

B433. "Much Ado About Money." National Law Journal (September 22, 2003) p. 23.

On Sept. 8, the U.S. Supreme Court heard an appeal of a lower court decision that voided a large portion of the 2002 Bipartisan Campaign Reform Act. Most prominent among the issues contested before the court in that case are the rejection by the lower court—a specially appointed three-judge panel—of the act's essential ban on soft-money contributions to national political parties and the lower court's actions with respect to the act's restrictions on use of corporate and union funds for "electioneering communications."

The details are surprisingly complex. (The appeals briefs run beyond 1,500 pages.) However, the underlying issue is not. It was framed famously (or by my light, infamously) by *Buckley v. Valeo*, in which the Supreme Court ruled that several limitations on campaign financing violate the First Amendment, or, to put it more colloquially, that money is speech.

Critics of the ruling hold that limiting the amounts of dough that lobbies and individuals can grant to a politician's campaign (not to his personal fortunes) ensures that all candidates will have a chance to be heard, that no one will be drowned out by an endless blitz of television and radio ads, which only the well-heeled can afford. And campaign managers base the details of their advertising strategies on polling, which is expensive, and hence not available to many of those who are anxious to enter the field.

In contrast, those who favor the ruling argue that to be able to raise money is one measure of how popular you are. (See Dean run; see Dean raising more money than all the other candidates....) And those who raise little money tend to draw more volunteers, which equalizes the playing field.

Bans on "airing" views

The Supreme Court will deal only with select slices of the basic issue because the act did not ban all contributions, and not all of the act was nullified by the lower court. One contested issue is the ban, which the act includes, on the use of corporate or union funds for any broadcast communications referring to a candidate for federal office that airs 60 days before an election or 30 days before the primary. The lower court instead embraced a much broader "backup" guideline included in the act, which states that corporate or union funds cannot be used for any broadcast communication that "promotes or supports... or attacks or opposes" a national candidate and is "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate."

This backup definition does not specify a particular window of time in which such advertisements would be banned. In other words, it prevents the use of corporate or union funds for advertisements promoting or attacking a candidate for national office at any time. As a result, we would witness the deliciously absurd situation in which even those who support the act nevertheless hope the Supreme Court will let this part of the lower court's ruling stand.

The second issue concerns "soft money." That is, money raised by political parties for general "party-building activities," such as voter registration drives, which is not subject to limits specified under the Federal Election Campaign Act (FECA) of 1971. The campaign finance reform act effectively banned soft money in that it required all money raised by national political parties to fall under the hard-money limits and regulations specified in FECA. The court held that while it is wrong for candidates and office holders to be able to

raise and spend money that is not accounted for under FECA, it's fine for political parties to raise and use soft-money contributions for activities such as voter registration drives, etc.

Some political scientists argue that the whole issue is largely academic-in the bad sense of the term. There is no way this law or any other could stop private money from flooding into the campaign coffers. Critics should look at the British system. Election costs in Great Britain are much lower because campaigns basically are limited to a few weeks. Each candidate is allowed to spend a small fixed amount (it's determined by a complex formula, but averages a puny four figures, compared to the millions spent by most American candidates). If a candidate spends more, the election results are invalidated. Candidates can mail one leaflet to each household free of charge, and the parties get free but rationed television time.

If the Mother of Democracy can limit money in the public square-we should be able to do at least as well.

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