Campaign Finance Law: A Brief Overview of the Supreme Court Ruling in *McConnell v. FEC*

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Summary

McConnell v. FEC, a 2003 U.S. Supreme Court decision, upheld the constitutionality of key portions of the Bipartisan Campaign Reform Act of 2002 (BCRA) against facial challenges. (BCRA, which amended the Federal Election Campaign Act [FECA], codified at 2 U.S.C. § 431 et seq., is also known as the McCain-Feingold 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 also invalidated a requirement that parties choose between making independent expenditures or coordinated expenditures on behalf of a candidate, and a prohibition on minors age 17 and under making campaign contributions. A 2007 Supreme Court decision, *FEC v. Wisconsin Right to Life, Inc. (WRTL II)*, while not expressly overruling *McConnell*, narrowed the application of BCRA. Finding that the BCRA "electioneering communications" provision was unconstitutional as applied to ads that Wisconsin Right to Life, Inc., sought to run, the Court in *WRTL II* held that advertisements that may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate cannot be regulated. For further discussion of *WRTL II*, see CRS Report RS22687, *The Constitutionality of Regulating Political Advertisements: An Analysis of Federal Election Commission v. Wisconsin Right to Life, Inc.*, by (name redacted).

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Background

The Bipartisan Campaign Reform Act of 2002 (BCRA), P.L. 107-155 (H.R. 2356, 107th Congress) significantly amended federal campaign finance law. 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 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.*

On May 2, 2003, the U.S. District Court for the District of Columbia issued its decision in *McConnell v. FEC,*[1] striking down many significant provisions of the law. The three-judge panel, which was split 2 to 1 on many issues, ordered that its ruling take effect immediately. 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, and issued its decision in December.

Restrictions on Political Party Soft Money and Electioneering Communications Upheld

In its most comprehensive campaign finance decision since its 1976 decision in *Buckley v. Valeo,*[2] the U.S. Supreme Court in *McConnell v. FEC*[3] upheld against facial constitutional challenges key portions of BCRA. 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 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

[1] 251 F. Supp. 2d 176 (D.D.C. 2003). For discussion of the district court ruling, *see* CRS Report RS21511, *Campaign Finance: Brief Overview of District Court Opinion in McConnell v. FEC*, by (name redacted). 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.

[2] 424 U.S. 1 (1976).

[3] 540 U.S. 93 (2003). In addition to the 248 page majority opinion, there are also six separate opinions concurring in part and dissenting in part.

general, the term "hard money" refers to funds that 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 *McConnell* Court readily acknowledged that it was under "no illusion that BCRA will be the last congressional statement on the matter" of money in politics. "Money, like water, will always find an outlet," the Court predicted, and therefore, campaign finance issues that will inevitably arise, and corresponding legislative responses from Congress, "are concerns for another day."[4] Indeed, in 2007, the Court in *FEC v. Wisconsin Right to Life, Inc. (WRTL II)*[5] determined that BCRA's "electioneering communications" provision was unconstitutional as applied to ads that Wisconsin Right to Life, Inc., sought to run, thereby limiting the law's application.

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.[6] As the Court noted, Title I takes the national parties "out of the soft-money business."[7] 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.[8] 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.[9] The Court observed that its treatment of

[4] *Id.* at 224.

[5] 127 S. Ct. 2652 (2007).

[6] *See* 2 U.S.C. § 441i(a).

[7] McConnell, 540 U.S. at 133.

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

[9] McConnell, 540 U.S. at 120 (*quoting* Buckley v. Valeo, 424 U.S. 1, 20 (1976)).

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 process resulting from the appearance of corruption. Determining that the lesser standard shows "proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise," the Court noted 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.[10]

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." Instead, 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.[11]

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,[12] 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."[13] 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. As 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.[14]

Prohibition on Using Corporate and Labor Union Treasury Funds to Finance Electioneering Communications Upheld

Title II of BCRA created a new term in 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.[15] Title II prohibits corporations and labor unions from using their general treasury funds (and any persons using funds donated by

[10] *Id.* at 137.

[11] *Id.* at 138-39.

[12] *See id.* at 295-96 (Kennedy, J., concurring, in part, dissenting, in part).

[13] *Id.* at 152.

[14] *See id.* at 153.

[15] *See* 2 U.S.C. § 434(f)(3)(A)(i). 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. 2 U.S.C. § 434(f)(3)(C).

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.[16] The Court upheld the constitutionality of this provision.

In *Buckley v. Valeo*,[17] 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. 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, according to most lower courts, a communication is considered issue advocacy, which is protected by the First Amendment and therefore, may not be regulated. 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. When the *Buckley* Court distinguished between express and issue advocacy, the *McConnell* Court found, 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."[18] "[T]he presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad," according to the Court.[19]

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 expression rather than simply a regulation.[20] 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.[21] The Court also rejected plaintiffs' assertion that the segregated fund requirement for electioneering communications is under-inclusive 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.[22]

In upholding BCRA's extension of the prohibition on using treasury funds for financing electioneering communications to non-profit corporations, the *McConnell* Court found that even though the statute does not expressly exempt organizations meeting the criteria established in its

[16] *See* 2 U.S.C. § 441b(b).

[17] *See* 424 U.S. 1, 80 (1976).

[18] McConnell, 540 U.S. at 192.

[19] *Id.* at 193.

[20] *Id.* at 204.

[21] *Id.* at 206.

[22] *Id.* at 207.

1986 decision in *FEC v. Massachusetts Citizens for Life (MCFL),*[23] it is an insufficient reason to invalidate the entire section. As *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 it could not validly apply to MCFL-type entities.[24]

Subsequently, in the 2007 decision *FEC v. Wisconsin Right to Life, Inc. (WRTL II),*[25] the Supreme Court held that Title II of BCRA was unconstitutional as applied to ads that Wisconsin Right to Life, Inc., sought to run. While not expressly overruling its 2003 ruling in *McConnell v. FEC,* the Court limited the law's application. Specifically, it ruled that advertisements that may reasonably be interpreted as something other than an appeal to vote for or against a specific candidate are not the functional equivalent of express advocacy and, therefore, cannot be regulated.[26]

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,[27] finding that it burdens the right of parties to make unlimited independent expenditures.[28]

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.[29] 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."[30]

[23] 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.

[24] McConnell, 540 U.S. at 211.

[25] 127 S. Ct. 2652 (2007).

[26] For further discussion of *WRTL II,* see CRS Report RS22687, *The Constitutionality of Regulating Political Advertisements: An Analysis of Federal Election Commission v. Wisconsin Right to Life, Inc.*, by (name redacted).

[27] *See* 2 U.S.C. § 315(d)(4).

[28] *See* McConnell, 540 U.S. at 213-21.

[29] *See* 2 U.S.C. § 441k.

[30] McConnell, 540 U.S. at 231-33.

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