

Federal Court Permits Corporate Issue Ads Near an Election

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By a 2-1 vote in an opinion written by the highly respected Judge Sentelle, a special three-judge district court of the U.S. District Court for the District of Columbia held that corporations have a First Amendment right to fund "true issue ads" during elections, even though they mention candidates and thus fall within the definition of "electioneering communications" found in the Bipartisan Campaign Reform Act (BCRA) of 2002. *FEC v. Wisconsin Right to Life, Inc.*, No. 04-1260, 2006 WL 374669 (D.D.C. Dec. 21, 2006).

WRTL Issue Ads

Wisconsin Right to Life, Inc. (WRTL) ran the ads in question before the 2004 election, but took them down when the electioneering communication blackout periods began. The ads argued that deferring votes on judicial confirmation was undesirable and urged voters in each state where the ads ran to contact their named Senators and tell them so. At that time judicial filibusters were a live issue in the Senate. However, some of the named senators were running for reelection. Because the ads named federal candidates and were broadcast to their constituents, they were electioneering communications that, under federal law, a corporation could not fund.

Why the Ads Are Permissible—The Majority Opinion

The court said *McConnell v. FEC* approved the "electioneering communication" standard because the government proved it had a compelling interest in regulating "express advocacy or its functional equivalent." According to the court, in *McConnell* the government did not prove, and the Supreme Court did not find, a compelling interest in regulating "true issue ads." Thus, BCRA electioneering communication provisions cannot constitutionally be applied to such true issue ads.

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For practical reasons, the court ruled that whether an ad is express advocacy or its functional equivalent must be judged within "the four corners" of the ad itself. Moreover, the judgment must not involve an attempt "to read any speaker's mind. Such an inquiry [is] not properly part of any First Amendment analysis." In this respect, the majority followed Buckley's reasons for developing its express advocacy test.

To classify the ads that WRTL had run, the court asked whether their language:

1. Describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future;
2. Refers to the prior voting record or current voting position of the named candidate on the issue described;
3. Exhorts the listener to do anything other than contact the candidate about the described issue;
4. Promotes, attacks, supports or opposes the named candidate; and
5. Refers to the upcoming election, candidacy and/or political party of the candidate.

In addition, as to the televised ad, the Court also looked the images displayed in concert with the language to evaluate whether they otherwise accomplish the prohibited result.

Importantly, WRTL "did not and does not challenge the reporting and disclaimer requirements" for true issue ads that fall within the electioneering communication definition. The court's holding is simply that corporations may fund such true issue ads. Whether they have to report is left for another day.

Delving into Intent—The Dissent

Judge Roberts disagreed that analysis should be limited to the four corners of the ad. He pointed out that McConnell had considered the intent behind "sham issue ads" and argued that a similar analysis was necessary.

Judge Roberts read Buckley and other precedent to disfavor analysis of likely listener reaction, but to allow assessment of the speaker's purpose. He pointed out that many criminal statutes punish speech in part because of the speaker's intent, e.g., speech intended to defraud or extort or induce someone into slavery.

Judge Roberts argued that a broader contextual analysis suggested the WRTL ads were intended to defeat Senator Feingold. He noted that WRTL had attacked Senator Feingold for delaying judicial confirmations and that opponents of the Senator were stressing that same issue during the election.