

CASE NOTE
‘Chris Van Hollen, Jr.,
v
Federal Election Commission (30.03.2012)’
*Antonios Kouroutakis**

Legal authority agencies have to tailor primary legislation based on shifts in legal precedent, as is the norm in case law. In the first instance, the question presented before the District Court of the District of Columbia in the *Chris van Hollen* case was whether the Federal Election Commission (‘FEC’) exceeded its statutory authority by promulgating a regulation that narrowed the disclosure rules of the Bipartisan Campaign Reform Act (‘BCRA’), 2 U.S.C. § 434(f)(2)(E) and (F). This case presents what appears to be the original instance of whether an agency may promulgate regulations that modify existing law to fit changed circumstances. Particularly, it calls into question whether an agency may narrow a statutory provision with the purpose of addressing a change in the statute’s breadth prompted by the legal precedent established through a Supreme Court ruling.

The court upheld the legal precedent of *Pennsylvania Dept. of Corrections v Yeskey*, according to which “the fact that a statute can be ‘applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; it demonstrates breadth’”.¹ It further upheld that “unambiguous statutory text is not rendered ambiguous simply because the statute has been called upon to govern unforeseen circumstances”.²

The circumstances of the case reported here are as follows: Congress enacted the BCRA as an amendment to the Federal Election Campaign Act (‘FECA’) in 2002 and, under the terms of the statute, persons who make disbursements to fund electioneering communications are subject to certain reporting obligations. The BCRA requires every ‘person’ who makes disbursements for the direct cost of producing and airing electioneering communications to disclose the following:

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¹ 524 US 206, 212 (1998).

² 851 F.Supp.2d 69, 81.

“(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed . . . directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of \$1,000 or more to that account . . .; or

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of \$1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date”.

Initially, the BCRA prohibited corporations from making electioneering communications unless they met strict criteria (section 203). However, the Supreme Court’s decision in *FEC v Wisconsin Right to Life, Inc* (*WRTL*) held that this prohibition was unconstitutional.³ Thus, following the *WRTL* precedent, corporations and labor organisations were permitted to make expenditures for electioneering communications that did not constitute express advocacy or its functional equivalent (*WRTL* ads).⁴

In 2010, the Supreme Court invalidated the prohibition on the use of corporate and union treasury funds to finance electioneering communications in *Citizens United v FEC*.⁵ However, the Court upheld section 201 of the BCRA – the sunshine provision – because “the public has an interest in knowing who is speaking about a candidate shortly before an election.”⁶

On December 26, 2007, the FEC, in order to implement the Supreme Court’s decision in *WRTL*, promulgated the regulation 11 C.F.R. § 104.20 (c) (9), which provides for disclosure:

“If the disbursements were made by a corporation or labor organization pursuant to 11 C.F.R. § 114.15, the name and address of each person who made a donation aggregating \$1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, which was made for the purpose of furthering electioneering communications.”

The first rationale behind this rule was that corporations and labor organisations may have funding sources other than donations, and that those persons may not support the corporation’s electioneering

³ 551 U.S. 449 (2007), 470–76.

⁴ *ibid*, 476–82.

⁵ 558 U.S. 310 (2010).

⁶ *ibid*, 369.

communications.⁷ The second rationale was that “the effort necessary to identify those persons who provided funds totaling \$1,000 or more to a corporation or labor organization would be very costly and require an inordinate amount of effort.”⁸

U.S. Rep. Christopher Van Hollen Jr. (plaintiff) filed a lawsuit on April 21, 2011 and alleged that the regulation promulgated by the FEC, 11 C.F.R. § 104.20(c)(9), fails to comply with federal law as it violates the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2)(A) and (C). The lawsuit argued that the agency exceeded its statutory authority, as the new regulations are incompatible with the disclosure scheme set forth in the BCRA.

The Hispanic Leadership Fund (“HLF”) and the Center for Individual Freedom (“CFIF”) moved to intervene, and on August 1, 2011, the Court granted these motions under Federal Rules of Civil Procedure. 24(1) as of right.

On March 30, 2012, the U.S. District Court for the District of Columbia (“District Court”) granted the plaintiff’s motion for summary judgment, denying the FEC’s cross-motion for summary judgment and also denying intervenor-defendant Hispanic Leadership Fund’s motion to dismiss and intervenor-defendant Center for Individual Freedom’s cross-motion for summary judgment.

The District Court concluded that the plaintiff’s challenge to the regulation promulgated by the defendant (FEC) defining the disclosure requirements for corporations and labor unions that fund electioneering communications, 1 C.F.R. § 104.20(c)(9), is contrary to the disclosure regime set forth in the BCRA, 2 U.S.C. § 434, specifically, subsections (f)(2)(E) and (F) thus invalid on the grounds that the agency exceeded its statutory authority, 5 U.S.C. § 706(2)(C).

The District Court concluded that Congress did not delegate authority to the FEC to narrow the disclosure requirement through agency lawmaking, and that a change in the reach of the statute brought about by a Supreme Court ruling did not render plain language to be ambiguous. Therefore, the agency “cannot unilaterally decide to take on a quintessentially legislative function.”⁹

⁷ Explanation and Justification for Final Rules on Electioneering Communications, 72 Federal Register, 7899 (Dec. 26, 2007).

⁸ *ibid* 72911.

⁹ 851 F.Supp.2d 69, 89.

The District Court reviewed the disclosure requirement for corporations and labor unions embodied in the FEC's regulation under the APA and applied the Chevron doctrine.

The District Court first examined whether Congress had directly spoken on the precise issue. Based on the agency's claim that the promulgated regulation was appropriate because the Supreme Court's decision in *WRTL* rendered the statute ambiguous, the District Court concluded that the agency did not respond to a direct delegation of lawmaking, but specifically undertook its legal authority to adapt the statute due to the changed circumstances.

Then the District Court examined whether the FEC's regulation was in accordance with the plain meaning of the statutory text itself. Applying the traditional statutory canons, the District Court found that the statutory language was clear and unambiguous and held that the text is not rendered ambiguous simply because the statute has been called upon to govern unforeseen circumstances.¹⁰

Furthermore, the District Court identified the original intent of Congress, which was to increase transparency on all undisclosed expenditures and accordingly it found incompatible the FEC's regulation with that intent. Finally, it held that the delegation according to 2 U.S.C. § 437d(a)(8) "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of this Act" does not apply when an agency limits the reach of the statutory provision.¹¹

The case reported above is an illustration of the application of the Chevron doctrine. The case shows the increasing statutory effect of secondary legislation. Considering the nature of campaign finance legislation, court intervention was necessary to eliminate loopholes permitting secret donations.

¹⁰ 851 F.Supp.2d 69, 81.

¹¹ 851 F.Supp.2d 69, 84.