

COMMENTS
in re:
FEDERAL ELECTION COMMISSION
Notice of Proposed Rule-Making (NPRM)
on

Internet Communications

Notice 2005-10 [Federal Register Vol. 70, No. 63 (April 4, 2005, pp. 16967-16979)]

Context and Executive Summary

The Federal Election Commission (FEC) has little choice but to maintain very close to the status quo in the matter at issue, regulation of “Internet Communications – exemption of the Internet from CFR regulation under the Bipartisan Campaign Reform Act of 2002 (BCRA). This does not mean permitting a loophole in BCRA regulation of political party committees. These are the prime targets of CFR regulations and it clearly was the intent of Congress that they not be allowed to use “soft money” to finance “public political advertising in any form.” This interpretation establishes an essential context for regulation of Internet use by political party committees. It does not establish a basis for regulating “Internet communications” more generally. This standpoint also honors the admonition of the Commission as well as the urging of many others, that BCRA requirements be provided a “narrow” construction in the Internet arena. Thus, any redefinition of the key “public communication” feature of the BCRA should be qualified to state: “general public political advertising by political party committees that employs electronic media of any sort, including those named in the Act.”

The Commission already recognizes the danger of overreaching in this arena. It should thereby avoid trying to solve the seeming problem of Internet “exclusion” identified by the Shays court via the back end of amending the “by means of” phrasing in 2 U.S.C. 431(22), rather than, directly and narrowly, via the front end of focus on the organizations implicated as in need of regulation by the BCRA, CFR and the history of Congressional debates on campaign finance reform. After all, the mutable, dynamic, innovative, informal and self-organizing qualities of the Internet would be most endangered by FEC overreaching. There is great danger to overreaching if a “back end” approach implied by the Notice is taken on this matter. There is, moreover, perhaps arguably, insufficient legal basis for the Commission to adopt such an approach because the Congress deliberately chose not to engage the question of Internet regulation via the BCRA. The issue was avoided by the time of passage of the Act, politically, and the only way that it can be engaged in any decisive way is by the Congress, politically. Perhaps arguably, but in this author’s considered opinion, the Shays Court previously overreached via its interpretation that the phrase “or any other form of general public political advertising,” implied that the Internet must be specified in the definitions of “public communication” and “political advertising.”

In its prior rulemaking to implement the BCRA, the Commission had properly excluded the Internet, observing that:

“the Internet is not one of the eight types of mass communication Congress listed in 2 U.S.C. 431(22)” and that “general language following a listing of specific terms...does not evidence Congressional intent to include a separate and distinct terms that is not listed, such as the Internet. 67 Fed. Reg. 49072.”¹

The precise nub of the “Internet Communications” issue was stated by the plaintiffs in the Shays proceeding during the Commission’s proceedings on “soft money” rulemaking: “appropriate disclosure requirements and funding restrictions apply to *public communications by political party committees via electronic means* (emphasis the author’s). The Commission should recall this as sufficient basis for a narrowly constructed approach to regulation of political speech via the Internet as recommended earlier in this commentary. The Commission is also advised to recall, in its own language, that ““Federal election activity” is “defined by the Act...and the definition includes no mention of the Internet.” The implication is unmistakable: Rather than proceed to respond to the (overreaching) decision of the Shays court in a way that threatens the “unique nature” of the Internet, the FEC would be well advised to remand the issue back to the Congress for further deliberation and decision to amend the Act.

Guiding Principles

The comments to follow accord with the “principles” to guide “possible regulation of online political speech of individuals” set forth by the Center for Democracy and Technology and supported by about 1,000 signatories.² Numbers 4-7 among the Center’s eleven principles are most germane to this commentary:

“4. The Federal Election Commission (FEC) should adopt a presumption against the regulation of election-related speech by individuals on the Internet, and should avoid prophylactic rules aimed at hypothetical...harms... Instead, the Commission should limit regulation to those activities where there is a record of demonstrable harm.

5. If in the future evidence arises that individuals’ Internet activities are undermining the purpose of the federal campaign finance laws, any resulting regulation should be narrowly delineated to avoid chilling constitutionally protected speech. The Commission should eschew a legalistic and overly formal approach to the application of campaign finance laws....

** Background on This Principle: Speaking out during an election is a constitutional right. The government needs to be very careful when it tries to regulate political speech. ...even if the FEC finds clear evidence that wealthy interests are engaging in practices that corrupt the political process, we believe it must write rules that are very narrow and

¹ **IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA:** CHRISTOPHER SHAYS and MARTIN MEEHAN, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant, Civil Action No. 02-CV-1984 (CKK), MOTION FOR SUMMARY JUDGMENT (P.37).

² As set forth by John Morris of the Center (jmorris@cdt.org) via an e-mail distributed by Steven Clift (clift@publicus.net) through his Democracy Online DO-WIRE listserve on 27 May, 2005.

clear, so that it does not also regulate or chill the online speech of small, independent political speakers.

6. Ordinary people should be able to broadly engage in volunteer and independent political activity without running afoul of the law or requiring consultation with counsel. The FEC should make clear that such activities are...beyond the scope of all campaign finance regulation (*including disclaimers...* emphasis mine).

7. Individuals should be able to collaborate with other such individuals to engage in a very substantial amount of independent election related speech online without being deemed a “political committee.”

“Public Communications” via the Internet

Not being in a position of simply adding the Internet to the list of “by means of” media in the BCRA definition of “public communication” (a change that would have to be made by Congressional amendment), the FEC finds itself in the position of having to include the Internet -- following the objections to its exclusion in *Shays v. Federal Election Commission* -- by insinuating it as falling under the purview of the final phrase in the list: “any other form of general public political advertising” [2 U.S.C. 431(22)]. This puts the Commission into a very awkward position in trying to frame appropriate responses to the DC Circuit Court decision. Only a small portion of Internet activity can be considered “advertising” and only a small portion of the latter can be considered “political advertising.” Thus, there is a real danger of seriously injuring an elephant with regulations that amount to swatting flies on the elephant’s hide.

Under the circumstances; that is, without explicit Congressional authorization otherwise, the Commission should continue to retain a general exclusion of Internet communications from the definition of “public communication” – with exception only of Internet communications that provide political (“PASO”) advertising (see below) by political party or federal candidate committees. The Commission proposes to veer from this policy in cases of “advertisements where another person or entity has been paid to carry the advertisement on its website.” But for disclosures or disclaimers (see the section below on these), this would be poor policy. Why? – Because it is discriminatory, favoring established, largely centralized, conventional media with respect to decentralized, mostly disestablished Internet media. The former rely upon advertising to survive. Why not Internet media? Many Internet media have disappeared for lack of even modest advertising revenues. Many more are struggling financially. It is doubtful that the Commission’s proposed change would withstand legal challenge.

Another problem with the Commission’s proposed ruling is that, as introduced in col.1 of page 16969 of the “Proposed Rules,” it is indiscriminate in its wording and, thereby, in the potential scope of its applicability. It refers to paid political advertising generally, not to that which only “refers to a clearly identified candidate for Federal office...and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office” (PASOs). The proposed rule should be worded so that it governs PASO

advertising more precisely. Advertising is also “speech.” Any proposition that purports to regulate political speech on the Internet must be de-minimus – with the narrowest possible construction. Rather than arbitrarily trying to redefine “public communication” within the terms of BCRA, and emerging with what may turn out to be a practically null change or unenforceable rule, the Commission would do well to send the matter back to the Congress for their reconsideration.

“Generic campaign activity”

The Bipartisan Campaign Reform Act of 2002 (BCRA) defines “generic campaign activity” as “campaign activity that promotes a political party and does not promote a [Federal] candidate or non-federal candidate” (2 U.S.C. 431(21)). “Public communication” is considered to be such an activity. So, FEC regulations CFR Part 100, paragraph 100.25, defines generic campaign activity more specifically as “a public communication that promotes or opposes a political party and does not promote or oppose a clearly identified Federal candidate or a non-Federal candidate. Note that this definition does not include “party-building” activities.³ Most of these have come to be treated as “Federal election activity” subject to regulation because they are presumably “connected” to elections that feature candidates for Federal office. “Type 2” of the latter cross references “generic campaign activity” so that this category becomes a sub-category of “Federal election activity.”⁴ This categorization is mistaken, as many of the Type 1 and Type 2 activities undertaken by sub-national political party committees have, at the times when they are undertaken, little or no connection to Federal elections. They are primarily localized and oriented to state and local elections. The lack of an appropriate, localized definition or effective focus upon “party building” activity in this definitional morass is, at best, problematic, and at worst, harmful to political parties as many commentators observed when campaign finance reform was being debated, pre-passage of BCRA. The definition of “generic campaign activity” is thus unsatisfactory, but the Commission would have to ask Congress to revisit BCRA to obtain any basis for redefinition that would make any substantial difference.

Internet Public Communication (as) Media

The implication pointed to by earlier paragraphs now can be put more precisely: Internet public communications should be afforded the same exemption as broadcast media. They are media. The movement towards “citizen’s journalism” and the increasing role of bloggers vis a vis mainstream media (MSM) should be sufficient to remind the Commission of the original meaning of the First Amendment – that it focuses on persons, not journalists or media organizations -- as if every person had a printing press, which

² Party-building activities include voter registration (an activity that, in all states, must be carried out several weeks in advance of elections), identification (ID) of those eligible to be members of an electorate; provision of information on party principles, positions on issues, organizations, forums, officials, et al.; sponsoring forums on issues, organizing “meetups” or social events, doing collaborative projects with other community-based organizations, and doing many activities that fall under the rubric of GOTV (“get out the vote”) that may not involve PASO with respect to federal or other candidates that may or may not be on the ballot.

⁴ FEC notice, op.cit., page 16968, footnote 2.

now they nearly, practically do, along with a keyboard.⁵ Businesses were not recognized as “legal persons” until 1886. Thus, public communications via the Internet should qualify for the “press exemption.” If the Commission decides, however, that the exemption should be extended only to “bloggers,” then it should apply even if a blogger uses corporate-owned computers (as, for example, if a blogger is “a corporate employee who blogs on her lunch hour”).⁶ Such a restriction, however, means that the Commission will have to struggle with a difficult question of definition: What is a blogger?, a question that begs an arbitrary answer in the dynamic, mutable arena of the World Wide Web.

Political Volunteer Activity

The Commission’s comments relative to “Internet Communications – Proposed 11 CFR 100.26” (Proposed Rules, p.16971) reveal a remarkable misunderstanding with regard to the nature of political volunteer activity. The “soapbox in a public square” public speaker example is quite malapropos as a lead-in to the Commission’s question of “cost,” especially since such activity should not be imaginable as a possible target of governmental regulation. The relevant cost of volunteerism is opportunity cost. Direct monetary outlays of the sort that preoccupy the Commission are the least of it. The opportunity costs of volunteers’ time, not defined or valued by the BCRA, are what really needs to be weighed; and FEC regulations must take great care to reduce these costs or at least not increase them. Unfortunately, as revealed by the writing of one of the Commissioners, CFR regulations have too often violated the latter precept.⁷

It is important to note that the highly restricted definition of Internet communications subject to Commission purview under the terms of reference (ToR) of the BCRA proposed earlier exclude such communications as may serve to elicit and inform political volunteer activity without engaging in PASO advertising, including Internet communications by political party committees and candidates for the sake of recruiting and engaging volunteers.

⁵ Outing, Steve (2005), “The 11 Layers of Citizen Journalism,” www.poynter.org/content_view.asp?id=83126 (14 June), one of many good examples of online citizen journalism collected by Steve Clift via http://www.dowire.org/wiki/Citizen_journalism_online. See also: Dube, Jonathan (2005), “Legal Guide to Weblogs.” CyberJournalist.net Publisher, which opens with the line: “Blogging is publishing,” in clift@publicus.net, DO-WIRE for 21 June, 2005. Richard Lewis, on his website and blog via www.TakeBackAmerica.tv, has written more directly on the fact that the First Amendment pertains to “living persons,” each potentially with their own “press,” with reference to state constitutions as well as the federal. E.G., Section 8 of the Kentucky Bill of Rights: “Printing presses shall be free to every person who undertakes to examine the proceedings of the General Assembly or any branch of government, and no law shall ever be made to restrain the right thereof. Ever person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty” (quoted in the section “Campaign Reform – I call it Fraud – you decide!”)

⁶ This is implied by, and the quote is taken from, Hasen, Richard L. (2005), “The Ripple Effects of the FEC’s Rules on Political Blogging...,” FindLaw’s Legal Commentary Writ (<http://writ.news.findlaw.com>, April 5, 2005).

⁷ See, for example, among other writings: Smith, Bradley (2000), “Address to the Catholic University Law Review Symposium on Election Law Reform.” Washington, D.C. (September 23).

The purview of FEC regulation of Internet communications that might impact political volunteer activity must be further circumscribed in addressing the value of “in kind” contributions to facilitate volunteer activity. The focus of the BCRA and the FEC is misplaced with respect to corporate donations of computer and Internet facilities used by volunteers without qualification as to corporate size. The literature on firm size has long since revealed that public features, impacts or implications of the private corporation increase with size. There are at least substantial quantitative and qualitative differences between big business and small. The corporate aspects of FEC purview of Internet communications, therefore, should be entirely limited to the “big” business part of the corporate sector, exempting small business⁸. The latter could be defined using Small Business Administration criteria. Cost and allocation criteria (see below) would be onerous for small business.

Costs and Allocations

Requirements to account for and allocate the costs of Internet communications should be restricted to large corporations. These include not-for-profit corporations.

From an economist’s standpoint, the most appropriate basis for allocation would be the marginal costs of PASO Internet communications. These are more readily measurable or computable than “allocation calculations” based on questionable percentages or more or less arbitrary cost assignments.

An issue here not raised by the Commission’s April 4, 2005 Notice should also be addressed or hereby identified for future deliberation – that of Internet communications within large corporations that own media organizations. Those that implicate “costs,” “allocations,” “coordination,” “disclosure” or other issues of concern in the Notice should become the subjects of FEC regulatory purview to the extent that “public communications” of PASO or “generic campaign activity” types are subjects of any such intra-corporate Internet communications.

Disclaimers and Disclosures

Any “general public political advertising” on an Internet website or blog should be required to carry a disclaimer or disclosure if there is any source (“disbursement”) involved other than the website’s or blog’s own author, or some monetary or other transactional (“expenditure”) basis upon which the advertising has been provided. The issues involved here are less those of campaign finance regulation than of intellectual honesty, journalistic integrity and accountability in the “marketplace of ideas” that the political arena is supposed to represent.

Coordination

The “coordination” strictures governing public communications are, in this writer’s

⁸ This point of using corporate size as a discriminator could be made, and has been made, more generally with regard to government regulation, but this is not the place to elaborate it.

opinion, arbitrary, difficult to enforce and contrary to the First Amendment. At least in the case of Internet communications, FEC rules should not apply but for the requirements to provide disclaimers and/or disclosures as indicated above.

BCRA: Needs to be Radically Revamped

Any amendments to FEC rules to implement the BCRA following on the NPRM addressed herein will not obviate the need to take the fundamental issue of FEC regulation of political speech over the Internet back to where it belongs -- the U.S. Congress for resolution, politically. This should be done in context -- in recognition of the fact that the Act has failed to achieve reformers' goals and needs to be radically revamped.

Review and revision of the Act should be guided by two observations

- (1) Money will always find a way to influence politics; the only substantial antidote to money is peoples' time; and therefore...
- (2) CFR regulation must focus on how to recognize, value and encourage (peoples' volunteer) contributions of time.

An alternative approach to campaign finance reform based on time rather than money is presented in the author's book, *WE, THE PEOPLE: A Conservative Populism* (Alpha Publishing, Inc., 2004).

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