



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Council for Responsible Government, Inc. et al.) **MUR 5024R**

STATEMENT OF REASONS

COMMISSIONER BRADLEY A. SMITH

On February 15, 2005, the United States District Court of the District of Columbia ordered the Commission to reconsider its November 2003 decision to dismiss the complaint filed by Kean for Congress against Council for Responsible Government, Inc. ("CRG" or "Respondents"), in light of the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003).¹ I welcome the opportunity to explain why I remain convinced that Respondents did not make expenditures that would subject them to the Federal Election Campaign Act ("FECA") source restrictions, limits, and reporting requirements under the guidance of *McConnell*.²

The facts in this matter are spelled out in detail in the January 13, 2004 Statement of Reasons signed by Commissioners Mason, Toner, and myself. Briefly, the Respondent produced and distributed two brochures related to Tom Kean, Jr., a congressional candidate in New Jersey in the June 2000 primary. Both brochures named Kean, featured his photo, and contended that Kean had been living in Washington, D.C. and Massachusetts, moving to New Jersey only to run for Congress. As explained in the January 2004 Statement, the brochures lacked express advocacy because they did not contain an exhortation to vote for or against a candidate. I declined to find express advocacy by divining the "purpose" of the communication, because as I read the case law and our regulations, such an inquiry is not permissible.³ Moreover, to the extent our

¹ *Kean for Congress v. FEC*, No. 04-0007 (D.D.C., Feb. 15, 2005) ("Order")

² In the Statement of Reasons issued January 13, 2004, three Commissioners (Mason, Smith and Toner) acknowledged that the *McConnell* decision had been issued December 10, 2003, but in light of the fact the Commission's vote in this matter was taken on November 4, that case could form no basis for the analysis offered us by the Office of General Counsel, or for our votes.

³ See *Thomas v. Collins*, 323 U.S. 516, 535 (1945); *Buckley v. Valeo*, 424 U.S. 1, 43 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 248-49 (1986) (citing *Buckley*), *FEC v. Christian Action Network*, 894 F. Supp. 946, 958 (W.D. Va. 1995), *aff'd* 92 F.3d 1178 (4th Cir. 1996) ("in order to avoid the possibility that a speaker's intent or meaning would be misinterpreted, the Court in *Buckley* limited FECA's

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regulations at 100.22(b) present a broader “reasonable person” standard that might reach this message, I could not apply that portion of the regulation because it had repeatedly declared unconstitutional.⁴

The question today is whether *McConnell* rejected the standard we followed in November 2003. The answer to that question is “no.” *McConnell* considered the constitutionality of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), which obviously does not itself apply to this matter because the underlying acts took place in June 2000. The only effect *McConnell* could have on this matter is if it contained a holding related to pre-BCRA law demonstrating that the Commission (and lower courts) had been applying that law incorrectly.

As the legal standard at issue here is “express advocacy,” we must consider what *McConnell* says about “express advocacy.” The opinion for the majority noted that *Buckley v. Valeo*, 424 U.S. 1 (1976), construed FECA’s disclosure, reporting requirements, and expenditure limits, “to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.”⁵ It described this as a “strict” reading such that “the use or omission of ‘magic words’ . . . marked a bright statutory line separating ‘express advocacy’ from ‘issue advocacy.’”⁶

The Court next related how the express advocacy standard had applied in practice, allowing issue advertising that in the Court’s view was “functionally identical in important respects” to express advocacy to be paid for with “soft” – i.e. nonfederal – funds. “Corporations and unions spent hundreds of millions of dollars of their general funds to pay for these ads, and those expenditures . . . were unregulated under FECA.”⁷ The Court then noted that in a 1998 report, the Senate Committee on Governmental Affairs found issue ads to be “highly problematic” because they enabled prohibited

[expenditure] restrictions to communications containing express words of advocacy . . .”), *Faucher v. FEC*, 928 F.2d 468, 471 (1st Cir. 1991) (“.. an interpretation given a statute by the Supreme Court becomes the law and must be given effect [citation omitted] It is not the role of the FEC to second-guess the wisdom of the Supreme Court.”).

⁴ *Virginia Soc’y for Human Life v. FEC*, 264 F.3d 379 (4th Cir. 2001), *Maine Right to Life Comm. Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996) Section 100.22(b) provides an alternative express advocacy standard, and reads:

When taken as a whole and with limited reference to external events such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because – (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action

Another court found that the exact same wording in a state statute was unconstitutional. *Iowa Right to Life Committee v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999)

⁵ 540 U.S. at 126.

⁶ *Id.*

⁷ *Id.* at 127-128

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sources to circumvent the Act, and were often coordinated with campaigns, thus avoiding the contribution limits.⁸

As the Court reported in *McConnell*, Congress responded by, among other things, amending the Act to prohibit political parties' use of nonfederal funds for public communications that promote, support, attack or oppose a federal candidate.⁹ Congress also created a new category of communications called "electioneering communications" defined as broadcast, cable or satellite communications made within 30 days of a primary or 60 days of a general election that refer to a clearly identified federal candidate, and are targeted to the relevant electorate.¹⁰ The new law forbade corporate or union treasuries from paying for such communications.

The Court upheld these new provisions. It held that the "promote, support, attack or oppose" standard, when applied to party committees, was sufficiently clear to give adequate notice of what conduct is prohibited, "particularly . . . since actions taken by political parties are presumed to be in connection with election campaigns."¹¹ It rejected a challenge to the electioneering communications provision that claimed unconstitutional any regulation of speech that did not contain express advocacy, stating that "the express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law."¹² The Court explained that the express advocacy standard in *Buckley v. Valeo* narrowed a vague and overbroad law, but another statute that "was neither vague nor overbroad" need not be "required to toe the same express advocacy line."¹³ The Court then observed that "express advocacy" appeared from the *McConnell* record to be "functionally meaningless" at achieving the legitimate state interests behind FECA.¹⁴

⁸ *Id.* at 131.

⁹ *Id.* at 170 (discussing BCRA § 301(20)(A)(iii))

¹⁰ *Id.* at 189-190 (discussing BCRA § 304).

¹¹ *Id.* at 170 n.64. The Court rejected an argument raised by plaintiff political parties that these restrictions violated due process by discriminating against political parties in favor of interest groups. Rather, the Court observed that "Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation." *Id.* at 188.

¹² *Id.* at 190. This has always been how I understood the express advocacy standard. See *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. LEGIS. 179, 190-95 (1998); see also *Searching for Corruption in All the Wrong Places*, 2 CATO S. CT. REV. 187, 217-20 (2003) (predicting that the Supreme Court would uphold provisions of BCRA in *McConnell*).

¹³ *Id.* at 192

¹⁴ *Id.* at 193, 217, 703 ("Any claim that a restriction on independent express advocacy serves a strong *Governmental interest* is belied by the overwhelming evidence that the line between express advocacy and other types of election-influencing expression is, for Congress's purposes, functionally meaningless.") (emphasis added). The Court did not hold that the term was "functionally meaningless" for narrowing an otherwise unconstitutionally vague statute. Thus, "express advocacy" would remain the required narrowing construction applicable to FECA's terms. And it remains a useful standard for courts faced with vague statutes post-*McConnell*. See *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004), cert. den. by *Stumbo v. Anderson*, 125 S.Ct. 453 (2004), *ACLU v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004) (quoting *Spear* favorably).

Congress could, therefore, enact different bright-line standards to address “flaws it found in the existing system.”¹⁵

Despite the arguments made by the Kean plaintiffs, *McConnell* did not amend “express advocacy” as it would apply at the time the alleged violations took place. The standard requires an exhortation to vote for or against a clearly identified federal candidate. *McConnell* essentially restates that same standard in its account of BCRA’s history.¹⁶ Congress did not attempt to change that standard, but instead in 2002 added to the law, with the Court’s blessing in *McConnell*, additional restrictions on party committee communications that “promote, support, attack or oppose” a federal candidate and on a newly created statutory category of “electioneering communications.” No one argues that the Commission should apply BCRA retroactively to conduct from 2000, and in any case this matter does not involve political party activity.

As to how we apply our pre-BCRA express advocacy regulation, in particular the question whether the analysis by other courts that held 100.22(b) unconstitutional are good law, the *McConnell* Court also offers us little. However, given the Court’s continued and persistent interest in examining such laws for vagueness and overbreadth, and that provision’s apparent lack of precision (what is a “limited reference” to “external events”? a “reasonable person”?),¹⁷ I do not think it appropriate to act contrary to several court holdings that have found it unconstitutional.¹⁸

As noted above, I am not blind to the fact the majority in *McConnell* expressed grave doubts about whether the express advocacy standard was effective in addressing what it found were “compelling governmental interests.”¹⁹ But nowhere does *McConnell* suggest that another standard should apply to pre-BCRA communications. In fact, since BCRA did not touch the core definition of “expenditure” upon which we apply the express advocacy standard, but rather enacted new standards only for political parties and entities engaged in electioneering communications, it is difficult to see how or why the Court would have revisited its narrowing definition of “expenditure” or the application of “express advocacy” to that definition.²⁰ Nor did the Court abandon its *Buckley* holding

¹⁵ *Id.* at 194.

¹⁶ *Id.* at 126-127

¹⁷ See *supra* note 4.

¹⁸ The Office of General Counsel contends that since *McConnell* found the phrase “promote, support, attack or oppose” not vague as applied to parties, courts following *McConnell* would conclude that 100.22(b) was not vague. The two laws are not analogous, since one provision applies only to parties while another applies to anyone. *McConnell* provides no new reason for courts to reconsider precedent and accept 100.22(b) and cannot be used to support the argument that the reasoning in these decisions is incorrect. Until such reconsideration occurs, we should instead look to the rulings of courts that have considered 100.22 and found it wanting.

¹⁹ Although the Court described the difference between express advocacy and issue advocacy as “functionally meaningless” from the government’s perspective, it is functionally a very meaningful standard from the speaker’s perspective, since it provides a clear standard for what is permissible speech.

²⁰ BCRA was carefully crafted to avoid conflicts with established First Amendment jurisprudence. See sources available at www.brennancenter.org/programs/bcra, in particular a letter from 67 constitutional

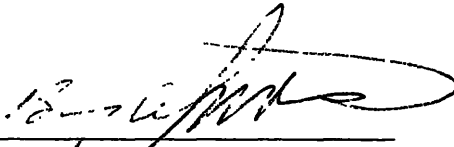
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that the law must not be unconstitutionally vague.²¹ It determined that BCRA's party committee and electioneering provisions passed that test. It did not, however, revisit *Buckley's* holdings regarding the construction of "expenditure" or express advocacy. In expressing doubts about the efficacy of express advocacy, the Court merely affirmed that Congress had leeway to create other, non-vague standards to address perceived problems.

The General Counsel's office and a majority of the Commission appear to agree that *McConnell* does not change the applicable law. As the p. 3 of the Counsel's Factual and Legal Analysis states, "*McConnell* did not involve a challenge to the express advocacy test or its application, nor did the Court purport to determine the precise contours of express advocacy to any greater degree than did the Court in *Buckley* Importantly, *McConnell* also did not address the validity of section 100.22(a) or (b) let alone cite the Commission's regulation for any purpose." Given this, I conclude that the reasoning that Commissioners Toner, Mason, and I expressed in the January 2004 Statement of Reasons remains correct.

Although there was no change in the applicable law, the Commission has chosen to use this remand to re-evaluate the facts and change the result using the same legal standard as before. The court, however, remanded this matter "for the sole purpose of permitting the FEC to apply *McConnell* to the facts of the Kean Committee's administrative complaint."²² I believe, therefore, that it is beyond the scope of the court's order and unfair to respondents for the Commission to so evaluate anew what was a completed MUR.

4/12/05
Date


Bradley A. Smith
Commissioner

scholars, in which they conclude that BCRA extended "current regulations cautiously and only in the areas in which the First Amendments protection is at its lowest ebb "

²¹ The federal courts of appeals in cases since *McConnell* continue to recognize the standard's utility in sculpting a clear rule from a vague statute. See sources cited *supra* note 14.

²² Order, *supra* note 1, at 3