FEDERAL ELECTION COMMISSION
Washington, DC 20463

Statement of Commissioner Hans A. von Spakovsky
on the Commission's Implementation of
the Supreme Court's Decision in *Wisconsin Right to Life v. FEC*

November 20, 2007

The rule we will consider today seeks to implement the Supreme Court's decision in the *Wisconsin Right To Life* case, which held that the funding prohibition on electioneering communications in the Bipartisan Campaign Reform Act of 2002 ("BCRA") is unconstitutional when applied to a communication that may reasonably be interpreted as something other than an appeal to vote for or against a candidate. The *Wisconsin Right To Life* decision has restored the constitutional significance of the line between campaign speech and issue speech that the Court's *McConnell* decision blurred. And I take great solace in the Chief Justice's reaffirmation that "[i]n drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it."

In the summer of 2006, I urged this Commission to adopt a regulatory fix that would have exempted grassroots lobbying communications from the scope of the electioneering communications definition.[1] That proposal was defeated, but now the Supreme Court has given us a broader, constitutionally-based exemption that we must implement. The Court has told us that not every communication captured by the electioneering communications provision in BCRA may be constitutionally regulated. Instead, only those communications that are the functional equivalent of express advocacy may be subject to governmental regulation. According to the Supreme Court, a communication is the functional equivalent of express advocacy only if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

Our task today is to adopt a regulation that implements the Supreme Court's new test in a way that makes it possible for the public to know with a high degree of certainty when they may speak freely on an issue of importance, and when they may not. The exemption language before us does that, but I am under no illusions that we will not still face tough decisions. This rule only gets us part of the way to faithfully implementing the Court's First Amendment decision. The time will come when we must decide the fate of a communication that presents a truly difficult determination under the Supreme Court's test. When that time comes, I intend to be guided by the Court's admonition that "the tie goes to

[1] *See* http://www.fec.gov/members/von_Spakovsky/speeches/statement20060803.pdf.

the speaker, not the censor," and that "we give the benefit of the doubt to speech, not censorship." I suspect I will be criticized by some when I put this intention into practice, but our rights to free speech and to petition the government enshrined in the First Amendment are precious rights not enjoyed by millions of people around the world, and I will do everything I can, consistent with my role as a Commissioner, to preserve those rights.

There are two basic approaches before us today. The first would place the new exemption within the Commission's definition of "electioneering communication," which is found at 11 CFR 100.29. Under this approach, an advertisement that satisfies the Supreme Court's exemption language would not constitute an "electioneering communication" and therefore would not be subject to either the funding prohibition or new disclosure requirements.

Under the second proposal, the exemption would be placed within the Commission's corporate and labor union funding regulations, at 11 CFR 114.15. Under this approach, an advertisement that satisfies the Supreme Court's exemption language would still qualify as an "electioneering communication," but a corporation or labor union would be permitted to finance it with general treasury funds. A complicated new disclosure regime would then apply to these "permissible electioneering communications."

The structure and language of the exemption that appears in the drafts before us is different than what appeared in our Notice of Proposed Rulemaking. In the first version of a Final Rule that we released, the safe harbor criteria set forth in the NPRM was recast into the two basic prongs of the Supreme Court's examination of the *Wisconsin Right to Life* advertisement. The Commission's understanding of the Court's test did not become any more or less strict, contrary to what some in the public suggested. The proposed rule was simply reformulated to better reflect the Court's analysis. The original safe harbor approach that appeared in the NPRM was too limiting. While it offered a degree of precision, it relied too heavily on the safe harbor, and would necessarily have resulted in communications that closely hewed to an FEC-sanctioned speech formula, which is a form of prior restraint. This result is absolutely contrary to the spirit of *Wisconsin Right to Life*, which seeks to "give the benefit of the doubt to speech, not censorship." Rather than tell the public how they should speak, it is better that we simply state what the Supreme Court's test is, and then describe how we will determine if that test is satisfied. However, in order to respond to the confusion that met our first proposal, we now have a proposed regulation that sets forth the Supreme Court's basic test, followed by a safe harbor, followed by a section indicating how the Commission will analyze communications that do not satisfy the safe harbor. I am comfortable with this proposal because it makes perfectly clear that an advertisement *does not have to* satisfy the safe harbor in order to satisfy the exemption.

However, I believe that the Supreme Court's decision calls for us to adopt a proposal that places the exemption within the definition of "electioneering communication." I am sympathetic to the motivations behind placing the exemption in Section 114 of the Commission's regulations, the most significant of which is that the Commission should do no more than is required by the Court's opinion. In fact, I agree. And while I fully acknowledge that *Wisconsin Right to Life* did not directly address BCRA's electioneering communication disclosure provisions, it is also indisputable that the

Court's opinion does not direct us to create a new reporting system for a category of communications that Congress never envisioned.

In supporting this approach, I am not motivated by any animus whatsoever toward reporting and disclosure in general. Transparency in elections is a good thing, and there is no doubt that disclosure of the funding of election-related speech is required by the law. Rather, I am motivated by my understanding of the Commission's function, which is to interpret and administer, not to legislate. A requirement that advertisements that are constitutionally exempt from our regulation under *Wisconsin Right to Life* should still have their funding reported is one that can only be implemented by Congress, not the FEC. The Supreme Court stated very clearly that "[t]his Court has never recognized a compelling interest in regulating ads, like WRTL's, that are neither express advocacy nor its functional equivalent." And the Court has *never* before upheld under the federal campaign finance laws the mandatory disclosure of issue advocacy by non-political committees.

The Court in *Wisconsin Right To Life* held that the electioneering communication provision cannot be applied to issue ads because they are not electoral campaign activity. We therefore have no authority to impose regulations on such speech. Nowhere does the campaign finance law that we are charged with administering regulate in any manner the non-electoral speech or activities of individuals and organizations that are neither candidates nor political committees. It is simply not the Commission's proper role to place this novel concept into our regulations.