Legal Sidebar

Campaign Finance: First Amendment Challenge to Party Soft Money Limits

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A potentially significant campaign finance lawsuit is pending in federal district court. On August 3, 2015, the Louisiana Republican Party and two Louisiana local committees filed suit arguing that provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) that restrict the raising and spending of political party unregulated funds or "soft money" are unconstitutional under the First Amendment.

Background:

"Soft money" is a term used to describe funds that some argue affect federal elections, but are not subject to the limits and source restrictions of federal campaign finance law. As the Supreme Court has observed, BCRA endeavored to take the parties "out of the soft-money business." In general, Title I of BCRA prohibits national parties and their agents from soliciting, receiving, directing, or spending soft money. It further prohibits state and local party committees from spending soft money for "federal election activity"; prohibits parties from soliciting and donating funds to tax-exempt organizations that spend money in connection with federal elections; prohibits federal candidates and officeholders from receiving, spending or soliciting soft money in connection with federal elections, and restricts their ability to do so in connection with state and local elections; and prevents circumvention of the restrictions on parties by prohibiting state and local candidates from raising and spending soft money to fund advertisements and other public communications that promote or attack federal candidates.

In 2003, the Supreme Court upheld the constitutionality of the soft money restrictions in Title I of BCRA against facial challenges. (A facial challenge argues that a statute is unconstitutional in all circumstances, whereas an as-applied challenge argues that a statute, even though generally constitutional, is unconstitutional as it affects a specific plaintiff.) The Court determined that the restrictions satisfy the First Amendment test applicable to limits on campaign contributions, that is, that they are "closely drawn" to effect a "sufficiently important interest." The Court considered the government's interest to be one of preventing corruption and the appearance of corruption, and notably, refused to interpret that interest to encompass only the elimination of cash-for-votes exchanges. In its more recent rulings, however, the Court has announced that only quid pro quo corruption—the notion of a direct exchange of an official act for money—or its appearance constitutes a sufficiently important governmental interest to justify limits on both contributions and expenditures.

Complaint:

In *Republican Party of Louisiana v. Federal Election Commission*, the plaintiffs maintain that provisions in Title I of BCRA restricting "federal election activity," are unconstitutional under the First Amendment, both facially and as applied to independent communications, including those made on the Internet, urging voter registration or voting, and made from an independent-communications-only account ("ICA"). Plaintiffs further argue that, both facially and as applied to the communications listed above, the following provisions of BCRA are unconstitutional: the ban on state and local parties using soft money for federal election activity; the requirement that federally regulated funds be used for fundraising for federal election activity; and the requirement that federal election activity be reported so that federal election activity could no longer be allocated between federal and nonfederal accounts.

In sum, plaintiffs maintain that the challenged provisions of law burden core political speech and association, which is highly protected under the First Amendment. Invoking the Supreme Court's 2014 ruling in *McCutcheon*, the plaintiffs

argue that in order to justify the law, the government must prove a close "fit" to a cognizable governmental interest, and that no such fit exists. Plaintiffs contend that the Supreme Court's most recent case law announces that the prevention of quid pro quo corruption or its appearance is the only interest that can justify campaign finance limits, and that the risk of such corruption does not support the restrictions at issue in this case. Criticizing the Supreme Court's 2003 ruling upholding the party soft money restrictions in BCRA against facial challenges, the plaintiffs argue that there was never any proof of quid pro quo corruption or its appearance in the record of that case that could be attributed to the donation of unregulated money to the parties.

Plaintiffs further argue that spending from an ICA does not pose a quid pro quo risk, much like spending from a "non-contribution account" of a nonconnected PAC (unaffiliated with a corporation or a union). Similar to super PACs, nonconnected PACs may maintain a separate account for making independent expenditures that is permitted to accept unlimited contributions.

To date, the Federal Election Commission has not yet filed a reply in this case.

Looking Ahead:

This case presents a First Amendment challenge to a remaining major provision of BCRA. In the 2010 *Citizens United* ruling, the Supreme Court invalidated the ban on corporations and labor unions using their own funds or "general treasuries" for electioneering communications found in Title II of BCRA. Furthermore, other rulings by the Court have invalidated additional provisions of BCRA as unconstitutional. As discussed above, in contrast to the Court's ruling in 2003 upholding the challenged provisions on their face, the Court's recent case law has limited the governmental interest that can justify a limitation of speech in this context to one of avoiding quid pro quo corruption or its appearance. Therefore, the outcome in this case might turn on whether the government can demonstrate that the challenged provisions of law serve that interest. If ultimately successful, this litigation could result in increased fundraising and spending by the parties.

The plaintiffs have asked that a three-judge court be convened to adjudicate the case. If granted, the Supreme Court has mandatory appellate jurisdiction because BCRA specifies that certain constitutional challenges to any of its provisions first be heard by a three-judge panel in the U.S. District Court for the District of Columbia with direct appeal to the Supreme Court.

For further reading, *see* Campaign Finance: Constitutionality of Limits on Contributions and Expenditures, and The State of Campaign Finance Policy: Recent Developments and Issues for Congress.