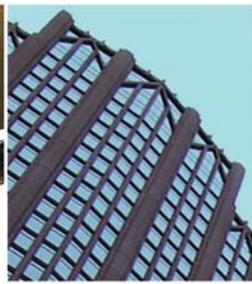


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Campaign Finance, Political Committees and Ethics

U.S. Supreme Court Relaxes Restrictions on Issue Ads Prior to Elections

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Federal Election Commission v. Wisconsin Right to Life, Inc., ___ U.S. ___, ___ S.Ct. ___, 2007 WL 1804336 (June 25, 2007).

In its most recent campaign finance decision, the United States Supreme Court eased restrictions on communications by organizations, holding that a provision of the federal campaign finance law is unconstitutional as applied to advertisements run by a special interest group in the closing weeks of a federal election.

Background

In response to a flood of special interest money in the 2000 elections (so-called "soft" money), Congress passed the Bipartisan Campaign Reform Act of 2002 ("BCRA") also known as the "McCain-Feingold" campaign finance legislation. The major component of the Act was a ban on "soft money" or the unlimited funds that were given by unions, corporations and other special interests to political parties. BCRA also sought to close a loophole in the campaign finance law allowing such groups to influence federal elections by running "issue ads." Federal election law has historically banned corporations and unions from running advertisements targeting a specific candidate, termed "electioneering communications." Before BCRA, special interest groups could circumvent those restrictions by running "issue ads" that did not mention specific candidates in the days and weeks before the elections. It is estimated that approximately \$500 million was spent on these type of advertisements in the 2000 election.

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Under BCRA, corporations and unions were barred from running issue advertisements that referred to a specific candidate within 60 days of a federal general election and 30 days of a federal primary. The so-called "blackout period" applied to for-profit corporations as well as special interest groups operating as a corporation (examples include the Sierra Club and the National Rifle Association). In 2003, the Supreme Court upheld BCRA as constitutional on its face in *McConnell v. Federal Elections Commission*, 540 U.S. 93, 124 S.Ct. 619 (2003), with Justice O'Connor serving as the crucial swing vote in a 5 to 4 decision.

Facts of *FEC v. WRTL*

In mid-2004, Wisconsin Right to Life, Inc. ("WRTL"), a tax-exempt non-profit corporation organized under Section 501(c)(4) of the Internal Revenue Code, funded advertisements encouraging Wisconsin residents to contact their U.S. Senators, Kohl and Feingold, and urged them to defeat Senate filibusters of President Bush's judicial nominees. Because Feingold was seeking reelection, the BCRA blackout period would begin prior to the Wisconsin primary and general elections, on August 15, 2004. WRTL planned to run the ads through the end of August 2004. In advance of the BCRA prohibition date, WRTL sought a preliminary injunction on First Amendment grounds to prohibit the FEC from enforcing the restriction. The United States District Court denied WRTL's request based on the conclusion that *McConnell* prohibited further challenges to the law including applying the law to particular circumstances.

In 2005, the Supreme Court reversed the District Court's denial and remanded, holding that *McConnell* did not prevent such challenges. On remand, the District Court granted summary judgment to WRTL, concluding that the BCRA provision was unconstitutional when applied to the WRTL advertisements. On the merits, the District Court found that the advertisements were genuine issue advertisements, protected by the First Amendment and not express advocacy in support or opposition to a particular candidate.

Decision

In its review of the District Court's decision in favor of WRTL, the Supreme Court affirmed the result, but the reasoning of the majority was fractured among several concurring opinions. A five Justice majority of Chief Justice Roberts, along with Justices Alito, Scalia, Thomas, and Kennedy, held that the BCRA restriction was unconstitutional as applied to the WRTL advertisements. Justice Roberts, writing for the Court, was joined by Alito who declined to overturn *McConnell* and strike down the provision of BCRA as unconstitutional. Justice Scalia wrote an opinion concurring in the judgment that was joined by Justices Thomas and Kennedy. These three supported overruling *McConnell* and holding the provision of the statute prohibiting issue ads during the blackout period unconstitutional. Justice Souter wrote the dissenting opinion and was joined by Justices Ginsburg, Breyer and Stevens. In his opinion, Chief Justice Roberts rejected the "intent and effect" test proposed by the FEC, who argued that, under *McConnell*, advertisements intending to influence and having an effect on a federal election are the functional equivalent of express advocacy (directly supporting or opposing an identified candidate in a federal election) and properly regulated by BCRA.

Instead, the Chief Justice designed a new test where "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

Applying the tests to WRTL, Chief Justice Roberts highlighted the fact that the advertisements offered a position on a legislative issue, exhorted the public to adopt the position and to contact their elected officials, failed to mention an election, candidacy, political party or challenger and did not espouse a position on a candidate's character, qualifications or fitness for office. Because the advertisements had another reasonable interpretation, the BCRA provision was an unconstitutional regulation of free speech as applied to the ads. Justice Scalia's concurring opinion criticized this new test as vague and argued that the ruling was in effect overturning *McConnell* with respect to the blackout period restriction. The dissenting Justices agreed with Scalia that *McConnell* was effectively overruled and declared that the regulations on corporate and union political contributions and spending are "open to easy circumvention" after the Court's ruling.

Impact

Although the WRTL decision did not address the central reform of BCRA, the ban on soft money is arguably undercut. While BCRA forced corporations to use political action committees, subject to contribution limits and FEC regulation, to fund these communications, corporations and unions can now tap corporate accounts to pay for issue advertisements in the days and weeks prior to a federal election so long as "the ad is susceptible of [any] reasonable interpretation other than as an appeal to vote for or against a specific candidate." Given the "reasonable interpretation" test articulated by Chief Justice Roberts, a special interest group seeking to influence a federal election can design, with appropriate legal review, a communication that is permissible.

It is likely that special interest groups will mount new challenges to BCRA in hopes that the Court will eventually reconsider the *McConnell* decision and strike down all regulations on political advertising. In the meantime, it is unclear how the FEC will apply the new ruling, and given the proximity of the 2008 elections, the agency may be pressed to issue new rules interpreting the decision by the end of the year.

We will keep you apprised of such developments. Please do not hesitate to contact us if you would like a copy of the decision or additional information on current campaign finance issues.

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