



## History of the case

McCain-Feingold (the Bipartisan Campaign Reform Act of 2002 or "BCRA") prohibited corporations and unions from using general funds for electioneering communications, which are essentially broadcast ads within 30 days of a primary and 60 days of a general election that simply mention the name of a federal candidate. In 2003, the U. S. Supreme Court upheld the law *on its face* in *McConnell v. FEC*.

In July 2004, Wisconsin Right to Life began running grass-roots lobbying ads asking Wisconsin citizens to call their Senators, Kohl and Feingold (then a candidate), and ask them to oppose the burgeoning filibusters of President Bush's judicial nominees.

Here is the text of one of those ads: "There are a lot of judicial nominees out there who can't go to work. Their careers are put on hold because a group of senators is filibustering--blocking qualified nominees from a simple 'yes' or 'no' vote. It's politics at work and it's causing gridlock. Contact Senators Feingold and Kohl and tell them to oppose the filibuster. Visit: [BeFair.org](http://BeFair.org)"

The BeFair.org website was specially created for the anti-filibuster campaign and contained information about the Senate confirmation process, the filibusters, federal courts, the judicial emergency caused by too few judges, and press releases about the anti-filibuster grass-roots lobbying campaign. The website set out the senators' positions on the filibusters, but contained no advocacy for or against either senator as a *candidate*, no reference to the upcoming election and no statement urging the election or defeat of either senator.

Because Sen. Feingold had chosen to run for re-election, Wisconsin Right to Life's ads would have become forbidden electioneering communications from August 15 to November 2, 2004 (79 continuous days because the primary and general election prohibition overlapped). Meanwhile, Congress remained in session and it was widely predicted that there would be a "fall showdown" on the filibuster issue. WRTL filed suit so that it would be able to continue running its ads during the blackout period. The case is known as *Wisconsin Right to Life v. Federal Election Commission*.

WRTL's suit claimed that the blackout period could not be constitutionally applied to grass-roots lobbying about upcoming votes in Congress. The right to petition the government is a protected right in the First Amendment and grass-roots lobbying has nothing to do with elections. WRTL argued that incumbent politicians should not be able to prohibit citizens from lobbying their representatives through campaign finance laws.

In 2004, the district court denied Wisconsin Right to Life's request and dismissed the case in 2005, based on its belief that when the Supreme Court upheld the blackout provision on its face in *McConnell*, it precluded such as-applied challenges. In 2006, the U.S. Supreme Court unanimously reversed the district court, ruling that as-applied challenges could be brought against the blackout period, and remanded the case for a decision on Wisconsin Right to Life's as-applied challenge.

In December 2006, the district court held the electioneering communication prohibition unconstitutional as applied to Wisconsin Right to Life's 2004 ads. It found that there was "no link" between the ads that Wisconsin Right to Life wanted to continue running and Sen. Feingold's character or fitness for office, (i.e., his role as a *candidate* as opposed to his role as a *legislator*).

In its Supreme Court appeal, Sen. McCain and the other co-sponsors of the McCain-Feingold law argued that broadcast ads could be prohibited if they "took a *critical* stance regarding a candidate's position on an issue." While WRTL's

ads did not criticize either Sen. Feingold or Sen. Kohl, McCain claimed they did by just bringing up the filibuster issue during an election.

In its June 25 decision, the Supreme Court went beyond merely affirming the district court and created a constitutional safe harbor for grass-roots lobbying. It stated that, if the communications meet certain specific criteria, they could be broadcast during the blackout periods.

Attorney James Bopp stated, "It will be important now for the Federal Election Commission, which has so long fought any protection for grass-roots lobbying within the blackout periods, to act promptly to adopt regulations which will give full effect to the Supreme Court mandate."

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