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Campaign Finance: Brief Overview of District Court Opinion in *McConnell v. FEC*

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Summary

On March 27, 2002, the President signed into law the Bipartisan Campaign Reform Act of 2002 (BCRA), P.L. 107-155 (H.R. 2356, 107th Cong.), which was also known as the McCain-Feingold campaign finance reform legislation prior to enactment. Most provisions of the new law became effective on November 6, 2002. Shortly after President Bush signed BCRA into law, Senator Mitch McConnell filed suit in U.S. District Court for the District of Columbia against the Federal Election Commission (FEC) and the Federal Communications Commission (FCC). Ultimately, eleven suits challenging the campaign finance reform law were brought by more than 80 plaintiffs and were consolidated into one lead case, *McConnell v. FEC*. In summary, the McConnell complaint for declaratory and injunctive relief argued that portions of BCRA violate the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution. On May 2, 2003, the U.S. District Court for the District of Columbia issued its decision in *McConnell v. FEC,* striking down many key provisions of the law. (See the text of the *per curiam* opinion at [http://www.dcd.uscourts.gov/02cv582a.pdf].) This report provides a brief overview of the court's decision and will be updated. The three-judge panel, which was split 2 to 1 on many issues, ordered that its ruling take effect immediately. Since the court has issued its opinion, several appeals have been filed. Under the BCRA expedited review provision, the court's decision will be reviewed directly by the U.S. Supreme Court. On May 19 the U.S. district court issued a stay to its ruling, which leaves BCRA, as enacted, in effect until the Supreme Court issues a decision. For more information see, Campaign Finance Reform Oversight [http://www.congress.gov/erp/legissues/html/isele2.html], and CRS Report RL30669, *Campaign Finance Regulation Under the First Amendment*.

On May 2, 2003, the U.S. District Court for the District of Columbia issued its decision in *McConnell v. FEC,* a challenge to the constitutionality of numerous provisions of the recently enacted Bipartisan Campaign Reform Act (BCRA), which was also known as the McCain-Feingold campaign finance reform legislation prior to enactment. The three-judge panel, which was split 2 to 1 on many key issues, ordered that its ruling take

effect immediately. Since the court has issued its opinion, several appeals have been filed with the U.S. Supreme Court. Under the BCRA expedited review provision, the court's decision will be reviewed directly by the U.S. Supreme Court. On May 19, 2003, the U.S. district court issued a stay to its ruling, which leaves BCRA, as enacted, in effect until the Supreme Court issues a decision.[1]

Background

On March 27, 2002, the President signed into law the Bipartisan Campaign Reform Act of 2002 (BCRA),P.L. 107-155 (H.R. 2356, 107th Cong.), and most provisions of the new law became effective on November 6, 2002. Shortly after President Bush signed BCRA into law, Senator Mitch McConnell filed suit in U.S. District Court for the District of Columbia against the Federal Election Commission (FEC) and the Federal Communications Commission (FCC). In summary, the McConnell complaint for declaratory and injunctive relief argued that portions of BCRA violate the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution.[2] Likewise, shortly after enactment, the National Rifle Association (NRA) filed suit in U.S. District Court for the District of Columbia against the FEC and the Attorney General seeking declaratory and injunctive relief against certain provisions of the Federal Election Campaign Act (FECA), as amended by BCRA. In summary, the NRA argued that the new law deprives it of freedom of speech and association, of the right to petition the government for redress of grievances, and of the rights to equal protection and due process, in violation of the First and Fifth Amendments to the Constitution.

Ultimately, eleven suits challenging BCRA were brought by more than 80 plaintiffs and were consolidated into one lead case, *McConnell v. FEC*,[3] by the U.S. District Court for the District of Columbia. Section 403(a) of BCRA provides that if an action is brought for declaratory or injunctive relief challenging the constitutionality of any provision of the Act, it shall be brought in the U.S. District Court for the District of Columbia and shall be heard by a 3-judge court. It further provides that a final decision in such an action shall be reviewable only by appeal directly to the U.S. Supreme Court by the filing of a notice of appeal within 10 days and the filing of a jurisdictional statement within 30 days after a final decision is rendered. Section 403(a)(4) charges the U.S. District Court for the District of Columbia and the Supreme Court to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.

On December 4 and 5, 2002 oral argument was heard in *McConnell v. FEC* before the three-judge panel of the U.S. District Court for the District of Columbia. Under the

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[1] Chamber of Commerce, *et al.* v. FEC, Civ. No. 02-751 (D.D.C., May 19, 2003)(granting motions to stay all or part of the court's May 1, 2003 final judgment in McConnell v. FEC)

[2] Section 403(c) of BCRA provides that any Member of Congress may bring an action for declaratory or injunctive relief challenging the constitutionality of the Act and Section 403(b) provides that in any action challenging the constitutionality of the Act, any Member of Congress has the right to intervene.

[3] No. 02-CV-0582 (D.D.C., consolidated May 13, 2002).

BCRA expedited review provision,[4] the court's decision, which was issued on May 2, 2003, will be reviewed directly by the U.S. Supreme Court.

Summary of Key Portions of the District Court's Decision

Issue Advocacy/Political Advertising by Corporations and Labor Unions (Soft Money). Generally, sections 203 and 201 of BCRA, respectively, prohibit labor unions and corporations (and any persons using funds donated by a corporation or labor union) from using treasury funds for "electioneering communications" — they must use a separate segregated fund (also known as a PAC) in order to fund such ads — and require disclosure to the Federal Election Commission (FEC) of disbursements for the costs of producing and broadcasting "electioneering communications" by *any* spender exceeding $10,000 per year. BCRA generally defines an "electioneering communication" as a broadcast, cable, or satellite advertisement that "refers" to a clearly identified federal candidate, is made within 60 days of a general election or 30 days of a primary and if for House or Senate elections, is targeted to the relevant electorate.[5] In the event that the primary definition of "electioneering communication" is held to be unconstitutional, Section 201 of BCRA provides a backup definition:

> any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

In *McConnell v. FEC,* the three-judge district court ruled 2 to 1 that the primary definition of "electioneering communication" is unconstitutional and accordingly, ruled that the prohibition on labor unions and corporations (and any persons using funds donated by a corporation or labor union) using treasury funds for "electioneering communications" and the requirement for disclosure to the FEC of spending for all "electioneering communications" is unconstitutional under the primary definition. The court upheld, however, the backup definition of "electioneering communication," deleting the last clause, "and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate," and hence, generally upheld the disclosure requirements and the prohibition on labor unions and corporations funding "electioneering communications" as defined by a portion of the backup definition.[6] As a result of this ruling, corporations and labor unions are generally prohibited from using treasury funds to pay for any broadcast, cable, or satellite communication — *at any time in the election cycle* — which "promotes or supports" or "attacks or opposes" a candidate for that office, "regardless of whether the communication expressly advocates a vote for or against a candidate."

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[4] P.L. 107-155 § 403, codified at 2 U.S.C. §437h note (2002).

[5] Section 201 of BCRA further defines "targeted to the relevant electorate" as a communication that can be received by 50,000 or more persons in a state or congressional district where the Senate or House election, respectively, is occurring.

[6] McConnell v. FEC, No. 02-CV-0582, slip op. at 6 (D.D.C., May 2, 2003).

Section 203 of BCRA also contains an exemption to the prohibition on corporations directly funding "electioneering communications," (*i.e.* using treasury funds instead of funding such advertisements through a PAC) for certain non-profit organizations. Under a portion of Section 203 known as Snowe-Jeffords,[7] Internal Revenue Code Section 501(c)(4) and 527(e)(1) organizations are permitted to use their general treasury funds for "electioneering communications" so long as the communication is paid for exclusively with funds from individuals who are U.S. citizens, nationals, or lawfully admitted for permanent residence.[8] The Snowe-Jeffords provision is an expansion of the law as it existed prior to BCRA. Prior to BCRA, the 1986 Supreme Court decision, *FEC v. Massachusetts Citizens for Life (MCFL),*[9] had provided an as-applied exception for non-profit corporations that satisfied certain criteria.[10]

Section 204 of BCRA, however, (known as the Wellstone Amendment)[11] effectively withdraws the Snowe-Jeffords exception in Section 203, according to the court in *McConnell v. FEC*.[12] As a result of the Wellstone Amendment in Section 204, entities that are organized under Internal Revenue Code Sections 501(c)(4) and 527(e)(1) are *not* permitted to use their general treasury funds for "electioneering communications."[13] As the McConnell court noted, the Wellstone Amendment was codified in a separate portion of BCRA in order to preserve severability.[14] Indeed, the *McConnell* three-judge panel struck down the Wellstone Amendment in Section 204 as it applies to corporations that meet the criteria set forth by the Supreme Court in *MCFL,* also known as "*MCFL* corporations." Hence, according the court, the prohibition against corporations using treasury funds to pay for "electioneering communications" applies only to non-*MCFL* corporations.

Raising and Spending of Soft Money by Political Parties. Section 101 of BCRA, which creates a new section in the Federal Election Campaign Act (FECA),

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[7] This provision of BCRA is named after its primary sponsors in the Senate, Senator Olympia Snowe and Senator Jim Jeffords.

[8] Codified at 2 U.S.C. § 441b(c)(2)(2002).

[9] 479 U.S. 238 (1986).

[10] In order to satisfy the MCFL criteria, a corporation is required to: (1) be formed for the purpose of promoting political ideas and cannot engage in business activities; (2) have no shareholders or other persons affiliated so that members have no economic disincentive for disassociating with it if they disagree with its political activity; and (3) not be established by a business corporation and cannot accept contributions from business corporations. *Id.* at 264.

[11] This provision of BCRA is named after its primary sponsor in the Senate, Senator Paul Wellstone.

[12] McConnell v. FEC, No. 02-CV-0582, slip op. at 9 (D.D.C., May 2, 2003).

[13] Codified at 2 U.S.C. § 441b(c)(6)(2002). The Wellstone Amendment provides that the Snowe-Jeffords exemption applicable to Internal Revenue Code § 501(c)(4) and § 527(e)(1) organizations "shall not apply in the case of a targeted communication that is made by" a corporation, labor union or person using funds donated by a corporation or labor union.

[14] McConnell v. FEC, No. 02-CV-0582, slip op. at 69 (D.D.C., May 2, 2003).

Section 323(a),[15] prohibits national parties from soliciting, receiving, directing, transferring, and spending nonfederal funds, *i.e.,* soft money. In a 2 to 1 split, the *McConnell v. FEC* court ruled that Section 323(a) is constitutional only to the extent that it bans national party committees from using nonfederal funds for public communications that "refer" to a clearly identified federal candidate — "regardless of whether a candidate for State or local office is also mentioned or identified" — and that "promotes or supports" or "attacks or opposes" a candidate for that office, "regardless of whether the communication expressly advocates a vote for or against a candidate."[16]

Section 101 of BCRA creates another new FECA provision, Section 323(b), which prohibits state and local parties from using nonfederal funds (or soft money) for "federal election activities." Section 301(20)(A) of FECA, as amended by BCRA, defines "federal election activities" to include: (i) voter registration drives in the last 120 days of a federal election; (ii) voter identification, Get-Out-The-Vote (GOTV) drives, and generic activity in connection with an election in which a federal candidate is on the ballot; (iii) public communications that "refer" to a clearly identified federal candidate — "regardless of whether a candidate for State or local office is also mentioned or identified" — and that "promotes or supports" or "attacks or opposes" a candidate for that office, "regardless of whether the communication expressly advocates a vote for or against a candidate"; or (iv) 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.[17] The *McConnell v. FEC* three-judge court ruled that Section 323(b) of FECA, as amended by BCRA, is constitutional only as applied to Section 301(20)(A)(iii) activities. That is, according to the court, state and local parties are prohibited from spending nonfederal or soft money on public communications that "refer" to a clearly identified federal candidate — "regardless of whether a candidate for State or local office is also mentioned or identified" — and that "promotes or supports" or "attacks or opposes" a candidate for that office, "regardless of whether the communication expressly advocates a vote for or against a candidate."[18]

Raising and Spending of Soft Money by Federal Officeholders and Candidates. Section 101 of BCRA prohibits, with few exceptions, federal officeholders and candidates from soliciting, receiving, directing, transferring, or spending nonfederal or soft money for any local, state, or federal election.[19] The *McConnell v. FEC* court upheld the constitutionality of this section of the statute in its entirety.[20]

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[15] Codified at 2 U.S.C. § 441i(a)(2002).

[16] McConnell v. FEC, No. 02-CV-0582 slip op. at 5-6 (D.D.C., May 2, 2003).

[17] Codified at 2 U.S.C. § 431(20)(2002).

[18] McConnell v. FEC, No. 02-CV-0582 slip op. at 6 (D.D.C., May 2, 2003).

[19] Codified at 2 U.S.C. § 441i(e)(2002).

[20] McConnell v. FEC, No. 02-CV-0582 slip op. at 7 (D.D.C., May 2, 2003). Judge Leon concurred with respect to the restriction on federal officeholders and candidates receiving, directing, transferring or spending nonfederal or soft money in connection with a state or federal election, but filed a separate dissent with regard to prohibitions on a federal candidate or officeholder from soliciting or raising soft money for the national parties.

Hard Money Sources for Candidates. Sections 304, 316 and 319 of BCRA,[21] sometimes referred to as the "millionaire provisions," were held to be non-justiciable by the *McConnell v. FEC* district court.[22] In brief summary, Section 304 limits repayment of candidate loans to his or her own campaign to $250,000, from amounts contributed after the election occurs. Section 304 also raises the limit on individual and party support for a Senate candidate whose opponent exceeds the designated threshold level of personal campaign funding. Section 319 raises the limits on individual and party support for a House candidate whose opponent exceeds the threshold of $350,000 in personal campaign funding.

Hard Money Contribution Limits. Section 307 of BCRA,[23] increases the limits on the amount that individuals can contribute to federal office candidates and to political parties. Under Section 307, individuals may contribute no more than $2,000 per candidate, per election, and no more than $25,000 per year to national party committees. The *McConnell v. FEC* district court panel held non-justiciable the issues presented by plaintiffs in regard to Section 307.[24]

Limitation on Lowest Unit Charge for Candidates. If a candidate makes any direct reference to another candidate for the same office in a broadcast advertisement, section 305 of BCRA denies a federal candidate the "lowest unit charge" for radio and television broadcast advertisements unless certain attribution requirements are met.[25] The *McConnell v. FEC* district court held that no plaintiff had standing at this time to challenge Section 305.[26]

Prohibition on Contributions by Minors. Section 318 of BCRA prohibits minors (defined as persons 17 and younger) from making contributions or donations to candidates or to a political party.[27] In *McConnell v. FEC,* the three-judge court unanimously held the prohibition to be unconstitutional.[28]

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[21] Codified at 2 U.S.C. § 441a (2002).

[22] McConnell v. FEC, No. 02-CV-0582 slip op. at 10 (D.D.C., May 2, 2003). The court held these sections of BCRA non-justiciable finding that the court lacked standing.

[23] Codified at 2 U.S.C. § 441a(a)(1)(2002).

[24] McConnell v. FEC, No. 02-CV-0582 slip op. at 11 (D.D.C., May 2, 2003).

[25] Codified at 47 U.S.C. § 315(b)(2002).

[26] McConnell v. FEC, No. 02-CV-0582 slip op. at 11 (D.D.C., May 2, 2003).

[27] Codified at 2 U.S.C. § 441k (2002).

[28] McConnell v. FEC, No. 02-CV-0582 slip op. at 11 (D.D.C., May 2, 2003).

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