"Svoboda, Brian (Perkins Coie)" <BSvoboda@perkinscoie.com>

10/01/2007 05:49 PM

To <wrtl.ads@fec.gov>
cc
bcc
Subject Comments

Attached please find comments on behalf of the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee, responding to the Commission's Notice of Proposed Rulemaking on electioneering communications.

Very truly yours,

Brian G. Svoboda | Perkins Coie LLP
>of counsel
>607 Fourteenth Street N.W.
>Washington, DC 20005-2011
>PHONE: 202.434.1654
>FAX: 202.654.9150
>E-MAIL: BSvoboda@perkinscoie.com

Perkins Coie

607 Fourteenth Street N.W.
Washington, D.C. 20005-2011
PHONE: 202.628.6600
FAX: 202.434.1690
www.perkinscoie.com

October 1, 2007

Ron B. Katwan, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Notice of Proposed Rulemaking

Dear Mr. Katwan:

We write on behalf of our clients, the Democratic Senatorial Campaign Committee ("DSCC") and the Democratic Congressional Campaign Committee ("DCCC"), in response to the Commission's Notice of Proposed Rulemaking to implement the Supreme Court's decision in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007).

As the agency tasked by Congress with the duty to administer and – in most instances – enforce the Federal Election Campaign Act of 1971 and the Bipartisan Campaign Reform Act of 2002, the Commission should continue to lend the maximum permissible effect to BCRA's electioneering communications provisions. *See* 2 U.S.C. § 437c(b)(1). Accordingly, we urge the Commission to follow the basic approach set forth in Alternative I, and do no more than necessary to conform the Commission's regulations to the Court's decision.

1. **The Commission Should Enact a Limited Exception From Part 114's Prohibitions That Tracks Closely With the Holding in *WRTL II***

The electioneering communications provisions, implemented throughout Commission regulations, are a part of a comprehensive regulatory scheme envisioned by Congress. Having banned the raising and spending of "soft money" by the national parties, and having curtailed state party soft money spending, Congress chose to place separate

restrictions on advertising by non-party, non-candidate and non-political committee sponsors during the days immediately preceding an election. BCRA's sponsors characterized those provisions as essential to "comprehensive ... balanced reform." 147 Cong. Rec. S3034 (daily ed. Mar. 28, 2001) (remarks of Ms. Snowe). Among their purposes was to ensure that the distribution of activity in the campaign finance process did not simply flow from the parties to entirely unregulated actors. *See* 147 Cong. Rec. S3041-42 (daily ed. Mar. 28, 2001) (remarks of Mr. Wellstone).

The Commission's first and foremost task is to enforce these provisions and the broader Congressional framework, within the parameters that the Court has now set. It must continue to "ground its view of the statute on congressional purpose ..." *Public Citizen v. Burke,* 843 F.2d 1473, 1478 (D.C. Cir. 1988). When the Commission moves away from interpreting the statute, and toward predictions of what the courts may find to be constitutional, its rules enjoy less deference from the courts. *Id.*

The Commission can – and indeed must – construe its statutes to avoid constitutional difficulties. But there is a difference between construing the statute, and interpreting the Constitution. This is why the D.C. Circuit found the Commission's "plea for deference" to be "doctrinally misconceived" in *Akins v. FEC,* 101 F.3d 731, 740 (D.C. Cir. 1997) (en banc), *vacated on other grounds,* 524 U.S. 11 (1998). According to the court, when the Commission assumed that the Supreme Court had imposed a "major purpose" requirement for political committee status, it went beyond its normal task of interpreting statutory language. *See* 101 F.3d at 740. Instead, the Commission tried to identify "the extent of the limitation ... put on this language by Supreme Court decisions." *Id.* The interpretation enjoyed no deference, because "agencies have no special qualifications of legitimacy in interpreting Court opinions." *Id.*

As a result, the soundest course for the Commission to follow is to hew as closely as possible to what the Supreme Court actually did. In *WRTL II,* the Supreme Court barred the Commission from enforcing the restrictions on corporate financing of electioneering communications against a particular type of ad. It did not create a "new exemption" from the definition of "electioneering communication." *See* Electioneering Communications, 72 Fed. Reg. 50,261, 50, 262 (2007). It did not address the constitutionality of the reporting, disclaimer or coordination statutes. *See id.* at 50,261. It said nothing about the statute's regulation of individuals, unincorporated entities or qualified nonprofit corporations. *See id.* at 50,263. It did not address the question of whether the statute could be applied to commercial or business advertisements. *See id.* at 50,264.

From this perspective, Alternative 1 is far better than Alternative 2. Indeed, Alternative 2 seems especially vulnerable to court challenge, insofar as it would extend an exemption from the definition of "electioneering communication" to advertisements that promote, support, attack or oppose a candidate – a power which Congress expressly withheld from the Commission. *See* 2 U.S.C. § 434(f)(3)(B)(iv).

Even if it were to adopt Alternative 1, however, the Commission should take care to narrowly tailor its new regulations to the Supreme Court's holding. Thus, for example, the Commission should avoid crafting "safe harbor" provisions for so-called "common types of communications." *See* 72 Fed. Reg. at 50,264. This is especially true for subjects that the Court did not reach at all, such as commercial or business advertisements, public service announcements, or charitable promotion activities. The task of creating "safe harbors" beyond the reach of the FECA belongs to the courts – not to the Commission.

Finally, the Commission should take special care not to narrow the range of disclosure now required from electioneering communication sponsors. *See id.* at 50,271. The Court did not consider any challenge to the disclosure requirements in *WRTL II,* and said nothing directly to cast doubt on their vitality. Those requirements remain on the books and continue to "perform an important function in informing the public about various candidates' supporters" – just as they did when the Supreme Court upheld them in *McConnell v. FEC,* 540 U.S. 93, 201 (2003). Party committees like the DSCC and DCCC have a real, direct interest in having access to information of this character, which is essential to their own strategic decision-making.

2. The Commission Should Not Revise the Definition of 'Express Advocacy' In Response to This Rulemaking

The Commission asks whether *WRTL II* provides "guidance regarding the constitutional reach of other provisions in the Act ..." 72 Fed. Reg. at 50,263. It notes the similarity between the principal opinion's discussion of the "functional equivalent of express advocacy," and the Commission's definition of "express advocacy" at 11 C.F.R. § 100.22. *See* 72 Fed. Reg. at 50,263. It then asks whether *WRTL II* requires "the Commission to revise or repeal any portion of its definition of express advocacy at section 100.22?" *Id.*

For several reasons, the Commission should leave the regulatory definition of "express advocacy" alone in this rulemaking:

First, any change to the definition of express advocacy should be grounded in the Commission's interpretation of the definition of "expenditure" – not the Commission's prediction of how a future court might apply the *WRTL II* holding. As when implementing the narrow holding of *WRTL II* itself, the Commission should avoid basing a new express advocacy rule entirely on constitutional analysis that enjoys no judicial deference. *See Public Citizen v. Burke,* 843 F.2d at 1478. Notably, the questions asked by the Commission in the Notice of Proposed Rulemaking are almost entirely constitutional in character. *See* 72 Fed. Reg. at 50,263.

Second, the "functional equivalent of express advocacy" is not the same as "express advocacy." By its very definition, it captures a wider range of speech. This is why Congress felt compelled to regulate it specially, even though existing statutes already governed the making of "expenditures" and the operation of "political committees" – both of which are terms limited by the express advocacy standard.

Third, the Commission must recognize that, over the past five years, political committees like the DSCC and DCCC have faced an unprecedented degree of regulatory uncertainty. They have seen two major rewrites of the FECA – the most recent of which took effect on September 14. They have seen serial court challenges to the rules under which their Members raise funds for other candidates, appear at state and local party events, and avoid prohibited coordination. The most recent of these cases – *Shays v. FEC,* No. 06-1247 (D.D.C. Sept. 12, 2007) – was decided just two days before the latest round of FECA changes took effect, and portends still more regulatory uncertainty, whether through further litigation or more rulemakings. The Commission's web site shows nine ongoing rulemaking projects – and approximately forty that have been undertaken since BCRA was passed.

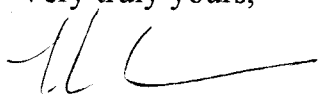
Even one who disagrees with Chief Justice Roberts' reasoning in *WRTL II* would be tempted to echo his cry, "Enough is enough." 127 S. Ct. at 2,672. Certainly, the Commission must implement legislation passed by Congress, and react to court decisions. But it need not begin to rewrite a rule that has historically been a source of contention, and that affects the entire regulated community – especially when it has been tasked simply with writing rules to conform to a Supreme Court opinion that directly affects only a fraction of the community.

Finally, political committees like the DSCC and DCCC now rely on the current definition, which has been in place for more than twelve years. The rule does not simply say when an individual has made an independent expenditure. It is also relevant to

whether a political committee has sponsored a communication that triggers the content prong of the coordination rules, thus making an in-kind contribution or coordinated expenditure. *See* 11 C.F.R. § 109.21(c)(3).

As always, we appreciate the opportunity to comment on these matters, and we request the opportunity to testify on behalf of the committees.

Very truly yours,



Robert F. Bauer
Judith L. Corley
Marc E. Elias
Brian G. Svoboda

Counsel to the DSCC and DCCC