For the Defense

by
Jonathan S. Krasno,
Binghamton University
Frank J. Sorauf,
University of Minnesota

Introduction

In some respects, our work in *McConnell v. FEC* began years before the passage of McCain-Feingold. During 1996–1997 we served on a commission organized by Herbert Alexander to create a political scientists' view of campaign financing. The majority voted 6 to 3 to recommend removing limits on the amounts that parties could contribute to candidates. Our dissent, with Janet Box-Steffensmeier, asserted that such a move would do little to strengthen parties or make elections more competitive, while increasing the potential for donors to corrupt parties (Citizens' Research Foundation 1997). Shortly afterward, we were contacted by lawyers from the FEC looking for expert witnesses in *Colorado Republican II* to argue on behalf of congressional limits on parties' "coordinated expenditures" (Sorauf and Krasno 1997). A few years later, we were asked by lawyers from the office of Missouri's Attorney General to testify on behalf of that state's regulation of party finances (modeled on FECA) in *Missouri Shrink PAC v. Lamb* (Krasno and Sorauf 2000). In all of these cases our "testimony" consisted of lengthy reports written for district courts or panels.[1]

We raise this history to make two points relevant to our involvement in *McConnell v. FEC*. First, the core of our testimony is entirely consistent with our earlier positions, starting with our dissent written prior to this string of litigation. To the extent that readers may wonder whether experts are hired guns directed by their employers, we can only say that that has not been our experience. Lawyers have occasionally pushed us to consider other arguments or extend ours, but nothing more. Second, we were relatively seasoned authors and witnesses by the time of this litigation. Naturally, this experience affected our relationship with the lawyers we worked with and our expectations of the process.

Most important, our previous work affected our perception of the role that scholarly experts play in litigation. We knew that our credibility to the judges depended on our ability to speak as scholars to the evidence and issues of the case. That is not to say, of course, that writing for the courts is merely an extension of writing for academic journals. Some of the differences are fairly obvious, but others may be surprising. Drawing on examples from our report in *McConnell*, we focus on four types of differences that we attended to in our work as expert witnesses: the purpose of our declaration, the audience we addressed, the tension between advocacy and scholarly detachment, and the need to predict. If these issues present special challenges to expert witnesses, we think the challenges are more than outweighed by the special rewards of participating in major constitutional litigation.

McConnell v. FEC

The litigation turned on a series of questions related to the two main components of McCain-Feingold: its ban on soft money and its definition of electioneering communications. The former was intended to end the practice of unlimited donations to political parties, including money from corporate and union treasuries, ostensibly for purposes other than federal election campaigns. The latter was meant to stem the explosion of so-called issue ads, commercials that supposedly promote issues, not candidates.[2] Because of the link between parties and soft money, the new law raised questions about its impact on the health of the parties and consequently their participation in elections and voter mobilization. The electioneering communications provisions generated less opposition from political science experts, but were widely regarded as more constitutionally troublesome for their potential impact on free speech. Though the bill was crafted to make its two parts detachable in anticipation of the legal battle to come, we viewed them as highly complementary. The availability of soft money created efforts to spend it on electoral politics, while the discovery of the issue-advocacy loophole intensified efforts to raise soft money.[3] Thus, McCain-Feingold has the advantage of addressing both supply of and demand for unregulated funds.

Purpose

Academic writing has a set of conventions familiar to readers of *PS.* Journal articles, for instance, generally follow a standard structure—introduction, data and/or model, results, conclusion (often with a call for further research)—that has evolved over time to serve a variety of ends. These goals include informing, impressing, and convincing the audience as efficiently as possible. In litigation, however, any list of purposes is dominated by the need to persuade. We recognized that judges, like any group of highly accomplished and informed individuals, are accustomed to gathering information from numerous sources and making up their own minds. They may be

https://doi.org/10.1017/S1049096504045123 Published online by Cambridge University Press

open to new positions—but only to a point. So, where possible, we reminded them of their previous conclusions or, less hopefully, showed how new circumstances necessitated a fresh look at old ideas.

This task was relatively straightforward in the matter of soft money. In *Colorado Republican II* the justices had already expressed alarm at unfettered fundraising by the parties and explicitly rejected the claim that parties are immune to the concerns about corruption that apply to candidates.[4] Nonetheless, we devoted some pages to detailing the practices that had developed since 1996 as the efforts to raise soft money intensified. Our main contention, again, was that elected and non-elected officials were active participants in the parties' fundraising and that the parties facilitated direct interactions between donors and policymakers. Abundant evidence supported these claims in the depositions of politicians, party operatives, donors, and lobbyists collected by the FEC and in the report of the Thompson Committee.[5] One example we noted was a 1997 letter from Senate Majority Leader Trent Lott (R-MS) promising donors "plenty of opportunities to share [their] personal ideas and vision with some of our top Republican leaders, senators, and panel members," while warning that the failure to contribute could result in loss of "a unique chance to be included in current legislative policy debates—debates that will affect your family and business for many years to come" (Krasno and Sorauf 2003, 15).

The situation with regard to the provisions on electioneering communications was quite different. The Court's 1976 observation in a footnote to *Buckley* that electioneering (i.e., the activity subject to regulation) was typified by use of words like "vote for" or "vote against" had been widely interpreted as constitutional doctrine by lower courts. The consensus prior to the case was that the judges were unlikely to consider overturning this "magic words" test. Knowing this and knowing the extensive record of advertising—including ads themselves, and depositions and internal documents from advertisers—submitted by the defendants, our main (and modest) goal was to convince the judges to look at the ads and believe what their own eyes told them. Our best evidence for why they should was the finding that almost none of the commercials aired by federal candidates in 1998 and 2000—all of which by statutory definition were classified as electioneering—used the magic words (Krasno and Seltz 2000; Krasno and Goldstein 2002). This is what our colleagues would recognize as a lack of criterion validity, since candidate ads serve as a criterion group whose purpose is known. The findings of fact from the district court panel (the trial court in this case) reveal that the judges examined hours of commercials and understood that the magic words test had become entirely outmoded.

Audience

Part and parcel of our effort to persuade was the recognition that the judges we addressed are not professional political scientists. That means, of course, that the jargon of academic journals had to be jettisoned, that concepts familiar to colleagues required at least cursory explanation, and that arguments had to be constructed in a more methodical and less parsimonious way. In other words, we devoted considerable attention to the writing. Beyond the prose, the lawyers we worked with urged us to make full use of the depositions from former senators, party officials, donors, and professional fundraisers (fn. 5) on the grounds that judges are used to dealing with individuals' accounts of their actions. We certainly did not shy away from data on dollars raised and spent, an inevitable part of any discussion of campaign financing, but we worked hard to incorporate these sworn statements.

The audience also affected the content of our report. The *Buckley* court decreed actual corruption or its appearance as the sole justification for congressional regulation of campaign financing, so, although we viewed the overriding goal of protecting the integrity of elections more broadly, we wrote to the justices' concerns (Sorauf 1986). As we noted, this was fairly straightforward with respect to soft money. It was harder to zero in on the corrupting aspect of the epidemic of issue ads starting in 1996. Some of their most notable traits, such as their viciousness, were largely irrelevant to the jurisprudence. We focused on their lack of transparency—issue advertisers were not required to report their receipts and expenditures, and many adopted misleading names to hide their true identities—arguing that the secrecy in which the money was raised and spent facilitated potential corruption. One group we noted, "Republicans for Clean Air," which ran critical spots against Senator John McCain during the 2000 primaries, actually consisted of two brothers in the energy business who had close ties to the Bush campaign.

The Tension between Advocacy and Detachment

Our attention to the purpose of and audience for our report underscores the gap between writing for scholarly journals and writing for the courts. Nonetheless, we found the line between advocacy (for we certainly advocated upholding McCain-Feingold) and detachment fairly easy to walk. In case we had any trouble, the lawyers we worked with were just as eager as we were to protect our credibility as scholars. We took care to avoid overheated rhetoric and exaggerated claims. For instance, we characterized McCain-Feingold as an important step toward increasing the public's faith in the electoral system (not an instant transformation) and discussed inequalities in the ability and opportunity to influence policymakers that arise from soft money (not the buying of Congress).

As scholars, we could offer the judges perspective on the campaign finance system's broader impact on American politics, along with experience developing and assessing certain types of evidence. So, recognizing the role that parties have traditionally played in mobilizing voters and the special concern that both Congress and the courts have expressed about turnout rates, we set out to examine the parties' soft-money expenditures on mobilization in the 2000 elections. Returning to the original FEC reports, we attempted to replicate and disaggregate LaRaja and Jarvis-Shean's (2001) finding that parties devoted 10.4% of their soft money expenditures ($47 million) to their own voter mobilization. We found that the largest amounts went to vendors for direct mail and telephone, activities that Gerber and Green describe as having virtually no impact on voting (Gerber and Green 2000).[6] By contrast, expenditures for canvassing, the most effective technique, were minimal (3–5%). This allocation of resources severely limited the net effect of the parties' mobilization efforts (Green 2002).

This finding fit with our discussion of party strength. Like other political scientists, we believe that parties are essential institutions of mass democracies and we root for American parties to grow more formidable. Indeed, we made certain to emphasize our common ground with the plaintiffs' experts, especially Milkis and LaRaja. The question for the litigation is whether denying parties their soft money would weaken them. In our view, undeniably impressive as the great sums flowing into and out of parties are, the better measure of their organizational capacity is their ability to do things themselves.[7] The great urban machines of the past, for instance, gauged their power by their ability to mobilize election workers and

https://doi.org/10.1017/S1049096504045123 Published online by Cambridge University Press

voters, an approach that intimately linked them, for better or for worse, to their constituents. We argued from a variety of evidence—including FEC reports, anecdotes, the work of other scholars, and case studies we had conducted for previous litigation[8]—that today's parties largely function by collecting money and purchasing services. That leaves the parties as distant objects to most Americans and probably incapable of effective get-out-the-vote campaigns. Thus, once one looks beyond the parties' bank accounts, it is apparent that their money has neither strengthened them appreciably, nor would removing some of it likely weaken them.

Prediction

Perhaps the most challenging aspect of writing for the courts is the need to predict the future. Academics are usually content to explain the past and occasionally the present, but the future rarely figures in most journal articles. The judges here, however, wanted to know how their decision would affect American electoral politics. This is a particular problem when discussing campaign financing because of its long history of unintended consequences. But there was no shirking, and we attempted to offer informed speculation whenever we felt reasonably confident.

Some of our forecasting involved little more than common sense. We had every reason to assume that, absent regulation, soft money and electioneering issue advocacy would continue to grow. The advantages of being able to move unlimited sums of money without the scrutiny and restrictions imposed on funds within the campaign finance system were simply too great to ignore. We were also certain that the parties would respond to the loss of soft money by redoubling their efforts to raise hard money, so that merely subtracting their soft money receipts from their accounts certainly overestimated the fiscal impact of McCain-Feingold. So far that prediction, made by many witnesses, has turned out to be correct (Mann and Ornstein 2004).

Students of American politics are sensitive to the impact of regulatory legislation on political parties, and so are we. While we could show that the parties' soft money had done relatively little to increase their organizational capacity—at least as we measured it—there remained the possibility that an ongoing supply might eventually benefit them. The problem with that argument from our point of view is that soft money had existed since the early 1980s, and the parties had raised increasing amounts since 1988 and particularly since 1996. Surely, more tangible progress in building parties might have been made during that period. The explanation in our view for why so little had been accomplished is that the soft money had been overwhelmingly raised by candidates and public officials and spent for their benefit. One example is the fundraising scandal that led to the Thompson Committee: President Clinton's efforts on behalf of the DNC in 1996 and the coordination between his campaign and the DNC in promoting his reelection. Moreover, we have already noted the extensive involvement of congressional figures in solicitations by the parties' campaign committees. Even more disturbing, studies of TV advertising in 1998 and 2000 showed that less than 10% of the ads aired by Democratic and Republican organizations mentioned either party by name, while all of them named candidates. Unless the needs of candidates somehow change in the future, we argued that there is no reason to expect parties to invest in themselves.

Conclusion

We began our report with a simple statement of our intent and our identity: "We write this report because we believe that our research and that of other political scientists speaks directly to issues in *McConnell v. FEC*." This may read like a throwaway line, but it goes to the core of our experience. We believed that research by political scientists on campaign finance, political parties, campaigns, voting behavior, and public opinion was relevant to the questions that the judges would be wrestling with, and we endeavored to bring these studies to their attention within a form they would recognize. The goal of political science is better understanding of the political world. The nontraditional venue here may have raised the stakes for political scientists, but it did not fundamentally alter that mission. To be convincing, we had to express ourselves clearly, anticipate criticisms, provide explanations, and analyze evidence.

The fact that we had written for the federal courts twice before and agreed to do so again in *McConnell* suggests that we derive some satisfaction from participating in these cases.[9] In this instance, that satisfaction was augmented by the Supreme Court's decision issued on December 10, 2003. The Court upheld virtually every provision of McCain-Feingold, often adopting the logic argued by the defense. It was a stunning, unexpected result. Justice Antonin Scalia, one of the dissenters, was typically blistering in his comments, calling the decision "the beginning of a long national tragedy." Supporters of the law were equally thrilled by their extensive victory.

As supporters of the law, we share that reaction. But even without that happy result, we would still find the experience both informative on the professional level and satisfying on the personal. No doubt, it is better to win than to lose, but we suspect and hope that colleagues who took the opposite position in the case can be pleased to have participated. If nothing else, it is flattering to have one's views sought by leading lawyers (including present and former solicitors general) and members of Congress who were parties in the case. To have been read and discussed by federal judges and Supreme Court justices (or, at least, by their clerks), as appears to have been the case here, is enormously gratifying.

The decision also contained several developments that most political scientists, including those who opposed McCain-Feingold, may appreciate. First, it affirmed Congress's expertise in campaign financing and accepted a level of deference to policymakers. This has not always been the case. For years many judges and their opinions had evinced skepticism about legislative regulation of campaign finance on the grounds that the incumbents who fashion the regulations are hopelessly self-interested.[10] In *McConnell* the majority of the Supreme Court deferred to the congressional policy and, instead of taking the "legislative" role, limited itself to issues of the constitutional authority of the Congress to act as it did.[11] Second, the decisions from both the district panel and the Supreme Court cite political scientists frequently. It is clear and welcome news for the discipline that judges take political scientists seriously and value their work.

Perhaps the most remarkable aspect of the decision, especially from the perspective of reformers, is its conclusion. One of the common metaphors of campaign financing is the leaky garden hose: block the flow of water at one place and it leaks out elsewhere. This is meant, of course, to illustrate the futility of reform. But the irony is that hydraulic systems, including garden hoses, actually do work. Turn on the faucet and water comes out; hook up a hose and the garden gets wet. So, we argued in the final section of our report that the true meaning of this metaphor is the need for vigilance and periodic repair: a lesson that every student of campaign financing knows. The system is in flux as various actors probe for advantage, and no "fix" will fix it for very long. The majority ended their decision with a similar observation: "Money, like

https://doi.org/10.1017/S1049096504045123 Published online by Cambridge University Press

water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day." We take this as a welcome dose of realism, and an invitation to Congress to remain prepared to act and to political scientists to continue their research on campaign finance.

Notes

1. Lower courts function as finders of fact for upper courts. Expert reports are generally not submitted to the Supreme Court, though the full trial record is always available, but in *McConnell* the justices allowed both sides to submit a limited number of reports with their briefs. *McConnell* also featured at least one round of rebuttals in which experts responded to each other's affirmative reports. In addition to our written work, we also traveled separately to Washington, D.C., for a grueling day of deposition/cross-examination.

2. The statute created a formula designed to capture most candidate-oriented or electioneering issue ads (often referred to as "sham issue ads") while avoiding most genuine or pure issue ads. Its basic approach is the product of a study group headed by political scientists Thomas Mann and Norman Ornstein (see http://www.brook.edu/gs/cf/reformcf.htm).

3. Soft money was a category created at the behest of parties (via a legal opinion from the FEC) to allow them to raise funds for "non-federal" activities, actions like erecting a headquarters or helping state or local candidates (Corrado et al. 2003). There have been a variety of efforts over time to blur the line between these activities and electioneering on behalf of federal candidates, culminating with "issue advocacy."

4. The Republican plaintiffs had argued that party organizations raised so much money from so many different contributors that they effectively obscured the identity of any particular donor. Therefore, any candidate benefiting from an NRSC or NRCC expenditure had no way of linking that good fortune to its original source.

5. Much of the record developed by the FEC remains unfortunately, under court seal. The Thompson Committee's work, both the majority and minority reports, is available. See "Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns," S. Rep. No. 105–167, at Chapters 5, 7, 18, and 32 (Majority Report), and at Chapters 39, 10–15, and 22–25 (Minority Report).

6. The mobilization expenditures we examined do not include the parties' spending on media.

7. There was no debate that party identification experienced little change during the 1990s with the acceleration in the amounts of soft money received, and little reason for either side to focus on party in government. The rise in party voting in Congress predates the 1990s (Rohde 1991). Even if it did not, the argument that soft money strengthened party in government would not have been helpful to the plaintiffs for it would have focused attention on the influence of money on policymakers' actions.

8. For example, the (paid) director of the Colorado Republican Party testified that it had tried and failed to send a newsletter to its members and organize a phone bank for volunteers before purchasing these services from vendors (Sorauf and Krasno 1997). While the state party received enormous support from federal committees, nearly all of the money was shipped out to vendors almost as soon as it arrived to aid specific candidates.

9. There are also the various amounts of income attested to by different witnesses in *McConnell* in their depositions.

10. Justice Scalia's comments from the bench during the oral arguments are illustrative:

Theodore Olson (Solicitor General, for McCain-Feingold): This Court has previously said, over and over again, this is an area where there is special expertise in Congress. This legislation. . .

Justice Scalia: Special expertise and also special interest. Do you know of any provision of this law that disadvantages incumbents? I can name you several that disadvantage challengers. . .

Mr. Olson (later): Well we pass laws in the United States, Justice Scalia, by people who already hold office.

11. This view is expressed in an *amicus* brief by a group of political scientists in *Shrink* (Beck et al. 1999).

References

Beck, Paul Allen, et al. 1999. Brief of *Amicus Curiae* (submitted for *Nixon v. Shrink Missouri Government PAC*). Available at http://supreme.lp.findlaw.com/supreme_court/briefs/98-963/98-963fo7/98-963fo7.pdf.

Citizens' Research Foundation. 1997. *New Realities, New Thinking*. Los Angeles: Citizens Research Foundation, University of Southern California.

Corrado, Anthony, Thomas E. Mann, and Trevor Potter. 2003. *Inside the Campaign Finance Debate: Arguments from the Court Battle over BCRA*. Washington, D.C.: Brookings Institution.

Gerber, Alan S., and Donald P. Green. 2000. "The Effects of Canvassing, Telephone Calls and Direct Mail on Voter Turnout: A Field Experiment." *American Political Science Review* 94:653–63.

Green, Donald. 2002. Rebuttal Report of Donald Green. Prepared for Defendant Intervenors in *McConnell v. FEC*.

Krasno, Jonathan S., and Kenneth Goldstein. 2002. "The Facts about Television Advertising and the McCain-Feingold Bill." *PS: Political Science and Politics* 35:207–212.

Krasno, Jonathan S., and Daniel Seltz. 2000. *Buying Time: Television Advertising in the 1998 Congressional Elections*. New York: Brennan Center for Justice.

Krasno, Jonathan S., and Frank J. Sorauf. 2000. Missouri's Limits on Political Parties. Prepared for the Attorney General of the State of Missouri in *Missouri Republican Party et al. v. Lamb*.

——. 2003. "Evaluating the Bipartisan Campaign Reform Act." *New York University Review of Law & Social Change* 28(1):121–81.

La Raja, Ray, and Elizabeth Jarvis-Shean. 2001. *Assessing the Impact of a Ban on Soft Money: Party Soft Money Spending in the 2000 Elections*. Berkeley: Institute of Governmental Studies and Citizens' Research Foundation Policy Brief.

Mann, Thomas E., and Norman J. Ornstein. 2004. "Separating Myth from Reality in *McConnell v. FEC*." *Election Law Journal* 3(2):291–98.

Rohde, David W. 1991. *Parties and Leaders in the Postreform House*. Chicago: University of Chicago Press.

Sorauf, Frank J. 1986. "Caught in a Political Thicket: The Supreme Court and Campaign Finance." *Constitutional Commentary* 3(1): 97–121.

Sorauf, Frank J., and Jonathan S. Krasno. 1997. Political Party Committees and Coordinated Spending. Prepared for the Federal Election Commission in *Colorado Republican II*.

https://doi.org/10.1017/S1049096504045123 Published online by Cambridge University Press