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Campaign Finance: Constitutional and Legal Issues of Soft Money

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L. Paige Whitaker
American Law Division

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Campaign Finance: Constitutional and Legal Issues of Soft Money

SUMMARY

Soft money has been a major issue in the campaign finance reform debate as such funds, before enactment of the Bipartisan Campaign Reform Act of 2002 (BCRA) [P.L. 107-155], were generally unregulated and perceived as resulting from loopholes in the Federal Election Campaign Act (FECA). Generally, the intent of BCRA, which amends FECA and became effective on November 6, 2002, is to restrict the raising and spending of soft money. This Issue Brief discusses constitutional and legal issues surrounding two major types of soft money that BCRA seeks to regulate: political party soft money and soft money used for issue advocacy communications. Corporate and labor union soft money, which FECA expressly exempts from regulation and is not addressed by BCRA, is also discussed.

Prior to BCRA, political party soft money was those funds raised by the national parties from sources and in amounts that FECA otherwise prohibited. Such funds were used in part for overhead expenses and issue ads, and then largely transferred to state and local parties, in accordance with the applicable state law, for grassroots and party building activity. As a result of BCRA, FECA now generally prohibits national party committees from raising or spending soft money, *i.e.* funds raised and outside the restrictions of FECA. Although the courts have not yet ruled on this issue specifically, in *McConnell v. FEC*, (No. 02-CV-0582, D.D.C., 2002)), which is currently pending before a three-judge panel of the U.S. District Court for the District of Columbia, plaintiffs argue that such restrictions on political party soft money are unconstitutional.

Over the last several election cycles, soft money spent for issue advocacy communications gained great popularity. Issue advocacy typically occurs when a group, such as a for-profit or non-profit corporation or labor organization, pays for an advertisement that could be interpreted to favor or disfavor certain candidates, while also serving to inform the public about a policy issue. BCRA regulates in this area by prohibiting corporations and labor unions from directly funding broadcast advertisements that "mention" a federal candidate 60 days before a general election and 30 days before a primary and by requiring disclosure of all such ads regardless of the source of funding. The prevailing view in the lower courts is that Supreme Court precedent generally holds that regulation of such communications, which do not contain specific express words of advocacy, is unconstitutional. Likewise, plaintiffs in the pending lawsuit challenging BCRA, *McConnell v. FEC*, argue that issue ads are constitutionally protected speech and may not be regulated.

Finally, soft money can be used to pay for certain corporate and labor union activities that are expressly exempt from FECA regulation: (1) communications by a corporation directed at stockholders, executive or administrative personnel and their families or by a labor organization directed at its members and families, on any subject; (2) voter registration and get-out-the-vote activities by a corporation, directed to its stockholders, executive or administrative personnel and their families, or by a labor organization to its members and their families; and (3) the establishment and administration of a political action committee (PAC). The recently enacted BCRA does not address this type of soft money.

MOST RECENT DEVELOPMENTS

On March 27, 2002, President Bush signed into law the Bipartisan Campaign Reform Act of 2002 (BCRA), (P.L. 107-155), which took effect on November 6, 2002. Primary features of the law include restrictions on party soft money and issue advocacy. Shortly after its enactment, Senator Mitch McConnell and others filed suit in U.S. District Court for the District of Columbia arguing that portions of the new law are unconstitutional. On December 4 and 5, 2002, oral argument was heard in McConnell v. FEC before a three-judge panel of the U.S. District Court for the District of Columbia. Under the BCRA expedited review provision (P.L. 107-155 § 403 (107th Cong.)), the court's decision will be reviewed directly by the U.S. Supreme Court where a ruling is anticipated by Summer 2003.

BACKGROUND AND ANALYSIS

Definitions of Hard and Soft Money in Federal Elections

Prior to enactment of the Bipartisan Campaign Reform Act of 2002 (BCRA) (P.L. 107-155), money for election related activities that was generally raised and spent outside of federal regulation was known as "soft money." It was raised and spent in a manner that could affect federal elections, but was unregulated – and legal – since it was not spent directly for or against specific federal candidates. Generally, the intent of BCRA, which amends the Federal Election Campaign Act (FECA) and became effective on November 6, 2002, is to restrict the raising and spending of soft money.

The term "hard money," has typically been used to refer to funds raised and spent in accordance with the limitations, prohibitions, and reporting requirements of the FECA. (*See* 2 U.S.C. §§ 441a, 441b(a).) Unlike soft money, hard money may be used in connection with a federal election. Under the FECA, hard money restrictions apply to contributions and expenditures from any "person," as defined to include, "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government," (2 U.S.C. § 431(11).)

This Issue Brief discusses constitutional and legal issues surrounding two major types of soft money that BCRA seeks to regulate: political party soft money and soft money used for issue advocacy. Corporate and labor union soft money, which FECA expressly exempts from regulation and BCRA does not address, is also discussed.

Political Party Soft Money

Before the enactment of BCRA, political party soft money funds were raised by the national parties from sources and in amounts that FECA otherwise prohibited. Such funds were used in part for party overhead expenses and issue ads, and then largely transferred to state and local parties, in accordance with the applicable state law, for grassroots and party building activity. Since the 1979 FECA Amendments, certain grassroots, voter-registration, get-out-the-vote, and generic party-building activities were exempt from FECA coverage. (2 U.S.C. § 431(9)(B)(viii),(ix).) In addition, certain Federal Election Commission (FEC) advisory opinions permitted soft money for a portion of activities that promoted both federal and state candidates. Therefore, money raised and spent for these activities was in large part not regulated and hence, was considered political party soft money.

As a result of BCRA, the FECA now generally prohibits national party committees from raising or spending soft money. Although the courts have not yet ruled on this issue specifically, in *McConnell v. FEC,* (No. 02-CV-0582, D.D.C., 2002)), which is currently pending before a three-judge panel of the U.S. District Court for the District of Columbia, plaintiffs argue that such restrictions on political party soft money are unconstitutional because they violate the rights of free speech and association under the First Amendment.

In the landmark *Buckley v. Valeo* case, the Supreme Court made it clear that the right to associate is a "basic constitutional freedom," and that any action that may have the effect of curtailing that freedom to associate would be subject to the strictest judicial scrutiny. (424 U.S. 1, 25 (1976) (*quoting Kusper v. Pontikes,* 414 U.S. 51, 57 (1973)).) However, the Court further asserted that the right of political association is not absolute and can be limited by substantial governmental interests such as the prevention of corruption or the prevention of even the appearance of corruption. (424 U.S. at 27-28.)

Employing this analysis, the *Buckley* Court determined that limitations on contributions can pass constitutional muster if they are reasonable and only marginally infringe on First Amendment rights in order to stem actual or apparent corruption resulting from *quid pro quo* relationships between contributors and candidates. The Court noted that, unlike an expenditure limitation, a reasonable contribution limitation does "not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties." (424 U.S. at 20-38.)

Defendants in the pending lawsuit challenging the constitutionality of BCRA, *McConnell v. FEC,* (No. 02-CV-0582, D.D.C., 2002)), argue that such restrictions on political party soft money are constitutional because eliminating political party soft money by subjecting it to the limits and restrictions of the FECA does not significantly impact political debate as many other methods of expression under the FECA are still available to a person seeking to make political contributions. For example, persons can still contribute directly to a candidate, to a PAC that would support a certain candidate, to the political party of such a candidate in accordance with FECA-regulated contribution limits (also known as "hard money" contributions), to state parties for state activities, or make independent expenditures on behalf of the candidate. Defendants also argue that the prohibitions on political party soft money will stem corruption or the appearance thereof that could result from *quid pro quo* relationships between large-dollar soft money contributors and federal office candidates who benefit from political party soft money expenditures. The Court in *Buckley* found that preventing corruption or the appearance thereof, which can be presented by such *quid pro quo* relationships, would constitute a substantial governmental interest warranting reasonable infringement on First Amendment rights. (424 U.S. 26-27.)

In a recent Supreme Court decision, *Nixon v. Shrink Missouri Government PAC,* (120 S.Ct. 897 (2000)), the Supreme Court upheld a Missouri state campaign contribution limits and reaffirmed its landmark 1976 precedent in *Buckley v. Valeo* that the government can regulate campaign contributions. The Court noted that it has consistently found that less justification is required in order to uphold limits on campaign contributions than is required to uphold limits on campaign expenditures. In his dissent, however, Justice Kennedy warned that the Court's decision undermines free speech protections and will add to the proliferation of "covert speech" in the form of soft money.

Soft Money Spent On Issue Advocacy

Over the last several election cycles, soft money spent for issue advocacy communications gained great popularity. Issue advocacy communications are paid for by a group, such as a for-profit or non-profit corporation or labor organization, for advertisements that could be interpreted to favor or disfavor certain candidates, while also serving to inform the public about a policy issue. BCRA regulates in this area by prohibiting corporations and labor unions from directly funding broadcast advertisements that "mention" a federal candidate 60 days before a general election and 30 days before a primary and by requiring disclosure of all such ads regardless of the source of funding. The prevailing view in the lower courts is that Supreme Court precedent requires that only those communications that expressly advocate the election or defeat of a clearly identified candidate can be constitutionally regulated; any such communication that does not meet this "express advocacy" standard is constitutionally protected First Amendment speech, which cannot be regulated. Hence, issue ads may be paid for with unregulated soft money.

Similar to the prevailing view in the lower courts, plaintiffs in the pending lawsuit challenging the constitutionality of BCRA, *McConnell v. FEC,* argue that issue ads are constitutionally protected speech and may not be regulated. On the other hand, the defendants generally argue that such restrictions are necessary to regulate "sham issue ads," broadcast by corporations and labor unions, which are designed to promote the election or defeat of a federal candidate.

In *Buckley* v. *Valeo,* (424 U.S. 1 (1976)), the Supreme Court generally held that campaign finance limitations apply to "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." A footnote to the opinion provides examples of such "express advocacy": terms "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" (*Id.* at 44 n.52; *see* 11 C.F.R. 101.22(a)). Communications without these 'magic words' are often classified as issue advocacy, thus falling outside the scope of the FECA.

In the 1986 decision of *Federal Election Commission v. Massachusetts Citizens for Life, Inc., (MCFL),* (479 U.S. 238 (1986)), the Supreme Court continued to distinguish between issue and express advocacy, holding that an expenditure must constitute express advocacy in order to be subject to the FECA prohibition against corporate use of treasury funds to make an expenditure "in connection with" any federal election. (*Id.* at 249-250). In *MCFL*, the Court ruled that a publication urging voters to vote for "pro-life" candidates, while also identifying and providing photographs of certain candidates who fit that description, could not be regarded as a "mere discussion of public issues that by their nature raise the names of certain politicians." Instead, the Court found, the publication "in effect" provided a directive to the reader to vote for the identified candidates and ergo, constituted express advocacy. (*Id.* at 249-250.)

In *FEC* v. *Furgatch*, (807 F.2d 857 (9th Cir. 1987), *cert. denied,* 484 U.S. 850 (1987)), the Ninth Circuit presented the following three-part test to determine whether a communication may be considered issue advocacy:

> First, even if it is not presented in the clearest, most explicit language, speech is 'express' for the present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed 'advocacy' if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be 'express advocacy of election or defeat of a candidate' when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action. (*Id*. at 864.)

However, the trend in the circuit courts appears to be away from the *Furgatch* and FEC definitions toward a more limited interpretation of what type of speech will constitute "express advocacy." Hence, regulation of fewer types of communications are being upheld as constitutionally permissible and therefore, more "issue ads" are permissibly funded with soft money.

In *Maine Right to Life Committee* v. *FEC*, (914 F.Supp. 8 (D. Maine 1996), *aff'd per curiam* 98 F.3d 1 (1st. Cir. 1996), *cert. denied*, 118 S.Ct. 52 (Oct. 6, 1997)), the First Circuit affirmed the district court's opinion that the FEC surpassed its authority when it included a "reasonable person" standard in its definition of "express advocacy." The court reasoned that such a standard threatened to infringe upon issue advocacy, an area protected by the First Amendment. (*Id.* at 12.) The Fourth Circuit reached a similar conclusion in *FEC v. Christian Action Network,* (92 F.3d 1178 (4th Cir. 1997).)

In *Vermont Right to Life Committee v. Sorrell,* (216 F.3d 264 (2d Cir. 2000)), the Second Circuit Court of Appeals found that state campaign regulations triggering disclosure and reporting requirements of speech that "expressly or **implicitly** advocate[] the success or defeat of a candidate" were facially invalid under the First Amendment because they would result in a regulation of constitutionally protected issue advocacy, (*emphasis added*). In Vermont, the court held that the Supreme Court in *Buckley v. Valeo* had established an "express advocacy standard" in order to insure that regulations were neither too vague nor intrusive on First Amendment protected issue advocacy. Accordingly, the court determined that by including the term "implicitly," the regulations extend to advocacy with respect to public issues, in violation of the rule enunciated in Buckley and its progeny.

Issue Advocacy Distinguished from Independent Expenditures

Soft money spent for issue advocacy communications is sometimes confused with independent expenditures. Although both types of expenditures are purportedly independent, (Justice Kennedy argues that, by nature, practically all expenditures are coordinated with a candidate and, thus, cannot be considered independent. *Colorado Republican Committee* v. *FEC (Colorado I)*, 518 U.S. 604 (1996)(Kennedy, J., concurring in the judgment, dissenting in part)), only independent expenditures are subject to the FECA, (2 U.S.C. §§ 431 *et seq.*) The *Colorado I* Court held that the First Amendment would prohibit the application of a FECA provision, 2 U.S.C. § 441a(d)(3), limiting political party expenditures made independently and without any coordination with a candidate or his or her campaign. The *Colorado* decision essentially banned any limitations on political party expenditures when they are made independently of a candidate's campaign. (*Colorado I,* 518 U.S. at 614-17.) Since a political committee making independent expenditures, however, is still subject to FECA restrictions regarding sources and contribution amounts it may receive from a person, (*see, e.g.,* 11 C.F.R. § 110.0(d)), an independent expenditure is not considered soft money.

In *FEC v. Colorado Republican Federal Campaign Committee (Colorado II),* (533 U.S. 431 (2001)), the Supreme Court held that a political party's coordinated expenditures, unlike genuine independent expenditures, may be limited in order to minimize circumvention of the Federal Election Campaign Act's (FECA) contribution limits. While the Court's opinion in *Colorado I* was limited to the constitutionality of the application of FECA's "Party Expenditure Provision" (2 U.S.C. § 441a(d)(3)) to an *independent* expenditure by the Colorado Republican Party, in *Colorado II* the Court considered a facial challenge to the constitutionality of the limit on *coordinated* party spending. Persuaded by evidence supporting the FEC's argument, the Court found that coordinated party expenditures are indeed the "functional equivalent" of contributions. (*Id.* at 447.) Therefore, in its evaluation, the Court applied the same scrutiny to the coordinated "Party Expenditure Provision" that it has applied to other contribution limits: inquiring whether the restriction is "closely drawn" to the "sufficiently important" governmental interest of stemming political corruption. (*Id.* at 456.) The Court further determined that circumvention of the law through "prearranged or coordinated expenditures amounting to disguised contributions" is a "valid theory of corruption." (*Id.*) In upholding the limit, the Court noted that "substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law," which, the Court concluded, "shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open." (*Id.* at 457.)

Corporate and Labor Union Soft Money

Generally, contributions and expenditures by corporations, labor unions, membership organizations, cooperatives, and corporations without capital stock have been prohibited in federal elections. (2 U.S.C. § 441b.) FECA, however, provides for three exemptions from this broad prohibition, that is, contributions and expenditures for: (1) communications by a corporation to its stockholders, executive or administrative personnel and their families or by a labor organization to its members or families on any subject; (2) nonpartisan voter registration and get-out-the-vote activities by a corporation aimed at its stockholders and executive and administrative personnel and their families or by a labor organization aimed at its members and their families; and (3) the establishment, administration and solicitation of contributions to a separate segregated fund (commonly known as a political action committee or PAC or SSF) to be utilized for federal election purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock. (2 U.S.C. § 441b(b)(2)(A)-(C); *see also* 11 C.F.R. § 114.1(a)(2)(i)-(iii).)

In *Communication Workers of America* v. *Beck*, (487 U.S. 735 (1988)), the Supreme Court held that labor unions are not permitted to spend funds exacted from dues-paying non-union employees under an agency shop agreement for certain activities unrelated to collective bargaining when those employees object to such expenditures. According to the Court, Congress' purpose in providing the union shop was to force employees to bear their fair share of the costs of labor-management negotiations and collective bargaining activities, but not to force employees to support unrelated labor union political activities they oppose. As a result of *Beck*, non-union employees in an agency shop agreement can request a refund of that portion of their dues used by the union for political activities. Accordingly, if workers exercise their rights under *Beck*, labor unions would lose some soft money funds, which would otherwise be available for election-related expenses. Campaign finance reform legislation that would simply codify the *Beck* decision, without expanding on the Court's ruling, would appear to be constitutional.

Bipartisan Campaign Reform Act of 2002 (BCRA) (P.L. 107-155) (enacted on March 27, 2002 and effective on November 6, 2002)

Political Party Soft Money. Prohibits national party committees from soliciting, receiving, directing, transferring, or spending soft money; generally prohibits spending of soft money for a "federal election activity" by state and local party committees, including an association or group of state or local candidates or officials. Prohibits state or local candidates from using soft money for public communications that promote or attack a clearly identified federal candidate, but exempts communications referring to a federal candidate who is also a state or local candidate. Permits state, district or local party committees to use some funds raised under state law for an allocable share (at a 50-50 hard to soft money ratio) of voter registration drives in the last 120 days of a federal election, and voter identification, get-out-the-vote drives, and generic activity if it: (1) does not refer to a federal candidate; (2) does not pay for a broadcast, cable or satellite communication (unless it refers solely to state/local candidates); (3) takes no more than $10,000 per year from any person for such activity (or less, if state law so limits); and (4) uses only funds raised by that party committee expressly for such purposes, with no transfers from other party committees. Defines "federal election activity" to include: (1) voter registration drives in last 120 days of a federal election; (2) voter identification, get-out-the-vote drives, and generic activity in connection with an election in which a federal candidate is on the ballot; and (3) "public communications" that refer to a clearly identified federal candidate and promote, support, attack, or oppose a candidate for that office (regardless of whether it expressly advocates a vote for or against) or services by a state or local party employee who spends at least 25% of paid time in a month on activities in connection with a federal election. Requires disclosure by national parties of all activity (federal and non-federal), and by state and local parties of specified activities, that might affect federal elections; removes building fund exemption.

Issue Advocacy. Creates a new term in federal election law, "electioneering communication," which regulates political ads that: "refer" to a clearly identified federal candidate, are broadcast within 30 days of a primary or 60 days of a general election, and for House and Senate elections, is "targeted to the relevant electorate." Generally, it would require disclosure of disbursements over $10,000 for such communications, including identification of each donor of $1,000 or more, and prohibits such communications from being financed with union or certain corporate funds. With respect to corporate funds, it exempts Internal Revenue Code § 501(c)(4) or § 527 tax-exempt corporations from making "electioneering communications" with funds solely donated by individuals who are U.S. citizens or permanent resident aliens, unless the communication is "targeted," *i.e.*, it was distributed from a broadcaster or cable or satellite service and is received by 50,000 or more persons in the state or district where the Senate or House election, respectively, is occurring. If the definition of "electioneering communication" is ruled unconstitutional, the Act provides an alternative definition, based on *FEC v. Furgatch*, (807 F.2d 857 (9th Cir. 1987)): a communication promoting, supporting, attacking, or opposing a candidate, regardless of whether it expressly advocates a vote for or against a candidate and is suggestive of no plausible meaning other than an exhortation to vote for or against a candidate.

For Additional Reading

CRS Issue Briefs

CRS Issue Brief IB87020. *Campaign financing,* by Joseph E. Cantor.

CRS Reports

CRS Report RL30582. *527 Organizations: How the Differences in Tax and Election Laws Permit Certain Organizations to Engage in Issue Advocacy Without Public Disclosure and Proposals for Change,* by Marie B. Morris.

CRS Report RS20650. *527 Organizations: Reporting Requirements Imposed on Political Organizations after Enactment of P.L. 106-230,* by Marie B. Morris.

CRS Report 97-973. *Business and Labor Spending in U.S. elections,* by Joseph E. Cantor.

CRS Report RL31290. *Campaign Finance Bills Passed in the 107th Congress: Comparison of S. 27 (McCain-Feingold), H.R. 2356 (Shays-Meehan), and Current Law,* by Joseph E. Cantor and L. Paige Whitaker

CRS Report 98-282. *Campaign Finance Reform: a Legal Analysis of Issue and Express Advocacy,* by L. Paige Whitaker.

CRS Report RS20849. *Campaign Finance Reform: Constitutional Issues Raised by Disclosure Requirements,* by L. Paige Whitaker.

CRS Report RS20854. *Campaign Finance Reform and Incentives to Voluntarily Limit Candidate Spending from Personal Funds: Constitutional Issues Raised by Public Subsidies and Variable Contribution Limits,* by L. Paige Whitaker.

CRS Report RL30669. *Campaign Finance Regulation under the First Amendment: Buckley v. Valeo and its Supreme Court progeny,* by L. Paige Whitaker.

CRS Report 97-1040. *Campaign Financing: Highlights and Chronology of Current Federal Law,* by Joseph E. Cantor.

CRS Report 97-555. *Compulsory Union Dues and Agency Fee Objectors,* by Gail McCallion.

CRS Report 96-484. *Political Spending by Organized Labor: Background and Current Issues,* by Joseph E. Cantor.

CRS Report RL31288. *Soft Money, Allegations of Political Corruption, and Enron,* by Jack Maskell and L. Paige Whitaker.

CRS Report 97-618. *The Use of Union Dues for Political Purposes: a Legal Analysis,* by L. Paige Whitaker.

Selected World Wide Web Sites

Federal Election Commission:
[http://www.fec.gov]

For access to full text of court decisions:
[http://www.findlaw.com/casecode/cases.html]

For access to *McConnell v. FEC* comprehensive case materials from Stanford Law School:
[http://www.law.stanford.edu/library/campaignfinance/#case]

For ongoing tracking of issue advocacy by the Annenberg Public Policy Center of the University of Pennsylvania:
[http://www.appcpenn.org/issueads/]