A District Court Panel Rules on Campaign Finance: What Does the Decision Mean?

Thomas E. Mann

Published for the Brookings Web Site, May 5, 2003

One mystery surrounding the litigation challenging the constitutionality of the Bipartisan Campaign Reform Act of 2002 (BCRA) – why the three-judge DC District Court panel was taking so long to issue its opinion after a December 2002 hearing on the case – was resolved last Friday. The more than 1,600 pages of opinions and orders revealed a fractious and personally contentious panel, one utterly unable to reach consensus on findings of fact or conclusions of law. The per curiam opinion signed by Judges Collen Kollar-Kotelly and Richard J. Leon and the separate memorandum opinions of all three judges, including Judge Karen LeCraft Henderson, together constituted so complex a set of findings and arguments that it is not surprising that early press accounts that the law had been largely overturned bore little resemblance to the court's decision.

In fact, the two pillars of the law – a ban on party soft money for use in federal elections and the regulation of electioneering issue advocacy – remained standing after the decision. The soft-money ban was weakened to apply only to nonfederal funds used to finance public communications that support or oppose federal candidates, not to other mixed activities such as voter registration and get-out-the-vote drives (GOTV). National parties can continue to raise nonfederal funds as long as those funds are not used for what have come to be known as sham issue ads. But federal officeholders and candidates may not raise nonfederal funds, effectively putting the congressional party committees and 527 committees formed by individual members of Congress out of the soft-money business.

Surprisingly, the second pillar of the law was actually strengthened by the court. While the court rejected the bright-line test for determining electioneering communications – broadcast ads running 30 days before a primary and 60 days before a general election that refer to a federal candidate and target that candidate's constituency – it accepted an abbreviated backup definition that extends BCRA's disclosure requirements and source limitations to a potentially much larger set of electioneering communications. Under this decision any communication broadcast by a group that promotes, opposes, attacks, or supports a specific candidate for federal office, regardless of when it is run, may no longer be financed with funds from corporate and union treasuries. Instead, the funding must come from separately segregated funds (or PACs) and be disclosed to the Federal Election Commission.

What is the significance of these two specific decisions and of the entire corpus of findings and conclusions disgorged by the D.C. panel, both for the 2004 election cycle and for the definitive decision on BCRA that the Supreme Court will reach in its current or fall term? Both plaintiffs (Senator Mitch McConnell and others challenging the constitutionality of the new law) and defendants (the Department of Justice, the FEC, and the congressional sponsors of BCRA) have to decide quickly whether to appeal for a stay of the District court's ruling. Defendants are clearly unhappy about the weakening of the soft-money provisions of the law while plaintiffs are concerned that the more liberal definition of electioneering communications could constrain group television advertising campaigns already underway. Their political and legal calculations will perforce be complex. Even without a stay, political actors will tread cautiously in this new and certainly temporary legal world. It seems unlikely that the national party committees, particularly the House and Senate campaign committees, will restart their soft-money raising operations. Prohibitions on soft-money raising by elected officials and on soft-

money spending for candidate-specific issue ads, when combined with uncertainty over what the Supreme Court might ultimately decide, make that a very risky and potentially counterproductive course of action.

More importantly, the District court opinion should be read in terms of how it sets the table for deliberation by the Supreme Court. On this score, defendants of the new law have reason to be encouraged. The three-judge panel was thought by most outside observers to be philosophically opposed to the regulatory approach and reach taken by Congress. Henderson, a Reagan appointee to the D.C. Circuit Court, and Leon, appointed to the D.C. District Court by President George W. Bush, both asked questions at the December hearing hinting that they were skeptical of the constitutionality of the new law. Kollar-Kotelly, a Clinton appointee, did not appear to show her hand. The betting was that the issue advocacy title of BCRA would be overturned by the panel and that parts of the soft-money ban, especially those restricting the activities of state and local parties, could be stricken as well.

It is now apparent that a very different dynamic developed on the panel. Judge Henderson appears to have concluded that the case was straightforward. The statute, in her view, is a wholesale assault on the "fundamental principle . . . inscribed in the First Amendment and repeatedly reaffirmed by the United States Supreme Court – that 'debate on public issues should be uninhibited, robust, and wide-open.'" She suggests that the voluminous record assembled for the case was probably unnecessary given the overriding First Amendment concerns. Her opinion offers a limited set of findings of fact that ignores or dismisses much of the evidence brought to the court and concludes that the major provisions of BCRA are transparently unconstitutional. Interestingly, the one exception is her finding that the prohibition on nonfederal fundraising by federal officeholders is constitutional.

Judge Leon, on the other hand, appears to have wrestled more open-mindedly with the huge body of evidence before the panel. He accepts the characterization of recent campaign finance practice presented by the defendants, namely, in Leon's words, "the use of corporate and union treasury funds, either directly or through soft money donations to political parties, to finance electioneering communications masquerading, predominantly, as 'issue ads.'" Moreover, he finds that "the defendants have more than adequately demonstrated the constitutionally necessary basis for Congress" to remedy this problem. As to the remedies that he affirms, Leon believes "it would make a mockery of existing Supreme Court precedent and the regulatory scheme that it has heretofore blessed, to hold otherwise." On the other hand, Leon rejects elements of BCRA that he finds unconstitutionally infringe on the First Amendment rights of political actors and their supporters.

Judge Kollar-Kotelly, in the longest and most detailed of the individual opinions, accepts most though not all of the facts submitted by the defendants and upholds virtually all of the major pillars of the statute. In reaching her findings of fact and conclusions of law, Kollar-Kotelly explicitly weighs the evidence and arguments of the plaintiffs but in most cases rejects them in favor of those presented by the defendants. Much of her opinion documents her case that BCRA is entirely consistent with Buckley and its progeny and, therefore, not in violation of the First Amendment. Since she shares with Judge Leon (but clearly not Judge Henderson) the view that party soft money and electioneering issue advocacy have undermined the regulatory regime put in place by Congress and upheld by the Supreme Court, a substantial basis existed for joining Leon in a per curiam decision.

Nonetheless, Kollar-Kotelly and Leon part company on the appropriate focus for determining whether Congress has a basis for regulating in the interest of preventing corruption

or the appearance of corruption. Leon concludes that Congress can regulate only those funds that are used for the purpose of directly influencing federal elections. This encompasses party soft money spent on candidate-advocacy public communications and electioneering communications that promote or oppose federal candidates. But it does not include party fundraising for nonfederal or mixed activities. Kollar-Kotelly, on the other hand, believes the appropriate focus is the fundraising process and the risk of corruption or its appearance posed when federal officeholders and party officials solicit large unregulated contributions from corporations, unions, and individuals.

What is the Supreme Court likely to make of these diverse and partially overlapping findings and opinions? In many respects, they are clearly on their own. With no consensual findings of fact from the District court and with the entire trial record available to them, the justices will make their own determination of the facts of the case. To the extent they rely on District court opinions, the justices will be drawn closer to the defendants than the plaintiffs. As to conclusions of law, the justices may give special weight to the fact that a conservative judge reviewing the case before him found an adequate constitutional basis for Congress to regulate party soft money and issue advocacy. It seems unlikely that a majority of the Supreme Court will facially dismiss BCRA in the fashion of Judge Henderson. The important question then is whether they will find compelling the rationale used by Congress to prevent circumvention and uphold the provisions of the law that Judge Leon could not. There is ample evidence and constitutional reasoning in the District Court record for them to do so.