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Campaign Finance: Constitutional and Legal Issues of Soft Money

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L. Paige Whitaker
American Law Division

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Campaign Finance: Constitutional and Legal Issues of Soft Money

SUMMARY

Prior to enactment of the Bipartisan Campaign Reform Act of 2002 (BCRA), P.L. 107-155, the term “soft money” generally referred to unregulated funds, perceived as resulting from loopholes in the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431 *et seq.* The general intent of BCRA, (effective November 6, 2002), which amends FECA, is to restrict the raising and spending of soft money. This Issue Brief discusses constitutional and legal issues surrounding two major types of soft money that BCRA regulates: political party soft money and soft money used for issue advocacy communications. Corporate and labor union soft money, which FECA exempts from regulation and is not addressed by BCRA, is also discussed.

Prior to BCRA, political party soft money was funds raised by the national parties from sources and in amounts that FECA otherwise prohibited. Such funds were used in part for overhead expenses and issue ads, and then largely transferred to state and local parties, in accordance with the applicable state law, for grassroots and party building activity. As a result of BCRA, FECA now generally prohibits national parties from raising or spending soft money (i.e., funds raised outside the restrictions of FECA). In *McConnell v. FEC*, 124 S. Ct. 619 (2003), the U.S. Supreme Court upheld the constitutionality of these restrictions on party soft money.

Over the last several election cycles, soft money spent for issue advocacy communica-

tions gained great popularity. Issue advocacy typically occurs when a group, such as a for-profit or non-profit corporation or labor union, pays for an advertisement that could be interpreted to favor or disfavor certain candidates, while also serving to inform the public about a policy issue. BCRA prohibits corporations and unions from using treasury funds to fund “electioneering communications,” defined as broadcast, cable or satellite advertisements that “refer to” a federal candidate, 60 days before a general election and 30 days before a primary, and regardless of the source of funding, requires disclosure of an ad’s cost, sponsor, and contributors. In *McConnell v. FEC*, the U.S. Supreme Court upheld the constitutionality of this regulation of “electioneering communications.”

Finally, soft money can be used to pay for certain corporate and labor union activities that are expressly exempt from FECA regulation: (1) communications by a corporation directed at stockholders, executive or administrative personnel and their families or by a labor organization directed at its members and families, on any subject; (2) voter registration and get-out-the-vote activities by a corporation, directed to its stockholders, executive or administrative personnel and their families, or by a labor organization to its members and their families; and (3) the establishment and administration of a political action committee (PAC). The recently enacted BCRA does not address this type of soft money.



MOST RECENT DEVELOPMENTS

On August 19, 2004, by a vote of 4 to 2, the Federal Election Commission (FEC) adopted new regulations to regulate non-party political groups by requiring, under certain circumstances, the use of federally regulated hard money contributions to pay for at least half of their expenses. The new rule, which will take effect in the 2006 election cycle, will regulate certain organizations based on whether their communications soliciting contributions indicate that “any portion of the funds received will be used to support or oppose the election of a clearly identified federal candidate.” If such solicitations are made, the organization would be considered a political committee and would therefore be subject to FEC regulation. The FEC action was taken in response to recent criticism of the activities by certain political organizations filing under Section 527 of the Internal Revenue Code, also known as 527s. (For text of the adopted new rule adopted, *see* Final Rules for Political Committee Status, Draft Proposal, submitted by Commissioners Smith, Weintraub, and Mason at [<http://www.fec.gov/agenda/agenda20040819.html>].)

On December 10, 2003, in *McConnell v. FEC*, 124 S. Ct. 619 (2004), the most comprehensive campaign finance ruling since *Buckley v. Valeo* in 1976, the U.S. Supreme Court upheld against facial constitutional challenges key portions of the Bipartisan Campaign Reform Act of 2002 (BCRA), (P.L. 107-155, also known as the McCain-Feingold or Shays-Meehan campaign finance reform law). A 5 to 4 majority of the Court upheld restrictions on the raising and spending of previously unregulated political party soft money and a prohibition on corporations and labor unions using treasury funds to finance “electioneering communications,” requiring that such ads may only be paid for with corporate and labor union political action committee (PAC) funds. The Court invalidated BCRA’s requirement that parties choose between making independent expenditures or coordinated expenditures on behalf of a candidate and its prohibition on minors age 17 and under making campaign contributions.

BACKGROUND AND ANALYSIS

Definitions of Hard and Soft Money in Federal Elections

Prior to enactment of the Bipartisan Campaign Reform Act of 2002 (BCRA), P.L. 107-155, money for election related activities that was generally raised and spent outside of federal regulation was known as “soft money” or non-federal funds. Soft money was raised and spent in a manner that could affect federal elections, but was unregulated – and legal – since it was not spent directly for or against specific federal candidates. Generally, the intent of BCRA, which amends the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431 *et seq.*, and became effective on November 6, 2002, is to restrict the raising and spending of soft money.

The term “hard money,” has typically been used to refer to funds raised and spent in accordance with the limitations, prohibitions, and reporting requirements of the FECA. *See* 2 U.S.C. §§ 441a, 441b(a). Unlike soft money, hard money may be used in connection with a federal election. Under the FECA, hard money restrictions apply to contributions and expenditures from any “person,” as defined to include, “an individual, partnership,

committee, association, corporation, labor organization, or any other organization or group of persons, but does not include the Federal Government or any authority of the Federal Government.” 2 U.S.C. § 431(11).

This Issue Brief discusses constitutional and legal issues surrounding two major types of soft money that BCRA regulates: political party soft money and soft money used for issue advocacy. Corporate and labor union soft money, which FECA expressly exempts from regulation and BCRA does not address, is also discussed.

Political Party Soft Money

Overview

Before the enactment of BCRA, political party soft money funds were raised by the national parties from sources and in amounts that FECA otherwise prohibited. Such funds were used in part for party overhead expenses and issue ads, and then largely transferred to state and local parties, in accordance with the applicable state law, for grassroots and party building activity. Since the 1979 FECA Amendments, certain grassroots, voter-registration, get-out-the-vote, and generic party-building activities were exempt from FECA coverage. 2 U.S.C. § 431(9)(B)(viii),(ix). In addition, certain Federal Election Commission (FEC) advisory opinions permitted soft money to be used for a portion of activities that promoted both federal and state candidates. (See, e.g., AO 1978-10). Money raised and spent for these activities was in large part unregulated and hence, was considered political party soft money. As a result of the BCRA amendments, the FECA now generally prohibits national party committees from raising or spending soft money by subjecting such funds to the limitations, prohibitions, and reporting requirements of FECA.

Supreme Court Upholds Restrictions on Political Party Soft Money: *McConnell v. FEC*

Title I of BCRA prohibits national party committees and their agents from soliciting, receiving, directing, or spending any soft money, 2 U.S.C. § 441i(a). In addition, Title I prohibits state and local party committees from using soft money for activities that affect federal elections; prohibits parties from soliciting for and donating funds to tax-exempt organizations that spend money in connection with federal elections; prohibits federal candidates and officeholders from receiving, spending, or soliciting soft money in connection with federal elections and restricts their ability to do so in connection with state and local elections; and prevents circumvention of the restrictions on national, state, and local party committees by prohibiting state and local candidates from raising and spending soft money to fund advertisements and other public communications that promote or attack federal candidates, 2 U.S.C. §§ 441i(b), (d), (e), (f).

In *McConnell v. FEC*, plaintiffs challenged Title I based on the First Amendment as well as Art. I, § 4 of the U.S. Constitution, principles of federalism, and the equal protection component of the Due Process Clause of the 14th Amendment. The Supreme Court upheld the constitutionality of all provisions in Title I, finding that its provisions satisfy the First Amendment test applicable to limits on campaign contributions: they are “closely drawn” to

effect the “sufficiently important interest” of preventing corruption and the appearance of corruption. Rejecting plaintiff’s contention that the BCRA restrictions on campaign contributions must be subject to strict scrutiny in evaluating the constitutionality of Title I, the Court applied the less rigorous standard of review – “closely drawn” scrutiny. Citing its landmark 1976 decision, *Buckley v. Valeo*, and its progeny, the Court noted that it has long subjected restrictions on campaign expenditures to closer scrutiny than limits on contributions in view of the comparatively “marginal restriction upon the contributor’s ability to engage in free communication” that contribution limits entail. The Court observed that its treatment of contribution limits is also warranted by the important interests that underlie such restrictions, that is, preventing both actual corruption threatened by large dollar contributions as well as the erosion of public confidence in the electoral process resulting from the appearance of corruption. The Court determined that the lesser standard shows “proper deference to Congress’ ability to weigh competing constitutional interests in an area in which it enjoys particular expertise.” Finally, the Court recognized that during its lengthy consideration of BCRA, Congress properly relied on its authority to regulate in this area, and hence, considerations of *stare decisis* as well as respect for the legislative branch of government provided additional “powerful reasons” for adhering to the treatment of contribution limits that the Court has consistently followed since 1976.

Soft Money Spent On Issue Advocacy

Overview

Over the last several election cycles, soft money spent for issue advocacy communications gained great popularity. Issue advocacy communications are paid for by a group, such as a for-profit or non-profit corporation or labor organization, for advertisements that could be interpreted to favor or disfavor certain candidates, while also serving to inform the public about a policy issue.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court construed FECA’s disclosure and reporting requirements, as well as its expenditure limitations, to apply only to funds used for communications that contain express advocacy of the election or defeat of a clearly identified candidate. Numerous lower courts have since interpreted *Buckley* to stand for the proposition that communications must contain express terms of advocacy, such as “vote for” or “vote against,” in order for regulation of such communications to pass constitutional muster under the First Amendment. Absent express advocacy, lower courts have held, a communication is considered issue advocacy, which is protected by the First Amendment and therefore many not be regulated.

Supreme Court Upholds Prohibition on Using Corporate and Labor Union Treasury Funds to Finance Electioneering Communications: *McConnell v. FEC*

Effectively overturning previous lower court rulings, the *McConnell* Court held that neither the First Amendment nor *Buckley* prohibits BCRA’s regulation of “electioneering communications,” even though electioneering communications, by definition, do not necessarily contain express advocacy. The Court determined that when the *Buckley* Court

distinguished between express and issue advocacy it did so as a matter of statutory interpretation, not constitutional command. Moreover, the Court announced that, by narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, it “did not suggest that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line.” “[T]he presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad,” the Court observed.

While Title II prohibits corporations and labor unions from using their general treasury funds for electioneering communications, the Court observed that they are still free to use separate segregated funds (PACs) to run such ads. Therefore, the Court concluded that it is erroneous to view this provision of BCRA as a “complete ban” on expression rather than simply a regulation. Further, the Court found that the regulation is not overbroad because the “vast majority” of ads that are broadcast within the electioneering communication time period (60 days before a general election and 30 days before a primary) have an electioneering purpose. The Court also rejected plaintiffs’ assertion that the segregated fund requirement for electioneering communications is underinclusive because it only applies to broadcast advertisements and not print or internet communications. Congress is permitted, the Court determined, to take one step at a time to address the problems it identifies as acute. With Title II of BCRA, the Court observed, Congress chose to address the problem of corporations and unions using soft money to finance a “virtual torrent of televised election-related ads” in recent campaigns.

In upholding BCRA’s extension of the prohibition on using treasury funds for financing electioneering communications to non-profit corporations, the Court found that even though the statute does not expressly exempt organizations meeting the criteria established in its 1986 decision in *FEC v. Massachusetts Citizens for Life (MCFL)*, 479 U.S. 238 (1986), it is an insufficient reason to invalidate the entire section. Since *MCFL* had been established Supreme Court precedent for many years prior to enactment of BCRA, the Court assumed that when Congress drafted this section of BCRA, it was well aware that this provision could not validly apply to *MCFL*-type entities. In *MCFL*, the Supreme Court ruled that a publication urging voters to vote for “pro-life” candidates, while also identifying and providing photographs of certain candidates who fit that description, could not be regarded as a “mere discussion of public issues that by their nature raise the names of certain politicians.” Instead, the Court found, the publication “in effect” provided a directive to the reader to vote for the identified candidates and ergo, constituted express advocacy. *Id.* at 249-250.

Issue Advocacy Distinguished from Independent Expenditures

Soft money spent for issue advocacy communications is sometimes confused with independent expenditures. Although both types of expenditures are purportedly independent, (Justice Kennedy argues that, by nature, practically all expenditures are coordinated with a candidate and, thus, cannot be considered independent. *Colorado Republican Committee v. FEC (Colorado I)*, 518 U.S. 604 (1996)(Kennedy, J., concurring in the judgment, dissenting in part), only independent expenditures are subject to the FECA. The *Colorado I* Court held that the First Amendment would prohibit the application of a FECA provision, 2 U.S.C. § 441a(d)(3), limiting political party expenditures made independently and without any coordination with a candidate or his or her campaign. The *Colorado* decision essentially

banned any limitations on political party expenditures when they are made independently of a candidate's campaign. *Colorado I*, 518 U.S. at 614-17. Since a political committee making independent expenditures, however, is still subject to FECA restrictions regarding sources and contribution amounts it may receive from a person (see, e.g., 11 C.F.R. § 110.0(d)), an independent expenditure is not considered soft money.

In *FEC v. Colorado Republican Federal Campaign Committee (Colorado II)*, 533 U.S. 431 (2001), the Supreme Court held that a political party's coordinated expenditures, unlike genuine independent expenditures, may be limited in order to minimize circumvention of the Federal Election Campaign Act's (FECA) contribution limits. While the Court's opinion in *Colorado I* was limited to the constitutionality of the application of FECA's "Party Expenditure Provision," 2 U.S.C. § 441a(d)(3), to an *independent* expenditure by the Colorado Republican Party, in *Colorado II* the Court considered a facial challenge to the constitutionality of the limit on *coordinated* party spending. Persuaded by evidence supporting the FEC's argument, the Court found that coordinated party expenditures are indeed the "functional equivalent" of contributions. *Id.* at 447. Therefore, in its evaluation, the Court applied the same scrutiny to the coordinated "Party Expenditure Provision" that it has applied to other contribution limits: inquiring whether the restriction is "closely drawn" to the "sufficiently important" governmental interest of stemming political corruption. *Id.* at 456. The Court further determined that circumvention of the law through "prearranged or coordinated expenditures amounting to disguised contributions" is a "valid theory of corruption." *Id.* In upholding the limit, the Court noted that "substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law," which, the Court concluded, "shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open." *Id.* at 457.

Corporate and Labor Union Soft Money

Generally, contributions and expenditures by corporations, labor unions, membership organizations, cooperatives, and corporations without capital stock have been prohibited in federal elections. 2 U.S.C. § 441b. FECA, however, provides for three exemptions from this broad prohibition, that is, contributions and expenditures for: (1) communications by a corporation to its stockholders, executive or administrative personnel and their families or by a labor organization to its members or families on any subject; (2) nonpartisan voter registration and get-out-the-vote activities by a corporation aimed at its stockholders and executive and administrative personnel and their families or by a labor organization aimed at its members and their families; and (3) the establishment, administration and solicitation of contributions to a separate segregated fund (commonly known as a political action committee or PAC or SSF) to be utilized for federal election purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock. 2 U.S.C. § 441b(b)(2)(A)-(C); *see also* 11 C.F.R. § 114.1(a)(2)(i)-(iii).

In *Communication Workers of America v. Beck*, 487 U.S. 735 (1988), the Supreme Court held that labor unions are not permitted to spend funds exacted from dues-paying non-union employees under an agency shop agreement for certain activities unrelated to collective bargaining when those employees object to such expenditures. According to the Court, Congress' purpose in providing the union shop was to force employees to bear their

fair share of the costs of labor-management negotiations and collective bargaining activities, but not to force employees to support unrelated labor union political activities they oppose. As a result of *Beck*, non-union employees in an agency shop agreement can request a refund of that portion of their dues used by the union for political activities. Accordingly, if workers exercise their rights under *Beck*, labor unions would lose some soft money funds, which would otherwise be available for election-related expenses. Campaign finance reform legislation that would simply codify the *Beck* decision, without expanding on the Court's ruling, would appear to be constitutional.

Bipartisan Campaign Reform Act of 2002 (BCRA) (P.L. 107-155) (enacted March 27, 2002; effective November 6, 2002)

The following summarizes BCRA provisions addressing political party soft money and soft money spent on issue advocacy, which were upheld as constitutional by the Supreme Court on December 10, 2003 in *McConnell v. FEC*, 124 S. Ct. 619 (2003).

Political Party Soft Money

Prohibits national party committees from soliciting, receiving, directing, transferring, or spending soft money; generally prohibits spending of soft money for a "federal election activity" by state and local party committees, including an association or group of state or local candidates or officials. Prohibits state or local candidates from using soft money for public communications that promote or attack a clearly identified federal candidate, but exempts communications referring to a federal candidate who is also a state or local candidate. Permits state, district or local party committees to use some funds raised under state law for an allocable share (at a 50-50 hard to soft money ratio) of voter registration drives in the last 120 days of a federal election, and voter identification, get-out-the-vote drives, and generic activity if it: (1) does not refer to a federal candidate; (2) does not pay for a broadcast, cable or satellite communication (unless it refers solely to state/local candidates); (3) takes no more than \$10,000 per year from any person for such activity (or less, if state law so limits); and (4) uses only funds raised by that party committee expressly for such purposes, with no transfers from other party committees. Defines "federal election activity" to include (1) voter registration drives in last 120 days of a federal election; (2) voter identification, get-out-the-vote drives, and generic activity in connection with an election in which a federal candidate is on the ballot; and (3) "public communications" that refer to a clearly identified federal candidate and promote, support, attack, or oppose a candidate for that office (regardless of whether it expressly advocates a vote for or against) or services by a state or local party employee who spends at least 25% of paid time in a month on activities in connection with a federal election. Requires disclosure by national parties of all activity (federal and non-federal), and by state and local parties of specified activities, that might affect federal elections; removes building fund exemption.

Issue Advocacy

Creates a new term in federal election law, "electioneering communication," in order to regulate political ads that "refer" to a clearly identified federal candidate, are broadcast

within 30 days of a primary or 60 days of a general election, and for House and Senate elections, are “targeted to the relevant electorate.” Generally, it requires disclosure of disbursements over \$10,000 for such communications, including identification of each donor of \$1,000 or more, and prohibits such communications from being financed with union or certain corporate funds. With respect to corporate funds, it exempts Internal Revenue Code § 501(c)(4) or § 527 tax-exempt corporations from making “electioneering communications” with funds solely donated by individuals who are U.S. citizens or permanent resident aliens, unless the communication is “targeted,” (i.e., it was distributed from a broadcaster or cable or satellite service and is received by 50,000 or more persons in the state or district where the Senate or House election, respectively, is occurring).

FOR ADDITIONAL READING

CRS Electronic Briefing Book on Campaign Finance Reform,
[<http://www.congress.gov/brbk/html/ebcam1.shtml>]

CRS Electronic Briefing Book page, *Tax-Exempt 527 Organizations*,
[<http://www.congress.gov/brbk/html/ebcam32.html>]

CRS Issue Briefs

CRS Issue Brief IB87020. *Campaign Financing*, by Joseph E. Cantor.

CRS Reports

CRS Report 97-973. *Business and Labor Spending in U.S. elections*, by Joseph E. Cantor.

CRS Report RS21511. *Campaign Finance: Brief Overview of McConnell v. FEC*, by L. Paige Whitaker.

CRS Report RL31290. *Campaign Finance Bills Passed in the 107th Congress: Comparison of S. 27 (McCain-Feingold), H.R. 2356 (Shays-Meehan), and Current Law*, by Joseph E. Cantor and L. Paige Whitaker.

CRS Report RS21693. *Campaign Finance Law: The Supreme Court Upholds Key Provisions of BCRA in McConnell v. FEC*, by L. Paige Whitaker.

CRS Report 98-282. *Campaign Finance Reform: a Legal Analysis of Issue and Express Advocacy*, by L. Paige Whitaker.

CRS Report RS20849. *Campaign Finance Reform: Constitutional Issues Raised by Disclosure Requirements*, by L. Paige Whitaker.

CRS Report RS20854. *Campaign Finance Reform and Incentives to Voluntarily Limit Candidate Spending from Personal Funds: Constitutional Issues Raised by Public Subsidies and Variable Contribution Limits*, by L. Paige Whitaker.

CRS Report RL30669. *Campaign Finance Regulation under the First Amendment: Buckley v. Valeo and its Supreme Court progeny*, by L. Paige Whitaker.

CRS Report 97-1040. *Campaign Financing: Highlights and Chronology of Current Federal Law*, by Joseph E. Cantor.

CRS Report RS21725. *IRS Guidelines for Political Advocacy by Exempt 501(c) Organizations: Revenue Ruling 2004-6*, by Erika Lunder.

CRS Report RS21716. *Political Organizations Under Section 527 of the Internal Revenue Code*, by Erika Lunder.

CRS Report RL31288. *Soft Money, Allegations of Political Corruption, and Enron*, by Jack Maskell and L. Paige Whitaker.

CRS Report 97-618. *The Use of Union Dues for Political Purposes: a Legal Analysis*, by L. Paige Whitaker.

Selected World Wide Websites

Federal Election Commission:
[<http://www.fec.gov>]

For access to full text of court decisions:
[<http://www.findlaw.com/cascode/cases.html>]

For access to U.S. Supreme Court BCRA cases page regarding *McConnell v. FEC* litigation:
[<http://www.supremecourtus.gov/bcra/bcra.html>]

For access to *McConnell v. FEC* comprehensive case materials from Stanford Law School:
[<http://www.law.stanford.edu/library/campaignfinance/#case>]

For ongoing tracking of issue advocacy by the Annenberg Public Policy Center of the University of Pennsylvania:
[<http://www.annenbergpublicpolicycenter.org/issueads/>]