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NEWSLETTER

Justice Scalia's Impact on Campaign Finance and How His Death Could Significantly Alter the Legal Landscape

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By Jan Witold Baran and Andrew G. Woodson

The passing of Supreme Court Justice Antonin Scalia on February 13 is significant in many ways, including for its impact on our nation's campaign finance jurisprudence. Throughout his nearly 30 years on the bench, Justice Scalia's strong, passionate, and often humorous advocacy for First Amendment principles carried much sway and, particularly in his later years, represented the views of a majority of the Court's members. But with his death and the prospect of President Obama appointing a replacement who does not share Justice Scalia's beliefs, there is a likelihood that the recent 5-4 majority supporting greater First Amendment freedom in cases such as *Citizens United v. FEC*, 558 U.S. 310 (2010), will soon become a 5-4 majority far more willing to uphold greater regulation of political speech.

Justice Scalia's first opportunity to weigh in on a campaign finance case came just months after taking office, when he provided an important vote in *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238 (1986), exempting the small, non-profit organization from the federal prohibition on independent corporate spending. Several years later *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) upheld restrictions on corporate speech more generally. It was Scalia's Orwell-invoking dissent that resonated most within the legal community. In fact, Scalia's dissent provided the analytical framework for subsequently overruling *Austin* twenty years later in *Citizens United*, once the composition of the Supreme Court changed and more justices—including Samuel Alito—were appointed that were

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sympathetic to Scalia's views.

While Justice Scalia did not write that many majority campaign finance opinions for the Court *per se*, his vote was often decisive and his dissents and concurrences were almost as powerful and memorable. For example, in his dissent in the *McConnell v. FEC*, 540 U.S. 93 (2003), Scalia wrote how it "is a sad day for the freedom of speech" when the Court allows restrictions on political speech but had recently disapproved of regulations involving sexually explicit cable programming, tobacco advertising, and illegally intercepted communications. In his 2007 concurrence in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), Scalia memorably mocked the federal prohibition on corporate electioneering communications by comparing it to the plight of a Moroccan cartoonist who had criticized the king's actions: "in the United States (making due allowance for the fact that we have elected representatives instead of a king) it is a crime [to criticize government actions], at least if the speaker is a union or a corporation . . . ." And in a concurring statement from *Doe v. Reed*, 561 U.S. 186 (2010), often cited by the "reform" community, Scalia extolled the virtues of disclosure, noting that "[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."

While Justice Scalia's death is unlikely to change the Court's views on disclosure, which currently enjoy support from seven of the eight remaining justices (Justice Clarence Thomas being the sole dissenter on this point), Justice Scalia's absence on other questions means that there is a 4-4 split on other important campaign finance questions. Some are already speculating that the Court could revisit and overrule its *Citizens United* decision in the next few years if President Obama is successful in appointing a liberal justice to the Court. While there are no doubt many substantive jurisprudential areas where Justice Scalia's loss will be felt, because of the close votes in many of the campaign finance cases in recent decades, this is certainly an area to watch where a new Justice may have a major impact.