



Iowa General Assembly

2003 Legal Updates

Legislative Services Agency – Legal Services Division

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Purpose. Legal update briefings are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative matters of recent court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although a briefing may identify issues for consideration by the General Assembly, a briefing should not be interpreted as advocating any particular course of action.

THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002

Filed by the United State Supreme Court
December 10, 2003

McConnell et al. v. Federal Election Commission et al., No.02-1674

<http://www.supremecourtus.gov/opinions/03pdf/02-1674.pdf>

The Act. The Bipartisan Campaign Reform Act of 2002 (BCRA, also known as the McCain-Feingold campaign finance reform legislation prior to enactment) is the latest of a series of federal enactments attempting to regulate big money campaign contributions. The most significant aspects of the BCRA legislation are found in Titles I and II: Title I regulates the use of “soft money” by political parties, officeholders, and candidates and Title II prohibits corporations and unions from using general treasury funds for certain types of “electioneering communications” which are intended to, or have the effect of, influencing federal elections.

The Litigation. Eleven suits were brought by more than 80 plaintiffs; they were consolidated at the district court level as McConnell v. Federal Election Commission (FEC), 251 F. Supp. 2d 176, 251 F. Supp. 2d 948 (2003). The case was initially heard by a three-judge trial panel of the U.S. District Court for the District of Columbia. That court issued a mixed decision on the law's constitutionality. Using an expedited appeal process, that decision was appealed directly to the United States Supreme Court.

The United States Supreme Court Decision. In a 5-4 decision a very divided Supreme Court upheld every major provision of BCRA. In summarizing the Court's holding on Titles I and II of BCRA, the Supreme Court stated: “We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day. In the main we uphold BCRA's two principal, complementary features: the control of soft money and the regulation of electioneering communications.”

A variety of concurring and dissenting opinions were also filed.

Analysis. The most significant aspects of BCRA and the McConnell opinion are found in Titles I and II and the Court's action in upholding those provisions.

- **Title I, Limitations on “Soft Money.”** BCRA in effect takes the national political parties out of the soft money business. “Soft money” is a contribution made solely for the purpose of influencing non-federal elections, or for mixed-purpose activities such as get-out-the-vote drives which may affect federal elections. Prior to BCRA soft money contributions were not affected by the earlier federal campaign restrictions. Thus nonfederal, or so-called soft money, could be contributed *in addition* to the maximum allowable regulated federal contributions. The state or local restrictions were gradually blurred by interpretations relating to issue advertising. Under these interpretations, soft money could be used to highlight issues, and could even mention a federal candidate or officeholder by name as long as the ad did not *expressly* call for the election or defeat of the federal candidate or officeholder. This interpretation fueled a rise in the solicitation and expenditure of soft money; money spent by the two major political parties was soft money.

Title I of BCRA plugs the soft money loophole by prohibiting national political party committees from soliciting, receiving, or directing a soft money contribution, and by prohibiting state and local political party committees from

using soft money for activities that affect federal elections. Under the Act federal election activity includes voter registration activity during the 120 days preceding a federal election; voter identification, get-out-the-vote and generic activity conducted in connection with a federal election; any public communication that identifies a candidate for federal office and promotes, supports, attacks, or opposes a federal candidate; and the services of a state political party committee employee dedicating 25 percent of the employee's time to federal election activity.

In upholding this restriction against numerous First Amendment freedom of speech challenges, on a 7-2 vote the Court stated that a less rigorous standard of review is applicable to campaign contribution limits. Such limits were held only to a "closely drawn" scrutiny rather than a "strict" scrutiny standard. Citing an earlier opinion, the Court stated: "[U]nlike restrictions on campaign expenditures, contribution limits entail only a marginal restriction on the contributor's ability to engage in free communication." The Court also stated that "...the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits." The Court noted that contribution limits impose serious burdens on free speech only if they are so low as to prevent candidates and political committees from amassing resources necessary for effective advocacy.

- **Title II, Electioneering Communications.** Title II creates a new term, "electioneering communication," defined as any "broadcast, cable or satellite communication that clearly identifies a federal candidate within 60 days of a general election or 30 days of a primary election." Title II prohibits corporations and unions from using general treasury funds for such a communication, although separate segregated funds from their political action committees may be used for this purpose. The use of segregated funds is limited to contributions by stockholders, executive and administrative personnel, and their families. Under previous court interpretations, communications were prohibited only if they expressly advocated the election or defeat of a federal candidate. This contributed to the growth of issue advertisements that might portray a candidate in a favorable or unfavorable light, but do not call for the election or defeat of the candidate.

Opponents of the electioneering restrictions raised a variety of arguments, but the central contention was that an inviolable First Amendment right existed to protect issue advocacy. The Court responded that the First Amendment did not erect a rigid barrier between advocacy and issue advocacy and that a compelling government interest existed in regulating that advocacy. Based on that conclusion, the Court determined issue advertisements broadcast during the 30- or 60-day period before a federal election are the "functional equivalent" of express advocacy and that the burden imposed by the Title II restriction was not excessive in that the Act provided an opportunity for corporations and unions to engage in express advocacy through the use of segregated funds raised only from stockholders and corporate officials.

Title II also expanded reporting requirements requiring the disclosure of the name of persons contributing \$1,000 or more into a segregated fund and requiring disclosure of the name of persons spending more than \$10,000 a year on electioneering communications. Once again, the Court rejected the argument that the First Amendment created a barrier between advocacy and issue advocacy (see above). The Court noted that these disclosure provisions require organizations broadcasting advertisements to reveal their identity so that the public can accurately determine the source of funding. Absent a "reasonable probability" of harm, the Court found that required disclosure did not place an unconstitutional burden on the freedom to associate in support of a particular cause.

Title II places new restrictions on independent expenditures that are controlled by or coordinated with a candidate or the candidate's campaign. Such efforts have long been treated as an indirect contribution and subjected to federal regulation. The Act expands this restriction to coordination with a national, state, or local committee of a political party. Opponents contended the restriction was impermissibly vague, absent a specific agreement of coordination. The Court was unconvinced that a specific agreement was necessary to establish a coordinated campaign, noting that "expenditures made after a 'wink or nod' often will be as useful to the candidate as cash."

- **Iowa Impact.** The McConnell opinion does not impact Iowa's campaign finance disclosure laws. Iowa Code chapter 68A largely involves reporting and recordkeeping requirements; while it contains some restrictions on contributions and contributors, they are not analogous to the federal Bipartisan Campaign Reform Act of 2002. However, future legislation could be affected by this decision since the decision clearly affords less First Amendment protections to campaign and even advocacy contributions than did previous opinions.

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