

## POLITICAL PARTIES' LIKELY RESPONSE TO THE CONSTITUTIONAL CHALLENGES TO BCRA

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I was not one of the people who were deposed in *McConnell v. FEC*<sup>1</sup> so I've been asked to discuss some of the implications of the decision for how the political parties might function in the future. I will focus on the congressional arena but I'll talk about political parties more broadly.

First, I would like to talk about what this decision says soft money, or non-federal money, can still be used for.

Soft money can be used for building funds, which I'll explain shortly. It could be used to fund a hundred percent of the cost for staff salaries. It could be used for other normal operating expenses, which I'll explain by way of anecdote in a moment. It can be raised, of course, for any other nonelectioneering activities that don't fall into that broad category and ostensibly would not involve a mix of hard and soft money to carry out. In sum, soft money can be used for miscellaneous activities that would free up hard money for electioneering activities. In this sense, what I think is most interesting about the ruling is that it brings us back to the early 1980s. In the 1980s we discovered soft money. The use of soft money in the 1980s reminds us of what Nate Persily mentioned on the last panel—that is whether the controversy is really the soft money that was the problem or is it really the use of soft money to fund issue ads that became the problem. What I really enjoyed about reading parts of this decision, as Richard Briffault talked about this morning, is how the judges go through the history several times describing what has evolved to cause the crisis that the Bipartisan Campaign Reform Act of 2002 (“BCRA”)<sup>2</sup> was designed to fix. You have to start with the 1996 election to look at the problem of using nonfederal money to pay for issue ads.

If we go back to the 1979 Federal Election Commission (“FEC”) regulations about permitting the use of nonfederal money to be used for these other party-building expenses, you get back to what Tony

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

<sup>2</sup> Pub. L. No. 107-155, 116 Stat. 81 (2002).

Coelho, who was the head of the Democratic Congressional Campaign Committee (“DCCC”) in the early 1980s, figured out—the value of raising soft money to free up hard money for electioneering expenses. Coelho was not thinking in the early 1980s that he would take those two pots of money and mix them together. He had in his own mind, as did many other party operatives in Washington, some very distinct ways to use those funds. Coelho pointed out that there are significant and important party functions that do not necessarily involve the direct election of (or the direct election efforts on behalf of) candidates. We focus on the reporting of activities in the thirty- and sixty-day windows before elections and we certainly know that candidates have to be nominated for office, but what about the time between the past general election and the next nomination season? In many instances you have more than a year and a half of time elapsing, but in between, unlike in the early part of the twentieth century, the parties don’t just cease to exist. They don’t lose their office space. They don’t just fire every single person that they have. They have ongoing party functions. They need a place to physically operate, at least some kind of skeletal staff, and a plan to articulate what the issue or ideological agenda is of the political parties. Coelho argued that parties should not have to use hard money dedicated to federal election activity to pay for some of these expenses, which are ongoing and are essential to what the party is all about. So initially, he was famous for creating that so-called building fund (I think this decision will make the Democrats very happy as they construct their new office building because if they have a cost overrun, they can now find a way to go ahead and pay for it out of soft money funds). But Tony Coelho helped to create the Harriman Communications Center. Going back to our previous discussion about whether the money has to go directly to a federal candidate to be perceived to be corrupting, I think when you put Pamela Harriman’s name on that Center, there wasn’t a Democratic candidate in the country who didn’t know whom they should appreciate for its existence. The Democratic media center, which at the time was state of the art, was going to change how Democrats could help their candidates vis-à-vis Republicans. Over time, the parties figured out what else could be shifted to those soft money accounts, even before issue ads. Coelho was famous for bolting furniture to the floor and arguing that office furniture, typewriters, etc., should be purchased with soft money, not with hard money, because items that were part of the building shouldn’t be considered a regular election expense.

One of the things that I’ve been looking at for the last several years is how the parties have been changing the way that they’ve used hard money (whether or not it is mixed with soft money). In the 2000 election cycle, the most dramatic case has really been the Democratic Senatorial Campaign Committee (“DSCC”). The break-

down of their operating expenses was only thirty percent hard money, seventy percent soft, which is a pretty large amount of the outlays. So, it isn't just that all this soft money has traditionally been going to pay for issue ads. Indeed, issue ads are expensive items that get a lot of press coverage, but it doesn't entirely explain why the parties were sad to see soft money go. Using soft money to offset other expenses like staff salaries (whose recipients usually don't complain about what the source of their money is as long as their paychecks clear) is not likely to make headlines. There are certain aspects of running a political party that aren't going to be subject to conduit corruption in the same sort of way as issue ads or certainly they're not going to be affected by where the money comes from. If this decision stands, then we would be back to the building fund scenario, at least at the national level.

Now let's move on to hard money for a moment. The three-judge panel found the new limits on raising hard money to be constitutional, which is obviously a boost for the political parties because they will be able to raise more money from individuals. The other interesting point is that those new hard money limits are indexed for inflation, which has been one of the enormous problems for the parties and another reason why they got pushed into the soft money business. The Federal Election Campaign Act's hard dollar limits were set in 1974 to \$1000 for individuals and it has remained that same \$1000 since 1974.<sup>3</sup> Obviously, inflation has degraded the value of that \$1000; raising the limit to \$2000 and allowing it to be indexed to inflation will obviously be significant. The question of course is whether Republicans and Democrats have people who will write checks of that magnitude in equal measure. I guess the general consensus is that the Republicans are the ones with, as they say, the bank managers who will write checks of that amount and the Democrats have fewer of those midlevel income people. The Democrats themselves say they have about the same number of rich people as the Republicans.

The other interesting thing is that the forced choice between coordinated and independent expenditures up to the date of nomination was struck down as unconstitutional. It was almost surprising how swiftly it was done and that there is barely a mention in a couple of the opinions of it at all. It seems so obvious to the judges, yet that provision was creating a lot of anxiety among the party committees and probably even more anxiety, as I found out myself, at the FEC about how on earth they were going to enforce that provision. It stated that once any political party committee—that could be a local,

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<sup>3</sup> Pub. L. No. 93-443, 88 Stat. 1263 (1974).

state, or national party committee—made even one dollar of an independent expenditure for a candidate after the date of nomination, every other party organization was bound to either make independent or coordinated expenditures, as the first party organization had. The coordinated spending limit was an umbrella limit which would apply to every party organization in the country affiliated with a major party, so its trigger might be an issue for party organizations wanting to spend independently. Coordinated expenditures will continue to be subject to the limit that already exists, which is indexed for inflation. The coordinated expenditures are party expenditures. The parties spend this money from their own checkbooks, but with the knowledge and consent of the candidate. The candidate might say to the party “we owe so much money to our media person” or “we would like you to pay for this mailing,” and they can talk about it and the check can be written. However, the independent expenditures are the interesting issue. They have to be paid entirely with hard money, but what this decision restores is the finding in *Colorado Republican I*<sup>4</sup> that political parties are allowed to spend independently of their candidates as long as they do not coordinate with them. The parties have not made very much use of this opportunity in the past three cycles (since they have legally had it). There have only been a few instances when they have decided to do it. The National Republican Congressional Committee (“NRCC”) spent \$1.3 million in 2002. And in the 2000 cycle, the DCCC spent nearly \$2 million, all of it in the last six days of the election, all of it on telephone banks. The problem has been that parties want to communicate with their candidates—it’s helpful to coordinate with your candidates to help them get elected. And so having that restriction against communication for independent expenditures has previously stood in the way of parties spending independently, but without the issue ad option, they will probably have more incentive to do it. The question about hard money is what will the parties do with the hard money that no longer has to be matched with the soft money to be spent? That mix is what the funding of issue ads really was all about. In other research, I found that over time the amount of money that the parties have spent even in coordinated expenditures and certainly in contributions to candidates has declined enormously as the amount of money that the national party organizations have transferred out to state parties to be mixed with soft money and spent in more favorable ways at the state level has soared. And so the question is whether or not that hard money would go back into spending for a wider number of can-

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<sup>4</sup> See *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 619-26 (1996) (Breyer, J.) (plurality opinion).

didates in contributions, coordinated expenditures, and potentially in independent expenditures, a great untapped category.

Finally, I want to talk about the big question, which is what difference does any of this make in winning elections? That really is (or should be) the central point with all discussions of campaign finance reform. The first thing we know is that the national party committees have already had to shift toward better hard money fund-raising techniques. They've done that and have outdone themselves in the first quarter so far, but it's still not very impressive in an off year and it doesn't tell us very much. The second thing which Diana Dwyre and I guessed on in *Life After Reform*,<sup>5</sup> is that we assume that the parties will shift towards more pre-primary activity because without the opportunity to spend on issue ads (which they have normally done fairly late in the cycle), they would have to find other ways to be effective. Indeed, *Roll Call* had an interesting article about the NRCC's early activity in Pennsylvania's 15th Congressional District, which is going to be an open seat race because the incumbent Pat Toomey has said he will run against Arlen Specter in the Republican primary for the U.S. Senate.<sup>6</sup> We see the NRCC having conferences and fund-raising events already for the person that it is choosing. It has said this is the individual they are backing for the Republican nomination in a place where the primary isn't scheduled for more than a year, which is extremely unusual. In the 1980s, you wouldn't even have contemplated that national party committees would get out front in a primary race. Part of it is because of the way interest groups have behaved in primaries and found that early activity really helps to frame the race better than later activity.

Thirdly, consider the search for self-financed candidates. Senator Jon Corzine (D-NJ), chair of the DSCC, (he being a good example of that) recently said that he's on the lookout for some millionaires to see if they would be interested in running for the U.S. Senate. That way, more hard money is freed up for him to spend for promising candidates in places where they aren't independently wealthy. If Jennifer Steen were here, she could talk more about it, and of course the millionaire provisions were left untouched in the decision.<sup>7</sup>

Fourth, I would like to mention the limited effect of issue ads on influencing the outcome of elections. When Diana Dwyre and I interview people and get them to talk about what difference it made

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<sup>5</sup> Diana Dwyre & Robin Kolodny, *National Political Parties After BCRA*, in *LIFE AFTER REFORM: WHEN THE BIPARTISAN CAMPAIGN REFORM ACT MEETS POLITICS* 83 (Michael Malbin ed., 2003).

<sup>6</sup> See Lauren W. Whittington, *Making a Dent in Pa.-15*, *ROLL CALL* (Apr. 9, 2003), at <http://www.rollcall.com>.

<sup>7</sup> See Jennifer Steen, *The "Millionaire's Amendment"*, in *LIFE AFTER REFORM*, *supra* note 5, at 159.

that they spent millions and millions of dollars in particular targeted races on issue ads, they reluctantly concede that they can only count in the single digits—maybe two or three races on the House side, maybe one or two races on the Senate side—where they think that the issue ads could have made the difference in the outcome. Obviously, with small margins in the House and the Senate, that may be all it takes. But the candidates themselves don't believe that the issue ads make much difference in election outcomes. If you ask those same candidates if they thought that issue ad spending by the parties made the difference between victory and defeat, even fewer of them than the parties claimed would acknowledge that to be the case. In David Magleby's studies,<sup>8</sup> you can see that there are a number of places where candidates have had to spend extra time and money campaigning against the help the parties have given them. That is, the way the parties do research and want to frame the debate and the way the candidates have done research and want to frame the debate in those races have not always been the same. What is extremely interesting about what's happened in the last three cycles with the political parties and issue ads is that parties had been very proud of the fact that they can spend as much money in a race as a candidate can and they believe that to make them relevant. I believe that's a dangerous path that BCRA can rein in. With issue ads the parties look at a particular race and say this candidate doesn't know what's good for them, we have a better idea. Should the party go on its own path to try to shape the race in a way that is decidedly different from what the candidate wants? That's an open question, which depends on your view of what parties should be in a system where they can no longer control nominations for office. I'm not sure that it's good for the parties to work that way and I'm certain that the candidates don't think it's very good for them. Issue ads are expensive and as we all know from what the Brennan Center found out about this particular media market here in Philadelphia,<sup>9</sup> they can help to escalate the cost of everybody's ads enormously in the last couple of weeks of the election. They make the price of getting involved in a competitive race so high that you lower the number of truly competitive races. And in some ways it's good for the parties because it gives them a more manageable number of races to deal with. In 2000, the number of competitive races was estimated at thirty-nine. That's much easier than

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<sup>8</sup> See The Center for Study of Elections and Democracy, at <http://cid.byu.edu/magleby/>, for a list of all the monographs edited by David Magleby and published by the Center on this topic.

<sup>9</sup> JONATHAN S. KRASNO & DANIEL E. SELTZ, *BUYING TIME: TELEVISION ADVERTISING IN THE 1998 CONGRESSIONAL ELECTIONS* (2000). For the *Buying Time* series published by the Brennan Center for Justice and other campaign finance publications, see *Brennan Center Publications*, [http://www.brennancenter.org/resources/resources\\_books.html#cf](http://www.brennancenter.org/resources/resources_books.html#cf).

having 200 competitive races. But is that better for democracy? That's the question. Is that really the kind of thing that we want if we're talking about an exchange of ideas?

Finally, there is a growing acknowledgment that the importance of soft money may be much more about "inside the beltway politics" than it is about winning elections. There's an explosion of leadership PACs and you don't have to be in leadership to have a leadership PAC. There is more of an acknowledgment that to be an effective leader in Congress, you have to prove your ability to raise large sums of money. That to show that you have power and influence in Washington means to be able to throw an event that requires that people spend a lot of money to talk with you and talk with other committee chairs or other leaders, and I think that's been a dangerous thing for democracy that has been really internal to the Washington community and not so relevant to how elections are run.