McCONNELL v. FEC

On December 10, 2003, the Supreme Court issued a ruling upholding the two principal features of the Bipartisan Campaign Reform Act of 2002 (BCRA): the control of soft money and the regulation of electioneering communications. The Court found unconstitutional the BCRA's ban on contributions from minors and the so-called "choice provision," which provides that a party committee cannot make both coordinated and independent expenditures on behalf of a candidate after that candidate's general election nomination.1 The Supreme Court's decision affirmed in part and reversed in part the U.S. District Court for the District of Columbia's decision in this matter.

Background

Congress passed the BCRA in order to eliminate soft money donations to national parties and to ensure that electioneering communications immediately before election day are financed with regulated money and properly disclosed to the public. The BCRA, among other things:

- Bans national party committees from raising or spending money outside the limits and prohibitions of the Federal Election Campaign Act (FECA);
- Limits state and local party committees' use of such funds for activities affecting federal elections;
- Prohibits solicitations and donations by national, state and local party committees for §501(c) tax exempt organizations that make expenditures in connection with federal elections and §527 organizations that are not federal political committees or state or local party or candidates' committees;
- Prohibits federal candidates and officeholders from soliciting, receiving, directing, transferring or spending soft money in connection with federal elections and limits their ability to do so in connection with state elections;

- Bans state and local candidates and officers from raising and spending nonfederal funds for public communications that promote, attack, support or oppose a federal candidate;
- Defines and regulates "electioneering communications;"
- Implements the party "choice provision;"
- Increases the hard money contribution limits;
- Permits even higher contribution limits for candidates opposed by "millionaires" who use their own funds for campaign expenditures;
- Defines coordination with a candidate or party committee; and
- Bans minors from making contributions to federal candidates and political party committees.

Most provisions of the BCRA took effect on November 6, 2002. As soon as the BCRA was enacted in March 2002, however, a number of parties filed challenges to the constitutionality of several BCRA provisions, including those listed above. These cases were consolidated around *McConnell v. FEC* and heard by a three-judge panel of the U.S. District Court for the District of Columbia. On May 2, 2003, the District Court determined that certain provisions were constitutional, while a number of others were unconstitutional or nonjusticiable. The District Court issued a stay of its ruling on May 19, 2003, while the case received an expedited appellate review by the Supreme Court.

Supreme Court Decision

National party committees' use of soft money

The BCRA bans national party committees and their agents from soliciting, receiving, directing or spending any funds that are not subject to the FECA's limits, prohibitions and reporting requirements. 2 U.S.C. §§441(a)(1) and (2). The Court found that this provision did not violate the Constitution because the governmental interest in "preventing the actual or apparent corruption of federal candidates and officeholders" was sufficiently important to justify contribution limits. The Court noted that the "record is replete with examples of national party committees' peddling access to federal candidates

and officeholders in exchange for large soft-money donations." The Court was also not persuaded by the plaintiffs' argument that this provision unconstitutionally interferes with national party committees' ability to associate with state and local committees. The Court found that nothing on the face of the provision "prohibits national party officers from sitting down with state and local party committees or candidates to plan and advise how to raise and spend soft money, so long as the national officers do not personally spend, receive, direct, or solicit soft money."

State and local party committees' use of soft money

The Court also upheld the BCRA's limits on state and local party committees' use of soft money for activities affecting federal elections, finding that this provision was closely drawn to match the governmental interest of preventing corruption and the appearance of corruption. 2 U.S.C. §441i(b). This provision of the BCRA provides that state and local party committees cannot use nonfederal funds to finance "federal election activity" (FEA), which is defined as:

1. Voter registration activity during the 120 days before an election;
2. Voter identification, get-out-the vote and generic campaign activity "conducted in connection with an election in which a [federal] candidate. . . appears on the ballot;"
3. A public communication that refers to a clearly identified federal candidate and promotes, attacks, supports or opposes that candidate; and
4. The services of a state committee employee who spends more than 25 percent of his or her compensated time on activities in connection with a federal election.

Instead, party committees must finance these activities with federal funds or, in some cases, they may finance them with a combination of federal and Levin funds, which are a new category of funds defined in the BCRA.2 The Court found that Congress had "concluded from the record that soft money's corrupting influence insinuates itself into the political process not only through national party committees, but also through state committees, which function as an alternate avenue for precisely the same corrupting forces." The

Court concluded that preventing "corrupting activity from shifting wholesale to state committees and thereby eviscerating the FECA clearly qualifies as an important governmental interest."

The Court further determined that the fact that FEA captures some activities that affect campaigns for nonfederal office is not sufficient to render the provision unconstitutionally overbroad. Activities that are considered FEA under the BCRA were also covered by the pre-BCRA allocation rules, and the Court concluded that "[a]s a practical matter, BCRA merely codifies the FEC's allocation regime principles while justifiably adjusting the applicable formulas in order to restore the efficacy of FECA's longstanding restriction on contributions to state and local committees for the purpose of influencing federal elections." The Court determined that the first two types of FEA listed above substantially benefit federal candidates by encouraging like-minded voters to go to the polls. The third type of FEA, involving public communications that support or oppose a federal candidate, directly affects the election in which the candidate is running, and the regulation of funds used for these communications is "closely drawn to the anticorruption interest it is intended to address." Similarly, the final FEA, regarding the payment of party committee staff, is justified by Congress' interest in preventing circumvention of the law.

Moreover, the Court found the Levin amendment to be constitutional insofar as the associational burdens created by its restrictions on transfers of Levin funds between party committees are far outweighed by the need to prevent the circumvention of the overall scheme. Additionally, the Court determined that evidence suggesting that the Levin fund restrictions might prevent parties from amassing the funds needed to make themselves heard was merely speculative.

Party solicitations for and donations to §501(c) and §527 organizations

The BCRA bans national, state and local party committees and their agents from soliciting funds for or making or directing donations to:

- §501(c) tax-exempt organizations that make expenditures in connection with federal elections; and
- §527 organizations, unless they are federal political committees or state or local party or candidate committees. 2 U.S.C. §441i(d).

The Court found the restriction on solicitations to be a valid anticircumvention measure: "Absent this provision, national, state, and local party committees would have significant incentives to mobilize their formidable fundraising apparatuses, including the peddling of access to federal officeholders, into the service of like-minded tax exempt organizations that conduct activities benefiting their candidates." The Court also found that the restrictions on donations were not unconstitutionally overbroad so long as the prohibition was not construed to prevent party committees from donating funds already raised in compliance with the FECA.

Federal candidates and officeholders

The BCRA additionally bars federal candidates and officeholders from soliciting, receiving, directing, transferring or spending soft money in connection with federal elections, and it limits their ability to do so for state and local elections. 2 U.S.C. §§441i(e)(1)(A) and (B). The Court found that these restrictions were closely drawn to prevent the corruption or the appearance of corruption of federal candidates and officeholders while at the same time accommodating these individuals' speech and associational rights.

State and local candidates and officeholders

The BCRA bars state and local candidates and officeholders from raising or spending nonfederal funds to pay for public communications that promote or attack federal candidates. 2 U.S.C. §442i(f). The Court found this to be a valid anticircumvention measure because, rather than limiting the amounts the state candidate/officeholder can spend, it merely places restrictions on the contributions that they can draw on to fund communications that directly affect federal elections. Moreover, by regulating only public communications, the provision "focuses narrowly on those

soft-money donations with the greatest potential to corrupt or give rise to the appearance of corruption of federal candidates and officeholders."

Electioneering communications

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court construed the FECA's disclosure requirements for certain entities' independent expenditures as limited to communications expressly advocating the election or defeat of a clearly identified federal candidate. However, the BCRA defines a new category of communication- "electioneering communications"- that encompasses any broadcast, cable or satellite communication that clearly identifies a federal candidate, airs within 30 days of a federal primary or 60 days of a federal general election and is targeted to the relevant electorate. 2 U.S.C. §434(f)(3)(A)(i). The BCRA requires persons who fund electioneering communications to disclose the source of the funds in certain circumstances and bars the use of corporate and union moneys to fund the communications.

The plaintiffs argued that *Buckley v. Valeo* drew a constitutionally mandated line between express advocacy, which contains "magic words" such as "vote for" or "vote against," and issue advocacy. The Court, however, found that the express advocacy restriction is not a constitutional command: "Both the concept of express advocacy and the class of magic words were born of an effort to avoid constitutional problems of vagueness and overbreadth in the statute before the *Buckley* Court." The Court found that the components of the definition of electioneering communication are objective and easily understood and, thus, "the vagueness objection that persuaded the Buckley Court to limit FECA's reach to express advocacy is inapposite here."

The Court upheld the restrictions on the use of corporate or union treasury funds to finance electioneering communications. Corporations and unions may still finance such communications through their separate segregated funds, and thus the provision does not result in an outright ban on expression. The Court rejected the plaintiffs' claims that arguments in support of the longstanding

ban on express advocacy communications financed by corporations and unions cannot be applied to the larger quantity of speech captured in the definition of electioneering communication. The Court found instead that "issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." The Court further explained that the "justifications for regulating express advocacy apply equally to those ads if they have an electioneering purpose, which the vast majority do."

The Court also upheld the BCRA's requirement for the disclosure of the names of persons who contributed $1,000 or more to the individual or group paying for the communication, finding that "the evidence here did not establish the requisite reasonable probability of harm to any plaintiff group or its members resulting from compelled disclosure." The Court was also not persuaded by the plaintiffs' arguments against the requirement to disclose executory contracts for communications that have not yet aired.[3] The Court determined that the probability that harm might result from requiring such disclosure was outweighed by the public's interest in obtaining full disclosure prior to the election.

"Choice provision"

The Court found that the BCRA's provision requiring political parties to choose between coordinated and independent expenditures on behalf of a candidate once he or she receives the party's nomination places an unconstitutional burden on the parties' right to make unlimited independent expenditures. 2 U.S.C. §441a(d)(4). The Court explained that "[a]lthough the category of burdened speech is limited to independent expenditures for express advocacy-and therefore is relatively small-it plainly is entitled to First Amendment protection. . . . The fact that the provision is cast as a choice rather than an outright prohibition on independent expenditures does not make it constitutional."[4]

Coordination

The BCRA extended the FECA's coordination rules governing expenditures coordinated with a candidate to those coordinated with a party committee and directed the Commission to promulgate rules that did not require "agreement or formal collaboration" in order to establish coordination. 2 U.S.C. §441a(a)(7)(B)(ii). The Court found this provision to be constitutional, noting that the absence of an agreement requirement does not render the provision unconstitutionally vague and that the plaintiffs had provided no evidence to suggest that this definition of coordination has chilled political speech.

Contributions from minors

The Court found the BCRA's ban on political contributions from individuals under 18 years old unconstitutional because it violates the First Amendment rights of minors.

FOOTNOTES:

1 The Court additionally ruled on a number of other challenges from the plaintiffs, including finding their challenge to the so-called Millionaire's Amendment to be nonjusticiable.
2 The limitations, restrictions and reporting requirements for raising Levin funds differ from those for raising federal funds. See 11 CFR 300.31 and 300.32(a)(4). Each state, district and local party committee has a separate Levin fund donation limit, and such committees are not considered to be affiliated for the purposes of determining Levin fund donation limits. Levin funds spent by a given state or local party committee must be raised solely by that particular committee, and these committees cannot raise Levin funds through joint fundraising efforts or accept transfers of Levin funds from other committees. Additionally, these committees cannot accept or use as Levin funds any funds that come from, or in the name of, a national party committee, federal candidate or federal officeholder. 11 CFR 300.31 and 300.34(b). For more information, see the April 2003 *Record* [PDF], and the September 2003 *Record* [PDF].
3 The Court made a similar determination in response to the plaintiffs' challenge of the BCRA's requirement for the disclosure of certain

executory contracts for independent expenditures. 2 U.S.C. §434.
4 The Court also voiced concerns about the fact that for the purposes of the choice provision all political committees established and maintained by a national party and all committees established and maintained by a state party are considered a single committee. 2 U.S.C. §441a(d)(4)(B). The Court determined that as a result "it simply is not the case that each party committee can make a voluntary and independent choice between exercising its right to engage in independent advocacy and taking advantage of the increased limits on coordinated spending under §§315(d)(1)-(3). Instead, the decision resides solely in the hands of the first mover, such that a local party committee can bind both state and national parties to its chosen spending option."

Source: FEC *Record* -- May 2002 [PDF]; June 2002 [PDF]; June 2003 [PDF]; and January 2004 [PDF].