Free Speech & Election Law

Campaign Finance Reform in the Supreme Court: Selections from the Federalist Society's 2003 National Lawyers Convention*

The Honorable Trevor Potter, Caplin & Drysdale
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MR. POTTER: Thank you very much, Judge. It's a pleasure to be here. I recognize the context of this discussion. I understand that not everybody in the room is already sold on the virtues of BCRA. I don't know how it is that Ken Starr talks me into these settings where I feel slightly as if I'm about to be scalped. But I will do my best nonetheless to raise some questions on your mind that might upset whatever certainties you have that this law is facially a bad idea. I personally think the founding fathers would be appalled by the soft money system that has led to this law, so that's probably a good place to start. What I'd like to do is lay out for you initially and briefly what it is that the Supreme Court has before it now by way of a description of the system, the evidence of corruption, and the arguments before it.

The soft money system begins with a law enacted in 1907, almost a century ago, prohibiting corporate involvement in federal elections, corporate contributions to political candidates and parties. That law was then revised and extended in 1974 as part of the post-Watergate reforms. Up until the late '70s, it was interpreted to mean exactly what it had said, which is that corporations (and separately from the 1947 law, unions) could not give funds to national party committees.

However, the Federal Election Commission, starting in the late '70s, responding to advisory opinion requests, first said that it was permissible for state parties to accept corporate funds and spend them on state activities such as registering people to vote, even though those state activities might also have some incidental affect on federal elections. Less obviously, the Commission then said, "Well, if state parties can do that, we suppose it's all right for national parties to take money that can't be spent in federal elections from sources like corporations and unions and put it in a separate account, provided they spend it on non-federal activities like state elections." That permission was extended to the national House and Senate Campaign Committees, even though their stated purpose is simply to elect federal candidates, their members.

Running forward over a period of years, that system went from what I have just described to a very different spectacle, highlighted for everybody in this room, I think, by the activities in connection with the Clinton Reelection Campaign in 1996. There you had, as reported by the Thompson Committee, fundraising by an incumbent president in the White House, with the famous sleepovers and the seats on Air Force One and the rest of it, of very large sums of money from individuals, corporations, and unions. That money was raised for the party committees and spent on advertising featuring the party's presidential candidate talking about how terrible a person called Dole-Gingrich was. And those ads, the targeting of those ads and the content, were approved by the party's nominee. All of this, mind you, from money that's not spent in federal elections. Senator Thompson filed an *amicus* brief with the Court and laid out, again, the findings of his committee.

The culmination of it, from a legal viewpoint, is epitomized by the Clinton 2000 Joint Committee, a fundraising committee created by now-Senator Clinton in New York, which had her raising contributions, at $100,000 a contribution, at a time when her campaign could only accept $1,000 per donor. That money was then split between her committee-to-elect, the state party, and the national party. And all of that money was spent on broadcast ads, created in some cases by the same advertising agency and by the same media advisors who were advising her, and those ads featured her talking about New York issues.

So, we had gone from, "Yes, a state party in Illinois can raise money and spend it on state elections," to "a federal candidate can raise unlimited contributions and contributions from corporations and unions which by law cannot participate in federal elections, and Federal candidates control the spending, and have the spending be advertising featuring them." And somehow, it was outside of the existing constitutionally-approved limits on spending and contributions in federal elections. Five hundred million dollars was raised and spent in this way through the National Party Committees alone in 2000. So, that's the problem, if I can define the problem in soft money being the raising and spending of these corporate and union funds outside of federal limits, and the spending of it on federal election activities.

Why is that a problem? Well, the problem was corruption and the appearance of corruption. The Supreme Court has said that it is permissible for Congress to regulate to prevent corruption and the appearance of corruption in federal campaigns. Some of the justices in majority opinions noted that in their view, it is self-evident that raising and spending large sums of money is potentially corrupting when done by federal office-holders and candidates. Again, we have the record of the Thompson hearing, with the types of people who were raising money seeking specific legislative outcomes, testimony about the White House being a turnstile, where you put your money in and you get your action out the other end, etc. Granted, there were complaints that it was a faulty, corrupt turnstile because it didn't always pro-

duce the result that was paid for. But that doesn't necessarily mean that the system is going to appear any less corrupt. We have first-person testimony from current and former House and Senate members about the pressure to vote based on large donations, about specific attempts to move legislation because of the identity of donors to party committees; testimony that the entire party legislative agenda in Congress was affected by these large donations. Remember, again, that House and Senate election committees are comprised of members of the House and Senate, so they had a very personal interest in what was given to those committees.

In addition to that testimony, there was evidence presented in the case involving charities. Specifically, the instance you may recall from the press, of $1 million being offered to President Clinton during his reelection campaign, which was then diverted by the White House to a 501(c)(3) charity, which could use it for get-out-the-vote activity. And on the Republican side, evidence that foreign nationals and Hong Kong contributors played their own part. They had given substantially to a 501(c)(3) created by actions of the officials of the Republican National Committee.

So, what's presented before the Court is a system that allows these large contributions, and the evidence of the problems—the potential for corruption, and in some instances the actual corruption—that Congress pointed to in saying, "We need to change this funding system." The solution that the Court is currently looking at in this area is essentially two-fold. In terms of the national parties, the new law has a ban on national party committees accepting, depositing, raising, and transferring soft money contributions. That includes, any money not permitted in federal elections, from corporations, from unions, or in excess of party limits. It's not often focused on, but I would note that the new law raised the amount that individuals can give to party committees, raised the aggregate, as well, of what individuals can give in a given year. I think that's one of the reasons why party hard money fundraising, since the new law, has done substantially better than before the law, because the limits are higher for hard money.

But, in any case, no soft money may now go to the party committees. Party committees may continue as they did before to involve themselves in state and local elections, but they have to do so with the money that they have in their coffers that they're permitted to raise — so the contributions come from individuals, not from corporations and unions. I note that because I think one of the red herrings out there is that parties are banned from engaging in state and local activities under the new law. National parties aren't, but they have to use the money that they have raised under the federal limits. So, that's the national party soft money ban.

The state party soft money regulations are, by nature of our federal system, of course, different because state and local parties participate in state and local elections, as well as in federal election activity. And for the states, they may raise and spend whatever they want for activity affecting just state elections. But there is a provision in the law that says that if they engage in federal election activities, then they have to use money raised under the federal system, deposited into their own federal account. That activity is public communications that attack, support, or oppose a federal candidate, and certain voter registration get-out-the-vote and voter ID activities that directly affect or are in connection with an election for federal office. So, that's the regulatory process for a state party. They can do whatever they want for state elections. If they are doing things that this Act defines as being "federal election activity," then they have to use federal money.

The issues raised before the Supreme Court by all of what I've just stated are, first, is the Court going to revisit what corruption is, the difference between the appearance of corruption and *quid pro quo* corruption? Second, is the Court going to have a problem with the congressional regulation of activity that affects both state and federal elections, like the generic activity by state parties that I just discussed? And in both of those, the question before the Court is going to be to what extent will they allow Congress to enact anti-circumvention legislation, legislation that is designed to prevent the circumvention of federal law by having these requirements on state parties, as well?

Other issues the Court is going to look at in connection with soft money are whether it's permissible for the Act to regulate political parties differently than other actors not controlled by members of Congress and officeholders who participate in the system, like the NRA or the Sierra Club. It also is clearly looking at the constitutional basis for the underlying ban on corporate and labor political activity, and perhaps at any distinctions they may want to draw between such a ban on for-profit corporations versus not-for-profit corporations.

Underneath all of this is a question of the degree to which the Court is going to defer to Congress, as it has in the past when it has upheld campaign finance laws. It did so on the basis that Congress, after all, knows a great deal about this and has first-hand experience with the dangers of corruption here. Or is the Court going to look at this and say, "Well this is a law passed by people who are peculiarly self-interested in their own elections, and therefore we ought to be more skeptical rather than less when Congress is regulating its own elections." That's a quick summary of the hot issues that the Court faces as it decides this case.

JUDGE STARR: Thank you, Judge Smith. It's a privilege for me to be here, and my thanks to the Federalist Society and the organizers of this particular gathering. This is a very important issue to our democratic order and our system of liberty, so I'm all the more grateful for this opportunity for us to come and to reflect on this together.

Full disclosure — I have the privilege and honor, through my law firm, of representing the Southeastern Legal

Foundation, a plaintiff in the litigation. Its general counsel, Valle Dutcher, is in the audience as we speak. And I also serve as co-counsel to Senator McConnell in *McConnell v. the Federal Election Commission*. We are working on this case along with Floyd Abrams, I believe the premier First Amendment lawyer of the age; Dean Kathleen Sullivan of the Stanford Law School; and Jan Baran, one of the great election law leaders in the country. This is a matter that has brought together a wide range of folks under the same umbrella. I mentioned the Southeastern Legal Foundation. I work with David Thompson who has been mentioned. You'll be hearing from David momentarily. Aligned on the same side are the ACLU, the California Democratic Party, the National Right to Life Committee, and the California Republican Party.

Trevor, in his observations, suggested concerns, abuses, of the recent past, and it needs to be said at the outset that there are certain provisions of BCRA that are good, that are well informed, and indeed that are not subject to challenge. He mentioned abuses of fundraising on federal property. That, indeed, needed to be tightened up. Some might remember "no controlling legal authority." There is now a controlling legal authority, and three cheers for it. There is absolutely no doubt whatsoever, that Lincoln bedroom sleepovers and White House coffees are out. So, too, are certain vague associations with folks from other countries. Those restrictions have been clarified. It's always nice to go to community events, but at least it should be a community event, and one should be careful about who's making the contribution to a candidate.

But there is much that is quite, in my judgment, profoundly wrong about McCain-Feingold because it is, by its very nature, a set of restrictions on fundamental democratic values. Take a simple reading of this law — but there is no such thing as a simple reading of the law. You see, it's 102 pages. Chuck Bell, the General Counsel of the California Republican Party, is smiling. We've read the law, haven't we, Chuck? I'm reminded of the Roman Emperor's tactic of putting the laws high above, out of sight, so no one could read them. All he needed to do was hire BCRA's draftspersons. One doesn't have a clue, other than one knows that whatever one does in politics these days is likely to be a felony. It is wildly overdone, almost comically so, except sentencing guidelines don't seem terribly humorous.

There are two fundamental reasons in our constitutional order why the so-called soft money ban should fall. But let's be clear about what we're talking about; we're talking about funds that are regulated by the states. Some states choose heavy-handed regulation, others are more gentle. And the Commonwealth of Virginia actually believes in freedom. Can you imagine, in this day in time?

The first concern is the First Amendment itself. We are regulating, indeed prohibiting, a basic right of individuals in a free society to come together under the mantel of an association called the political party and organize so as to communicate, to persuade, and then to mobilize, all consistent with state law. Parties exist to bring together like-minded persons, to articulate a philosophy or world view, and, if all goes well and people work hard, to see that philosophy triumph at the polls, in this vast commercial republic, as Mr. Madison envisioned it and described it. That takes—can you imagine?—money. And it takes lots of it, particularly in California, as to which the record is so elaborate in this case.

Now, some of our friends believe that the money dimension changes the world. They're really quite wrong, and they're rebuked by an elaborate body of First Amendment law, with which they otherwise cheerfully and full-throatedly agree. It should be viewed as settled — let me go ahead and summon *New York Times v. Sullivan*. You don't even have to agree with the actual holding to agree with the Court's round rejection of the proposition that the strength of the First Amendment interest in the case was diluted by the fact that it was a paid commercial ad. Let's pause for a moment to reflect on *New York Times v. Sullivan*.

A group of citizens came together, associated with one another, organized, pooled their resources, went to an advertising agency in New York, and purchased through the advertising department of the *New York Times* an ad that might be known as a negative ad, an attack ad. It accused Commissioner Sullivan of crimes, perhaps of violation of BCRA. No, nothing quite so serious, just police brutality. But this group of citizens took out this ad called "Heed Their Rising Voices," and Mr. Sullivan's very able lawyers said, "Well, see there? It's just a commercial transaction." Now, scroll back in time and recall that the law of commercial speech had not developed. The argument was that this is commerce and not protected. But that fell on deaf judicial ears even at the time. It was swept aside, the idea of the value of this communication, even though it was paid for.

Now, let there be no doubt that the activity that we're talking about today is a First Amendment activity and that there's going to be a shrinkage of it. There is going to be less speech by political parties. That is not seriously contested in the record that was developed in this case. And the principal example of that, ironically in terms of the politics, is the California Democratic Party, in light of the expense of communicating statewide. It is absolutely clear.

And yet, McCain-Feingold is strangely incomplete. It attacks and weakens political parties while at the same time, rightly, doing nothing about other groups and organizations that do many of the same things. See, for example, the NAACP and its $10 million voter mobilization effort in the year 2000. This is the same activity as political parties; but here there are no limitations. And we now know from the record before the Court that McCain-Feingold saps political parties of their strength while empowering two new classes of power brokers: the super-wealthy — have you heard of George Soros?; and the organizers and facilitators who know the super-wealthy — have you heard of Harold Dickies and perhaps Ms. Malcolm of Emily's List fame? Those are the new power brokers in the United States.

The weakening of the political parties is a very, very bad thing. We think it has constitutional dimensions of a very high order. The parties, at a broader political and political-cultural level, have served the nation well, contributing to a political culture that, for all of its failings, has been characterized by remarkable stability and durability. McCain-Feingold changes all that, and very much for the worse.

The second reason, more briefly, that McCain-Feingold's scheme should fall lies in the very structure of our institutions. One need not agree with the Court's 11th Amendment jurisprudence or the reading of the limits of Congress' power. That's just the *Lopez* case. You can agree with *Lopez*, but you can even disagree with it and still conclude that McCain-Feingold exceeds Congress' enumerated powers. Article I, Section 4 provides very simply (and this is the operative clause so I ask you to listen carefully, as well as respectfully, to the Constitution): "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof, but the Congress may, at any time, by law, alter such regulations."

The discussion has already shown McCain-Feingold goes far, far beyond the world of elections of representatives and senators. It regulates directly and overtly, the national parties. And it does so — and this is a clear example of its excess and overbreadth — even in off-year elections when no federal election of a senator or representative is on the ballot.

The example that became a very familiar one in the litigation was this. It would have been a crime for the then-chair of the RNC, Governor Racicot, or his successor, Mr. Gillespie, to send a letter asking Republicans around the country to send a contribution of any amount, to the gubernatorial campaign of his friend Haley Barbour. Now, that is an off-year state election, just as Louisiana is having tomorrow, and yet Congress is purporting to regulate it, to regulate the activity of parties in connection with that election.

Over 40 states have some form of election during off years, including very important mayoral contests in cities as small as New York and Los Angeles. McCain-Feingold sweeps in all the election activity by political parties at all levels and subjects those activities to federal law and regulation, displacing in the process entire bodies of state law. That can't be right.

So, what is right, in closing, and what is the answer? Virginia once again shows the nation. It takes a bit of Mr. Jefferson, who believed in the idea of liberty, and it takes a nice dose of Louis Brandeis, who believed in sunshine as the disinfectant, and the wonderful result is freedom with disclosure, Internet disclosure. Anyone can contribute unlimited amounts to a party, to a candidate, and guess what? Virginia has a very vibrant political system free of any suggestion of corruption.

* These selections were taken from a panel entitled "Campaign Finance Reform in the Supreme Court," sponsored by the Federalist Society's Free Speech & Election Law Practice Group at the Federalist Society's 2003 National Lawyers Convention on November 14, 2003. The panel was moderated by Hon. Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit, and also featured Prof. Daniel R. Ortiz from the University of Virginia School of Law and Mr. David Thompson of Cooper and Kirk. A full transcript of the discussion will be published in the next issue of *Engage*.