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Key Provisions of Federal Campaign Finance "Reform" Legislation Struck Down

On Friday, May 2, the U.S. District Court for the District of Columbia declared many key provisions of the federal Bipartisan Campaign Finance Act of 2002 ("BCRA") unconstitutional in the case of McConnell v. FEC. The BCRA, commonly known by the name of its Senate sponsors as "McCain-Feingold," was considered by a three-judge panel, which split on many issues.

The Court was unanimous, however, in striking down the ban on contributions by minors to candidates, a great victory for the minors represented by the James Madison Center for Free Speech. The political party represented by the Madison Center also won an important victory when the panel struck down a prohibition on contributions to them from corporations, unions, and individuals to be used for political activity unrelated to particular candidates, e.g., get-out-the vote activity.

The issue advocacy groups represented by the Madison Center won an important victory when the court struck down the ban on mentioning the name of a candidate for 60 days before an election (30 before a primary). But unfortunately the Court then upheld a backup provision that bans year round any broadcast communication that "promotes or supports" or "attacks or opposes" a federal candidate.

Under this backup definition, Madison Center client National Right to Life Committee ("NRLC") could not broadcast TV ads attacking or supporting cloning legislation by various legislators because this could be viewed as supporting or opposing the candidate. The backup definition is so vague that Madison Center General Counsel James Bopp, Jr. asks "who now knows what speech is prohibited and what isn't?" He declared the backup definition of "electioneering communications" "more pernicious, more evil" than the 60-day blackout period that was struck down, noting that the backup definition could be violated by merely labeling a candidate/legislator "pro-life" or "pro-choice," which could launch an extensive and expensive FEC investigation into whether listeners would consider such labeling opposing or supporting candidates.

Fortunately, this vague backup definition flies in the face of Supreme Court precedent and so stands an excellent chance of being struck down on appeal. The Court also needs to finish the job as to a vague definition of "coordination" that would turn ordinary contacts by groups like NRLC with legislators (e.g., to promote legislation or obtain answers to voter guide questions) into coordinated expenditures so as to then be considered forbidden corporate contributions.

And the Court also needs to finish the job by striking down the ban on political parties' expenditures for promoting or opposing candidates positions on issues. Congress effectively said the First Amendment protects using political party money to build new party headquarters, but not to speak about candidates. Bopp said this "sets the First Amendment on its head" because the

core of the First Amendment is speech about candidates, not building construction. He noted that the trial court "failed to grasp that political parties have issue agendas they want to promote. They aren't just federal election machines. They have principles, legislation, and issues that they want and need to promote."

Overall, Bopp declared the district court's decision "a good beginning for protecting the First Amendment and the free speech of citizen groups, which are key to a vital marketplace of ideas in America," although he said the court "didn't demonstrate adequate sensitivity to some First Amendment issues."

The Madison Center represents 10 clients in the case: U.S. Rep. Mike Pence, Alabama Attorney General Bill Pryor, Libertarian National Committee, Inc., Club for Growth, Inc., Indiana Family Institute, Inc., National Right to Life Committee, Inc., National Right to Life Educational Trust Fund, National Right to Life Political Action Committee, Trevor M. Southerland, and Barret Austin O'Brock;

Appeal from this decision will go directly to the U.S. Supreme Court, bypassing the usual route through an intermediate appellate court as dictated by Congress in the BCRA. It is unclear how quickly the Supreme Court will review the case. It normally goes on recess at the end of June or early July and reconvenes in October.