Case at a Glance

Supporters of the Bipartisan Campaign Reform Act of 2002 say that, by banning soft money and cracking down on sham "issue ads," the new law enforces prior campaign reform laws and prevents corporate treasury and union dues money from funding campaigns. The challengers say the law violates the freedom of speech and association and unconstitutionally treads on states' rights to control their own elections.

Can Congress' Latest Attempt at Campaign Finance Reform Pass the Free Speech Test?

by David L. Hudson, Jr.

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ISSUE

Does the Bipartisan Campaign Reform Act of 2002 violate the First Amendment by banning soft money and regulating sham "issue ads"?

FACTS

On September 8, the Supreme Court will convene a special session to hear four hours of oral arguments in consolidated cases involving the constitutionality of various provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA), which was signed into law in March 2002 by President Bush.

Known previously by the names of its congressional sponsors—McCain-Feingold, after Sens. John McCain (R-Ariz.) and Russell Feingold (D-Wis.), and Shays-Meehan, after Reps. Christopher Shays (R-Conn.) and Marty Meehan (D-Mass.)—the law seeks to close loopholes in the existing campaign-finance legal systems:

> Our legislation aims to end the current system in which corporate treasury and union dues money drowns out the voice of individual Americans by banning soft money and closing the sham "issue ad" loophole. By calling sham issue ads what they truly are—very real campaign ads—we enforce the 1907 and 1947 laws and prevent corporate treasury and union dues money from funding campaigns.
>
> —Rep. Christopher Shays

The BCRA's primary goals are to limit soft money and to regulate sham "issue ads" that are really thinly disguised advocacy ads. The term "soft money," though undefined in the federal election laws,

McConnell v. FEC (02-1674)
NRA v. FEC (02-1675)
FEC v. McConnell (02-1676)
McCain v. McConnell (02-1702)
Republican Nat. Committee v. FEC (02-1727)
National Right to Life Committee v. FEC (02-1733)
ACLU v. FEC (02-1734)
Adams v. FEC (02-1740)
Paul v. FEC (02-1747)
California Democratic Party v. FEC (02-1753)
AFL-CIO v. FEC (02-1755)
Chamber of Commerce v. FEC (02-1756)

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September 8, 2003
From: The U.S. District Court for the District of Columbia

generally refers to money raised and spent outside the regulatory structure for federal election campaigns. "Hard money" refers to federally regulated funds subject to strict contribution limits under the Federal Election Campaign Act of 1971.

Title I of the BCRA not only prohibits national political parties from raising soft money but also prohibits state and local political parties from spending soft money on so-called "federal election activity." Title II ends "sham" issue ads by regulating "electioneering communications." The law prohibits corporations and labor unions from directly funding broadcast ads that mention a federal candidate 60 days before a general election and 30 days before a primary election.

Finally, various other provisions of the BCRA impose other restrictions, such as prohibiting contributions by minors (Section 318), requiring broadcasters to disclose political entities' requests for ad time (Section 504), identifying sponsors of ads (Section 311), and requiring candidates to refrain from attack ads if they want the lowest rate for broadcast ads (Section 305).

Section 403(a) of the BCRA requires that constitutional challenges to the law be heard by a special panel of three federal judges with direct review by the United States Supreme Court. Numerous lawsuits were filed by various politicians, nonprofit groups, and other organizations that challenged the law on different grounds, including the First, Fifth, and Tenth Amendments to the Constitution.

In more than 1,600 pages of opinions, the federal court panel—consisting of Judges Karen L. Henderson, Colleen Kollar-Kotelly, and Richard J. Leon—struck down some of the law's provisions, upheld others, and ruled that some claims were nonjusticiable. Judge Henderson sought to strike down most provisions, Judge Kollar-Kotelly sought to uphold most of them, and Judge Leon found himself more in the middle. The panel was united with respect to only six provisions.

The court invalidated much of Section 101, the heart of BCRA's soft money restrictions, and it struck down many of the restrictions on national political party committees. However, it interpreted the statute so as to uphold other parts of Title I and Title II, including portions of the law regulating "electioneering communications"—ads that are designed to affect the outcome of an election.

Both sides appealed various aspects of the ruling to the U.S. Supreme Court.

Case Analysis

The Federal Election Commission (FEC) defends the BCRA by arguing that it is the product of careful and protracted legislative debate. It contends that unregulated soft-money donations and unregulated election-related advertisements thwart the effectiveness of prior campaign-finance reform. It also argues that the law is needed in order to eliminate the potential for corruption caused by the massive influx of soft money into federal elections and the growing use of corporate and labor-union general treasury funds to pay for ads that seek to influence the outcome of federal elections.

The law's challengers counter that these measures violate the First Amendment right of freedom of speech and association and unconstitutionally tread on states' rights to control their own elections.

Title I of the BCRA

Title I of the BCRA generally prohibits national political parties and federal candidates or officials from raising soft money. It also restricts state and local political party committees from spending soft money on activities that are defined as "federal election activity."

The government argues that these soft-money restrictions are necessary because of "abundant record evidence that describes a systemic exchange of large soft-money donations for access to federal office-holders, through arrangements brokered by the parties."

The law's closing of the soft-money loophole "is reasonably designed to prevent actual and apparent corruption of federal office-holders and is therefore consistent with the First Amendment," the FEC writes. The agency points out that the largest soft-money donors gave money to both major political parties. They argue that this shows that the donors are not concerned with spreading their political messages but are merely interested in buying influence and access with federal office-holders.

The national parties raised $741 million in hard money in the 2000 election cycle. Therefore, the challengers say, the loss of soft money will not harm democratic discourse. If national political party committees were not banned from soliciting soft-money donations, the parties could easily circumvent the existing contribution limits in the Federal Campaign Election Act of 1971.

The challengers vigorously dispute this argument: "In reality, defendants' anti-circumvention rationale is no rationale at all. Any currently lawful use of money to affect the political process could be character-

ized as an attempt to 'circumvent' currently existing prohibitions on other uses." They say Congress could easily have crafted a more narrowly tailored provision. For example, the *McConnell* brief contends, Congress could have placed a "cap on the amount of state-regulated funds that could be given to national parties." They point out that Congress could have passed the Hagel Amendment, which would have imposed a $60,000 total limit on donations from any one donor to a national party committee. What Congress did instead, the law's challengers argue, is create legislation that dramatically impacts both federal and state elections.

The challengers further assert that Section 101 deeply intrudes on the associational freedoms of national political parties by prohibiting them from transferring state-regulated funds to state and local committees. State and local parties, while still allowed to spend soft money, may not spend it on "federal election activity." Under the law, this term includes: (1) voter registration activity within 120 days before a federal election; (2) voter identification, get-out-the-vote activities, or generic campaign activities in connection with an election in which a federal candidate appears on the ballot; (3) any public communication that refers to a clearly identifiable candidate for federal office; and (4) all services provided by an employee who devotes more than 25 percent of his or her compensated time to activities in a federal election.

To the law's challengers, "federal election activity" goes far beyond regulating actual federal elections and will affect state and local elections. "This is overkill in the extreme" and "mere wordplay," the *McConnell* challengers write in their brief. They argue that the BCRA will have a great effect on state and local elections.

The challengers also argue that the soft-money provision is an invalid exercise of Congress' power to regulate elections under Article I, Section 4 of the Constitution. "Quite apart from First Amendment concerns, Section 101 should fall in its entirety," they write. "Section 101 massively intrudes into a core area of state sovereignty—the ability of States to regulate their own elections. The Elections Clause authorizes Congress to regulate the financing of federal, not state, campaigns." The Constitution's framers, this argument goes, did not intend for the federal government to regulate state elections.

Title II of the BCRA

The FEC next defends Title II of the BCRA, arguing that its provisions are a necessary response to the vast amount of monies ("hundreds of millions of dollars") poured into federal elections by corporations and labor unions in the form of "electioneering communications."

Title II must be understood, the FEC asserts, against the background of Congress' century-long regulation of corporate financing of elections. It cites the U.S. Supreme Court's statement in *FEC v. Beaumont*, 123 S.Ct. 2200 (2003): "Since 1907, there has been continual congressional attention to corporate political activity."

Furthermore, it says, the Court in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), determined that certain nonprofit corporations could engage in issue ads but not express advocacy ads. After this ruling, corporations and unions circumvented the express advocacy ban and began pouring money into elections in the form of candidate-centered issue ads. "The express-advocacy test is not only easy to circumvent, but it does not accurately identify communications designed to affect candidate elections," the FEC writes.

For this reason, Congress needed to come up with language that would prohibit corporations and unions from deluging the voters with sham "issue" ads. Congress' solution was to limit so-called "electioneering communications." This is the essence of BCRA's Title II. The primary definition of "electioneering communications" is found in Section 201. It consists of four parts: (1) broadcast ads that (2) refer to a clearly identified candidate for federal office, that (3) are distributed within 60 days before a general election or 30 days before a primary, and that (4) are targeted to the identified candidate's electorate. The so-called fallback definition is "any broadcast, cable, or satellite communication that promotes or supports a candidate for office, or attacks or opposes that candidate for that office regardless of whether the communication expressly advocates a vote for or against a candidate."

The FEC says these Title II provisions are not onerous, because corporations and unions can still pay for electioneering communications by establishing either a political action committee or a separate, segregated fund. The segregated-fund option shows that the BCRA is narrowly tailored.

According to the FEC, these provisions do not ban any speech; they merely limit the manner in which a corporation or labor union may finance it. "To avoid the BCRA, an organization need only refrain from identifying a federal candidate in an issue advertisement or avoid the narrow window before the candidate's election or advertising in the

candidate's district," the agency writes. Broadcast media have historically been subject to much greater federal regulation than the print media, the government says.

The challengers, however, attack these "electioneering" definitions. They note that the bottom line of the Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), is that campaign ads that do not expressly advocate the election or defeat of a candidate are valid and cannot be regulated. They contend that, by regulating ads that are not express advocacy ads, Congress has flouted a first principle of *Buckley*. They argue, "To prevail, defendants must not only convince this Court to jettison stare decisis values and overrule *Buckley*, but also persuade the Court to promulgate a new rule prohibiting corporations and unions from engaging in core political speech about issues and candidates."

Other challenged provisions

Two sections of the BCRA, Sections 304 and 319, are called the "millionaire provisions." They allow congressional candidates to accept contributions above the normal limits when the candidate faces an opponent who expends substantial personal funds on his own campaign. In other words, the law gives more fundraising leeway to candidates who face very wealthy opponents. The FEC asserts that the lower court in these cases was correct in ruling the claims against these sections are nonjusticiable, i.e., not properly before the Court.

Section 305 of the BCRA entitles a candidate to benefit from lower costs for broadcast ads if he promises not to make direct reference to his opponent. This is why this provision is called the "attack ad" provision. The lower court ruled that the claim against this provision is also nonjusticiable, primarily because Senator McConnell is not up for re-election until 2008. In any case, the government asserts, the provision does not violate the First Amendment because it does not discriminate on the basis of viewpoint.

The challengers, however, contend that Section 305 is "one of BCRA's most obviously unconstitutional provisions." They argue that it violates the "unconstitutional conditions" doctrine by requiring candidates to refrain from speech in order to receive a governmental benefit. They argue that Section 305 violates one of the most venerated principles of the Court's First Amendment jurisprudence from the famous libel case *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in which the Court wrote that the First Amendment allows "vehement, caustic, and sometimes unpleasantly sharp attacks on … public officials."

Section 504 requires broadcast stations to maintain and make available for public inspection a complete record of requests to purchase broadcast time for political ads. Although this provision was unanimously struck down by the lower court, the government argues that it serves the public interest: "By enabling viewers and listeners to identify the persons actually responsible for communications aimed at a mass audience, those regulations assist the public in evaluating the message transmitted." The *McConnell* challengers counter that it "imposes a wealth of burdensome and invasive requirements upon broadcasters and political speakers alike." They argue that the provision requires disclosing to the government the identity and message of political groups, a requirement that runs counter to another venerated First Amendment decision, *NAACP v. Alabama*, 357 U.S. 449 (1958), which prevented the forced disclosure of NAACP membership lists.

Finally, Section 318 prohibits minors from making contributions to federal candidates or political parties. This provision is necessary, the FEC asserts, in order to prevent wealthy people from donating more money through their children. The government points out that minors do not have the right to vote, so the law "does not meaningfully burden any right that minors have traditionally been understood to possess." The *McConnell* challengers write that "Section 318 is so plainly unconstitutional, it is difficult to know where to start." They note that the Supreme Court has held that minors, like adults, possess First Amendment rights and that there are less restrictive alternatives to a ban that Congress could have considered with respect to minors' contributions.

SIGNIFICANCE

Senators McCain and Feingold first introduced a version of the BCRA in 1997. The Court's decision will thus affect six years of legislative wrangling over the regulation of campaign finance.

The case affords the Court another opportunity to refine, reinterpret, or overrule its seminal decision in campaign-finance regulation—its 1976 decision in *Buckley v. Valeo* that upheld and struck down various portions of the Federal Election Campaign Act of 1971. In that decision, the Court determined that the First Amendment erected high barriers to laws seeking to regulate campaign expenditures but much less insurmountable hurdles with respect to laws regulating campaign contributions.

Like *Lemon v. Kurtzman*, 403 U.S.

602 (1971), in the area of Establishment Clause jurisprudence or *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), in the area of commercial speech, *Buckley* has continued to survive despite being attacked on virtually every side.

Some argue, as the Cato Institute and the Institute for Justice do in their amicus brief, that *Buckley* fails to provide sufficient free-speech protection to political expression, the core type of expression the First Amendment was designed to protect. They write, "A return to First Amendment fundamentals would apply strict scrutiny to all restrictions on political speech and association, including restrictions on campaign contributions, express advocacy, and corporate or union speech."

Others take the view expressed by Supreme Court Justice John Paul Stevens, who wrote in his concurring opinion in *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377 (2000), that "money is property, not speech."

Among the law's many provisions, the "attack ad" provisions and electioneering definition may be the most vulnerable, as they seem to conflict with the express advocacy/issue advocacy distinction in prior law. Other provisions are more likely to be upheld by the Court. It would be a shock if its decision proves to be any more united than the fractured lower-court panel decision in this case.

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Amicus Briefs

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