McConnell v. Federal Election Commission— A Sad Day for the Freedom of Speech?

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"This is a sad day for the freedom of speech." So wrote Justice Antonin Scalia concerning the majority opinion in *McConnell v. Federal Election Commission.*[1] The *McConnell* majority narrowly upheld most of the provisions in the Bipartisan Campaign Reform Act of 2002 (BCRA), which had created significant new regulations covering political campaign contributions, advertising, and expenditures. Most notably, the BCRA prohibits national party committees and their agents from soliciting, receiving, directing, or spending any soft money, i.e., money not subject to the restrictions of the Federal Election Campaign Act of 1971 (FECA).[2] In short, the BCRA "takes national parties out of the soft-money business."[3] The BCRA also expanded broadcasters' record-keeping obligations concerning campaign advertising[4] and imposed new rules for candidates seeking "lowest unit charge" advertising rates.[5]

These and other BCRA provisions, according to the Court, were in large measure a constitutionally appropriate attempt to purge national politics of the perceived "pernicious influence of 'big money' campaign contributions."[6] The Court thus upheld most of the BCRA, including provisions that affect media organizations. This article focuses upon the Court's ruling concerning those provisions and discusses the decision's potential aftermath.

Record-Keeping Requirements

The BCRA amended the Communications Act of 1934 (1934 Act) by requiring broadcasters to keep records of requests for political broadcasts and to make those records available to the public.[7] Specifically, under the BCRA, a broadcaster must record and disclose to the public a "complete record of a request to purchase broadcast time" that (1) is made by or on behalf of a legally qualified candidate for public office; (2) refers to a legally qualified candidate or an election to federal office; or (3) otherwise "communicates a message relating to any political matter of national importance," including "a national legislative issue of public importance."[8] The record must reflect whether the broadcaster accepted or rejected the request; the rate charged for the broadcast time; the air date and time; the class of time purchased; the candidate, office, election, or issue to which the ad refers; and the name, contact address, and telephone number of the person purchasing the time.[9]

In *McConnell*, Senator Mitch McConnell (R-Ky.) and other plaintiffs, including the National Association of Broadcasters (NAB),[10] argued that these record-keeping and disclosure requirements imposed onerous, unjustified administrative burdens that violated the First Amendment. The *McConnell* district court agreed and found the requirements unconstitutional.[11] The Supreme Court reversed the district court, upholding the requirements.

Candidate Record-Keeping Requirement Justified

Regarding candidates' requests for broadcast time, Justice Breyer wrote for a majority of the Court that the record-keeping requirements are "virtually identical" to Federal Communications Commission (FCC) regulations that date back to 1938.[12] The FCC has estimated that compliance with its rules entails six to seven hours of work per year by each broadcaster.[13] Comparing that expense "to the many millions of dollars of revenue broadcasters receive from candidates" and numerous other record-keeping requirements that broadcasters face, the Court upheld the regulation.[14]

The Court also rejected the argument that the requirement failed to significantly further any important governmental interest. Public access to records concerning candidate requests, Justice Breyer wrote, is necessary to assure that broadcasters are providing access to the airwaves in an even handed manner and for the lowest unit rate (when applicable).[15] Also, access to such information facilitates verification of candidate compliance with campaign finance regulations.[16] Accordingly, the candidate record-keeping requirement was upheld as constitutional.

Noncandidate and Issue Provisions Also Upheld

A majority of Justices also approved the requirement that broadcasters keep records concerning election-related messages requested by noncandidates. Senator McConnell and the NAB argued that this provision was "particularly intolerable under the First Amendment" because the requirement "forces disclosure to the government of the identity and the message (even if it is never broadcast) of private individuals and groups engaged in advocacy about important, often controversial, social and political issues."[17] In response, Justice Breyer cited reasons similar to those that the Court identified in upholding the candidate-information requirements, i.e., that the data concerning noncandidate requests would be useful in evaluating "broadcasting fairness" and in measuring the amount of money that individuals or groups spend to elect particular candidates.[18]

Finally, the Court also upheld the requirement that broadcasters record and disclose every request for broadcast time concerning national legislative or political issues. The NAB and Senator McConnell argued that this requirement was unconstitutionally vague, but the BCRA's terminology, Justice Breyer wrote, was no more vague than language used to impose other obligations upon broadcasters.[19]

As for whether the issue record-keeping requirement might prove unduly burdensome, Justice Breyer conceded that recording such requests might be more of a burden than recording, for example, every candidate request. But such burdens should be addressed, the

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Court decided, by the FCC in the first instance. "The parties remain free to challenge the provisions, as interpreted by the FCC in regulations, or as otherwise applied," Justice Breyer wrote.[20]

Disclosure Not a Threat

In conclusion, Justice Breyer addressed the possibility, cited in a dissenting opinion, that candidates might wish to keep their political strategies secret before an advertisement's broadcast.[21] The BCRA, Justice Breyer noted, compelled disclosure only of names, addresses, and requests, not of advertising content.[22] Moreover, Justice Breyer noted, the BCRA required disclosure only "as soon as possible," thus leaving room for the FCC to limit premature disclosure.

In any event, Justice Breyer wrote, if the FCC implemented the BCRA in a way that compelled the disclosure of constitutionally protected information, candidates (including the plaintiffs) could challenge the constitutionality of the disclosure rules as applied.[23] But to reject the record-keeping requirements facially, Justice Breyer stated, would launch a "revolution in communications law."[24] Rather than do so, the Court concluded, the disclosure requirements would be affirmed.

Lowest Unit Charge Requirement

The BCRA further amended the 1934 Act by narrowing the field of candidates to whom broadcasters must offer lowest unit charge advertising rates.[25] Under the BCRA, broadcasters are required to offer these low rates to candidates who either (1) provide written certification that they and their authorized committees will "not make any direct reference to another candidate for the same office" in any lowest-unit-rate broadcast, or (2) clearly identify themselves at the end of their broadcasts and state that they approve of the broadcasts.[26] In other words, under the BCRA, broadcasters may elect to charge more than their lowest unit rate for so-called attack ads in which the sponsoring candidates are not identified.

The *McConnell* majority did not reach the question of whether the BCRA's sponsorship-identification requirement for the lowest unit rate is constitutional. During proceedings in the district court, Senator McConnell testified that he planned to run unsigned ads critical of his opponents in the future (and had run such ads in the past).[27] This testimony, Chief Justice Rehnquist wrote for the *McConnell* majority, was insufficient to demonstrate a concrete, actual injury to Senator McConnell. Because the senator's current term does not expire until 2009, the Republican primary in 2008 would be the first election in which he might be denied the lowest unit rate for unsigned ads mentioning his opponents. That potential injury, Chief Justice Rehnquist wrote, was "too remote temporally to satisfy Article III standing."[28]

Dissenting Opinion on Sponsorship Identification

A dissenting opinion, however, indicates that at least three Justices would have voted to uphold the lowest unit price requirements. Justice Stevens, in an opinion that Justices Ginsburg and Breyer joined, wrote that Senator McConnell's plans for 2008 were sufficiently timely to confer standing.[29] Those Justices, therefore, would have reached the merits of his challenge and, Justice Stevens wrote, rejected that challenge.

Broadcasters, Justice Stevens noted, have the option of charging the lowest unit rate for all campaign ads; the BCRA does not require them to screen ads for compliance with the new disclosure requirements unless they charge more than the lowest unit rate for noncomplying ads.[30] But assuming that broadcasters choose to make such distinctions, Justice Stevens wrote, the distinctions would serve "an important—and constitutionally sufficient—purpose."[31] Moreover, Justice Stevens offered, Congress could constitutionally require "all sponsors of attack ads to identify themselves in those ads."[32] Thus, although the *McConnell* majority did not reach the question, at least three of the Justices would have supported the sponsorship-identification requirements if the provision had been addressed.

Other ID Requirements

In any case, both prior legislation and other BCRA provisions impose identification requirements.[33] The FECA required that ads "expressly advocating the election or defeat of a clearly identified candidate" or soliciting contributions identify the sponsor.[34] The BCRA extended the identification requirements to any "electioneering communication," i.e., to any broadcast, cable, or satellite communication (with certain notable exceptions discussed below) that (1) refers to a clearly identified candidate for federal office; (2) is made within sixty days before a general, special, or runoff election for the office sought by the candidate or thirty days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate for the office sought; and (3) in the case of a communication referring to a candidate other than president or vice president, is targeted to the relevant electorate.[35]

Chief Justice Rehnquist's majority opinion found that this extension of the identification requirements was sufficiently related "to the important governmental interest of shedding the light of publicity on campaign financing."[36] Given this finding, it is quite likely that a majority of the Justices would uphold the similar identification requirement for attack ads.

The bottom line? Broadcasters have a green light to charge more than the lowest unit rate for anonymous attack ads. However, because the BCRA requires election communications to contain sponsor identification, broadcasters will rarely have the opportunity to charge more.

Ban on Corporate-Funded Political Speech

The BCRA effectively banned use of a corporation's general funds to pay for electioneering communications. Under FECA, corporations and labor unions could not use their treasuries to finance ads expressly advocating the election or defeat of federal candidates.[37] The BCRA extends that ban to electioneering communications that do not expressly call for the candidate's election or defeat.[38]

This broadening of FECA's ban on corporate funding of political speech, the *McConnell* plaintiffs argued, is unconstitutional under the Court's landmark decision on campaign regulation, *Buckley v. Valeo*.[39] In *Buckley*, the Court found that a statutory restriction on expenditures "relative to a clearly identified can-

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didate" was unduly vague. The vagueness problem, the *Buckley* Court added, could "be avoided only by" applying the restriction to "explicit words of advocacy of election or defeat of a candidate."[40] This holding, the *McConnell* Court explained, "was the product of statutory interpretation rather than a constitutional command."[41] Consequently, *Buckley* did not establish a constitutional impediment to the BCRA's extension of the ban on corporate funding of political speech.

Political Speech Ban Justified

Having dispensed with *Buckley*, the *McConnell* Court readily upheld the BCRA's sweeping ban on corporate-funded political speech. Under the BCRA, the Court explained, "corporations and unions may not use their general treasury funds to finance electioneering communications, but they remain free to organize and administer segregated funds, or PACs, for that purpose."[42] Moreover, the BCRA allows corporations (such as broadcasters) to present news stories, commentaries, or editorials because those items are expressly excluded from the definition of "electioneering communications."[43] The BCRA, therefore, "does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events."[44] Consequently, the Court concluded, the BCRA's extension of the FECA ban on corporate funding of political speech did not unduly burden such speech.

Justice Kennedy Dissents

Justice Kennedy vigorously dissented from this portion of the majority's decision. The BCRA, he wrote, "escalates Congress's discrimination in favor of the speech rights of giant media corporations and against the speech rights of other corporations, both profit and nonprofit."[45] "Unions and corporations, including nonprofit corporations," he added, "now face severe criminal penalties for broadcasting advocacy messages that refer to a clearly identified candidate" during the days before an election.[46] "The exemption for broadcast media companies, moreover, makes the First Amendment problems worse, not better."[47]

Also, according to Justice Kennedy, the fact that a corporation's officers, directors, or employees are free to fund political speech through segregated funds does not remedy the abridgement of the corporation's First Amendment rights because under the BCRA the "corporation *as a corporation* is prohibited from speaking."[48] Moreover, setting up a separate PAC requires the corporation to take special steps that create major disincentives for speech, with the effect falling most heavily on smaller entities that often have the most difficulty bearing the costs of compliance. Even worse, for an organization that has not yet set up a PAC, spontaneous speech that "refers to a clearly identified candidate for Federal office" becomes impossible, even if the group's vital interests are threatened by a piece of legislation pending before Congress on the eve of a federal election.[49]

For all of these reasons, according to Justice Kennedy, the BCRA's ban on corporate funding for political speech should have been struck down. "Never before in our history has the Court upheld a law that suppresses speech to this extent."[50]

Justice Thomas likewise wrote a forceful dissent. Although the *McConnell* majority opinions did not "expressly strip the press of First Amendment protection," Justice Thomas wrote, "there is no principle of law or logic that would prevent the application of the Court's reasoning" to justify "outright regulation of the press."[51] Justice Thomas argued further:

> What is to stop a future Congress from determining that the press is "too influential," and that the "appearance of corruption" is significant when media organizations endorse candidates or run "slanted" or "biased" news stories in favor of candidates or parties? Or, even easier, what is to stop a future Congress from concluding that the availability of unregulated media corporations creates a loophole that allows for easy "circumvention" of the limitations of the current campaign finance laws?[52]

The majority's reasoning, Justice Thomas concluded, places the protections of such landmark opinions as *Miami Herald Publishing Co. v. Tornillo*[53] "in peril."[54] "Nor is there anything in the joint opinion that would prevent Congress from imposing the Fairness Doctrine, not just on radio and television broadcasters, but on the entire media," Justice Thomas wrote.[55] "The press now operates at the whim of Congress."[56]

Regulation of Soft Money

Finally, and as has been widely reported elsewhere, the *McConnell* majority upheld the BCRA's regulation of soft money, i.e., contributions to political parties.

"For nearly 30 years, FECA has placed strict dollar limits and source restrictions on contributions that individuals and other entities can give to national, state, and local party committees for the purpose of influencing a federal election."[57] Those and other restrictions, however, did not apply to contributions to political parties. Thus, prior to the BCRA, "corporate, union, and wealthy individual donors [were] free to contribute substantial sums of soft money to the national parties, which the parties [could] spend for the specific purpose of influencing a particular candidate's federal election."[58]

Candidates exploited the soft-money loophole, according to the *McConnell* majority, to increase their prospects of election; in return, donors created a sense of obligation "on the part of officeholders."[59] Elected officials in turn rewarded their donors, the *McConnell* majority suggested, through "manipulations of the legislative calendar" that led to the failure of generic drug legislation, tort reform, and tobacco legislation.[60] Moreover, national party committees acted as intermediaries in these transactions, according to the Court, "peddling access to federal candidates and officeholders in exchange for large soft-money donations."[61] The BCRA, the Court concluded, was a constitutional attempt to cut off soft-money end runs around the FECA.

***McConnell* Aftermath: What's Next?**

Taken as a whole, the Justices' opinions and the BCRA's text provide some early indications of the legislation's possible consequences for the media and society as a whole. Although the statute's track record is limited, a few possibilities have appeared.

Redirection of Money

One possible result of the legislation is the redirection of money that would otherwise have gone to broadcasters. For example, as discussed above, the BCRA forbids the use of corporate treasuries for electioneering communications. The new law, however, leaves open to corporations the option of using their treasuries to fund campaign advertising in the print media or on the Internet.[62] The *McConnell* majority expressly approved of this distinction, explaining 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 "remedial legislation was needed to stanch that flow of money."[63] Whether that "torrent" will be redirected to spam

e-mail and newspaper ads remains to be seen.

Moreover, soft-money contributions that would have gone to parties might now instead go to other organizations that are largely exempt from the BRCA's and FECA's fundraising restrictions.[64] Ironically, many of these organizations opposed the BCRA. "Even though we were very critical of [the BCRA], we are also beneficiaries of it," said Stephen Moore of the Club for Growth.[65] In January 2004, Moore's group launched an Iowa television campaign critical of Democratic presidential candidate Howard Dean. The $100,000 ad campaign advised Dean to take his "tax-hiking, government-expanding, latte-drinking, sushi-eating, Volvo-driving, *New York Times*-reading, body-piercing, Hollywood-loving, left-wing freak show back to Vermont."[66]

Some groups that might be expected to benefit from the BCRA, however, say that the *McConnell* decision will have little, if any, effect on their 2004 campaign plans.[67] For example, according to the Sierra Club's Margaret Conway, that group's fundraising for the 2004 election has so far remained on par with efforts in past election years.[68]

One problem with the redirection of money from parties to other types of organizations is the resulting effect on campaign finance accountability. As the *National Journal* reported ten days after the *McConnell* decision:

> Now that soft money is verboten for political parties and federal candidates, it is flowing to a new generation of interest groups, many of which have a distinctly partisan tilt. These outside organizations, for the most part, face far fewer public-disclosure requirements than the political parties did. The result may be a campaign finance system that's even less transparent and accountable than the one it replaced.[69]

Avoiding the Disclosure Requirements

Early advertising may become another method of avoiding the BCRA's disclosure requirements, as demonstrated by an organization called Americans for Jobs, Health Care & Progressive Values, which advertised in Iowa.[70] The group's ads emphasized that Howard Dean, as Vermont's governor, supported cuts in Medicare, stood with President Bush in supporting NAFTA, and earned a perfect "A" rating from the National Rifle Association.[71] The ad's supporters appeared to include backers of other Democratic candidates, but the BCRA required no official disclosures as long as the ads ended at least thirty days before the Iowa caucuses.[72] Thus, a widespread television campaign critical of a leading Democratic candidate was broadcast in a key caucus state without disclosure of the information called for in the BCRA.[73] Perhaps such early advertising will become a common method of avoiding the BCRA's disclosure requirements in the future.

Conclusion

The 2004 election may be too early to provide a clear indication of the BCRA's ramifications because groups may just now be learning how to take advantage of and to cope with the legislation.[74] As NAB president Edward O. Fritts observed in December 2003, "This is a complex 300-page opinion that will require extensive evaluation before its full impact is understood."[75] Thus, although Fritts predicted that *McConnell* "will cause substantial changes in the manner in which federal candidates utilize broadcasting to reach the voters,"[76] the decision's effects upon the media—and the political process as a whole—are still to be determined.

Endnotes

1. 124 S. Ct. 619, 720 (2003) (slip op. of Scalia, J., at 3).
2. *See* slip op. of Stevens & O'Connor, JJ., at 21, 23 (citing 2 U.S.C.A. § 441i(a) (Supp. 2003)).
3. *Id.* at 23.
4. *See* 47 U.S.C. § 315(e)(1) (Supp. 2003).
5. *Id.* § 315(b).
6. *See* slip op. of Stevens & O'Connor, JJ., at 3–4.
7. *See* 47 U.S.C. § 315(e).
8. *Id.* § 315(e)(1).
9. *Id.* § 315(e)(2).
10. McConnell and the NAB were both represented in the Supreme Court by Floyd Abrams of Cahill Gordon & Reindel LLP.
11. *See* McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176, 186 (D.D.C. 2003) (per curiam).
12. *See* slip. op. of Breyer, J., at 3 (citing 47 C.F.R. § 73.1943 (2003)).
13. *Id.* at 4.
14. *Id.* at 4–6.
15. *See id.* at 5–6.
16. *See id.* at 6.
17. *See* Brief for Appellants/Cross-Appellees Senator Mitch McConnell et al., McConnell v. F.E.C., No. 02–1674, 2003 WL 21999283, at *74 (U.S. July 8, 2003).
18. *See* slip op. of Breyer, J., at 8–10.
19. *See id.* at 10 (citing, inter alia, 47 U.S.C. § 315(a) (Supp. 2003), which requires broadcasters to afford opportunities for discussion of "issues of public importance").
20. *Id.* at 12.
21. *Id.* at 12 (citing slip op. of Rehnquist, C.J., dissenting, at 14–15). Note that Chief Justice Rehnquist wrote this dissenting opinion concerning the record-keeping requirements but wrote for the Court's majority in rejecting challenges to other BCRA provisions, as discussed more fully elsewhere in this article.
22. *Id.*
23. *Id.* at 12, 14.
24. *Id.* at 15.
25. *See* 47 U.S.C. § 315(b) (Supp. 2003).
26. *Id.*
27. *See* slip op. for the Court by Rehnquist, C.J., at 4.
28. *Id.*
29. *See* slip op. of Stevens, J., at 3.
30. *Id.*
31. *Id.*
32. *Id.* at 4.
33. *Id.* at 9.
34. *See* 2 U.S.C. § 441d(a) (Supp. 2003).
35. *See* 2 U.S.C. § 434(f)(3)(A)(i) (BCRA § 311).
36. *See* slip op. for the Court of Rehnquist, C.J., at 9.
37. *See* 2 U.S.C. § 441b(a).
38. *See* slip op. of Stevens & O'Connor, JJ., at 97.
39. 424 U.S. 1 (1976).
40. *Id.* at 43.
41. *See* slip op. of Stevens & O'Connor, JJ., at 84.
42. *Id.* at 98.
43. *Id.* at 102 (citing 2 U.S.C. § 434(f)(3)(B)(i)) (Supp. 2003).
44. *Id.* (quoting Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 668 (1990)).
45. *See* slip opinion of Kennedy, J., concurring in part and dissenting in part, at 3–4.
46. *Id.* at 40.
47. *Id.* at 46.
48. *See id.* at 48 (quoting Justice Scalia's dissenting opinion in Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990)).
49. *Id.* at 48-50.
50. *Id.* at 52.
51. *See* slip op. of Thomas, J., at 22, 25.
52. *Id.* at 23. Indeed, Justice Thomas noted, the National Rifle Association is said to have already considered the possibility of acquiring a television or radio station in an effort to sidestep the BCRA. *Id.* at 23–24 & n.15. *See also* John Eggerton, *Kerry Takes Aim at "NRA-TV,"* BROADCASTING & CABLE 20 (Dec. 15, 2003) (reporting presidential candidate's concern that NRA might "hijack the airwaves and use their special-interest millions to fund a steady stream of NRA-TV"), *available at* www.lexis.com.
53. 418 U.S. 241 (1974).
54. *See* slip op. of Thomas, J., at 24.

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55. *Id.* at 25.
56. *Id.*
57. *See* slip op. of Stevens & O'Connor, JJ., at 35.
58. *Id.* at 36.
59. *Id.*
60. *Id.* at 40.
61. *Id.* at 41.
62. *See* 2 U.S.C.A. § 434(f)(3)(A) (Supp. 2003).
63. *See* slip op. of Stevens & O'Connor, JJ., at 101.
64. *See, e.g.,* 2 U.S.C. § 441b(c)(2) (Supp. 2003) (ban on corporate electioneering communications not applicable to communication by I.R.C. § 501(c)(4) organization or I.R.C. § 527 political organization); *but see id.* § 441i(d) (parties may not solicit funds for § 501(c)(4) or § 527 organizations) (discussed in slip op. of Stevens & O'Connor, JJ., at 66).
65. *See* Susan Davis, *Club for Growth Launches Anti-Dean, Anti-Dem Campaign*, NAT'L J. CONGRESS DAILY (Jan. 7, 2004).
66. *Id.*
67. *See id.*
68. *Id.*
69. *See* Eliza Newlin Carney, Peter H. Stone & James A. Barnes, *New Rules of the Game*, NAT'L J. (Dec. 20, 2003), *available at* www.lexis.com.
70. *See* Martin Schram, *A Loophole for Attack Ads*, (Scripps Howard News Serv. Dec. 23, 2003, *available at* www.lexis.com.
71. *Id.*
72. *Id.*; *see also* 2 U.S.C. § 434(f)(3)(A)(i)(II)(bb) (Supp. 2003) ("electioneering communications" subject to regulation include, inter alia, ads within thirty days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate).
73. *See* Schram, *supra* note 70.
74. *See* Davis, *supra* note 65 (quoting Benjamin Ginsberg, lawyer who represents Republican party committees).
75. *See* NAB President & CEO Edward O. Fritts, Statement on Supreme Court Decision on Campaign Finance Reform (Dec. 10, 2003), *at* www.nab.org/newsroom/pressrel/statements/S1803.htm.
76. *Id.*