

Analysis of Supreme Court Decision Upholding Constitutionality of New Campaign Finance Law

On Wednesday, December 10, 2003, the Supreme Court issued its opinion in *McConnell v. FEC*, the case challenging the constitutionality of the Bipartisan Campaign Reform Act of 2002 (BCRA). In the most important Supreme Court campaign finance decision in a generation, the Court upheld the constitutionality of the BCRA, with a few minor exceptions. In so doing, the Supreme Court ruled that campaign finance laws like the BCRA prevent corruption and the appearance of corruption, and do not restrict protected free speech.

The summary of the Supreme Court decision below was prepared by Wilmer, Cutler & Pickering, the lead counsel for the legal team that represented the congressional sponsors of the BCRA in *McConnell v. FEC*.

Highlights of *McConnell v. FEC*

On Wednesday, December 10, 2003, the Supreme Court upheld all of the core provisions of the Bipartisan Campaign Reform Act ("BCRA"). Justice Stevens and Justice O'Connor, joined by Justices Breyer, Ginsburg and Souter, upheld the ban on the raising and spending of soft money by political parties as well as the electioneering communications provisions, which require the use of "hard money" to finance certain advertisements that are broadcast within 30 days of a primary or 60 days of a general federal election.

The Chief Justice and Justice Kennedy joined the majority to uphold the portion of the law that prevents federal candidates and officeholders from raising or spending any soft money in connection with a federal election. In upholding BCRA, the Court reaffirmed its decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), and reiterated, with a quotation from Elihu Root, that corporate contributions are a "constantly growing evil which has done more to shake the confidence of plain people of small means of this country in our political institutions than any other practice...." [p. 3]

The Supreme Court found that the record before it, including the findings of a Senate investigation into allegations of wrongdoing in the 1996 federal elections ("Thompson Committee Report") provided a compelling rationale for reform. The Thompson Committee Report and other evidence before the Congress demonstrated conclusively that political parties, corporate and union donors, and others circumvented federal election regulations by using "soft money" for get-out-the-vote drives and generic party advertising, and by broadcasting so called "issue ads" specifically intended to influence federal elections.

As the Court stated: "The question for present purposes is whether large soft money contributions to national party committees have a corrupting influence or give rise to the appearance of corruption. Both common sense and the ample record in these cases

confirm Congress' belief that they do." [p. 35] The Court cited evidence provided by several current and former members of Congress, and concluded: "The evidence connects soft money to manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation." [p. 40]

The Court's majority opinion deferred to the judgment of Congress regarding regulation of the electoral process, where it enjoys "particular expertise." Consistent with the level of scrutiny the Court has applied in other campaign finance cases, the Court applied "closely drawn" scrutiny to the soft money provisions, which limit the source and size of contributions to political parties. The Court also recognized the "important governmental interests" in limiting the appearance of corruption and protecting the "public confidence in the electoral process," noting that both "common sense and the ample record" confirm Congress' finding that soft money donations give rise to actual or apparent corruption.

Title I: The Soft Money Ban

The Court's decision upholding Title I of BCRA removes national party committees and their agents from the solicitation, receipt, direction, or expenditure of unregulated "soft money" contributions, regardless of how the funds are spent, on the grounds that preventing actual or apparent corruption of federal candidates and officeholders is a sufficiently important governmental interest to justify a total ban of soft money.

The Court found substantial evidence that large donors were offered access to federal candidates and officeholders, and indicated that Supreme Court precedent itself provided substantial evidence that large contributions to a national party give rise to corruption and the appearance of corruption. The Court stated:

[U]nlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation. The evidence set forth above, which is but a sampling of the reams of disquieting evidence contained in the record, convincingly demonstrates that soft-money contributions to political parties carry with them just such temptation. [p. 44]

The Court further found that BCRA does not prohibit national party officers from meeting with state and local party committees or candidates to advise them on their plans for raising and spending of soft money, so long as the national party is not directing the spending of soft money.

The Court found that the prohibition on the use of soft money by state and local party committees for federal election activities is closely drawn to the important governmental interest of preventing actual and apparent corruption, explaining that: "given the close ties between federal candidates and state party committees, BCRA's restrictions on national committee activity would rapidly become ineffective if state and local committees remained available as a conduit for soft-money donations." [p. 53]

The Court also upheld the Levin amendment, which allows for the use of some "home-grown" soft money expenditures by state and local party committees in specific circumstances. The Court found that Congress made a reasonable prediction that without these restrictions state and local parties would be used to circumvent a national party ban on soft money, and found that the Levin provision was tailored to regulate contributions that directly benefit federal candidates.

The Court upheld a prohibition on national, state, and local party committees and their agents soliciting, directing or making donations 501(c)(3) tax exempt organizations, and to specified 527 political organizations. However, the Court construed this provision to ban only soft money donations to these tax exempt organizations. Under the ruling, political parties and others are free to donate funds to tax exempt organizations as long as they comply with FECA's source and amount restrictions.

The Court, in a 7 to 2 decision (with Chief Justice Rehnquist and Justice Kennedy joining), held that federal candidates and officeholders could be prohibited, with certain exceptions provided for in the statute, from soliciting, receiving, directing, transferring, or spending soft money in relation to federal elections. The Court also upheld the restrictions on the ability of federal candidates and officeholders to solicit, receive, direct, transfer, or spend soft money in relation to state and local elections. The Court found that this provision was a valid anti-circumvention measure and was closely drawn to prevent the corruption or the appearance of corruption of federal candidates and officeholders.

The Court held that Title I of BCRA does not violate constitutional federalism principles, because it does not require states and state officials to carry out federal regulations. The Court held that Title I only regulates private parties' conduct and allows states to enforce their own restrictions on campaign financing of state and local elections.

Titles II - V: The Electioneering Communications Provision and Other Issues

The Court upheld the "Electioneering Communications" provisions of BCRA in their entirety. These provisions prohibit corporations and unions from using general treasury funds to sponsor broadcast, cable or satellite ads that clearly identify a candidate for federal office, are broadcast within 60 days of a general election or 30 days of a primary, and are targeted to the candidate's electorate.

In upholding these provisions, the Court rejected plaintiffs' argument that the "express advocacy" or "magic words" test, which required an ad to be funded with hard money only if it contained express words of advocacy such as "Vote for Jane Doe," is a "constitutional command." The Court concluded that the "unmistakable lesson from the record" before it was that the "magic-words requirement is functionally meaningless." [p. 86]

The Court found that the record developed in this case and in Congress showed that "corporations and unions used soft money to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections, and that remedial legislation was needed to staunch that flow of money." [p. 101]

In doing so, it affirmed the state interest in preventing the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." [p. 99, quoting *Austin*, 494 U.S. 652, 660 (1990)] The Court also agreed with the defendants that the Electioneering Communications provisions were constitutional as applied to non-profit organizations that do not qualify for the narrow exception for certain non-business corporations previously established in its earlier decision in *MCFL*.

The Court rejected challenges to BCRA's disclosure requirements, which increase the transparency of the campaign finance system and better inform the electorate.

The Court upheld provisions that allow the Federal Election Commission (FEC) to treat Electioneering Communications that are coordinated with a candidate or party as contributions to, and expenditures by, that candidate or party. The Court allowed the FEC to implement Congress' instruction to promulgate new regulations defining impermissible coordination that do not "require agreement or formal collaboration to establish coordination." [p. 116]

The Court struck down the provision prohibiting minors 17 years and younger from making political contributions and the provision requiring parties to choose between making independent expenditures or coordinated expenditures on behalf of candidate.

The Court declined to rule on challenges to other BCRA provisions, including increases in the amount of hard money which can legally be contributed to national parties and federal candidates, and the so-called millionaire's amendment.

Conclusion

The Supreme Court's decision strengthens our democracy by holding that Congress has sufficient constitutional authority, consistent with the First Amendment, to protect the federal political process from the corrosive influence of large unregulated donations by corporations, unions and wealthy individuals. The Court appropriately concluded its opinion stating:

Many years ago we observed that "[t]o say that Congress is without power to pass appropriate legislation to safeguard... an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection." [quoting *Burroughs*, 290 U.S. at 545]. We abide by that conviction in

considering Congress' most recent effort to confine the ill effects of aggregated wealth on our political system. [p. 118]

The sweeping affirmation of the constitutionality of the BCRA is a testament to the care the sponsors took in legislating practical solutions that were consistent with the Supreme Court's established jurisprudence in the field of campaign finance law.