MCCAIN-FEINGOLD AND THE D.C. DISTRICT COURT

Trevor Potter[*]

Today we've heard a rather heroic attempt at an exhaustive description of what the district court decision in *McConnell v. FEC*[1] held. The bad news is that this entire summary is only temporarily relevant. At a maximum, it is relevant for the six or seven months that it will take the Supreme Court to issue its definitive opinion in this case, assuming the Justices hear the case in early fall and take a couple of months to rule.[2]

Let me focus on a couple of larger-picture aspects of this decision. First is the fact that the district court has perhaps gotten a bum rap. The press is, I think, in disbelief that it could take any court nearly 1700 pages to say anything, and I'd suggest that idea may come from journalistic training that suggests that if it doesn't fit into eight column inches, it's too long. In fact, this was a very complicated case. The court included three judges and four separate decisions—one per curiam, and one for each judge. To understand where the majority lays on any given issue, one has to overlay the decisions to see where the decisions align and where they don't. It was a bit like reading punch-card ballots and holding them up to the light as you try to figure out where the consensus of the court is. Sometimes the judges are helpful, and sometimes they're not. For instance, there's a little nugget buried in Judge Leon's opinion in which he helpfully says that if he agrees with another judge's result and doesn't explicitly disagree with that judge's rationale, then he is adopting that judge's rationale for his own statement of reasons. As a result, you have to go through the Leon decision and figure out where he agrees with a particular

---

[*] Chair and General Counsel, Campaign Legal Center.

[1] 251 F. Supp. 2d 176 (D.D.C.) (three-judge court), *prob. juris. noted*, 123 S. Ct. 2268 (2003) (mem.).

[2] It is also possible that the effect of the district court decision will be even shorter than that, because there has been a blizzard of motions to stay the decision and oppositions to those motions and disputes over what exactly should be stayed. There has already been one excursion to the Supreme Court and back by the National Rifle Association ("NRA"), which sought to get Chief Justice Rehnquist to intervene. Interestingly, the result of that was for the Chief Justice to effectively set a deadline for the district court to decide on a stay by May 20, and to say that he would not rule on a stay while the question was before the district court. But if the district court had not ruled by May 20, the Chief Justice said, the NRA was welcome to come back. The Chief Justice may have been considering the five and one-half months it took the district court to render its decision on the merits and thinking that he didn't want a repeat of that.

judge's vote, but doesn't appear to offer his own rationale, and then figure out which of the other judges' rationales, therefore, have the status of a majority court finding. So it is complicated to go through, but I think it's important to understand that you had three judges approaching this in three different ways, with an apparently difficult working relationship.

For those who have not sorted through the glories of the original footnotes, they have provided a great deal of grist to those who follow federal court proceedings. In one now-famous footnote, Judge Henderson goes out of her way to suggest that in the future, if Congress wants to pass a complicated statute and give it to a three-judge court, it ought to be a three-judge circuit court, and should not include district court judges who presumably are not up to the hard work of construing these standards.[3] The district judges returned fire in their footnotes, in which they essentially say this case is not susceptible to hasty review, and the reason it was given to a three-judge district court is that the judges were expected to come up with lengthy findings of fact and to carefully sift through the record. They point out the case featured a 100,000-plus-page record. In fairness to the district judges, about half of their lengthy decisions is findings of fact. They went through the evidence, the expert reports, the depositions, the cross examinations, the documents, and attempted to sift through that 100,000 pages to produce a little under 2% of that as an opinion. I think the court's process will prove extremely helpful as the Supreme Court looks at what the record actually proves. It's difficult, after all, to imagine the Supreme Court going through that sort of enormous record; that's why a three-judge district court was impaneled to do that piece of the job for them.

There has, of course, been a great deal of discussion about who won this initial phase of the case. When the decision was released late in the afternoon of May 2, the press had very little time to process it before their deadlines for the next day's papers. Typically, the first organization to issue a story was the Associated Press ("AP"), which put out a report suggesting that the Bipartisan Campaign Reform Act of 2002 ("BCRA" or "the Act") had been largely thrown out. Other media organizations, as is typical, based their initial reporting on that misleading AP story. There was, however, a strong counteraction to that by the defendants as they sifted through the opinion, and came to the realization that large portions of the Act had been upheld. I think it's fair to say that the most telling aspect of this is that all sides are, of course, going to appeal. There is no party that was 100% pleased with the district court's opinion. There are wins and losses

[3] *See McConnell*, 251 F. Supp. 2d at 266-67 n.1 (Henderson, J., concurring in the judgment in part and dissenting in part).

throughout.

It seems to me that what ultimately is most important about the district court's opinions, though, is not their constitutional findings. The province of the Supreme Court will be to interpret the Constitution. Many of the findings of the district court are, of course, based on Supreme Court opinions. The district court was required to make those calls in order to proceed with the case. That does not mean, however, that they are going to be in any way dispositive. Indeed, it is certain that the Justices will have their own views of their own opinions and what they mean when presented with this case.

What that means, of course, is that the factual findings in this case are what are important. There again, I believe it is interesting that Judge Henderson, the circuit court judge, goes out of her way to suggest to the Supreme Court that the Justices need not defer, as they normally would, to district court findings. She suggests two reasons. First, she writes that the record is accessible to the Supreme Court because it was a trial on paper, and therefore the Supreme Court need not defer, as is typical, to a lower judge's viewing of a witness's demeanor. Secondly, says Judge Henderson, the judges did not all agree on the findings. Because she disagreed with a number of these findings, she urges the Court to take into account the fact that many of the factual findings were arrived at on a two-to-one basis.

That being the case, the usual standard is that the Supreme Court defers to district court findings unless they are clearly erroneous. And the district court did issue a number of findings that I believe will be very helpful to the defense of the statute when it reaches the Court.

First, I must reveal my bias and say that as I go through this list of favorable findings by the district court, it seems to me that most of these are self-evident; that they would be commonsensical to any sentient person who has read the newspapers over the last five or ten years. Indeed, they are the findings Congress itself made as it was adopting the statute. Nonetheless, what has happened through five months of discovery and culminated in the district court proceeding is that what most people took as obvious has now been reduced to sworn testimony and empirical numbers in formal findings of fact. For example, I picked up a random page of Judge Kollar-Kotelly's decision which contains her Finding 1.77.1. It says: "[Republican National Committee ("RNC")] documents show that the RNC's donor programs offer greater access to federal office holders as the donations grow larger, with the highest level and most personal access offered to the largest soft money donors."[4] That does not strike me as

[4] *McConnell*, 251 F. Supp. 2d at 502 (Kollar-Kotelly, J.) (internal citations omitted).

particularly surprising. But in this litigation, propositions like that were, in fact, strongly contested by the plaintiffs. So I think it is helpful that the court has looked at the arguments on both sides of these key questions—what sort of corruption exists, what is being sold, how soft money is being used, the purpose and effect of corporate and labor "issue advertising"—and has come out with some very specific findings of fact based on this record.

First, the court agrees with the proponents of BCRA that large, unregulated donations by corporations, unions, and wealthy individuals create the appearance of corruption, and they accept the polling data submitted by the Act's defenders. Rather startlingly, these polls indicate that 71% of Americans believe that members of Congress sometimes vote the way donors want—not in itself a big shock. But Americans believe politicians do their donors' bidding even when that is not what most people in their districts want and even when that is not what members of Congress themselves think is best for the country. I think it's astonishing that fully 71% of Americans think their representatives vote against what they think is in the country's best interest because of soft money donations.

There is a series of results like this that the court found credible, and adopted as facts, indicating that the soft money system has fostered an appearance of corruption. That, of course, is what the Supreme Court has said the government has to prove in order to justify its regulation of political contributions in *Buckley*.[5] The court goes on to say that there is evidence of *actual* corruption. The judges reviewed the record and concluded that there is proof that access to federal officeholders is sold to the largest donors—to the highest bidder. There is ample evidence in the record that legislative outcomes are actually affected by soft money donations to party committees. The court therefore ends up concluding that not only is there an *appearance* of a problem with political corruption, but there is, in fact, an *actual* problem with corruption because of large contributions to party committees. That was a fundamental cornerstone of Congress's reasoning in passing BCRA, and the court has affirmed it.

A majority of the district court judges then say that, based on their review of the record, soft money is used by political parties to influence federal elections. In particular, the court found that these unregulated funds are used by the parties to run advertising in federal elections designed to elect one candidate or defeat another. Judge Leon, in particular, writes that the record evidence makes clear that parties have long used corporate and labor soft money donations to

[5] Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

elect or defeat federal candidates,[6] and that party "issue ads" have not only been crafted for the specific purpose of directly affecting federal elections, but they have been very successful in doing just that. So in finding that what Congress called "electioneering communications"—ads featuring federal candidates, targeted to the candidates' electorates at elections time—are intended to influence federal elections, the district court upheld another cornerstone of the congressional reasoning in passing BCRA. And Judge Leon and Judge Kollar-Kotelly say such spending is therefore regulable by Congress. Those, I believe, are going to be the decisional cornerstones that will be helpful to the defense of the Act in the Supreme Court—the findings on corruption, on the use of soft money by the political parties, and on the use of corporate and labor money to fund federal election advertising.

There are a couple of areas where I think the district court went astray. I suspect the Act's opponents have similar lists. In my case, the list focuses on Judge Leon. I should note again that overall, with one or two exceptions, you had a situation where one judge upheld BCRA, one judge struck it down, and Judge Leon was the vote in-between, piece by piece. And he did pick and choose and rewrite.

In particular, I would focus on what I believe to be an indefensible finding: party committees do not influence federal elections when they raise and spend soft money at the state or federal level for anything except "public communications" as defined in the Act. Judge Leon specifically would throw out the Act's requirement that when political party employees spend more than 25% of their time on a federal race, the employees' salaries must be paid with hard money. What that means under Judge Leon's reasoning, as I understand it, is that while parties can't take out ads featuring federal candidates that promote, attack or support those candidates, they can hire a staff of hundreds to go out and work for those same candidates, and pay for all that with soft money raised for that express purpose. As I read the decision, the explanation for this seeming disconnect is that Judge Leon finds it implausible that this sort of spending by parties will actually influence federal elections.

In fact, however, it seems to me that there is a strong record to the contrary, particularly deriving from the election cycles of 1988 and 1992. In those elections, a great deal of soft money was spent—$84 million in 1992—and none of it was spent on advertising featuring federal candidates, which became prevalent later. That $84 million was raised and spent in 1992 to elect or oppose federal candidates, through political party programs designed to do exactly that—to raise

---

[6] *See McConnell*, 251 F. Supp. 2d at 824 (Leon, J.) (finding 37); *id.* at 528-29 (Kollar-Kotelly, J.) (findings 2.26, 2.27).

the soft money, to move it to the state party level, to spend it in target states, to ensure voter turnout. Again, there was nothing illegal about that, but the facts clearly indicate that this activity is designed to influence federal elections. Judge Leon, the deciding vote, found that it did not.

In terms of issue advertising, Judge Leon would rewrite the statute. He disagreed with Congress's conclusion that the best way to reach electioneering communications was through the bright line test, targeted at the period thirty days before a primary and sixty days before a general election. Judge Leon objected on the basis that the thirty- to sixty-day test could be too all-encompassing, accepting the plaintiffs' allegation that the definition would include some advertising that was actually true issue advertising, which receives greater constitutional protection from government regulation. Judge Leon, in his reading of the defendants' *Buying Time* study, ended up concluding that you could read the study to say that 17% or 18% of the advertising in the preelection period was true issue advertising, and he felt that the Act, in regulating those ads, was fatally overbroad.

Having rejected the first standard adopted by Congress, Judge Leon then moved to BCRA's backup standard, which had been proposed on the floor by Senator Arlen Spector during Senate consideration and approved by eighty-two votes. Judge Leon then rewrote Senator Specter's backup definition to remove a portion of it. The provision identifies electioneering communications as ads that "promoted, supported, opposed or attacked" a federal candidate, and were not "capable of any other plausible interpretation except to elect or defeat such a candidate." Judge Leon said that this last phrase was vague, and that it was possible that someone trying to run an ad before an election would not know whether it was "capable of any other plausible interpretation" or not. Accordingly, he struck that portion of the backup definition.

The effect of Judge Leon's revision, though, is a rather broader definition of electioneering communications than Congress had adopted. The definition now covers any advertising paid for with corporate or union treasury funds that promotes, supports, opposes, or attacks a federal candidate, at any time, anywhere. Judge Leon explains that this is, in his view, not a vague standard because all one has to do is determine whether the ad is neutral or not. If it favors one candidate or another, then it's an electioneering communication, and it can't be paid for with corporate or union funds. If it is neutral as to the candidates, then it is not an electioneering communication.

I believe the effect of these two areas of Judge Leon's decision—opening up the soft money loophole for state and federal parties and revising the electioneering communications standard—is to disrupt the coherence of the Congressional statute by selectively rewriting it.

I think that is a problem. It is hard to see how the Act's soft money ban can be effective if there is soft money being raised at the federal level and sent to the states to affect federal elections. That is particularly the case when one considers the new Federal Election Commission ("FEC") rule narrowly defining the ban on solicitation of soft money by federal officeholders. Under the district court's decision, federal office holders can't solicit that soft money, but under the FEC rule, "solicitation" does not include a range of activities such as going to fund-raisers and standing there while soft money is being raised. So in those circumstances, I believe the decision does raise some serious practical problems.

Accordingly, I am hopeful that the Supreme Court will take a different tack than Judge Leon when it takes up these particular aspects of the new law. I am equally hopeful that the Supreme Court will agree with Judge Leon and Judge Kollar-Kotelly in their primary conclusion that the soft money system was corrupt and could be reached by Congress.