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On The Docket

Campaign Finance and the Courts

Analysis of Court Decision on Constitutionality of New Campaign Finance Law

On Friday, May 2, 2003, the three-judge District Court panel issued its opinion in *McConnell v. FEC*, the case challenging the constitutionality of the Bipartisan Campaign Reform Act of 2002 (BCRA). The decision sustains many of the most important provisions of the BCRA. It also declares other portions of the law unconstitutional.

This legal analysis was prepared by Roger Witten, Seth Waxman, and Randolph Moss of Wilmer, Cutler & Pickering, the lead counsel for the legal team representing the congressional sponsors in this case, and by Fred Wertheimer of Democracy 21, a member of the legal team representing the congressional sponsors.

Highlights of *McConnell v. FEC*

Soft Money

- **The District Court confirmed that Congress was entitled to bar federal officeholders and candidates from, directly or indirectly, raising or spending soft money.** The Court upheld the provision of the statute that prevents federal officeholders and candidates from soliciting, receiving, directing, transferring, or spending soft money, or from directly or indirectly controlling any entity that raises or spends soft money.

  In addition to barring federal officeholders and candidates from raising or spending soft money, this prohibition also explicitly applies to "an entity directly or indirectly established, financed maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding federal office."

  As Judge Kollar-Kotelly wrote, the prohibition "permits federal candidates and officeholders to continue to engage and fully participate in the political process, but closely circumscribes their activities to prevent the kinds of problems that developed with their solicitation of nonfederal funds." Kollar-Kotelly at 591. Judge Henderson likewise opined, "[I]n severing the most direct link between the federal candidate and the nonfederal donor, . . . [the provision preventing federal candidates from soliciting soft money] can serve to prevent the appearance of corruption where it is most acute." Henderson at 323.

  - The decision means that the President, Vice President, Members of Congress, and federal candidates cannot solicit, receive, direct, transfer or spend soft money.

    The decision also means that the four congressional campaign committees – the DSCC, NRSC, DCCC and NRCC – cannot raise or spend soft money. These four committees are made up wholly of Members of Congress. As such, the committees are entities controlled by federal officeholders within the meaning of the statute, and like the officeholders who control them, the committees are barred from raising and spending soft money.

    In using the term "entity," Congress provided the broadest possible coverage to ensure that federal officeholders and candidates could not evade the prohibition on their raising and spending soft money through the use of an "entity" of any type subject to their control.

    In 2000 the four congressional party fundraising committees raised a total of $212 million in soft money, and in 2002 they raised a total of $288 million in soft money – for an overall total of a half billion

dollars in soft money raised by the congressional campaign committees during the past two elections.

- Furthermore, to the extent that a president or presidential nominee, directly or indirectly, controls a national party committee, the same prohibition would apply.

- **The District Court upheld the soft money ban as it applies to the financing of sham issue ads and other public communications. This covers the most substantial uses of soft money by the parties in recent elections.** A majority of the panel upheld the portions of the BCRA that prohibit national, state, and local parties from spending soft money on "public communications" that refer to a candidate for federal office and that promote, support, attack or oppose a candidate for that office. The phrase "public communication" is broadly defined in the BCRA to cover "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising."

  - As Judge Leon explained, the term "public communication" is "defined broadly to include everything from telephone banks to mass mailings." Leon at 46, n.55.

  - With respect to sham issue ads, Judge Leon found that "[t]he record is clear that many, if not most, of the party so-called 'issue ads' refer to a specific federal candidate. And the evidence also demonstrates that the advertisements are designed to, and do, support or oppose those candidates for that office." Leon at 53. Judge Kollar-Kotelly similarly found that "these advertisements make a mockery of the original justification for allowing parties to raise [soft money] funds, as they have nothing to do with 'party building.'" Kollar-Kotelly at 80.

- **In failing to sustain the soft money ban in its entirety, the District Court erred.** The Supreme Court has recognized (1) Congress's broad authority to prevent the circumvention of constitutionally-upheld campaign finance laws, and (2) the risk that political parties will be used "as agents for spending on behalf of those who seek to produce obligated officeholders." Indeed, in *Colorado Republicans II* – the most recent Supreme Court campaign finance case – the Court sustained just such an anti-circumvention measure, and did so even without specific evidence of past evasion of the particular provision at stake but based solely on "a serious threat of abuse."

  Here, Congress correctly devised a comprehensive approach for preventing the use of soft money to evade the federal campaign finance laws. Moreover, the evidence produced in this case shows that when the national

political parties raise tens or hundreds of thousands of dollars – and at times, millions of dollars – from a corporate, union or individual donor, everyone involved believes that those contributions come with a price tag. There can be no doubt that these large contributions – whether used for sham issue ads or GOTV efforts – raise the specter of "politicians too compliant with the wishes of large contributors." *Shrink Missouri*, 538 U.S. at 389.

As the Supreme Court has stressed, courts should not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *NRWC*, 459 U.S. at 210.

- **The District Court recognized that soft money undermines our democracy.**

    - Judge Kollar-Kotelly found that "[t]he record is a treasure trove of testimony from Members of Congress, individual and corporate donors, and lobbyists, as well as documentary evidence, establishing that contributions, especially large nonfederal donations, are given with the expectation that they will provide the donor with access to influence federal officials, that this expectation is fostered by the national parties, and that this expectation is often realized." Kollar-Kotelly at 136.

    - "From this record it is clear that large donations, particularly unlimited nonfederal contributions, have corrupted the political process." Kollar-Kotelly at 179.

    - Judge Leon found that "the record does establish that the public not only appreciates that there are many donors giving large sums of money (mostly corporations and unions) to the political parties, but believes and expects that the donors—in return—receive privileged access to the legislators and special influence in the legislative process. . . . There is ample evidence, including polls and press reports, to support Congress's judgment that the special access and perceived special influence accorded to those large donors have undermined the public's confidence in the independence of its elected representatives from those donors, and thereby giving rise to an appearance of corruption." Leon at 58-59.

    - Although Judge Leon concluded that the risk of actual or perceived corruption is not apparent where the parties spend funds on "generic" campaign activity – such as a GOTV efforts – Judge Kollar-Kotelly correctly found that "[m]erely preventing the national political party committee from spending nonfederal funds on certain activities would do nothing to address the corruption associated with the national political party committees *soliciting* and *collecting* nonfederal funds." Kollar-Kotelly at 566 (emphasis

added). Rather, "*Buckley* and its progeny all instruct that the fundraising process is the focal point of the contribution restriction analysis…." Kollar-Kotelly at 496 n.153.

Sham Issue Ads

- **The District Court rejected the argument made by opponents of the law that an ad may only be treated as a campaign ad, subject to campaign finance laws, if the ad contains the words "vote for" or "vote against."** The Court held that the "vote for/vote against" test, known as the "magic words" or "express advocacy" test, is not a constitutional straitjacket. Both Judges Kollar-Kotelly and Leon concluded that "the Supreme Court never intended the so-called express advocacy test to be a constitutional rule of law limiting the power of Congress to regulate expenditures for certain uncoordinated advocacy that directly affects federal elections, notwithstanding the absence of these words." Leon at 74 & n.97. As Judge Kollar-Kotelly found, there exists an "[u]ncontroverted record of abuse and circumvention of the longstanding prohibition of [expenditure limits for corporations and unions]." Kollar-Kotelly at 356. "Since 1996, this longstanding prohibition [of expenditure limits for corporations and unions] has become a fiction, with abuse so overt as to openly mock the intent of the law." Kollar-Kotelly at 358.

- **The District Court held that corporations and labor unions may not finance ads that promote, support, attack or oppose a candidate for federal office, except through use of their PAC funds.**

    - The Court struck down the primary definition of campaign ads subject to the campaign finance laws, but upheld the back-up definition in a manner that substantially broadened the coverage of the provision:

        - Under the primary definition, a campaign ad – or "electioneering communication" – is a broadcast ad that refers to a federal candidate and is run within 60 days of a general election or 30 days of a primary election in that candidate's district or state. The District Court rejected this provision.

        - Under the back-up provision, a campaign ad is a broadcast ad that promotes, supports, attacks or opposes a candidate – regardless of whether it contains "magic words" or "express advocacy" – and that also "is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." The Court struck down the last clause of this provision as unconstitutionally vague, but upheld the remainder of the definition. As a result, corporations and labor unions may not use their general treasury funds to

finance any ads that promote, support, attack or oppose a federal candidate at any time during the election cycle.

- **The District Court upheld the provision subjecting non-profit corporations to the same rules as corporations and labor unions regarding the running of sham-issue ads.**

    - As the Court recognized, application of the sham-issue ad rules to non-profit corporations is justified in light of "the demonstrated appearance of corruption that arises if for-profit corporations and unions are able to funnel their general treasury funds through nonprofit corporations in order to purchase electioneering communications that they cannot otherwise purchase directly." Leon at 98 (concurring in Judge Kollar-Kotelly's opinion at Part III.I.E.1.a.) Non-profit corporations that do not receive funds from for-profit corporations or labor unions, and that meet certain additional requirements, are not subject to this provision, as the congressional sponsors intended.

- **The District Court upheld the provision that requires individuals and groups of individuals, who run sham-issue ads, to disclose their expenditures and the main sources of their funding.**

<u>Coordination</u>

- **The District Court rejected the opponents' challenge to the principal coordination provision of the BCRA.**

    - The Court embraced the arguments of the supporters of the law about the need to take a broad, "functional," and vigorous approach in policing coordinated expenditures, and rejected the opponents' arguments that coordination requires an actual "agreement," that the BCRA's coordination standards are unconstitutionally vague, that coordination regulations may only extend to express advocacy, and that the coordination provisions should not be extended to political parties. With respect to other portions of the opponents' challenge – including the challenge to how the FEC might implement the provision – the Court agreed with the supporters that it was both premature to reach those issues and beyond the jurisdiction of the three-judge court.

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