

Big Free Speech Win

BY Dave Andrusko

On December 21, a three-judge panel upheld a challenge by Wisconsin Right to Life (WRTL) to a portion of the infamous 2002 McCain-Feingold campaign finance "reform" law. The 2-1 decision is an important First Amendment free speech victory.

U.S. District Judge Richard Leon, joined in his opinion by U.S. Court of Appeals Judge David B. Sentelle, held that McCain-Feingold's ban on corporate electioneering communications is unconstitutional as applied to three grassroots lobbying ads created by WRTL. U.S. District Judge Richard W. Roberts dissented.

One provision of the law (known formally as the "Bipartisan Campaign Reform Act of 2002") said that in the 60 days prior to a November general election or the 30 days prior to a primary, money from corporations, unions, and citizen advocacy groups such as WRTL can not be used to sponsor radio and TV ads that broadcast an "electioneering communication"—one that "refers to" a candidate for federal office.

The challenge by WRTL, litigated by NRLC General Counsel James Bopp, Jr., ran up and down the legal ladder before coming to the panel. The decision now is likely to go to the United States Supreme Court.

"If the high court agrees with [the December 21] decision, the justices may have to establish a test to differentiate genuine issue ads from phony ones," the Associated Press reported.

At issue in *WRTL v. FEC* are ads WRTL wanted to run in 2004. The ads simply said that some senators in Washington were "using the filibuster tactic" to prevent an up or down vote on a number of President Bush's judicial nominees. "Contact [Wisconsin] Sens. [Russell D.] Feingold and [Herb] Kohl and tell them to oppose the filibuster," the ad said.

The Federal Election Commission (FEC) argued that because Feingold was running for re-election, WRTL could not run the ads that mentioned him in the 60 days prior to the November elections or 30 days prior to Wisconsin's primary. WRTL and Bopp took the FEC to court.

In 2003, in the case of *McConnell v. Federal Election Commission*, the Supreme Court upheld McCain-Feingold in principle. It was that ruling which a three-judge panel initially cited in rejecting WRTL's challenge.

But last January the Supreme Court said that when it upheld the law's provision with respect to "electioneering communications" against a "facial challenge in the 2003 decision," it did "not purport to resolve future as-applied challenges." In so doing the justices ordered the district court "to consider the merits of WRTL's as-applied challenge."

In its opinion, the panel concluded that WRTL's as-applied challenge boiled down to the assertions that its ads were not "express advocacy" (or its "functional equivalent") and that the government "has failed to demonstrate a compelling interest in regulating these ads." The panel said "we agreed with each of the plaintiff's contentions."

The defendant—the FEC—had argued that an evaluation “should not be limited to a facial evaluation of the ad’s language, but a contextual analysis of the ‘intent’ behind the ad’s creation and the ‘effect’ that the ad is intended, and likely, to have on the voting public,” the panel wrote.

“Simply stated, it appears to this Court that the judiciary, in conducting First Amendment analysis, should not be in the business of trying to read any speaker’s mind.” The panel warned, “Such an inquiry is unpre-cedented and not properly a part of any First Amendment analysis.” (Emphasis added.)

Responding to the panel’s decision, Mr. Bopp said, “This is a victory for the right of the people to lobby their members of Congress on upcoming votes even if there is a pending election.” He added, “This grassroots lobbying is simply self-government at work, which is protected by the First Amendment.”

The full decision can be read at <http://www.dcd.uscourts.gov/opinions/2006/2004CV1260-154347-12212006a.pdf>.