Washington Post: Supreme Court: Campaign Finance Decision

Kenneth W. Starr
Attorney
Wednesday, December 10, 2003; 3:30 p.m ET

In a 5-4 decision the Supreme Court today upheld the most important provisions of the McCain-Feingold campaign reform act of 2002. The justices rejected arguments that the new provisions intrude on constitutionally protected rights of free speech and free political association. They similarly rejected claims that the soft money restrictions cut too deeply into the prerogatives of the states to regulate elections.

Starr served as Solicitor General of the United States from May 27, 1989 to January 20, 1993 and was appointed Independent Counsel on the Whitewater matter in August 1994. He has argued 25 cases before the Supreme Court and is the author of "First Among Equals: The Supreme Court in American Life." (Warner Books) He is currently head of the Appellate Litigation group at the law offices of Kirkland and Ellis.

Kenneth W. Starr: I'm delighted to be with you today. I'm obviously disappointed with the Supreme Court's decision today. I can't promise that I've digested all 300 pages of the Court's opinions in the last few hours, but I'd be happy to try to answer any questions you might have.

Williamsburg, Va.: Some provisions of the law were upheld while others were struck down. Will the deletion of some provisions from the law create any perverse effects, or will the law function more or less as intended?

Kenneth W. Starr: Today's decision upheld virtually the entirety of the Bipartisan Campaign Reform Act (BCRA), including its two most important components: the restrictions on the raising and spending of non-federal funds, or so-called "soft money," by national and state political parties, and the restriction on broadcast advertising that refers to federal candidates by corporations and unions within specified periods before federal elections. The only provisions that were invalidated were two relatively narrow provisions regarding contributions by minors and coordinated expenditures by political parties. With those minor (no pun intended!) exceptions, the law upheld by the Supreme Court today is effectively the law that Congress enacted. Whether or not Congress foresaw all of the practical consequences of BCRA, of course, is another matter.

Arlington, Va.: What is next? How will the reform community continue to challenge this law now that the Supreme Court has ruled?

Kenneth W. Starr: The cases that were decided today involved so-called "facial" challenges to BCRA: that is, challenges to the law as it was written, rather than challenges to the law as it is being applied in practice. As the Court's opinions today themselves indicate, it is quite likely that

various aspects of the law will now be subject to "as applied" challenges, in which plaintiffs seek relief based on their particular circumstances. I would also anticipate that there will be challenges to the Federal Election Commission's regulations implementing BCRA; in fact, some of BCRA's own sponsors have already commenced such litigation. Finally, BCRA's sponsors have suggested that they are considering various pieces of follow-up legislation (including reforms to the financing system for presidential elections), which, if enacted, may themselves be subject to court challenge. In other words, campaign finance law will continue to be a growth industry.

Washington, D.C.: Which of the justices' votes surprised you the most? Does the ruling confirm Justice O'Connor's status as the most powerful woman on the planet?

Kenneth W. Starr: Going into the argument, we knew that Justice O'Connor's vote would be vital in this case, as it so often is. She had written comparatively little in the campaign finance area before today's decision. At the argument, she asked tough questions of both sides. I therefore can't say that I was surprised by her vote, except perhaps with regard to her vote in upholding the restrictions on corporate and union speech (which arguably represented a change of position from her position in an earlier case).

Washington, D.C.: Mr. Starr,

I'm confused on what today's ruling means for the leading precedent on campaign finance law.

Did the Court overturn the Buckley provisions? Or expand them?

Kenneth W. Starr: Unfortunately from our point of view, as of today, McConnell v. FEC itself is arguably the leading precedent on campaign finance law! As for the Court's 1976 decision in Buckley v. Valeo, which upheld restrictions on campaign contributions but struck down restrictions on expenditures, only two Justices by my count (Justices Scalia and Thomas) plainly indicated their willingness to overturn Buckley. All of the other Justices seemed to work from the premise that Buckley was still good law, but concluded that Buckley supported their respective positions. (Interestingly, the Chief Justice was on the Court when Buckley was decided, and largely voted with the majority in that case.)

Cambridge, Mass.: What did the court do with the "stand by your ad" provision? Did they discuss it at all?

Kenneth W. Starr: The Court generally upheld BCRA's many disclosure provisions, but suggested that at least some could be subject to later "as applied" challenges.

Miami, Fla.: In your view, does the Court's decision effectively declare an "open season" for the diversion of massive amounts of what used to be soft money through new 527 organizations, including those with explicit political agendas?

Kenneth W. Starr: In a word, yes. As Tom Edsall has reported in a series of articles in the Post, individuals such as George Soros have already indicated their intention to give millions of dollars to interest groups (or so-called "527" organizations) that have been set up with the express purpose of spending "soft money" on activities such as get-out-the-vote efforts and voter mobilization. The practical effect of this diversion, as we unsuccessfully argued in the Supreme Court, is to empower unaccountable and shadowy new interest groups at the expense of the two major political parties, which have played an important and unifying role in our political process. It's a sad day not only for the freedom of speech, as Justice Scalia wrote in his dissent, but also for the political parties.

Northfield, Minn.: The conventional wisdom seemed to be that this law would almost surely be struck down.

What specific assumptions about the justice's likely reasoning turned out to be wrong?

Kenneth W. Starr: I'm not sure I agree with you about the conventional wisdom (though perhaps I've been inside the Beltway for too long!). Many pundits suggested that the challengers had a harder road to hoe with regard to the "soft money" provisions than the "issue advertising" provisions. But with respect to both components of BCRA, both sides had difficult case law to distinguish away. For that reason (among others!), this was certainly one of the most complex cases I've ever had to argue before the Court.

Grinnell, Iowa: Though this law might not make all the changes that are necessary, shouldn't there be some protection from the government to keep the richer candidates from having all the advantages in an election, and isn't this law a step in that direction?

Kenneth W. Starr: BCRA contains a provision known as the "millionaires' provision," which raises the ordinarily applicable contribution limits for a candidate running against another candidate who uses his own money to pay for his campaign. Interestingly, that provision was not challenged by any of the main litigants in the Supreme Court, though it may be subject to subsequent challenge. All of BCRA's other provisions apply equally to rich and poor candidates alike.

Washington, D.C.: Does the Court attempt to reconcile its decision that a candidate can spend an unlimited amount of money on his/her own campaign with its finding here? Doesn't this law make it more difficult for candidates who are not wealthy to raise money?

Kenneth W. Starr: As Justices Scalia and Kennedy note in their dissents, BCRA arguably advantages incumbents at the expense of challengers, since incumbents have been shown to be more adept at raising so-called "hard money" (which is subject only to certain source and amount restrictions). As a practical matter, even with BCRA's "millionaires' provision," it seems quite likely that it will be even more difficult for challengers without substantial personal resources to defeat incumbents than it was before BCRA was enacted.