WISCONSIN LEGISLATIVE COUNCIL LEGAL MEMORANDUM

U.S. Supreme Court Case on Campaign Finance: *McConnell v. FEC*

INTRODUCTION

On December 10, 2003, the U.S. Supreme Court released its much-anticipated decision on the constitutionality of the Bipartisan Campaign Reform Act of 2002 (BCRA). In *McConnell v. FEC*, 540 U.S. __ (2003), the U.S. Supreme Court, in a five to four decision, upheld the major provisions of the BCRA.

This memorandum describes the court's decision with respect to two of the major provisions of the BCRA: (1) the regulation of "electioneering communications" or "issue ads"; and (2) the regulation of "soft money." In addition, this memorandum will briefly describe the ramifications of the decision on the regulation of issue ads for state campaign regulation purposes.

BACKGROUND

By way of background, BCRA, enacted in 2002, constituted a major overhaul of the nation's system of financing campaigns for federal office. Upon enactment of BCRA, several plaintiffs brought suit seeking declaratory rulings in federal court that various provisions of BCRA were unconstitutional. The cases were consolidated and assigned to a federal district court consisting of three judges in April 2002. After months of discovery and briefing, the court held oral argument on December 4 and 5, 2002. On May 2, 2003, the court issued its decision consisting of four separate opinions and over 1,600 pages of text. When taken as a whole, the opinions had the effect of upholding a number of aspects of BCRA, striking down others, and modifying some others. On May 19, 2003, however, the court stayed, or suspended, its ruling pending final disposition in the Supreme Court of the United States. Subsequently, the Supreme Court heard oral arguments in the case on September 8, 2003 and, as noted, issued its final ruling on the matter on December 10, 2003.

BCRA'S PROVISIONS: ELECTIONEERING COMMUNICATIONS

BCRA generally requires every person who makes a disbursement for the direct cost of producing and airing "electioneering communications" in an aggregate amount in excess of $10,000 during any calendar year to file with the Federal Election Commission (FEC) a statement containing certain information. Generally, the statement must be filed within 24 hours after reaching the $10,000 aggregate annual disbursement limit and additional reports are due within 24 hours after any additional expenditures aggregating in excess of $10,000 since the last statement was filed. In addition to actual disbursements, a person is treated as having made a disbursement if the person has executed a contract to make a disbursement.

The statement filed with the FEC must include, among other things: (1) the identification of the

person making the disbursement and of any person sharing or exercising direction or control over the activities of such person; (2) the principal place of business of the person making the disbursement if not an individual; (3) the amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made; (4) the election to which the electioneering communication pertains and the names of the candidates identified or to be identified; and generally (5) the names and addresses of individuals contributing $1,000 or more.

BCRA, with some exceptions, defines "electioneering communication" as:

Any broadcast, cable, or satellite communication which--

> *(1) refers to a clearly identified candidate for federal office;*
>
> *(2) is made within--*
>
> > *a. 60 days before a general, special, or runoff election for the office sought by the candidate; or*
> >
> > *b. 30 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 by the candidate; and*
>
> *(3) in the case of a communication which refers to a candidate for an office other than President or Vice-President, is targeted to the relevant electorate.*

In addition to the above-described disclosure requirements, BCRA also effectively prohibits corporations and labor unions from funding electioneering communications from their general treasuries.

<u>THE COURT'S DECISION: ELECTIONEERING COMMUNICATIONS</u>

In upholding BCRA's provisions relating to electioneering communications, the court rejected the argument that its past decisions, primarily *Buckley v. Valeo*, had established a constitutionally mandated line between express advocacy and issue advocacy which protected the latter from government regulation. The court instructed that its "magic words" test, which many lower courts had interpreted to mean that the government could not regulate campaign ads that did not use the "magic words" of "vote for," "vote against," "elect," "defeat," or similar words, was merely a product of statutory interpretation and not a constitutional command. In fact, the court noted that Buckley's magic words test is "functionally meaningless" because it is easily evadable and advertisers would seldom choose to use the "magic words" even if doing so had no legal ramifications. The court pointed out that even though "issue ads" do not explicitly urge viewers to vote for or against a candidate, they are no less clearly intended to influence elections.

Turning to BCRA's electioneering communications disclosure requirements, the court sustained the disclosure requirements because they are intended to provide the electorate with information, deter actual corruption and avoid the appearance thereof, and aid in the gathering of data necessary to enforce more substantive electioneering restrictions. However, the court acknowledged that in some situations, donor disclosure requirements could do unconstitutional harm to, for example, minor parties and independent candidates, if such donor disclosure requirements would cause potential donors to not donate for fear of threats, harassment, or reprisals. In this case, however, none of the plaintiffs could show any harm due to the disclosure requirements.

The court also upheld BCRA's requirement that makers of electioneering communications also disclose contracts to disburse funds to make such communications because such a requirement effectively prevented circumvention of the reporting requirements by timing payments until after the election.

With respect to BCRA's limits on corporations and unions funding electioneering communications from their general treasuries, the court noted that the government's ability to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of a candidate has been firmly embedded in the law since its decision in *Buckley v. Valeo*. The court also pointed out that such a limitation was not a total ban on such communications because corporations and labor unions could still fund such communications through separately administered segregated funds, or political action committees (PACs). Because the court had previously found that there was no real difference between express and issue advocacy, the court concluded that the government could regulate corporate and union use of issue ads.

The court also rejected the argument that the limitation was too broad because it applies to ads that have no electioneering purpose (true issue ads) but are run within the time frames of BCRA. The court pointed out that the vast majority of ads studied and submitted as evidence in the case were intended to have an electioneering purpose, and even if BCRA inhibited some constitutionally protected corporate and union speech, the court would not prohibit enforcement of the law unless the application to protected speech is substantial, especially in light of the law's plainly legitimate applications. The court concluded that the plaintiffs failed to show a substantial burden.

Additionally, the court rejected the claim that the law was underinclusive because it did not apply to all forms of communication. The court said that Congress had the right to address the problem one step at a time, dealing with what it perceives is the biggest problem at the moment.

BCRA'S PROVISIONS: SOFT MONEY

BCRA prohibits national party committees and their agents from soliciting, receiving, directing or spending any soft, or unregulated, money. It also prohibits state and local party committees from using soft money for activities that affect federal elections and prohibits political parties from soliciting and donating funds to tax-exempt organizations that engage in electioneering activities. The law also restricts federal candidates and officeholders from receiving, spending, or soliciting soft money in connection with federal elections and limits the ability to do so in connection with state and local elections. Finally, BCRA prohibits state and local candidates from raising and spending soft money to fund advertisements and other public communications that promote or attack a candidate for federal office.

Plaintiffs challenged these provisions on a variety of constitutional grounds.

THE COURT'S DECISION: SOFT MONEY

In short, the court characterized the complex soft money regulations of BCRA as simply regulating the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders. The court indicated that the main question it had to decide with respect to the soft money regulations of BCRA was whether large soft money contributions to national party committees have a corrupting influence or give rise to the appearance of corruption. The court concluded that both common sense and the record in the case confirmed Congress's belief that such contributions do. The court noted that the evidence submitted to the lower court

showed that parties regularly keep track of soft money contributions, that candidates and officeholders knew who the contributors were, and that the donors made contributions to secure influence over federal officeholders or officials. The court also found evidence that these soft money contributions may have affected the congressional calendar so as to cause Congress to fail to enact high profile legislation. The court noted that the prevention of corruption justifying regulation is not limited to "cash for votes" but extends to "undue influence."

In sum, the court concluded that there was substantial evidence to support Congress's determination that large soft money contributions to national political parties give rise to corruption and the appearance of corruption. Accordingly, the court upheld the soft money bans.

THE COURT'S ISSUE AD RULING AND WISCONSIN

Over the last several sessions, proposals have been introduced in the Wisconsin Legislature to regulate issue ads that use the name or an image of a candidate within a certain period of time prior to an election but which do not specifically advocate the election or defeat of a candidate. The issue ad regulation contained in 2003 Senate Bill 12 is representative of many of these proposals. Among other things, Senate Bill 12 imposes registration and reporting requirements upon committees that, within 60 days of an election, make a communication by a communication media that includes a reference to a candidate at that election, an office to be filled at that election, or a political party. Specifically, if a committee receives any contribution, makes any disbursement, or incurs any obligation to make a disbursement to make such a communication, without cooperation or consultation with a candidate, the committee must report to the Elections Board within 24 hours the name of each candidate who is supported or whose opponent is opposed and the total amount of contributions received, disbursements made, and obligations incurred for such a purpose. The committee must also report the name of the candidate in support of or in opposition to whom the contribution was received, a disbursement made, or the obligation incurred. These reports are used, in part, to determine the amount of supplemental grants certain candidates are eligible to receive in order to respond to these communications. In addition, Senate Bill 12, in conjunction with the state's current ban on corporate contributions, would effectively prohibit corporations from using their general treasury funds for the purpose of making such issue ads.

This regulatory scheme is very similar to that employed in BCRA and upheld in *McConnell v. FEC*. The Supreme Court's ruling in *McConnell v. FEC* clearly opens the door for the regulation of issue ads on the state level. While the form of that regulation will ultimately be up to the Legislature or the Elections Board (which has maintained administrative rules on election-related communications), several things appear clear:

1. The state may regulate election-related communications that do not use the "magic words" of express advocacy, which are made within a certain time period before an election.

2. The state may impose reasonable reporting requirements on groups that run such "issue ads."

3. Any regulation of issue ads which results in corporations or labor unions being prohibited from running such ads with funds from their general treasuries would likely survive constitutional challenge so long as such groups could still engage in such ads through funding made by PACs.

4. Any regulation of such issue ads may require the reporting of contracts to make disbursements prior to their actual disbursement. While such

reporting under various state versions of campaign finance reform, like Senate Bill 12, may result in additional public grants to candidates based upon expenditures that have not yet been made, the constitutional implications of requiring reporting of those obligations appear to have been resolved.

The memorandum was prepared on December 19, 2003, by Robert J. Conlin, Senior Staff Attorney. The information memorandum is not a policy statement of the Joint Legislative Council or its staff.

WISCONSIN LEGISLATIVE COUNCIL
One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536
Telephone: (608) 266-1304 • Fax: (608) 266-3830
Email: leg.council@legis.state.wi.us
http://www.legis.state.wi.us/lc