



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**CONCURRING STATEMENT ON ADVISORY OPINION REQUEST 2012-19
(AMERICAN FUTURE FUND)**

Vice Chair Ellen L. Weintraub and Commissioner Cynthia L. Bauerly

June 13, 2012

Today, the Federal Election Commission approved a response to an Advisory Opinion Request filed on behalf of American Future Fund, a 501(c)(4) organization.¹ American Future Fund asked whether a number of proposed radio and television advertisements criticizing President Obama and using terms such as “the Administration,” the “White House,” “Obamacare,” or “Romneycare” instead of his or Governor Romney’s names would still “refer[] to a clearly identified [Federal] candidate” such that they would be “electioneering communications” (or “ECs”) under the Act if made within the statutory time windows. One proposed ad would even contain an audio clip of President Obama’s voice. We supported Draft B, which concluded that all such ads would be ECs.² After Draft B failed by a 3-3 vote, we supported the consensus draft that the Commission approved by a vote of 4-2.³

Our decision to support Draft B was not difficult in light of the text of the Act, its legislative history, and guiding Supreme Court precedent. In creating the category of “electioneering communications” under the BCRA,⁴ Congress plainly intended to broaden the reach of the Act beyond communications that contain express advocacy or its functional equivalent. Moreover, Congress specifically eschewed an approach that would have made application of the EC definition turn on whether a specific communication contains certain “magic words.”⁵ The Supreme Court upheld this approach in *McCormell v. FEC*.⁶

¹ In the 2010 cycle, American Future Fund spent over \$2.2M on electioneering communications alone, and over \$9.5M in total, all without disclosing a single contributor.

² Draft B concluded that one ad, Proposed Advertisement No. 4, which would refer only to a Cabinet member who is not running for office and to “the government,” would not be an EC.

³ The consensus draft incorporates the substance of Draft B’s analysis as to Proposed Advertisement No. 4, as well as its conclusions as to Proposed Advertisement Nos. 7 and 8, which contain the terms “Obamacare” and “Romneycare.”

⁴ See Pub. L. 107-155 (2002).

⁵ See, e.g., 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002) (Statement of Sen. McCain); *id.* at S2116 (Statement of Sen. Levin); *id.* at S2135 (Statement of Sen. Snowe); 148 Cong. Rec. E178-03 (Feb. 13, 2002) (Statement of Rep. Meehan); *id.* at H349 (Statement of Rep. Borski); *id.* at E175-02 (Statement of Rep. Meeks).

⁶ 540 U.S. 93,193-94 (2003).

In *Citizens United*, the Court struck down the funding restrictions for ECs.⁷ In that same opinion, however, eight justices of the Supreme Court resoundingly upheld the Act's disclosure and disclaimer requirements, which serve a vital purpose by "enable[ing] the electorate to make informed decisions and give proper weight to different speakers and messages."⁸ The Court specifically noted "[the] evidence in the record that independent groups were running election-related advertisements while 'hiding behind dubious and misleading names.'"⁹ The Court found BCRA's disclosure and disclaimer requirements to be an appropriate remedy for this problem and "therefore upheld BCRA §§ 201 and 311 on the ground that they would help citizens 'make informed choices in the political marketplace.'"¹⁰

The Act defines an EC as "any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office. . . ."¹¹ The legislative history of BCRA specifically addresses how to interpret the phrase "refers to a clearly identified candidate" in section 434(f)(3)(A). Senator Feingold, one of BCRA's chief sponsors, explained in response to a query from another senator that an ad meets this statutory test if it "mentions, identifies, cites, or directs the public to the candidate's name" or makes any other "unambiguous reference to the candidate's identity."¹² Consistent with the Act and its history, the Commission's regulation provides that a communication refers to a clearly-identified Federal candidate for purposes of the EC reporting and disclaimer requirements if "the candidate's name, nickname, photograph, or drawing appears in the ad, or the identity of the candidate is *otherwise apparent though an unambiguous reference* . . ."¹³

We had little difficulty determining that all but one of American Future Fund's proposed ads would qualify as ECs under this regulation. To begin, it is untenable to suggest that an ad containing a candidate's own voice does not contain an "unambiguous reference" to him. The contention that some listeners might not recognize the candidate's voice is not only highly improbable in the case of the President, but also irrelevant, because our analysis does not turn on this type of subjective perception.¹⁴ Such an argument is akin to saying that the President's

⁷ See *Citizens United v. FEC*, 558 U.S. ___, 138 S.Ct. 876, 898 (2010).

⁸ *Id.* at 916.

⁹ *Id.* at 914 (quoting *McConnell*, 540 U.S. at 197).

¹⁰ *Id.* (quoting *McConnell*, 540 U.S. at 197).

¹¹ The other EC requirements are that the communication take place within 60 days before the general election or 30 days before the primary, nominating caucus, or convention; and, in non-presidential races, that the communication be "targeted to the relevant electorate." See 2 U.S.C. § 434(f)(3)(A).

¹² 148 Cong. Rec. S2144 (daily ed. Mar. 20, 2002).

¹³ 11 C.F.R. § 100.29(b)(2) (emphasis added).

¹⁴ The President's voice is so ubiquitous that merely to mention the name of any recent President (George W. Bush, Clinton, Reagan, etc.) is to conjure a memory of the sound of his voice. As even one of our colleagues conceded during the Commission's discussion of American Future Fund's request, "everybody and their dog" would recognize President Obama's voice.

photo in an ad is not an unambiguous reference because some viewers may not recognize his face; objectively, it clearly identifies him.¹⁵ The claim that one cannot refer to a candidate by his voice is like the proverbial “thirteenth stroke of a crazy clouk” – it casts doubt upon all of the accompanying arguments, and demonstrates the lengths to which some will go to avoid the Act’s disclosure and disclaimer requirements.

Likewise, terms such as “the White House” and “the Administration,” as used by American Future Fund, are also unambiguous references to a candidate – the President, Barack Obama. President Obama is the head of the Administration; its policies are his policies. And “the White House” – like “10 Downing Street” or “Buckingham Palace” – is a place inextricably linked to the official who lives and works there. Anyone else currently working in the White House works for President Obama, and acts solely on his behalf. When American Future Fund exhorts those who hear or view its ads to call “the Administration” or “the White House,” it is not asking them to send a message to a switchboard operator, or a building. It is asking them to send a message to President Obama. To pretend otherwise is like suggesting that the millions of children who address letters every December to “the North Pole” may be writing to the elves, not Santa Claus. It simply makes no sense.

Finally, ads using nicknames for legislation like “Obamacare” and “Romneycare” literally contain candidates’ names. In crafting section 100.29(b), the Commission specifically declined to exempt such ads from the definition of EC.¹⁶ We see nothing in American Future Fund’s proposed ads to suggest that they were intended to be anything other than what they appear to be: references to the candidates and the policies associated with them. We are pleased that a majority of the Commission could agree on this point.

Ultimately, our first obligation is to apply faithfully the “plain meaning” of the Act.¹⁷ For the reasons discussed above, we find the phrase “refers to a clearly-identified candidate” in section 434(f)(3)(A) to be unambiguous as applied to American Future Fund’s proposed ads. Thus, these ads would fall within the definition of “electioneering communication” if made within the statutory time windows.

As Justice Scalia noted in another case: “Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. . . . [A] society which . . . campaigns anonymously . . . hidden from public scrutiny and protected from the accountability of

¹⁵ The fact that playing an audio clip of a candidate’s voice is not mentioned as an example of an “unambiguous reference” in the Act’s legislative history or the Commission’s regulation is hardly dispositive. Such an argument brings to mind the Commission’s unsuccessful defense of its initial decision to exclude all Internet communications from the regulatory definition of “public communication” on the basis that Congress did not mention them among the examples. That position was soundly rejected by the United States District Court for the District of Columbia, a ruling the Commission did not appeal, opting instead to amend the regulation. *See Shays v. FEC*, 337 F. Supp. 2d 28, 111-12 (D.D.C. 2004), *aff’d*, 414 F.3d 76 (D.C. Cir. 2005). We fear this argument would fare little better.

¹⁶ *See* Explanation and Justification for Final Rules on Electioneering Communications, 67 Fed. Reg. 65190, 65201 (Oct. 23, 2002).

¹⁷ *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995).

criticism . . . does not resemble the Home of the Brave.”¹⁸ Time and again over the last two years, the Commission has failed to take Justice Scalia’s insight to heart. Most recently, the United States District Court for the District of Columbia, in *Van Hollen v. FEC*, struck down wholesale another part of our EC regulations, section 104.20(c) (governing the contents of EC reports).¹⁹ The court ruled that that regulation “directly contravene[d]” the text of the Act and “the Congressional goal of increasing transparency and disclosure in electioneering communications.”²⁰

In light of this recent history, we would have thought that all commissioners would be inclined to proceed with caution when presented with a new request to narrow our EC reporting and disclaimer requirements. The Commission has been down this road before, and it does not end well. For these reasons, we supported Draft B.

6/13/2012
Date

Ellen L. Weintraub by ELW
Ellen L. Weintraub
Vice Chair

6/13/2012
Date

Cynthia L. Bauerly by ELH
Cynthia L. Bauerly
Commissioner

¹⁸ *Doe v. Reed*, 561 U.S. ___, 130 S.Ct. 2811, 2837 (2010) (Scalia, J., concurring in judgment).

¹⁹ See *Van Hollen v. FEC*, No. 11-0766, ___ F. Supp. 2d. ___, 2012 WL 1066717 (D.D.C. Mar. 30, 2012); *Van Hollen v. FEC*, No. 11-0766, slip op. at 3 (D.D.C. Apr. 27, 2012); see also *Shays v. FEC*, 414 F.3d 76, 109 (D.C. Cir. 2005) (striking down previous Commission attempt to limit EC definition to communications broadcast “for a fee”).

²⁰ 2012 WL 1066717, at *12.