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The Campaign-Reform Crime, Part 1

by James Bovard

In 2002, Congress passed and George Bush signed the McCain-Feingold Bipartisan Campaign Reform Act (BCRA). The McCain-Feingold Act was supposed to create an era of clean politics — uncorrupt, untainted, and far loftier than what Americans had experienced in prior decades.

If the 2008 election proved anything, it revealed that politicians cannot be trusted to clean up politics. Instead, the “reform” laws they pass are usually nothing more than attempts to suppress criticism and protect incumbents against challenge.

At the time the McCain-Feingold Act was being debated, the supposed problem plaguing American politics was the proliferation of so-called soft money — money given by individuals or political action committees in amounts not limited by federal regulations. President Bush’s solicitor general, Theodore Olson, told the Supreme Court that soft money is “a euphemism for money that’s going around the system ... money that is prohibited to go to Federal elections.”

But the concept of “soft money” is itself a charade based on the idea that politicians should have almost boundless control over anything that could affect their reelection.

At the same time that Congress imposed new restrictions on citizens’ political activism, it doubled the amount of money that can be legally given to candidates (so-called hard money). During the 1999-2000 election cycle, 90 percent of the hard money went to incumbent congressmen. Incumbents received almost 10 times as much money as challengers because the incumbents are already in a position to reward donors.

Though almost all congressmen get reelected, their victories are often tarnished by the indignities they suffer along the path to perpetuating their power. The most revolutionary element of the Bipartisan Campaign Reform Act is the de facto prohibition on most issue ads on radio and television during election season. Thanks to the new act, it can be a federal crime to expose the abuses of congressmen or presidents while they are seeking reelection — usually the only time their power can be effectively challenged. The act restricts nonprofit groups’, corporations’, and other entities’ “electioneering communications” within 30 days of a primary election or 60 days

of a general election. An “electioneering communication” is defined broadly enough to stifle most things that can adversely affect the voting totals of an incumbent president or member of Congress. It would have been indelicate for Congress to specifically prohibit ads criticizing incumbent politicians. Instead, it banned practically all issue ads from radio and television.

The Bill of Rights is not vague on this subject. The First Amendment states that “Congress shall make no law ... abridging the freedom of speech, or of the press.” Congress ignored this stark edict and imposed stranglehold restrictions on “electioneering communications.”

Attacking free speech

Like a bunch of amateur actors in a small-town Shakespeare performance, one congressman after another proclaimed a lofty motive for knifing the First Amendment in the debate leading to the bill’s passage. Rep. Chris Shays (R-Conn.) claimed the restrictions were actually a triumph for free speech:

The reform legislation we introduce today strengthens First Amendment values. It will ensure that elected officials are more responsive to the voices of their constituents and do not appear beholden only to big money. As your own constituents would surely tell you, stemming the tide of soft money would improve their access to government — and enhance their First Amendment rights — by allowing them to participate in the process.

“First Amendment values” became an Orwellian substitute for “freedom of speech.”

Rep. Zach Wamp (R-Tenn.) also insisted that restricting criticism of congressmen was a victory for free speech: “We need to stand up for the First Amendment and treat these groups and these people playing politics in elections the same as the candidates themselves.” The Founding Fathers forgot to include a footnote to the First Amendment specifying the need for full disclosure to the federal speech police.

Some members insisted that by betraying the Bill of Rights, Congress would restore Americans’ trust in government. Rep. Nancy Pelosi (D-Calif.) declared, “We have an opportunity today to send a valentine to the American people; to tell them they are important to us; that what they think matters to us; that they should have faith in government.” Rep. John Lewis (D-Ga.) commented, “We must pass [the campaign finance reform act] to lessen the people’s growing cynicism.... It is time to restore the people’s faith in their government.”

Nothing infuriated many solons more than negative ads. Democratic senators denounced attack ads as the equivalent of “crack cocaine,” “drive-by shootings,” and “air pollution.” Sen. John McCain (R-Ariz.) declared, “I hope that we will not allow our attention to be distracted from the real issues at hand — how to raise the tenor of the debate in our elections and give people real choices. No one benefits from negative ads. They don’t aid our nation’s political dialog.”

While campaigning for the presidential nomination in December 1999, McCain announced, “If I could think of a way constitutionally, I would ban negative ads.”

Bush signed the law on March 27, 2002. He applauded the fact that the law “creates new disclosure requirements and compels speedier compliance with existing ones, which will promote the free and swift flow of information to the public regarding the activities of groups and individuals in the political process.”

Unfortunately, as Bush’s secrecy mania shows, he does not cherish the same standard of the “free and swift flow of information” regarding the government’s own activities. He declared, “All of the American electorate will benefit from these measures to strengthen our democracy.”

Supreme Court review

The new law was quickly challenged and ended up in the Supreme Court on September 8, 2003. Many incumbents were bitter about the burden of fundraising. Dietary freedom was a major goal of the new law: Theodore Olson, recited tales of woe by senators “who describe what it’s like, the breakfasts, the lunches, the receptions, the dinners, the endless cycle of campaign finance.” Chief Justice Rehnquist retorted, “I don’t believe [it] is a permissible basis for a restriction that, you know, we’re tired of having to go to these breakfasts and lunches.” Some of the new law’s supporters presumed that if members of Congress were not so busy raising money, they might even begin reading the bills they vote on and perhaps even become zealous at oversight. Such naiveté would be touching if it was not countenancing the sacrifice of some people’s freedom to augment other people’s leisure.

On December 10, 2003, the Supreme Court upheld most provisions of the law by a 5 to 4 vote. The ban on issue ads survived intact. The majority decision offered endless hairsplitting about “electioneering communications.” The Supreme Court did not deign to explain why Americans should have more unfettered access to bestiality videos than to information about what their rulers were doing to them.

The majority of the justices concluded that the pervasive new restrictions were justified to reduce the American political system’s corruption or the appearance of corruption. The Court’s decision repeatedly derided “so-called issue advocacy” — as if any comments on public policy during election season are inherently suspect. The Court justified greatly expanding federal restrictions on speech because “the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad.” The Court noted that its earlier decisions exempting “express advocacy” from restrictions “has not aided the legislative effort to combat real or apparent corruption.” Public communications “that promote or attack a candidate for federal office ... undoubtedly have a dramatic effect on federal elections. Such ads were a prime motivating force behind BCRA’s passage,” the Court noted. The Court declared that “any public communication that promotes or attacks a clearly identified federal candidate directly affects the

election in which he is participating.” So, the Court reasoned, members of Congress were entitled to restrict such communications. It explained: “Congress enacted the new ‘electioneering communications’ provisions precisely because it recognized that the express advocacy test was woefully inadequate at capturing communications designed to influence candidate elections.” But who entitled Congress to “capture” everything intended to influence an election? Does the Supreme Court believe that incumbents are practically entitled to mind control over the voters?

The Supreme Court ruled that pre-election issue ads can be criminalized: even if “advertisements do not urge the viewer to vote for or against a candidate in so many words they are no less clearly intended to influence the election.” It denounced “sham ads” but never defined the word “sham.” Paul Jacob, former chief of U.S. Term Limits, a nonprofit group that fights corruption by ending congressmen’s tenured status, commented, “Perhaps labeling an advertisement a ‘sham’ is like naming someone an ‘enemy combatant’ — all constitutional rights are then lost.” The Supreme Court sacrificed freedom to fairness — in this case, protecting politicians from potentially unfair criticism.

The profound philosophical issues in the decision were largely ignored in the media’s coverage. Instead, most story lines simply portrayed the decision as a victory over conniving special interests. Justice Clarence Thomas rightly declared that the decision “upholds what can only be described as the most significant abridgment of the freedoms of speech and association since the Civil War.”

Scalia’s dissent

Justice Scalia, in a noble dissent, warned that the law “cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government.” He declared that “this legislation prohibits the criticism of members of Congress by those entities most capable of giving such criticism a loud voice: national political parties and corporations, both of the commercial and the not-for-profit sort.” He hinted that some members of Congress “who voted for this legislation did so not to produce ‘fairer’ campaigns, but to mute criticism of their records and facilitate reelection.”

Scalia noted how the decision attacked both freedom of speech and freedom of association: “The freedom to associate with others for the dissemination of ideas — not just by singing or speaking in unison, but by pooling financial resources for expressive purposes — is part of the freedom of speech.” He captured the transcendent issue before the Court: “This litigation is about preventing criticism of the government.” Preserving the government’s reputation now trumps the people’s rights.

Seth Waxman, a former U.S. solicitor general who argued in favor of the law to the Supreme Court, hailed the verdict: “Congress is not handcuffed by the First Amendment.” But if Congress is not handcuffed by the First Amendment, then what could possibly curb its power?

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