

Brennan Center for Justice
Summary of Supreme Court Rulings in
***McConnell v. FEC* (Dec. 10, 2003)**

Core Conclusions from the Court's Decision

- Bans on unrestricted soft money contributions to political parties are constitutional.
- Electioneering communications can be regulated to the same extent as express advocacy, even though they do not contain “magic words.” The “magic words” test is not constitutionally required.
- Regimes that define electioneering communications in terms of referring to candidates within 60 days of a general election or 30 days of a primary election are constitutional.

General Analysis

- The Supreme Court's decision represents a major victory for the campaign finance reform movement. The Supreme Court upheld all of the most important provisions of the Bipartisan Campaign Reform Act (“BCRA”), closing the soft money loophole and permitting regulation of sham issue ads.
- The Court decided every issue by a clear majority, although there were dissents by various justices. Furthermore, the reasoning and language of the principal majority opinion is very strong.
- The case is over. The Supreme Court's decision does not require a remand or any further proceedings. The essential portions of BCRA were upheld without the need for any further consideration and will be in force during the upcoming election cycle.
- The Supreme Court emphasized the authority of Congress to engage in incremental legislative change to adjust the campaign finance laws to changing circumstances and the most pressing problems. The Supreme Court's deference to the political judgments of Congress provides strong support for defending campaign finance laws in general, especially against claims that laws are underinclusive.
- The Supreme Court's decision provides clear guidance that can be effectively used to draft constitutionally sound campaign finance laws at the state level, and it will also bolster the defense of state laws already on the books.

Soft Money (Title I)

With regards to the restrictions on soft money (donations to political parties in unregulated amounts from any source), the Supreme Court:

- Upheld restrictions on national or state party use of soft money to fund advertisements, in any media, which clearly identify a federal candidate and promote or support a candidate or attack or oppose a candidate, regardless of whether the advertisements use “magic words.” BCRA § 101(a).

- Upheld a ban on federal officeholders’ raising or using soft money. BCRA § 101(a).
- Upheld a ban on soft money use by state officeholders or candidates to fund any public communication that identifies a candidate for federal office and promotes or opposes such a candidate. BCRA § 101(a).
- Upheld restrictions on national or state party use of soft money for non-federal purposes or mixed federal/non-federal purposes. BCRA § 101(a).
- Upheld restrictions on national or state party use of soft money on voter registration activities, voter identification, get-out-the-vote activity, or generic campaign activity, and on services provided by an employee of a State, district, or local committee who spends more than 25 percent of that employee’s compensated time on activities in connection with a federal election. BCRA § 101(a).
- Upheld a ban on national, state, or local parties giving money to nonprofit groups that spend money on federal elections, but construed this restriction to apply only to contributions made with soft money. BCRA § 101(a).

Electioneering Communications (Title II)

BCRA contained two definitions of “electioneering communication.” The primary definition used a bright-line test (broadcast, cable, or satellite ads that refer to a candidate, air within 60 days of the election or 30 days of the primary, and are targeted to the voters in the candidate’s district). BCRA also provided that, if the primary definition were found unconstitutional, a secondary, backup definition would apply instead. With regard to the electioneering communications provisions, the Supreme Court:

- Upheld the primary definition of “electioneering communication.” BCRA § 201(a). In doing so, the Court established that the “magic-words requirement is functionally meaningless” and not constitutionally required. Stevens-O'Connor Maj. Op. at 86.
- Did not reach the issue of whether the secondary definition was constitutional because the primary definition was upheld.
- Upheld a ban on the use of corporate or union treasury funds to fund electioneering communications. BCRA § 203(a).
- Upheld applying the ban on corporate electioneering communications to nonprofit advocacy groups, BCRA § 204, except for a narrow category of advocacy groups that are purely political, accept no corporate or union money and are not corporate or union controlled, and provide no economic benefit to members (so-called *MCFL* organizations).
- Upheld requirement that the sponsor of an electioneering communication disclose donors who gave more than \$1,000 to the group that ran the electioneering communication,

BCRA § 201(a), so ad sponsors cannot hide behind misleading names like “Citizens for Better Medicare,” which was actually a lobbying group for the pharmaceutical industry.

- Upheld a requirement that funders of electioneering communications disclose their expenditures when they sign contracts to produce or broadcast ads, even if they do not actually make payments until after the election. Thus, the information voters need will be available while it is still relevant. BCRA § 201(a).

Coordination (Title II)

With regard to the coordination provisions, the Supreme Court:

- Upheld treating third-party expenditures coordinated with party committees as contributions to those committees. BCRA § 202.
- Struck down the requirement that parties choose between making expenditures coordinated with candidates and making uncoordinated expenditures of unlimited amounts. BCRA § 213. The Court did not hold that requiring parties to make the choice was inherently improper. The problem was that once a state or local party made the choice, its decision was binding on the national party and all of the other state and local affiliates. The Court left open the possibility that a revised version that did not give such power to one entity to bind dozens of others could survive constitutional review.
- Upheld the requirement that the Federal Election Commission redraft its regulations and held that the specific regulations that the FEC has adopted in response were not yet reviewable. BCRA § 214(b)-(c).

Miscellaneous (Titles III, IV, and V)

With regard to other provisions, the Supreme Court:

- Upheld a requirement that the sponsor of an election-related ad (whether or not broadcast) identify itself in the ad. BCRA § 311.
- Allowed the “Millionaire Provisions” to stand (held not yet reviewable). BCRA § 304, 316, 319.
- Allowed the higher contribution limits to stand (held not reviewable). BCRA § 307.
- Struck down a ban on contributions by minors. BCRA § 318. The Court’s decision focused on the breadth of the ban and the lack of any showing that it was narrowly tailored to a real problem, such as parents’ using their children as conduits to evade contribution limits.
- Upheld requirements for record-keeping and disclosure of information about broadcast ads. BCRA § 504.

Implications for Advocates

- You CAN regulate sham issue ads.
- You CAN limit or ban soft money contributions to parties.
- You CAN require disclosure of planned spending for a campaign ad, once there is a contract, even before the money is spent or an ad is run.
- You CAN require disclosure of a sponsor on an ad.

If you are interested in developing new campaign finance reform legislation at a state or local level, the Brennan Center for Justice can provide counseling and drafting assistance. Please contact us at (212) 998-6730 or brennan.center@nyu.edu.

Our analysis of the Supreme Court's decision will also appear in our new edition of *Writing Reform*, the Brennan Center's guide to drafting state and local campaign finance laws. The new edition will be available soon.