The Bipartiſan Campaign Reform Act of 2002: A Threat to Freedom

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The Bipartiſan Campaign Reform Act of 2002, more commonly referred to as the McCain/Feingold Act, is a campaign finance reform bill purported to have the intended effect of limiting or eliminating "ſoft money." However, its actual effect if to limit and curtail the freedoms permitted by the U.ſ. political ſyſtem. It evinces a deſign to eſſentially undermine our inherent right to ſpeak freely regarding political iſſues and our political leaders. It is with this underſtanding that one muſt oppoſe this law.

To realize fully where this bill came from, and how it paſſed, we muſt firſt look at the hiſtory of campaign finance reform. The firſt campaign finance reform ever paſſed by the U.ſ. federal government came in 1867, thus prohibiting "Federal officers from requeſting contributions from Navy Yard workers."[1] This was followed by the Tillman Act in 1907, the "firſt Federal campaign diſcloſure legiſlation" in 1910, the Federal Corrupt Practices Act of 1925, the Hatch Act of 1939, Taft-Hartley Act of 1947, and finally the Federal Election Campaign Act of 1971, alſo referred to as FECA.[2]

FECA, which went into effect in April of '72, lead to the creation of Political Action Committees, which allowed corporations and labour unions to make voluntary contributions to federal elections.[3] It

[1] http://www.fec.gov/info/appfour.htm
[2] *Ibid.*
[3] *Ibid.*

alſo lead to the firſt taxpayer-financed federal election in U.ſ. hiſtory in 1967.[4]

In 1974, FECA was amended ſo as to create the Federal Election Commiſſion. According to the F.E.C.,

> The Commiſſion was given juriſdiction in civil enforcement matters, authority to write regulations and reſponſibility for monitoring compliance with the FECA. Additionally, the amendments tranſferred from GAO to the Commiſſion the function of ſerving as a national clearinghouſe for information on the adminiſtration of elections.[5]

Along with this came ſtrict limits on contributions.

The argument given in favour of the Bipartiſan Campaign Reform Act of 2002 is that it counteracts ſoft money. But what is "ſoft money"? "ſoft money" if deſcribed as money that, although not made directly to a candidate's campaign, is ſpent on ſuch things as "iſſue advertiſing," which can be advertiſements for or againſt a candidate's poſitions.[6] Another take on "ſoft money" can be found in Jim Babka, founder of RealCampaignReform.org, according to whom the reaſon incumbents hate "ſoft money" ſo much is becauſe "it's the only thing left that endangers their power and influence."[7]

We then muſt aſk ourſelves, why is "ſoft money" viewed ſo negatively? According to Public Citizen, a group that ſupports regulation on "ſoft money", iſſue ads "undermin[e] the integrity of federal and ſtate campaign finance laws." Public Citizen baſically believes that Campaign Finance Reform iſn't cenſoring thoſe who wiſh to uſe their freedom of ſpeech to influence elections, but rather that it aims "to provide accountability of thoſe groups and individuals who are attempting to influence elections," and that iſſue ads are a "ſham" that muſt be dealt with by government.[8] In reality, all iſſue ads are ad-

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[4] *Ibid.*
[5] *Ibid.*
[6] http://en.wikipedia.org/wiki/Campaign_finance_in_the_United_ſtates
[7] http://www.realcampaignreform.org/babka/liberty_for.htm
[8] http://www.citizen.org/congreſs/campaign/iſſueſ/iſſue_ads/

vertiſements encouraging the public to ſupport or oppoſe a particular iſſue or candidate. The fear that groups like Public Citizen have that iſſue ads will "influence elections" ſhouldn't be a fear, but rather appreciation for the fact that freedom of ſpeech works, and that private citizens or political organiſations can have their meſſage heard on any political topic or candidate.

This is preciſely why incumbents fear iſſue ads, becauſe they know that any group of concerned citizens could come together and purchaſe ads ſhowcaſing ſomething about their public policy that turns voters away from them. According to Paul Jacob, politicians "went after groups that run iſſue ads. This legiſlation would ban term limits groups and others from running ads that dare to mention an incumbent's name within 60 days of an election. Of courſe, incumbents don't like being criticized; ſo they want to outlaw our ſpeech."[9]

In contraſt to "ſoft money," there's alſo "hard money," which is baſically money provided through direct donations, whether from individuals or Political Action Committees. Theſe donations are alſo regulated. Citizens are limited in how much they can donate to an election campaign, that theſe donations cannot exceed $2,000. Further, "Federal candidate committees muſt identify...all PACſ and party committees that give them contributions, and they muſt provide the names, occupations, employers and addreſſes of all individuals who give them more than $200 in an election cycle."[10]

One may aſk, "Why all the regulation? Why does McCain/Feingold allow us to donate $2,000, but not $3,000? Why am I not permitted to purchaſe an ad ſaying candidate-X is a horrible candidate?" The anſwer one receives to theſe queſtions vary between who you aſk. If you aſk Senator John McCain what the aim of his campaign reform was, he may tell you it was to "take a ſtand for or againſt the corrupting influence of big-money campaign contributions."[11] To

[9] http://www.uſtermlimits.org/Preſs/Common_ſenſe/cf337.html
[10] *Supra* note 6
[11] http://mccain.ſenate.gov/index.cfm?fuſeaction=Newſcenter.ViewOpEd&Content_id=741

counter this, John ſamples of the Cato Inſtitute might point out that "McCain...has not ſhown that ſoft money corrupts legiſlators or elections."[12] ſupporters of the Bipartiſan Campaign Reform Act of 2002 may go further and claim that:

> The law poſes no threat to [freedom of ſpeech or aſſocia-tion]. It is actually quite modeſt in its ambitions. The new campaign finance law reinſtates the ſtatus quo ante of barely a decade ago, before ſoft money began to be a major component of national party fundraiſing and before candidate-ſpecific ſham "iſſue ads" were uſed to undermine the diſcloſure and contribution limitation proviſions of federal election law.[13]

Even if it were true that the aim of the campaign finance reform waſn't to limit ſpeech, one cannot ignore the fact that thiſ is preciſely the reſult of the legiſlation. Although a preſs releaſe from Senator McCain may ſtate that "[i]ndividualſ and groups retain their full Firſt Amendment rights" and that "[t]he only new requirements relate to the diſcloſure and ſources of funding for televiſion and radio ads cloſe to an election that feature federal candidates,"[14] this is ſimply not true. Regulation is being extended even to blogs on the internet. On Thurſday, March 24th, FEC commiſſioners voted five-to-one to "approve a procedure that is expected to end with a final ſet of Internet rules—governing everything from whether bloggers are journaliſts to bulk political e-mail—in place by the end of the year."[15]

The other true effect of this legiſlation is incumbency protection. In fact, it would go by no ſtretch of the imagination to refer to this as the "Incumbency Protection Act of 2002." Aſ Repreſentative Ron Paul, MD, points out,

> Outrageouſly, the Court failed to ſtrike down a proviſion of the campaign finance bill that virtually outlaws criticiſm of incum-

[12] http://www.cato.org/pubs/pas/pa-393es.html
[13] http://mccain.ſenate.gov/index.cfm?fuſeaction=Newſcenter.ViewPreſsReleaſe&Content_id=1121
[14] *Ibid.*
[15] http://news.com.com/Feds+get+ſet+for+Net+rules/2100-1028_3-5634670.html

> bent politicians for 60 days before an election—exactly the time when most voters learn about candidates and issues. The ban essentially prohibits any group from airing radio or television ads that cast politicians in a negative light during the critical final months of an election. The ban even carries the possibility of criminal penalties, meaning the Court has endorsed criminalizing political dissent! Incumbent politicians certainly will be the beneficiaries of the new ban, as they no longer have to suffer through ads that criticize their performance.[16]

As usual, Representative Paul cuts straight to the issue. since politicians control the laws, the very real tendency exists that they will (and do) try to use this power to maintain their power.[17] In passing legislation that prevents alternative view-points from getting publicity, Senator McCain, Senator Feingold, and others have constructed a means for abolishing freedom of speech where and when it is most necessary to be open. Political debate should be open and free, thus any legislation that censors dissent is inherently tyrannical.

Of course, it's not just the Congress that passed this bill and the President who signed it in that are responsible for these government abuses. The judicial system is just as complicit in this. Two very-notable court cases in particular have emerged as a result of campaign finance reform: *Buckley v. Valeo* and *McConnell v. FEC.*

The main issues in question during *Buckley v. Valeo* was whether or not the Federal Election Campaign Act in 1971 were (A) whether or not it infringed on our right to freedom of speech, as recognised by the first amendment, and (B) whether or not it infringed upon our right to due process, as recognised by the fifth amendment. The court ruled that limiting campaign spending was unconstitutional, but that limiting campaign funding was not.[18] The result of this ruling was that it helped to limit the amount of money third parties could raise. The "mainstream" parties have the resources to spend on

[16] http://www.house.gov/paul/tst/tst2003/tst122203.htm
[17] *Supra* note 9
[18] http://en.wikipedia.org/wiki/Buckley_v._Valeo

campaigns, whereas third parties ſuch as the Libertarian Party, the Green Party of the United States, and the Conſtitution Party have ſignificantly leſs, and thus they are affected more greatly by the limitations on campaign fundraiſing than are the two duopoliſtic parties.[19]

The other court caſe iſ *McConnell v. FEC*, which aimed to decide whether the Bipartiſan Campaign Reform Act of 2002 infringed upon our freedom of ſpeech. In a ſurpriſe ruling, the court upheld the "conſtitutionality" of the Bipartiſan Campaign Reform Act of 2002. Not only this, but the court baſically ordered that the F.E.C. become more ſtrict in itſ activities and begin to regulate political ſpeech on the Internet, regulations that will undoubtedly be uſed to ſilence political diſcourſe regarding candidates.[20] There are now bills in Congreſs, ſuch as the Firſt Amendment Reſtoration Act, HR 689, and the Online Freedom of ſpeech Act, ſ 678, deſigned to reſtore freedom of political ſpeech in America, but neither of theſe bills have yet been voted on.[21]

The queſtion that really needs to be aſked is, does campaign finance reform work? If the goals of campaign finance reform is to ſhield incumbents from diſſent, enact cenſorſhip of political iſſues, and keep third parties ſmall ſo as to maintain the duopoly Democrats and Republicans hold over our political ſyſtem, then I would argue that campaign finance reform works marvelloufly. However, if the object is to counteract ſome negative reſult of "ſoft money," I would argue that the Bipartiſan Campaign Reform Act of 2002 and campaign finance reform in general is a failure.[22] I would, in fact, go even further and argue that it's unneceſſary. There's no proof that allowing people to freely purchaſe iſſue ads has ſome negative effect in politics or on politicians.[23] Hence, it is my belief that the Bipartiſan Campaign Reform Act of 2002 ſhould be repealed.

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[19] http://www.realcampaignreform.org/what_you_ſhould_know.htm
[20] http://www.redſtate.org/ſtory/2005/4/13/164333/833
[21] *Ibid.*, http://www.cnſnewſ.com/viewpoliticſ.aſp?Page=/Politicſ/archive/200502/POL20050209b.html
[22] *Supra* note 16
[23] *Supra* note 7