

What's on EMILY's "To-Do" List Now? Court Ruling Expands Soft Money Options for Nonprofits

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On September 18, 2009, a federal appeals court in Washington, DC, issued a significant ruling striking down a number of Federal Election Commission (FEC) regulations "that restrict how nonprofits may spend and raise money to advance their preferred policy positions and candidates." The case, *EMILY's List v. Federal Election Commission*, No. 08-5422 (D.C. Cir. Sept. 18, 2009), is an important decision with potentially broad-ranging implications for groups not only like EMILY's List, but also potentially for-profit corporations, trade associations and their federal political action committee (PACs).

EMILY's List is a nonprofit organization whose goal, as its own website describes, is to build "a progressive America by electing pro-choice Democratic women to office." EMILY's List works to achieve its goals not only by making contributions to candidates and political parties, but also by spending money on voter registration drives, get-out-the-vote (GOTV) activities and general advertising (*i.e.*, by making expenditures of its own).

The court's opinion observed that with respect to the first category of activity-making direct contributions-nonprofit entities may be required to use "hard-money" dollars to finance such activity. (Individuals may contribute up to \$5,000 per year to a nonconnected PAC's "hard-money" account, which means that the amount of funds available for such activities is restricted to some degree.) But the majority on the three-judge panel was not convinced that the FEC's regulation of the second category of activity-expenditures-was constitutionally permissible.

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For example, one of the challenged regulations required PACs registered with the FEC to use hard dollars to pay for at least 50% of the costs of generic voter registration and GOTV activities referring to a particular party. The panel found that organizations like EMILY's List are entitled, under the First Amendment, to pay for 100% of the costs of such generic activities out of their unrestricted (*i.e.*, soft money) accounts.

A second challenged regulation concerned the use and attribution of solicitations where contributors were informed that funds would be used to support clearly identified candidates at the state and federal level. Under the FEC's regulations, at least 50% of the funds received in response to such a solicitation must be treated as hard money. Due to the \$5,000 cap on hard-money contributions, this limit severely restricts a nonprofit's fundraising abilities since the 50% cap will impact the soft-money totals as well. The panel's majority found that this rule inhibited the constitutional right of nonprofits "to raise money for their soft-money accounts to help support their preferred candidates."

As these examples illustrate, what is most striking about the EMILY's List opinion is the breadth of the constitutional analysis. The majority's opinion began by identifying a number of core principles that could be discerned from the Supreme Court's earlier campaign finance decisions, including its rejection of the "equalization rationale"- *i.e.*, the notion that the political speech of some entities may be restricted in order to provide others with an equal voice in the process. The majority's opinion also cited the Supreme Court's heightened degree of protection for independent spending by citizens and groups, finding that the earlier Supreme Court decisions cast doubt on the linkage between independent spending by third parties and the potential for corruption. The panel majority used this distinction to buttress its own attack on the FEC's regulations, noting that the same concerns and supporting evidence about *quid pro quo* and contributions to political parties that led the Supreme Court to uphold some of the restrictions in *McConnell v. FEC*, 540 U.S. 93 (2003), had not been shown to be present where individuals contributed to nonprofit groups making their own expenditures.

Although later parts of the opinion-and the concurrence by Judge Janice Rogers Brown-focused on various statutory interpretation issues, it is these constitutional holdings that may have the longest and most dramatic impact on the federal campaign finance landscape. This is particularly true since the court's constitutional analysis extended not just to nonprofits registered as a political committee, but rather to all non-connected nonprofits. Moreover, it is possible that the breadth of this holding will be expanded further once the *Citizens United* opinion is handed down by the U.S. Supreme Court.

A final determination about whether to appeal this decision has not been made. The FEC Commissioners were unable to reach agreement on whether to pursue an appeal, and the Solicitor General, acting as the government's attorney, determined that she had no authority to seek a rehearing by the entire intermediate appellate court. However, the Solicitor General still has the option of petitioning the U.S. Supreme Court to hear the case. Other cases working their way up through the federal courts, including *Speechnow.org v. FEC*, also may address some of the same issues in the event that *EMILY's List* is not appealed.