independent expenditures, as *Buckley v. Valeo* established that the First Amendment protects the right of individuals and political committees to spend unlimited amounts of their own money on an independent basis to participate in the election process. Independent expenditures, however, must be publicly disclosed through the Federal Election Commission.

At one time, the Federal Election Commission presumed that party committees were incapable of making independent expenditures, reasoning that parties and their candidates were so intertwined that there could be no truly uncoordinated expenditures. In *Colorado Republican*, however, the Supreme Court ruled that party committees had the same right to make independent expenditures as other committees if the factual record demonstrates the actual independence of the activity. The remaining issue in that case (whether party committees may constitutionally be restricted in the amount they may spend on a *coordinated* basis to elect their candidates) is currently on remand to the lower courts.

The definition of what constitutes a "coordinated" expenditure is not clear at this time. The Federal Election Commission is currently in the midst of an administrative rulemaking to define more clearly what coordination means, and when the concept applies. Under current FEC

regulations, the commission looks to several criteria in determining coordination. For instance, inside knowledge of a candidate's strategy, plans, or needs, consultation with a candidate or his or her agents about the expenditure, distribution of candidate-prepared material, or using vendors also used by a candidate may be considered by the FEC as evidence of coordination: see 11 C.F.R. § 109.1 (d) (campaign literature); FEC Advisory Opinions 1982-30 and 1979-80 (vendors).

PROHIBITED CONTRIBUTIONS AND EXPENDITURES

Although most individuals and organizations are limited in their ability to make contributions in connection with federal elections, others are prohibited by law from making such contributions or expenditures. The Federal Election Campaign Act has four such prohibitions.

National Banks, Corporations, and Labor Organizations Prohibition

Section 441b of the act makes it unlawful for any national bank or any corporation organized by authority of any law of Congress, any other corporation, or any labor organization to make contributions in connection with a federal election or for anyone to accept such contributions. Thus, corporations and unions cannot contribute their general treasury funds to a federal candidate (PAC funds, contributed voluntarily by individuals for these purposes, are not covered by this provision). This broad prohibition is subject to three significant exceptions.

Nonprofit issue-advocacy groups exemption.

The Supreme Court has held that certain small, ideologically based nonprofit corporations should be exempt from the prohibition on independent expenditures by corporations in connection with federal elections: Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) (*MCFL*).

The FEC has adopted regulations containing criteria required for a corporation to be exempt under *MCFL.* According to the FEC, such a corporation

1. Must have as its only express purpose the promotion of political ideas[4]
2. Cannot engage in business activities (other than fund-raising expressly describing the intended political use of donations)[5]
3. Can have (i) no shareholders or other persons, other than employees and creditors with no ownership interest, affiliated in any way that could allow them to make a claim on the [corporation's] assets or earnings and (ii) no persons who are offered or who receive any benefit that is a disincentive for them to disassociate themselves with the corporation on the basis of the corporation's position on a political issue
4. Cannot be established by a business corporation or labor organization or accept anything of value from business corporations or labor organizations.[6]

If these criteria are satisfied, the corporation may make unlimited *independent expenditures* in connection with a federal election: 11 C.F.R. § 114.10.

If a qualified *MCFL* corporation makes independent expenditures aggregating more than $250 in a single year, it must report that expenditure to the FEC, as with any other independent expenditure. For *MCFL* corporations, this also involves filing a certification with the FEC that the corporation meets the qualifying criteria for the *MCFL* exemption.

4. "Promotion of political ideas" is defined as "issue advocacy, election influencing activity, and research, training or educational activity that is expressly tied to the organization's political goals": 11 C.F.R. § 114.10 M (1).

5. Examples of such benefits are credit cards, insurance policies, savings plans, or training, education, or business information supplied by the corporation: 11 C.F.R. § 114.10(c) (3) (ii) (A) and (B).

6. A nonprofit corporation can show through its accounting records that this criterion is satisfied, or will meet this requirement if it is a qualified 501 (c) (4) corporation and has a written policy against accepting donations from business corporations or labor organizations: 11 C.F.R. § 114. 10 Q (4) (111).

Press exemptions.

The second major exception exempts certain press activities from the act's definition of expenditure: 2 U.S. C. § 431 (9) (B) (I). The section provides that the term *expenditure* does not include "(i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." According to the legislative history of this section, Congress included the provision to indicate that it did not intend the act "to limit or burden in any way the first amendment freedoms of the press" and to assure "the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns": H.R. Rep. No. 1239, 93d Cong., 2d Sess., at 4.

Thus, any qualifying media organization can make expenditures in connection with federal elections provided the organization falls within the bounds of the exemption. However, exactly what is within the statute's protection remains unclear. The FEC has indicated that media entities may present debates or cable-cast editorials, but the agency has challenged the distribution of printed materials endorsing a candidate as part of a cable company's billing process. The ultimate determination of that case remains pending: See *Federal Election Commission v. Multimedia CableVision, Inc.*, No. 95-3280 (10th Cir. 1996).

Internal communications exemption.

All corporations are permitted to communicate with their *restricted class* whenever they so choose, and labor unions may likewise communicate with their members. A corporation's restricted class is defined as its stockholders and its executive or administrative personnel and their families: 11 C.F.R. § 114.3 (a). Thus, a corporation can send mailings to its restricted class, endorsing a particular candidate. Similarly, a corporation could invite a candidate to appear before its restricted class and endorse the candidate in connection with the event. However, the corporation must take steps to ensure that only its restricted class receive

such communications. Communications with the restricted class are not generally regulated by the FEC, but internal communications of more than $2,000 per election expressly advocating the election or defeat of a candidate must be reported: 2 U.S.C. § 431(9) (B) (iii).

The exemption for communications with members has been used by labor unions for voter registration drives, telephone banks to turn out the vote on election day, and candidate endorsements. Such communications may be completely partisan in nature but can only be made to the union's members or to the corporation's restricted class—not to the general public (see the discussion of general issue advocacy below).

Foreign Contribution Prohibition

For many years there was no ban on foreign contributions. In 1938, in the face of evidence of Nazi German money spent to influence the U.S. political debate, Congress passed the Foreign Agents Registration Act. This law required agents of foreign entities engaged in publishing political "propaganda" to register and disclose their activities, but it did not regulate political contributions. In 1966, after congressional hearings in 1962–63 revealed campaign contributions to federal candidates by Philippine sugar producers and agents of Nicaraguan president Luis Somoza, Congress moved to prohibit political contributions in *any* U.S. election by any foreign government, political party, corporation, or individual (except foreign nationals who are permanent residents of the United States).[7]

The act now prohibits foreign nationals, either directly or indirectly, from making contributions in connection with any election to political

7. Donations to a building fund of a national or state political party committee are specifically excepted from treatment as a "contribution" under the FECA, 2 U.S.C. § 431(8) (B) (viii), and thus seem likely not to be covered by the foreign money prohibition.

The statute states: "any gift, subscription, loan, advance, or deposit of money or anything of value to a national or a State committee of a political party [is not a contribution if it is] specifically designated to defray any cost for construction or purchase of any office facility not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office."

office, including state and local elections as well as federal: 2 U.S.C. § 44 le.[8] The act defines "foreign national" as (1) a foreign principal, as such term is defined by section 611 (b) of title 22, except that the term "foreign national" shall not include any individual who is a citizen of the United States, or (2) an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence, as defined by section 1101 (a) (20) of title 8.[9]

This prohibition also operates to prevent domestic subsidiaries of foreign corporations from establishing PACs if the foreign parent finances the PAC's establishment, administration, or solicitation costs or if individual foreign nationals within the corporation make decisions for the PAC, participate in its operation, or serve as its officers: 11 C.F.R. § 110.4 (a) (2) and (3). Since federal law prohibits a foreign national from making contributions through another person or entity, a domestic subsidiary of a foreign parent corporation may only make contributions out of domestic profits. It may not make nonfederal contributions out of subsidies received from the foreign parent, nor may it use such funds to pay for the establishment, administration, or solicitation costs of its PAC. Similarly, foreign nationals may not participate in the selection of the individuals who run the PAC.

These provisions are at the heart of much of the controversy about fund-raising activity in the 1996 election. One issue is whether this

8. 22 U.S.C. § 611 (b) provides:

(b) The term "foreign principal" includes (1) a government of a foreign country and a foreign political party; (2) a person outside of the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any state or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and (3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

9. 8 U.S.C. § 1101 (a) (20) provides: The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

foreign national prohibition applies to the donation of "soft," or nonfederal, money to a national party committee. The Department of Justice's stated view on this question has varied, and the matter is probably fact-specific: Can the funds donated be said to have been used in connection with any election to political office, whether federal, state, or local, or were they only used for nonelection activities?[10]

Federal Contractors Prohibition

The act prohibits anyone who contracts with the United States or any of its departments or agencies to make any contribution to any political party, committee, or candidate for public office, nor may such a contribution be solicited from any person between the time of the negotiations and completion of the contract. However, federal contractors that are corporations can establish federal PACs: 2 U.S.C. § 441c.

Contributions in the Name of Another Prohibition

Section 441f of the act provides that "no person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person." This section is often enforced in connection with other prohibitions. For example, where a foreign national gives money to a U.S. citizen to be contributed by such person to a federal candidate, there is

10. Attorney General Janet Reno's testimony before the Senate Judiciary Committee on April 30, 1997, indicates that the Department of Justice may now interpret Section 441e to prohibit soft money contributions to party committees from foreign nationals. See Department of Justice Oversight, *Hearing of the Senate Judiciary Committee*, Federal News Service, April 30, 1997 (responses to questions from Senator Fred Thompson). Senator Thompson asserted in his questioning of Attorney General Reno that her interpretation that "soft money" was never a "contribution" under the act would make acceptance of soft money contributions from foreign sources legal. The attorney general disagreed, stating that "441e prohibits contributions from foreign nationals in connection with all elections, state and federal, and thus they can't use soft money from foreign sources for issue ads by political parties."

both a violation of § 441e (foreign contributions) and § 441f (a contribution in the name of another).

THE PRESIDENTIAL SYSTEM

Major Parties (Democrats and Republicans)

The contribution and expenditure limits described above apply to all federal elections other than presidential campaigns. Presidential elections are partially publicly funded. That is, once a major party presidential candidate meets certain requirements, the general election campaign may choose to receive full U.S. government funding from the Treasury accounts funded from the $3 voluntary taxpayer checkoff.

Presidential primaries.

Presidential primaries are funded through a combination of public and private funding. The partial public funding is provided in matching funds, public funds matching up to $250 of a single individual's contributions. To qualify for such matching funds, the candidate must demonstrate nationwide support through raising at least $5,000 in individual contributions of up to $250 each in at least twenty separate states. Candidates must also agree, among other things, to

- Limit primary spending to an inflation adjusted amount—approximately $31 million in 1996
- Limit spending in each primary state to a specific amount (which increases with population)
- Limit spending of personal funds to $50,000

Once these requirements are met or agreed to, the candidate can receive matching payments: see generally 11 C.F.R. § 9033. 1.

Private contributions for presidential candidates are still limited as in other federal elections. Individuals may contribute up to $1,000 to a

presidential primary campaign committee, and qualified multicandidate PACs can contribute up to $5,000.

The general election.

Once a candidate becomes the nominee for a major party, he or she becomes eligible for a public grant (which was $61.82 million per candidate in 1996). To receive these funds, however, the candidate must agree to spend no more than the grant received and must not accept private contributions. Additionally, the two major party national committees may each spend a voting-age population-adjusted amount ($12 million in 1996) in coordination with their presidential candidates: 2 U.S.C. § 441a(d) (2). This amount is separate from any get-out-the-vote or generic party-building activities the parties conduct. As noted below, the Republican and Democratic National Committees do not consider their "issue advocacy" advertising to be subject to this limit (whether or not coordinated with their presidential candidates).

Candidates not accepting public funds.

Candidates are not required to accept public funds in either the primary or general elections. Candidates refusing such funds are permitted to spend as much of their own money in support of their campaigns as they wish. As a result, a candidate refusing public funding would have no per state spending limit or overall spending limit in the primary campaign (Steve Forbes in 1996) and no spending limit in the general election campaign (Ross Perot in 1992). Such a candidate could still accept private contributions in both the primary and general election campaigns, subject to the standard $ 1,000 per election contribution limit for individuals.

Convention funding.

Each of the major parties' nominating conventions may also be paid for, in part, by public funding: see 26 U.S.C. § 9008. Each major party received a grant of $12.36 million in 1996 to finance its nominating

convention. Minor parties may qualify for convention funding based on their presidential candidates' share of the popular vote in the preceding election.

Political parties accepting convention funding may spend in connection with the convention only the amount of public funds they receive. However, the host city and other sponsors support conventions in a variety of ways. The city, through its host committee (a federally registered committee created to support convention activities) may spend money promoting itself as a convention location, pay for the convention hall, and provide local transportation and related services to the convention: see 11 C.F.R. § 9008.52. Additionally, the host city itself may directly accept cash and in-kind contributions from local (but not other) businesses, which are often received by a tax-deductible entity. In some circumstances, corporations can also provide goods (such as automobiles) free to the conventions as part of a promotional program. These exemptions, as interpreted by the FEC, have in practice resulted in extensive convention-related fund-raising by the host city and the political parties, usually raising individual, corporate, and labor funds for the convention far greater in total than the federal grant. Conventions now have "official" airlines, computer companies, car rental agencies, and the like, all in addition to the federal grants to the political parties.

Third- and Minor-Party Presidential Candidates

Minor parties (those that have received at least 5 percent but no more than 25 percent of the popular vote in the preceding presidential election) and new parties (a party that is not a major or minor party) may also receive partial public funding for the general election, in some instances. New- and minor-party candidates may accept private contributions, but only within the general limits on such contributions ($1,000 per election from individuals, and no corporate or labor contributions).

A candidate who agrees to abide by the restrictions applicable to

publicly funded presidential candidates (including an FEC audit and a $50,000 limit on the use of personal funds) and who then meets a threshold of 5 percent of the general election vote will receive public funding based on his or her share of the vote but not until after the election: see 11 C.F.R. § 9004.3. Days after the 1980 general election, independent John Anderson became the first such candidate to receive "retroactive" funding, based on unofficial vote totals showing that he had received nearly 7 percent of the popular vote. In subsequent elections, an individual who has received 5 percent or more of the vote in a previous general election may be eligible to receive general election funding before the election: see 11 C.F.R. § 9004.2. The most prominent example is Ross Perot, who ran as an independent in 1992, then appeared on most state ballots as the nominee of the Reform Party in 1996. Even though Perot had not run under the Reform Party banner in 1992, he received public funding in 1996 based on his 1992 general election vote total.

Additionally, minor-party candidates may be eligible for primary funding as well. Examples include Lyndon H. LaRouche, who appeared on the ballot in several states as the candidate of the U.S. Labor Party in 1976 but failed to qualify for public funding in that year's general election. Beginning in 1980, however, LaRouche sought the Democratic Party's nomination for president several times. He secured matching funds for most of those primary campaigns by receiving the necessary individual contributions to meet the statutory criteria for "nationwide support." Similarly, Lenora Fulani received matching funds when she sought the New Alliance Party nomination in 1988 and 1992. Because of the 5 percent threshold, however, she failed to qualify for general election funding in either of those two years.

Once the FEC certifies a minor party or new party as a "national" party, then the party may contribute to its presidential candidate's campaign, subject to the same types of contribution limits that the major parties face. During the 1996 election, the Libertarian, Natural Law, and Taxpayers Parties all had national recognition from the FEC. The Re-

form Party received no such recognition, in part because Ross Perot argued that the national organization was merely a collection of state parties. Without the national party designation, Perot could avoid federal limits in the personal funding he could provide for the Reform Party's convention. However, he could still only contribute a maximum of $50,000 to his own general election campaign because he accepted federal funding. Before and after the 1996 election, Reform Party members opposed to Perot sought federal recognition of state party organizations they controlled, both to limit Perot's influence and to gain control of the subsequent federal funding guaranteed by Perot's 8 percent showing in 1996. Had Perot not been the Reform Party's nominee in 1996, the party's presidential candidate would have had to meet the 5 percent vote threshold in the 1996 election before receiving any federal funding.

"SOFT MONEY"

The act prohibits party committees from accepting contributions in excess of individual or PAC limits or from impermissible sources (corporations, unions, foreign nationals). In a series of advisory opinions, the FEC has allowed state and national party committees to accept funds from some sources and in amounts otherwise prohibited by federal election law, provided such funds are placed in separate " nonfederal" accounts and not used for federal election purposes.

The FEC has created a complex system of allocation formulas regulating the proportions of hard and soft money that party committees may use for generic party activity (administrative, overhead, get-out-the-vote, issue ads, and the like). National party committees (but not state or local) are also required to disclose soft money donations to the FEC.

RESTRICTIONS ON POLITICAL FUND-RAISING BY MEMBERS OF CONGRESS AND EXECUTIVE BRANCH OFFICIALS

There are several statutes that regulate the location and form of political fund-raising. Most of these are designed to protect federal employees

from pressure to contribute to federal candidates and parties, but one simply prohibits any solicitation or receipt of a federal contribution in a federal workplace. These statutes carry criminal or civil penalties, and their intricacies have been the focus of much attention as a result of reported fund-raising activities at the White House during the 1996 election.

A series of criminal provisions makes it unlawful to attempt to obtain a political contribution from a government employee by means of threats of firing (18 U.S.C. § 601); for a candidate for Congress or federal employee or officer to solicit a campaign contribution from any other federal employee or officer (18 U.S.C. § 602); for a federal officer or employee to contribute to his or her employer's campaign (18 U.S.C. § 603); for any person to solicit a political contribution from someone known to be entitled to funds for federal "work relief" (18 U.S.C. § 604); or to demote or threaten to demote a federal employee for giving or withholding a political contribution (18 U.S.C. § 606).

Additionally, 18 U.S.C. § 607 makes it a criminal offense (subject to a fine or three years in jail or both) to "solicit or receive any contribution . . . in any room or building occupied in the discharge of official duties" by any federal officer or employee. Congress is specifically exempted from the receipt portion of this provision, provided that any funds received are transferred within seven days to a federal political committee and that the contributors were not told to send or deliver the money to the federal office building.

"Soft Money"

The most important limitation on the scope of these solicitation provisions was probably unintentional. In 1979, Congress amended each of these sections to replace language referring to "contributions for any political purpose" or "to be applied to the promotion of any political object" with the more precise "contribution" as "within the meaning of section 301(8) of the Federal Election Campaign Act of 1971." The result is that this new definition only reaches contributions "for the purpose

of influencing" federal elections, thereby arguably leaving solicitations for nonfederal ("soft money") donations beyond the reach of the solicitation ban.

Thus, a key question for federal prosecutors becomes whether the money being solicited is hard or soft (a distinction unknown to Congress when the new definition of "contribution" was inserted in these laws in 1979). This in turn raises questions about contributions solicited by federal candidates or their agents explicitly for the purpose of influencing a federal election but deposited in and spent out of a nonfederal account. Common Cause, among others, has argued that such donations should be considered "contributions" under the Federal Election Campaign Act of 1971, as amended.

A seldom-used FEC regulation adopted in 1990 may be relevant to this debate:

> Any party committee solicitation that makes reference to a federal candidate or a federal election shall be presumed to be for the purpose of influencing a federal election, and contributions resulting from that solicitation shall be subject to the prohibitions and limitations of the Act. This presumption may be rebutted by demonstrating to the Commission that the funds were solicited with express notice that they would not be used for federal election purposes. 11 C.F.R. §102.5 (a) (3).

This provision has the potential to bring the solicitation of funds deposited in party soft money accounts within the federal definition of "contribution." Such a result would have significant implications for the interpretation of the criminal statutes banning solicitations of federal employees for campaign contributions or the solicitation or receipt of such contributions in federal buildings.

Additional issues raised by 1996 events include which areas of the White House are exempt from the solicitation ban because they are not used "in the discharge of official duties" (in 1979, the Department of Justice issued an opinion to President Jimmy Carter that a luncheon with Democratic party fund-raisers held in the White House family

quarters fell within the "private residence" exemption implicit in the law). Questions have also been raised about whether the prohibition on solicitation applies when the solicitation occurs through a phone call from a federal office but the recipient of the conversation is not in a federal building, and whether there is an exemption from the ban on "receiving" a contribution for "ministerial" acts (such as taking an envelope containing a contribution and delivering it to an authorized representative of a political committee) .

Congress

As noted above, the prohibition on receiving contributions in a federal building does not apply to Congress, as long as certain conditions are met. However, the ban on solicitations from a federal workplace does apply to Congress.

The Committee on Standards of Official Conduct has recently reminded House members that, entirely aside from the criminal statute, the Rules of the House also regulate political fund-raising and "are quite specific, and quite restrictive" ("April 25, 1997 Memorandum for All Members, Officers and Employees"). Under House rules, "*Members and staff may not solicit political contributions in their office or elsewhere in the House buildings, whether in person, over the telephone, or otherwise*" (emphasis in original). Added the committee: "The rule bars *all* political solicitations in these House buildings. Thus, a telephone solicitation would not be permissible merely because, for example, the call is billed to the credit card of a political organization or to an outside telephone number, or it is made using a cellphone in the hallway." Nor may House telephone numbers be left for a return call if the purpose is the solicitation of a political contribution, according to the committee. This advice responds to claims that members of Congress were using cellular telephones in their offices, or fund-raising in the Capitol, instead of using the cubicles set aside for fund-raising telephone calls in office buildings near the Capitol owned by the Democratic and Republican campaign committees.

The Senate also has rules regulating campaign activity in Senate buildings and the Capitol and restricting the number of members of a senator's staff who may handle campaign contributions.

The Hatch Act

The Hatch Act, first passed by Congress in 1939 during President Franklin Roosevelt's second administration to protect federal employees from political pressure, bans all Executive Branch federal employees from knowingly soliciting, accepting, or receiving a political contribution from any person: 5 U.S.C. § 7322. Although (unlike the criminal provisions) "political contribution" is still broadly defined as "any gift . . . made for any political purpose," the penalty for violations of the Hatch Act is either thirty days suspension without pay or removal of the employee's position. The Hatch Act has no criminal penalties.

ISSUE ADVOCACY

Issue advocacy is speech that does not "expressly advocate" the election or defeat of a federal candidate and is therefore not subject to any of the limits, prohibitions, or disclosure provisions of the federal election laws. As a result, corporations, unions, advocacy groups, and party committees may raise and spend funds for such speech without limit, and (except for party committees) without disclosure of sources or amounts. Three current issues concerning issue advocacy are the focus of legal attention:

- When does "issue advocacy" become "express advocacy"?
- When is it "coordinated" with a candidate so as to make it a "contribution" subject to all of the federal election laws?
- Is some party committee issue advocacy exempt from the FEC's soft money allocation regulations because it is unrelated to any election?

OTHER PLAYERS IN THE ARENA

In addition to those who contribute under the laws established by the act, other significant entities play roles in political campaigns.

Unions

Although the act and FEC regulations treat corporate and union funds similarly, other considerations have made unions unique in the political landscape. Like corporations, they may not contribute directly to federal candidates but may create and administer a PAC, may contribute to the nonfederal accounts of political parties, and may sponsor "issue" advertising to the general public.

As membership organizations, they may also communicate with their members (numbering in the millions) on any subject (including urging them to vote for specific candidates or parties) and may use union treasury funds to do so. In *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), the Supreme Court determined that the National Labor Relations Act limited union uses of money raised from nonunion employees as a condition of employment to support collective bargaining ("agency agreements"). As a result, nonunion employees in closed-shop states cannot be required to fund political spending as a condition of their employment.

This decision potentially reduces the political use of funds paid involuntarily to unions by nonmembers. On April 13,1992, President George Bush issued Executive Order 12800, which required government contractors to post notices informing their nonunion employees that they could object to use of their union dues for political purposes. On February 1, 1993, however, President Bill Clinton issued Executive Order 12836, rescinding Executive Order 12800, and referred the issue to the National Labor Relations Board for further consideration.

The broader question on the use of dues from union members themselves for political activity was not addressed in *Beck*. Republican Party leaders argue that union members should be given some mechanism for authorizing or restricting the use of their dues for political

purposes (perhaps including issue advertising), claiming that a substantial number of union members disagree with the political choices made by union leaders. Democrats and unions respond that union leaders are freely elected by the membership and are thus only exercising their representative authority. Besides, they add, corporate shareholders do not vote whether to approve corporate political spending on issue advocacy either. Member dues in any case provide only a portion of the funds available to unions for such communications, so union leaders could probably use other funds for these activities if necessary.

In 1996 the AFL-CIO announced a $35 million television advertising campaign, which ran in dozens of congressional districts with vulnerable Republican incumbents, attacking the members' congressional voting records on issues such as social security, medicare, and federal funding for education. These "issue" advertisements were paid for with union treasury funds, on the grounds that they did not "expressly advocate" the election or defeat of the member of Congress but instead had endings such as "tell your representatives to stop cutting medicare." This spending was in addition to direct union PAC contributions to Democratic candidates and party committees and the use of union organizers in congressional districts. Additionally, unions engaged in traditional voter registration activity and election day get-out-the-vote telephone banks directed to union members and reportedly assigned paid organizers to some congressional districts to coordinate communications activities.

Corporations

Corporations have been prohibited from contributing to federal candidates since the beginning of this century, when the first federal campaign finance restrictions were enacted by Congress. However, like unions, corporations still participate in the political process in a variety of ways.

Most visibly, corporations may establish and pay the administrative costs of separate segregated funds, known as PACs, and may encourage employees and stockholders to contribute personal funds to those com-

mittees. Additionally, corporations may communicate with their executives and management personnel, urging them to support and contribute to specific parties or candidates, and may host visits by candidates at corporate facilities, subject to FEC rules. The most important aspect of such internal corporate activity is the ability of corporate executives and PACs to raise funds for federal candidates. The FEC has issued complicated new regulations governing such corporate political activity, but fund-raising by corporate executives under these rules remains a substantial source of money for federal candidates.

Corporations may also pay for "issue advocacy" advertising, either directly or through donations to other groups, such as industry associations or issue-oriented 501 (c) (4)s that are engaged in public advertising programs. Because issue advertising is not defined as a campaign "expenditure," it does not need to be disclosed, making it difficult to identify the sources or amounts of such spending. In 1996, "the Coalition" was formed by a group of business associations, including the U.S. Chamber of Commerce, to respond in kind to the labor unions' televised issue advocacy ads. The Coalition is reported to have raised some $3.5 million from corporations for this activity and has announced plans to continue such general public communications in the future. Additionally, corporations contribute substantial sums of "soft money" to the nonfederal accounts of the national party committees and directly to state parties (where permitted by state law).

Finally, the Supreme Court has held that it is unconstitutional to prohibit corporations from spending funds to campaign for and against state ballot measures. (See *First National Bank of Boston v. Bellotti*, 435 U.S. 765 [1978]; document 3.2.) In states such as California, where ballot initiatives are often identified with particular candidates or political parties, this can provide an avenue for a significant direct expenditure of corporate funds that may have the effect of influencing a federal election.

501 (c) (4) Organizations

Section 501 (c) (4) of the Tax Code provides for the establishment of "social welfare organizations" exempt from federal income tax. Although these organizations must be operated exclusively for the promotion of the public social welfare and cannot be for profit, they still can engage in political activities, as long as these activities do not become their primary purpose.

The Internal Revenue Service (IRS) interprets this restriction to allow 501 (c) (4) organizations to participate in an election by doing such things as rating candidates on a partisan basis (Rev. Rul. 67-368, 1967-2 *Cumulative Bulletin* 194 July 1967). They also may promote legislation (Rev. Rul. 71-530, 1971-2 *Cumulative Bulletin* 237 July 1971; Rev. Rul. 67-293, 1967-2 *Cumulative Bulletin* 185 July 1967). As long as its political activities do not become an organization's primary activity, a 501 (c) (4) entity can engage in any activity consistent with state and federal laws. Under new FEC regulations, 501 (c) (4)s that qualify as *MCFL* issue advocacy corporations may engage in independent political expenditures.

As the public becomes more aware of politically active 501 (c) (4) organizations, there have been calls for limits on such activities by tax-exempt entities. For instance, the Christian Coalition, designed as a 501 (c) (4) entity, has played a highly visible role in state and national Republican Party politics, going so far as to claim credit for the Republican success in the 1994 elections and to create a multimillion-dollar war room at the 1996 Republican National Convention. The FEC has sued the group, claiming it has made illegal and unreported contributions to federal candidates, largely through its "voter guide" activities. Republicans argue that many other groups engage in similar (if smaller-scale) activities on behalf of Democrats.

Additionally, the IRS appears to be questioning whether some groups can become so partisan in nature or purpose that they advance a narrow private or partisan purpose, rather than the general social

welfare, and thus are not entitled to a tax exemption. The IRS challenged the National Policy Forum, headed by former RNC chairman Haley Barbour, on this basis. It may be raising similar objections to the Christian Coalition, which has apparently yet to receive IRS approval of its application for recognition of 501 (c) (4) status after an unprecedented period of review. Both major parties have traditionally benefited from such organizations: the Democratic Leadership Council (DLC) is a 501 (c) (4) organization that obtained its exemption in the 1980s and was once headed by President Clinton.

Another feature of the 1996 election year was the contribution of substantial sums by party committees to 501 (c) (4) organizations, which then reportedly used those funds for issue advocacy activities. The advantage to the party committee is that the contribution can be entirely soft money, whereas if the same activity were done by the party entity, only 35 percent of it can be paid for with soft money, under FEC allocation regulations discussed above.

501 (c) (3) Organizations

Section 501 (c) (3) organizations are tax-exempt entities organized for charitable and other similar purposes and are ostensibly prohibited from intervening in any political campaigns: Internal Revenue Code § 501 (c) (3) of the Tax Code. Thus, these organizations cannot endorse candidates, contribute to campaigns, or organize a political action committee. However, they can conduct nonpartisan voter registration and get-out-the-vote efforts in accord with FEC regulations (see 11 C.F.R. § 114.4). Additionally, they may sponsor candidate forums on issues of public concern (Rev. Rul. 86-95, 1986 *Cumulative Bulletin* 73, August 18, 1986). Candidates and party committees can (and do) raise money to enable such organizations to perform their "nonpartisan" tasks.

The FEC has recently gone to court to prevent party committees from funding 501 (c) (3) voter registration activity solely with soft or nonfederal funds (See *Federal Election Commission v. California Dem-*

ocratic Party 97-0891 DFL PAN, Eastern Dist. of Cal., filed May 9, 1997). The commission argues that such voter registration activity can only be paid for by party committees pursuant to the FEC's allocation regulations and thus with a proportional use of hard and soft money. The FEC argues that party committees cannot avoid the allocation rules by "subcontracting" the voter registration activity out to a 501 (c) (3) organization, as it alleges was done by the California Democratic Party.

Many well-known think tanks are 501 (c) (3) organizations, including Brookings, the American Enterprise Institute, Heritage, Cato, the Family Research Council (Gary Bauer's group), and the Progressive Policy Institute (associated with the DLC). Some are genuinely nonpartisan, while others appear close to one party or group of candidates. Additionally, many organizations maintain a collection of entities under one umbrella, such as the Sierra Club, which has a 501 (c) (3), a 501 (c) (4), and a PAC. Many of the ethics charges against Newt Gingrich related to his use of just such a collection of organizations, including charitable and educational groups, for political purposes.

ENFORCEMENT

The Federal Election Commission

The federal campaign finance laws are enforced by the FEC in the case of civil violations and by the Department of Justice when a criminal violation is charged. The FEC itself has no independent authority to impose penalties. If, after an investigation, the alleged violators are unwilling to sign a settlement agreement and pay a monetary penalty to the U.S. Treasury, then the FEC can vote to sue the offender in federal court, present the evidence to a judge, and ask the court to find a violation and impose a fine.

Penalties sought by the FEC range from a few hundred dollars to many thousands of dollars, depending on the size and nature of the violation. The act restricts penalties to $5,000 per violation, or the amount at issue, whichever is larger (and doubles these sums in the case of knowing and willful violations).

Standing Issues—What If the FEC Deadlocks or Fails to Act?

The act contains a provision allowing parties whose complaints have been dismissed or otherwise not acted on by the FEC to file suit against the FEC in federal court alleging that the FEC's failure to act was arbitrary and capricious. If successful, the party can obtain a court order requiring the FEC to act in accord with FECA on the complaint. If the FEC does not follow the court order within thirty days, the party may sue the alleged campaign law violator directly: 2 U.S.C. § 437g(a) (8). This provision of the act has almost never been used. For an example of a recent rare instance, see *Democratic Senatorial Campaign Committee v. Federal Election Commission*, Civil Action No. 96-2184 (JHG), (D.D.C. May 30,1997), where a federal judge held that the FEC had failed in its statutory duty to investigate a Democratic complaint against Republican campaign activity in a number of Senate campaigns in 1992. The judge ruled that the commission's inability to complete its investigative process after four and a half years was an abdication of its enforcement role, and as a result gave the Democratic Senatorial Campaign Committee the right to sue the National Republican Senatorial Committee directly in federal district court over the alleged violations.

The statutory right to challenge FEC action or nonaction is an unusual provision and has served as the basis for a number of successful challenges to FEC enforcement decisions in the past. However, this right to seek judicial review of FEC actions requires a high standard of proof (that the FEC decision was "arbitrary and capricious") and is in any case now being challenged and limited by the federal courts. As recent D.C. Circuit Court decisions make clear, complainants seeking judicial review of FEC action or nonaction must meet federal standing (right to file suit) requirements under Article III of the Constitution. They must suffer an "injury-in-fact" caused by the FEC's action (or failure to act) that may be redressed by the court's order. In what appear to be somewhat conflicting decisions, the D.C. Circuit has held that if complainants, as voters, were deprived of legally required information about contributions and expenditures, this is a sufficient injury to confer

standing: *Akins v. Federal Election Commission*, 101 F.3d 731, 737 (D.C. Cir. 1996) (*en banc*) (*cert granted*, 65 U.S.L.W. 3825 [U.S. June 16, 1997] [No. 96-1590]). However, the assertion that the FEC's acts deprived voters of information generally is not sufficient to convey standing: *Common Cause v. Federal Election Commission*, 108 F.3d 413,418 (D.C. Cir. 1997). In that case, Common Cause was denied the right to challenge the FEC's conclusion of an investigation of Republican Party spending in Montana, even though Common Cause had filed the original complaint with the FEC. The court held that Common Cause had not shown that it was injured by the FEC's decision (or that it would benefit from an FEC or judicial finding that the party activity violated the law) and thus could not bring the case. Since Common Cause has historically challenged numerous FEC enforcement decisions, this holding may significantly restrict the ability of such "public interest" organizations to seek court review of FEC decisions in the D.C. Circuit. The Supreme Court has also recently agreed to review the *Akins* decision. That review has the potential to result in the establishment of a clearer (and perhaps narrower) new nationwide standing rule, which could foreclose a significant amount of judicial review of FEC action or inaction.

The Justice Department—Criminal Prosecutions

The Justice Department pursues criminal violations of the campaign finance laws either after referral from the FEC or upon independent discovery. U.S. attorneys or the department's Public Integrity Section may investigate alleged violations, using FBI assistance and grand juries. Cases are tried in federal court, and allegations may include ancillary mail fraud/wire fraud or conspiracy violations. Penalties may include jail terms and substantial monetary penalties.

Aggravated and intentional campaign finance crimes may be prosecuted either as misdemeanor violations of the act or as felonies under the conspiracy and false statement provisions: 2 U.S.C. § 437g(d); 18 U.S.C. §§ 371 and 100 V1. Prosecution under the mail or wire fraud

statutes may also be available in some cases: see 18 U.S.C. §§ 1341 and 1343. The Department of Justice pursues campaign finance crimes involving $10,000 and under as FECA misdemeanors and considers for felony prosecution only those involving more than $ 10,000.

Criminal prosecution of federal election law violations is pursued in cases demonstrating "willful violation of a core" FECA provision, involving "a substantial sum of money" ($2,000 or more) and resulting "in the reporting of false campaign information to the FEC."[11] The core provisions of FECA include the following:

- Contribution limits[12]
- Ban on corporation and labor contributions[13]
- Ban on contributions from federal contractors[14]
- Ban on contributions from foreign nationals[15]
- Prohibition against making contributions in the name of another[16]
- Avoidance of FEC disclosure requirements

Schemes used to disguise illegal contributions have also been prosecuted as violations of 18 U.S.C. § 371 (conspiracy to obstruct the lawful functioning of a government agency) and § 1001 (submitting false information to a federal agency).

Defendants convicted of FECA misdemeanors may receive sentences of imprisonment: see *United States v. Goland*, 959 F.2d 1449 (9th

11. Individuals may still contribute to a special fund campaign committees may establish under FECA limits/restrictions to pay for legal and accounting compliance expenses.

12. See Select Committee on Ethics, U.S. Senate, *Senate Ethics Manual*, S. Pub. 104-44 (September 1996), pp. 178–88.

13. See generally Laura A. Ingersoll, ed., *Federal Prosecution of Election Offenses*, 6th ed. (Department of Justice, January 1995), pp. 133–35.

14. Ingersoll, *Federal Prosecution of Election Offenses*, p. 115.

15. Ingersoll, *Federal Prosecution of Election Offenses*, p. 93.

16. Ingersoll, *Federal Prosecution of Election Offenses*, p. 109.

Cir. 1992) (ninety days). Corporate defendants may receive large fines for misdemeanor FECA violations: *United States v. Fugi Medical Systems*, C.R. No. 90-288 (S.D.N.Y., sentencing proceedings, August 15, 1990).

Significant sentences have been applied to felony campaign finance crimes prosecuted under §§ 371 (conspiracy) or 1001 (false statements). The theory behind conspiracy prosecutions is explained in the Justice Department's handbook on election law crimes: "A scheme to infuse patently illegal funds into a federal campaign, such as by using conduits or other means calculated to conceal the illegal source of the contribution, thus disrupts and impedes the FEC in the performance of its statutory duties." To obtain a conviction under § 371, the evidence must show that the defendant intended to disrupt and impede the lawful functioning of the FEC (such as by causing false information to be provided to the FEC by the recipient committee, thereby "misleading the public as to the actual source of the contribution"). Causing another person to submit false information to the FEC may be prosecuted as a violation of 18 U.S.C. §§ 1001 and 2, which taken together criminalize acts that cause another person (that is, a campaign treasurer) to submit false information to the FEC: see *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994).

Statute of Limitations Issues

FECA contains a three-year statute of limitation, which applies to prosecutions for criminal violations of Title 2: 2 U.S.C. § 455 (a). It does not, however, specify the statute of limitations for civil enforcement actions. A number of courts have concluded that the general federal default five-year statute of limitations applies to these civil actions: *Federal Election Commission v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996); *Federal Election Commission v. National Right to Work Committee*, 916 F. Supp. 10 (D.D.C. 1996); and *Federal Election Commission v. National Republican Senatorial Committee*, 877 F. Supp. 15 (D.D.C. 1995). The statute of limitations for campaign finance violations prosecuted under 18 U.S.C. M 371 or 1001 is five years: see 18 U.S.C.

§ 3282. The Justice Department may prosecute under these ancillary criminal provisions (conspiracy, fraud, and so on) even though the three-year FEC statute of limitations has run, if the five-year statute applicable to the federal criminal statutes has not yet passed.

Some courts have found that the statute of limitations period commences when the violation is committed. In *Williams*, the court rejected the FEC's argument that the period should be "tolled" (with the clock not started) until the violation is discovered: *Williams*, 104 F.3d at 240. The FEC also contended that the period should be tolled or frozen under the doctrine of "equitable tolling" for fraudulent concealment. Tolling a limit under this theory requires a showing that the defendant fraudulently concealed operative facts, that the FEC failed to discover the facts in the limitations period, and that the FEC pursued the facts diligently until discovery of the facts. The court rejected this argument also, determining that the FEC had the facts it needed in FECA reports filed by recipient committees to discover the operative facts: *Williams*, 104 F.3d at 241. The practical effect of these decisions is to make it significantly more difficult for the FEC to pursue allegations of campaign finance violations and to cause the commission to close a number of high-profile investigations that were past or near the five-year limit. Especially in the case of presidential campaigns, which undergo a multiyear audit before the commission even authorizes the opening of an enforcement matter, the combination of the FEC's current capabilities and the five-year statute of limitations means that many investigations will as a practical matter be aborted without a resolution.