Order Code RS21693
December 19, 2003

Campaign Finance Law: The Supreme Court Upholds Key Provisions of BCRA in *McConnell v. FEC*

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Summary

In its most comprehensive campaign finance ruling since *Buckley v. Valeo* in 1976, on December 10, 2003, in *McConnell v. FEC,* the U.S. Supreme Court upheld against facial constitutional challenges key portions of the Bipartisan Campaign Reform Act of 2002 (BCRA), (P.L. 107-155, commonly known as the McCain-Feingold or Shays-Meehan campaign finance reform law). A 5 to 4 majority of the Court upheld restrictions on the raising and spending of previously unregulated political party soft money and a prohibition on corporations and labor unions using treasury funds to finance "electioneering communications," requiring that such ads may only be paid for with corporate and labor union political action committee (PAC) funds. The Court invalidated BCRA's requirement that parties choose between making independent expenditures or coordinated expenditures on behalf of a candidate and its prohibition on minors age 17 and under making campaign contributions.

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 Congress), which is commonly known as the McCain-Feingold or Shays-Meehan campaign finance reform law, named after the primary sponsors of the legislation. 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) arguing 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. Likewise, the National Rifle Association (NRA) filed suit against the FEC and the Attorney General arguing 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 the law

were brought by more than 80 plaintiffs and were consolidated into one lead case, *McConnell v. FEC.*[1]

On May 2, 2003, the U.S. District Court for the District of Columbia issued its decision in *McConnell v. FEC,* striking down many significant provisions of the law.[2] The three-judge panel, which was split 2 to 1 on many issues, ordered that its ruling take effect immediately.[3] After the court issued its opinion, several appeals were filed and on May 19 the U.S. district court issued a stay to its ruling, leaving BCRA, as enacted, in effect until the Supreme Court ruled. Under the BCRA expedited review provision, the court's decision was directly reviewed by the U.S. Supreme Court. On September 8 the Supreme Court returned to the bench a month before its term officially began to hear four hours of oral argument in the case.

Restrictions on Political Party Soft Money and Electioneering Communications Upheld. In its most comprehensive campaign finance decision since *Buckley v. Valeo*[4] in 1976, on December 10, 2003, in *McConnell v. FEC,* the U.S. Supreme Court upheld against facial constitutional challenges key portions of BCRA.[5] The most significant portion of the Court's decision is the 119 page majority opinion coauthored by Justices Stevens and O'Connor, joined by Justices Souter, Ginsburg, and Breyer, in which the Court upheld two critical features of BCRA: the limits on raising and spending previously unregulated political party soft money and the prohibition on corporations and labor unions using treasury funds – which is unregulated soft money – to finance directly electioneering communications. Instead, BCRA requires that such ads may only be paid for with corporate and labor union political action committee (PAC) funds, also known as hard money. In general, the term "hard money" refers to funds that

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

[2] McConnell v. FEC, No. 02-CV-0582 (D.D.C., May 2, 2003). In brief, the three-judge district court panel struck down BCRA's blanket prohibition on the raising of soft money by national parties and the use of soft money by state and local parties, but retained the ban only for public communications that mention clearly identified federal candidates. The panel also retained the prohibition on the raising of soft money by federal candidates and officials. Regarding "electioneering communications," which BCRA prohibits from being financed with corporate and union treasury funds, the three-judge panel struck down the regulation of all broadcast ads that refer to clearly identified federal candidates in the last 30 days of a primary or 60 days of a general election, but upheld a portion of BCRA's secondary definition, thus allowing regulation of advertisements that supported or opposed federal candidates, regardless of when they were disseminated. For further discussion regarding the district court ruling, *see,* CRS Report RS21511, *Campaign Finance: Brief Overview of McConnell v. FEC,* by L. Paige Whitaker.

[3] 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.

[4] 424 U.S. 1 (1976)(upholding the constitutionality of portions of the Federal Election Campaign Act of 1971 (FECA), including contribution limits, disclosure and record-keeping provisions, and public financing of presidential elections, but invalidating limits on expenditures and independent expenditures, expenditure limits by candidates from their personal funds, and the method of appointing members to the FEC.)

[5] No. 02-1674, slip op. (U.S. Dec. 10, 2003). In addition to the 248 page majority opinion, the decision also contains six separate opinions concurring in part and dissenting in part.

are raised and spent according to the contribution limits, source prohibitions, and disclosure requirements of the Federal Election Campaign Act (FECA), while the term "soft money" is used to describe funds raised and spent outside the federal election regulatory framework, but which may have at least an indirect impact on federal elections.

In upholding BCRA's "two principal, complementary features," the Court readily acknowledged that it is under "no illusion that BCRA will be the last congressional statement on the matter" of money in politics. The Court observed, "money, like water, will always find an outlet." Hence, campaign finance issues that will inevitably arise and the corresponding legislative responses from Congress "are concerns for another day."[6]

Restrictions on Political Party Soft Money Upheld. Title I of BCRA prohibits national party committees and their agents from soliciting, receiving, directing, or spending any soft money.[7] As the Court notes, Title I takes the national parties "out of the soft-money business."[8] In addition, Title I prohibits state and local party committees from using soft money for activities that affect federal elections; prohibits parties from soliciting for and donating funds to tax-exempt organizations that spend money in connection with federal elections; prohibits federal candidates and officeholders from receiving, spending, or soliciting soft money in connection with federal elections and restricts their ability to do so in connection with state and local elections; and prevents circumvention of the restrictions on national, state, and local party committees by prohibiting state and local candidates from raising and spending soft money to fund advertisements and other public communications that promote or attack federal candidates.[9] Plaintiffs challenged Title I based on the First Amendment as well as Art. I, § 4 of the U.S. Constitution, principles of federalism, and the equal protection component of the Due Process Clause of the 14th Amendment. The Court upheld the constitutionality of all provisions in Title I, finding that its provisions satisfy the First Amendment test applicable to limits on campaign contributions: they are "closely drawn" to effect the "sufficiently important interest" of preventing corruption and the appearance of corruption.

Rejecting plaintiff's contention that the BCRA restrictions on campaign contributions must be subject to strict scrutiny in evaluating the constitutionality of Title I, the Court applied the less rigorous standard of review – "closely drawn" scrutiny. Citing its landmark 1976 decision, *Buckley v. Valeo*, and its progeny, the Court noted that it has long subjected restrictions on campaign expenditures to closer scrutiny than limits on contributions in view of the comparatively "marginal restriction upon the contributor's ability to engage in free communication" that contribution limits entail.[10] The Court observed that its treatment of contribution limits is also warranted by the important interests that underlie such restrictions, *i.e.* preventing both actual corruption threatened by large dollar contributions as well as the erosion of public confidence in the electoral

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[6] *Id.* at 118-19.

[7] 2 U.S.C. § 441i(a).

[8] McConnell v. FEC, No. 02-1674, slip op. at 23 (regarding BCRA Titles I and II)(U.S. Dec. 10, 2003).

[9] 2 U.S.C. §§ 441i(b), 441i(d), 441i(e), 441i(f).

[10] No. 02-1674, slip op. at 24 (*quoting* FEC v. Beaumont, 123 S. Ct. 2200 (2003)).

process resulting from the appearance of corruption.[11] The Court determined that the lesser standard shows "proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise."[12] Finally, the Court recognized that during its lengthy consideration of BCRA, Congress properly relied on its authority to regulate in this area, and hence, considerations of *stare decisis* as well as respect for the legislative branch of government provided additional "powerful reasons" for adhering to the treatment of contribution limits that the Court has consistently followed since 1976.[13]

Responding to plaintiffs' argument that many of the provisions in Title I restrict not only contributions but also the spending and solicitation of funds that were raised outside of FECA's contribution limits, the Court determined that it is "irrelevant" that Congress chose to regulate contributions "on the demand rather than the supply side." Indeed, the relevant inquiry is whether its mechanism to implement a contribution limit or to prevent circumvention of that limit burdens speech in a way that a direct restriction on a contribution would not. The Court concluded that Title I only burdens speech to the extent of a contribution limit: it merely limits the source and individual amount of donations. Simply because Title I accomplishes its goals by prohibiting the spending of soft money does not render it tantamount to an expenditure limitation.[14]

Unpersuaded by a dissenting Justice's position that Congress' regulatory interest is limited to only the prevention of actual or apparent *quid pro quo* corruption "inherent in" contributions made to a candidate,[15] the Court found that such a "crabbed view of corruption" and specifically the *appearance* of corruption "ignores precedent, common sense, and the realities of political fundraising exposed by the record in this litigation."[16] According to the Court, equally problematic as classic *quid pro quo* corruption, is the danger that officeholders running for re-election will make legislative decisions in accordance with the wishes of large financial contributors, instead of deciding issues based on the merits or constituent interests. Since such corruption is neither easily detected nor practical to criminalize, the Court reasoned, Title I offers the best means of prevention, *i.e.*, identifying and eliminating the temptation.[17]

Prohibition on Using Corporate and Labor Union Treasury Funds to Finance Electioneering Communications Upheld. Title II of BCRA creates a new term in

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[11] *Id.* at 26 (*quoting* FEC v. National Right to Work, 459 U.S. 197, 208 (1982)).

[12] *Id.* at 27. The Court further noted that "closely drawn" scrutiny provides Congress with sufficient room to anticipate and respond to circumvention of the federal election regulatory regime, which is designed to protect the integrity of the political process. *Id.*

[13] *Id.*

[14] *Id.* at 28-29.

[15] *See, id.* at 8-10, 15 (Kennedy, J., concurring, in part, dissenting, in part)(finding that the *Buckley* Court relied on the principle that campaign finance regulation that restricts speech without requiring proof of a specific act of corruption only withstands constitutional challenge if it regulates conduct that presents "a demonstrable *quid pro quo* danger").

[16] *Id.* at 43.

[17] *Id.* at 44.

FECA, "electioneering communication," which is defined as any broadcast, cable or satellite communication 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 it is a House or Senate election, is targeted to the relevant electorate.[18] Title II prohibits corporations and labor unions from using their general treasury funds (and any persons using funds donated by a corporation or labor union) to finance electioneering communications. Instead, the statute requires that such ads may only be paid for with corporate and labor union political action committee (PAC) regulated hard money.[19] The Court upheld the constitutionality of this provision.

In *Buckley v. Valeo*, the Court construed FECA's disclosure and reporting requirements, as well as its expenditure limitations, to apply only to funds used for communications that contain express advocacy of the election or defeat of a clearly identified candidate.[20] Numerous lower courts have since interpreted *Buckley* to stand for the proposition that communications must contain express terms of advocacy, such as "vote for" or "vote against," in order for regulation of such communications to pass constitutional muster under the First Amendment. Absent express advocacy, lower courts have held, a communication is considered issue advocacy, which is protected by the First Amendment and therefore may not be regulated.[21] Effectively overturning such lower court rulings, the *McConnell* Court held that neither the First Amendment nor *Buckley* prohibits BCRA's regulation of "electioneering communications," even though electioneering communications, by definition, do not necessarily contain express advocacy. The Court determined that when the *Buckley* Court distinguished between express and issue advocacy it did so as a matter of statutory interpretation, not constitutional command. Moreover, the Court announced that, by narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, it "did not suggest that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line."[22] "[T]he presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad," the Court observed.[23]

While Title II prohibits corporations and labor unions from using their general treasury funds for electioneering communications, the Court observed that they are still free to use separate segregated funds (PACs) to run such ads. Therefore, the Court concluded that it is erroneous to view this provision of BCRA as a "complete ban" on

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[18] 2 U.S.C. § 434(f)(3)(A)(i). "Targeted to the relevant electorate" is defined 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. 2 U.S.C. § 434(f)(3)(C).

[19] 2 U.S.C. § 441b(b).

[20] Buckley, 424 U.S. at 80.

[21] For further discussion regarding lower court rulings holding that express words of advocacy are the constitutional minima in order for a communication to be subject to regulation, *see*, CRS Report RL30669, *Campaign Finance Regulation Under the First Amendment: Buckley v. Valeo and Its Supreme Court Progeny*, by L. Paige Whitaker.

[22] McConnell, slip op. at 85.

[23] *Id.* at 86.

expression rather than simply a regulation.[24] Further, the Court found that the regulation is not overbroad because the "vast majority" of ads that are broadcast within the electioneering communication time period (60 days before a general election and 30 days before a primary) have an electioneering purpose.[25] The Court also rejected plaintiffs' assertion that the segregated fund requirement for electioneering communications is underinclusive because it only applies to broadcast advertisements and not print or internet communications. Congress is permitted, the Court determined, to take one step at a time to address the problems it identifies as acute. With Title II of BCRA, the Court observed, Congress chose to address the problem of corporations and unions using soft money to finance a "virtual torrent of televised election-related ads" in recent campaigns.[26]

In upholding BCRA's extension of the prohibition on using treasury funds for financing electioneering communications to non-profit corporations, the Court found that even though the statute does not expressly exempt organizations meeting the criteria established in its 1986 decision in *FEC v. Massachusetts Citizens for Life (MCFL),*[27] it is an insufficient reason to invalidate the entire section. Since *MCFL* had been established Supreme Court precedent for many years prior to enactment of BCRA, the Court assumed that when Congress drafted this section of BCRA, it was well aware that this provision could not validly apply to MCFL-type entities.

Requirement that Political Parties Choose Between Coordinated and Independent Expenditures After Nominating a Candidate Invalidated. The Court invalidated BCRA's requirement that political parties choose between coordinated and independent expenditures after nominating a candidate,[28] finding that it burdens the right of parties to make unlimited independent expenditures.[29]

Prohibition on Campaign Contributions by Minors Age 17 and Under Invalidated. The Court invalidated BCRA's prohibition on individuals age 17 or younger making contributions to candidates and political parties.[30] Determining that minors enjoy First Amendment protection and that contribution limits impinge on such rights, the Court determined that the prohibition is not "closely drawn" to serve a "sufficiently important interest."[31]

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[24] *Id.* at 98.

[25] *Id.* at 100.

[26] *Id.* at 101.

[27] 479 U.S. 238 (1986)(holding that the following characteristics exempt a corporation from regulation: (1) its organizational purpose is purely political; (2) its shareholders have no economic incentive in the organization's political activities; and, (3) it was not founded by nor accepts contributions from business organizations or labor unions). *Id.* at 259, 264.

[28] 2 U.S.C. § 315(d)(4).

[29] McConnell, slip op. at 108.

[30] 2 U.S.C. § 441k.

[31] McConnell, slip op. at 10-11 (regarding BCRA Titles III and IV).