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Campaign Finance: Constitutional and Legal Issues of Soft Money

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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.* Generally, the intent of BCRA, (effective Nov. 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*, (No. 02-1672), the U.S. Supreme Court will be considering the constitutionality of the BCRA restrictions on party soft money.

Over the last several election cycles, soft money spent for issue advocacy communications 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 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. The prevailing view in the lower courts is that Supreme Court precedent generally holds that regulation of such communications, which do not contain express words of advocacy, is unconstitutional. Likewise, plaintiffs in the pending lawsuit, *McConnell v. FEC*, argue that issue ads are constitutionally protected speech and may not be regulated. Defendants, however, maintain that BCRA provides a constitutional regulation of “sham issue ads,” which are designed to promote the election or defeat of a federal candidate, and should therefore be subject to regulation. The Supreme Court will hear oral argument in this case on September 8, 2003.

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

Shortly after enactment of the Bipartisan Campaign Reform Act of 2002 (BCRA), P.L. 107-155, (effective Nov. 6, 2002), Senator Mitch McConnell and others filed suit in U.S. District Court for the District of Columbia arguing that portions of the new law are unconstitutional. Primary features of the law include restrictions on party soft money and issue advocacy. On May 2, 2003, a three-judge panel of the U.S. District Court for the District of Columbia struck down BCRA's blanket prohibition on the raising of soft money by national parties and the use of soft money by state and local parties, but retained the ban only for public communications that "refer" to clearly identified federal candidates. The panel also retained the prohibition on the raising of soft money by federal candidates and officials. Regarding "electioneering communications," which BCRA prohibits from being funded by corporations and labor unions, the three-judge panel struck down the regulation of all broadcast ads that refer to a clearly identified federal candidates in the last 30 days of a primary or 60 days of a general election, but upheld a portion of the secondary definition of electioneering communication, thus allowing regulation of advertisements that supported or opposed federal candidates, regardless of when they were disseminated. *McConnell v. FEC*, No. 02-CV-0582 (D.D.C. May 2, 2003). On May 19, the district court issued a stay to its ruling, which leaves BCRA, as enacted, in effect until the Supreme Court issues a decision.

On June 5, 2003, the U.S. Supreme Court agreed to expedite its review of BCRA and on September 8, 2003, heard four hours of oral argument. (*McConnell v. FEC*, No. 02-1672). A decision in this case is expected by December 2003.

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.

Selected Case Law

The constitutionality of such restrictions on party soft money is a major issue in the currently pending Supreme Court case, *McConnell v. FEC*, (No. 02-1672). In its landmark decision, *Buckley v. Valeo*, the Supreme Court made it clear that the right to associate is a “basic constitutional freedom,” and that any action that may have the effect of curtailing that freedom to associate would be subject to the strictest judicial scrutiny. 424 U.S. 1, 25 (1976) (*quoting Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)). However, the Court further asserted that the right of political association is not absolute and can be limited by substantial governmental interests such as the prevention of corruption or the prevention of even the appearance of corruption. 424 U.S. at 27-28.

Employing this analysis, the *Buckley* Court determined that limitations on contributions can pass constitutional muster if they are reasonable and only marginally infringe on First Amendment rights in order to stem actual or apparent corruption resulting from *quid pro quo* relationships between contributors and candidates. The Court noted that, unlike an expenditure limitation, a reasonable contribution limitation does “not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.” 424 U.S. at 20-38. Furthermore, the *Buckley* Court found that preventing corruption or the appearance thereof, which can be presented by such *quid pro quo* relationships, would constitute a substantial governmental interest warranting reasonable infringement on First Amendment rights. 424 U.S. 26-27.

In a more recent Supreme Court decision, *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the Supreme Court upheld a Missouri state campaign contribution limits and reaffirmed its landmark 1976 precedent in *Buckley v. Valeo* that the government can regulate campaign contributions. The Court noted that it has consistently found that less justification is required in order to uphold limits on campaign contributions than is required to uphold limits on campaign expenditures. In his dissent, however, Justice Kennedy warned that the Court's decision undermines free speech protections and will add to the proliferation of "covert speech" in the form of soft money.

Pending Lawsuit: *McConnell v. FEC*

In *McConnell v. FEC*, the plaintiffs argued in the district court that the BCRA restrictions on political party soft money are unconstitutional because they significantly burden free speech and association rights under the First Amendment, but are not sufficiently tailored to prevent actual corruption or the appearance thereof. Consolidated Opposition Brief for Plaintiffs at 14-29, *McConnell v. FEC*, No. 02-CV-0582 (D.D.C. 2002). Plaintiffs further maintained that BCRA regulation of the role of national party committees in state and local elections usurps the states' power to regulate such elections in violation of the Tenth Amendment to the Constitution and principles of federalism. *Id.* at 4-14.

Defendants, however, maintained that the prohibitions on political party soft money will stem corruption, in actuality and appearance, that result from *quid pro quo* relationships between large-dollar soft money contributors and federal office candidates who benefit from political party soft money expenditures. Defendant-Intervenors' Excerpts of Brief of Defendants at 19-44, *McConnell v. FEC*, No. 02-CV-0582 (D.D.C. 2002). With regard to BCRA's impact on state and local parties, defendants argued that the restrictions were enacted to serve the same anti-corruption and anti-circumvention purposes that informed the FECA's restrictions on the national parties and only limit the source and amount of money state parties can use to pay for federal election activity. *Id.* at 51-60.

Section 101 of BCRA, which creates a new section in the Federal Election Campaign Act (FECA), Section 323(a), codified at 2 U.S.C. § 441i(a), prohibits national parties from soliciting, receiving, directing, transferring, and spending nonfederal funds, *i.e.*, soft money. On May 2, 2003, in a 2 to 1 split, the *McConnell v. FEC* court upheld the BCRA ban on national parties using nonfederal funds for public communications that "refer" to a clearly identified federal candidate — "regardless of whether a candidate for State or local office is also mentioned or identified" — and that "promotes or supports" or "attacks or opposes" a candidate for that office, "regardless of whether the communication expressly advocates a vote for or against a candidate." No. 02-CV-0582 slip op. at 5-6 (D.D.C., May 2, 2003). However, the court found that the prohibition on national parties soliciting, receiving, directing, transferring, and spending soft money otherwise was unconstitutional. On May 19, 2003, the district court issued a stay to its ruling, which leaves BCRA, as enacted, in effect until the Supreme Court issues a decision.

Section 101 of BCRA creates another new FECA provision, Section 323(b), which prohibits state and local parties from using nonfederal funds (or soft money) for "federal election activities." Section 301(20)(A) of FECA, as amended by BCRA, defines "federal election activities" to include: (i) voter registration drives in the last 120 days of a federal election; (ii) voter identification, Get-Out-The-Vote (GOTV) drives, and generic activity in

connection with an election in which a federal candidate is on the ballot; (iii) public communications that “refer” to a clearly identified federal candidate — “regardless of whether a candidate for State or local office is also mentioned or identified” — and that “promotes or supports” or “attacks or opposes” a candidate for that office, “regardless of whether the communication expressly advocates a vote for or against a candidate”; or (iv) 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. Codified at 2 U.S.C. § 431(20). The *McConnell v. FEC* three-judge court ruled that Section 323(b) of FECA, as amended by BCRA, is constitutional only as applied to Section 301(20)(A)(iii) activities. According to this court ruling, state and local parties would be prohibited from spending nonfederal or soft money on public communications that “refer” to a clearly identified federal candidate — “regardless of whether a candidate for State or local office is also mentioned or identified” — and that “promotes or supports” or “attacks or opposes” a candidate for that office, “regardless of whether the communication expressly advocates a vote for or against a candidate.” However, state and local parties would still be permitted to use soft money for other “federal election activities” including, voter registration, GOTV drives, generic activity in connection with an election where a federal candidate is on the ballot, and services by state or local party employees spending at least 25% of paid time in a month on federal election activities. No. 02-CV-0582 slip op. at 6 (D.D.C., May 2, 2003).

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. The prevailing view in the lower courts is that Supreme Court precedent requires that only those communications that expressly advocate the election or defeat of a clearly identified candidate can be constitutionally regulated; any such communication that does not meet this “express advocacy” standard is constitutionally protected First Amendment speech, which cannot be regulated. Hence, according to most lower courts, issue ads may be paid for with unregulated soft money.

BCRA prohibits corporations and unions from using treasury funds to fund “electioneering communications,” defined as broadcast 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. P.L. 107-155, §§ 201-204.

Selected Case Law

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court generally held that campaign finance limitations apply to “communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.” A footnote to the opinion provides

examples of such “express advocacy”: terms “such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” *Id.* at 44 n.52; see 11 C.F.R. 101.22(a). Communications without these ‘magic words’ are often classified as issue advocacy, thus falling outside the scope of the FECA.

In the 1986 decision of *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, (MCFL), 479 U.S. 238 (1986), the Supreme Court continued to distinguish between issue and express advocacy, holding that an expenditure must constitute express advocacy in order to be subject to the FECA prohibition against corporate use of treasury funds to make an expenditure “in connection with” any federal election. *Id.* at 249-250. In MCFL, the 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.

In *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987), the Ninth Circuit presented the following three-part test to determine whether a communication may be considered issue advocacy:

First, even if it is not presented in the clearest, most explicit language, speech is ‘express’ for the present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed ‘advocacy’ if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be ‘express advocacy of election or defeat of a candidate’ when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action. *Id.* at 864.

However, the trend in the circuit courts appears to be away from the *Furgatch* and FEC definitions toward a more limited interpretation of what type of speech will constitute “express advocacy.” Hence, regulation of fewer types of communications are being upheld as constitutionally permissible and therefore, more “issue ads” are permissibly funded with soft money.

In *Maine Right to Life Committee v. FEC*, 914 F.Supp. 8 (D. Maine 1996), *aff’d per curiam* 98 F.3d 1 (1st. Cir. 1996), *cert. denied*, 522 U.S. 810 (1997), the First Circuit affirmed the district court’s opinion that the FEC surpassed its authority when it included a “reasonable person” standard in its definition of “express advocacy.” The court reasoned that such a standard threatened to infringe upon issue advocacy, an area protected by the First Amendment. *Id.* at 12. The Fourth Circuit reached a similar conclusion in *FEC v. Christian Action Network*, 92 F.3d 1178 (4th Cir. 1997).

In *Vermont Right to Life Committee v. Sorrell*, 216 F.3d 264 (2d Cir. 2000), the Second Circuit Court of Appeals found that state campaign regulations triggering disclosure and reporting requirements of speech that “expressly or **implicitly** advocate[] the success or defeat of a candidate” were facially invalid under the First Amendment because they would result in a regulation of constitutionally protected issue advocacy, (*emphasis added*). In Vermont, the court held that the Supreme Court in *Buckley v. Valeo* had established an

“express advocacy standard” in order to insure that regulations were neither too vague nor intrusive on First Amendment protected issue advocacy. Accordingly, the court determined that by including the term “implicitly,” the regulations extend to advocacy with respect to public issues, in violation of the rule enunciated in *Buckley* and its progeny.

Pending Lawsuit: *McConnell v. FEC*

Similar to the prevailing view in the lower courts, plaintiffs in the currently pending lawsuit challenging the constitutionality of BCRA, *McConnell v. FEC*, argued in the district court that issue ads are constitutionally protected speech that may not be regulated. Plaintiffs maintained that *Buckley* and its progeny clearly enunciate the standard that the government may not regulate political speech beyond express advocacy. Consolidated Opposition Brief for Plaintiffs at 32-41, *McConnell v. FEC*, No. 02-CV-0582 (D.D.C. 2002).

Defendants, on the other hand, argued that the BCRA restrictions on “electioneering communications” are necessary to regulate “sham issue ads,” which are intended and designed to promote the election or defeat of a federal candidate. Defendant-Intervenors’ Excerpts of Brief of Defendants at 66-94, *McConnell v. FEC*, No. 02-CV-0582 (D.D.C. 2002). Often broadcast by corporations and labor unions, defendants argue that such ads violate FECA restrictions on corporate and union spending. *Id.* at 94-119. Therefore, defendants maintained that BCRA was simply an effort by Congress to repair the “gaping holes recently opened in FECA’s coverage.” *Id.* at 106.

On May 2, 2003, the three-judge district court ruled 2 to 1 that the primary definition of “electioneering communication” is unconstitutional and accordingly, ruled that the prohibition on labor unions and corporations (and any persons using funds donated by a corporation or labor union) using treasury funds for “electioneering communications” and the requirement for disclosure to the FEC of spending for all “electioneering communications” would be unconstitutional under the primary definition. The court upheld the backup definition of “electioneering communication,” with the deletion of the last clause, “and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.” Thus the court generally upheld the disclosure requirements and the prohibition on labor unions and corporations funding “electioneering communications” as defined by a portion of the backup definition. No. 02-CV-0582, slip op. at 6 (D.D.C., May 2, 2003). Under this ruling, corporations and labor unions would generally be prohibited from using treasury funds to pay for any broadcast, cable, or satellite communication — *at any time in the election cycle* — which “promotes or supports” or “attacks or opposes” a candidate for that office, “regardless of whether the communication expressly advocates a vote for or against a candidate.” However, on May 9, 2003, the district court issued a stay to its ruling, which leaves BCRA, as enacted, in effect until the Supreme Court issues a decision.

Section 203 of BCRA also contains an exemption to the prohibition on corporations directly funding “electioneering communications,” (*i.e.* using treasury funds instead of funding such advertisements through a PAC) for certain non-profit organizations. Under a portion of Section 203 known as Snowe-Jeffords, (named after its primary sponsors in the Senate), Internal Revenue Code Section 501(c)(4) and 527(e)(1) organizations are permitted to use their general treasury funds for “electioneering communications” so long as the communication is paid for exclusively with funds from individuals who are U.S. citizens,

nationals, or lawfully admitted for permanent residence. Codified at 2 U.S.C. § 441b(c)(2)(2002). The Snowe-Jeffords provision is an expansion of the law as it existed prior to BCRA. Prior to BCRA, the 1986 Supreme Court decision, *FEC v. Massachusetts Citizens for Life (MCFL)*, 479 U.S. 238 (1986), had provided an as-applied exception for non-profit corporations that satisfied certain criteria. In order to satisfy the MCFL criteria, a corporation is required to: (1) be formed for the purpose of promoting political ideas and cannot engage in business activities; (2) have no shareholders or other persons affiliated so that members have no economic disincentive for disassociating with it if they disagree with its political activity; and (3) not be established by a business corporation and cannot accept contributions from business corporations. *Id.* at 264.

Section 204 of BCRA, however, (known as the Wellstone Amendment) effectively withdraws the Snowe-Jeffords exception in Section 203, according to the district court in *McConnell v. FEC*. No. 02-CV-0582, slip op. at 9 (D.D.C., May 2, 2003). As a result of the Wellstone Amendment in Section 204, entities that are organized under Internal Revenue Code Sections 501(c)(4) and 527(e)(1) are *not* permitted to use their general treasury funds for “electioneering communications.” Codified at 2 U.S.C. § 441b(c)(6). As the *McConnell* district court noted, the Wellstone Amendment was codified in a separate portion of BCRA in order to preserve severability. In *McConnell*, the district court struck down the Wellstone Amendment in Section 204 as it applies to corporations that meet the criteria set forth by the Supreme Court in *MCFL*, also known as “*MCFL* corporations.” Hence, under the district court ruling, the prohibition against corporations using treasury funds to pay for “electioneering communications” would apply only to non-*MCFL* corporations. As noted earlier, however, on May 9, 2003 the district court issued a stay to its ruling, which leaves BCRA, as enacted, in effect until the Supreme Court issues a decision.

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 Nov. 6, 2002)

The following summarizes BCRA provisions addressing political party soft money and soft money spent on issue advocacy.

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. If the definition of “electioneering communication” is ruled unconstitutional, the Act provides an alternative definition, based on *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987): a communication promoting, supporting,

attacking, or opposing a candidate, regardless of whether it expressly advocates a vote for or against a candidate and is suggestive of no plausible meaning other than an exhortation to vote for or against a candidate.

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

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

Selected World Wide Web Sites

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:
[<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.appcpenn.org/issueads/>]