

The *McConnell v. FEC* Campaign Finance Decision—a Summary

May 9, 2003

On May 2 the special three-judge court that Congress created to speed constitutional challenges to the Bipartisan Campaign Reform Act (BCRA) issued its long-awaited ruling. The outcome was as complex as BCRA itself. The three judges issued four opinions that totaled more than 1600 pages.

Judge Henderson, who regularly sits on the U.S. Court of Appeals, voted to strike down almost all of BCRA. Judge Kollar-Kotelly, a district court judge, opined that virtually the entire statute is valid. Judge Leon, another district court judge sitting on his first major case, provided the deciding vote in almost each instance. In broad outline, the results were as follows:

- **Soft Money:** National and state political parties have a First Amendment right to raise and spend so-called "soft money" for most purposes, but not for speech that supports or opposes a federal candidate. Federal office holders may not solicit "soft money," but may participate in some fundraising for state and local parties and § 501(c) organizations, subject to complex restrictions.
- **The 30/60 Day Electioneering Rule:** The provision forbidding corporations and unions to fund broadcast ads that refer to a federal candidate 60 days before an election or 30 days before a primary was struck down. But the court created and imposed a new backup rule.
- **The "Neutral Speech" Electioneering Rule:** BCRA provided that, if the 30/60 day rule were struck down, a backup standard would apply. Judges Leon and Kollar-Kotelly struck down part of the backup provision, but permitted the rest to take effect. Hence, corporations and unions may not broadcast ads that are not "neutral" and promote, support, attack or oppose a named federal candidate.
- **Coordination:** Judges Leon and Kollar-Kotelly refused to decide the validity of BCRA's provisions providing that spending may be deemed "coordinated" with a candidate, and hence a "contribution," even if there is no agreement. They ruled that, until the validity of the FEC's new regulations on the same subject is determined, this issue is not "justiciable." Judge Henderson would have struck down this provision.
- **Reporting:** The court sustained various reporting provisions. Because new FEC regulations did not require reporting of spending on ads until the ads had run, the court declined to rule on a BCRA provision that appeared to require reporting before ads ran.

- **Party/Candidate Relations:** A provision requiring national parties to elect between coordinating with candidates and making independent expenditures to support them was struck down.
- **Increased Contribution Limits:** Because no plaintiff had standing to challenge the increased contribution limits established by BCRA, the increased limits remain in effect.
- **Miscellaneous:** All three judges struck down BCRA's attempts to require broadcasters to report "attempts" to purchase air time and to forbid any federal contribution by minors. The court upheld a requirement of detailed disclosures concerning the sponsors of advertising. The court held that no plaintiff had the right to challenge the "Millionaire's provision" and provisions dealing with when candidates should receive the lowest unit rate for advertising.
- **Appeal:** All sides are filing appeals directly to the Supreme Court, which probably will hear argument in September/October. This would allow orderly briefing over the summer, with a decision possible by the end of the year. However, the schedule is still undecided.

Stay

The three-judge ruling took effect immediately. The NRA has filed a motion to suspend the effect of the three-judge court's rulings until the Supreme Court rules. The three-judge court has ordered that other stay motions be filed and opposed immediately. Stay requests go first to the three-judge court, then to the Chief Justice and the Supreme Court.

FEC Reaction

The FEC is considering whether to describe its enforcement intentions pending the Supreme Court's ruling.

Special Cautions

For the time being, corporations and their representatives should exercise special caution with respect to any of the following activities:

- Funding broadcast ads that refer to federal candidates (most members of Congress).
- Contributing "soft money" to political parties (be sure uses of funds are permitted).
- Discussing with candidates or parties any advertising or other activities that might be seen as a "coordinated" effort to affect an election.

Wiley Rein & Fielding LLP represents Senator McConnell, as well as the Chamber of Commerce, the National Association of Manufacturers and the Associated Builders & Contractors in this case. For more information about the firm visit www.wrf.com.