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## **The Campaign-Reform Crime, Part 2**

**by James Bovard**

We saw in the last issue how the McCain-Feingold Act — the Bipartisan Campaign Reform Act of 2002 (BCRA) — sought to fundamentally change the American political landscape. Politicians did not allow the Act’s power to lie idle in the first presidential election after its enactment.

The BCRA’s issue-ad ban — the peril that Justice Antonin Scalia targeted in his dissent to the Supreme Court decision upholding the act — quickly helped muzzle potential critics of incumbents.

The BCRA “protects” citizens from exposure to a sweeping array of messages. The AFL-CIO noted that the act prohibits pre-election ads that

call upon a Member of Congress to support or oppose imminent legislation, or ask viewers or listeners to urge the member to do so; inform the public, or express an opinion, about a Member of Congress’s votes, legislative proposals or performance otherwise; respond directly to a Member [of Congress] who has criticized the [independent] organization or taken issue with its activities or policies; or encourage candidates to commit that, if elected, they will support or oppose particular legislation or policies.

The issue-ad ban strikes across the board, muzzling the National Abortion Rights League and the American Life League, the National Rifle Association and the Brady Campaign to Ban Handguns, the Sierra Club and the American Civil Liberties Union.

On March 11, 2004, the Federal Election Commission proposed sweeping rules that could reclassify thousands of nonprofit organizations as federal “political committees” if they spent more than \$1,000 on any type of activity related to a presidential or congressional election. The Coalition to Protect Nonprofit Advocacy, an organization with 600 members from across the ideological spectrum, complained, “Under the proposed rules, nonprofits would be virtually prohibited from criticizing or praising President Bush until after the November election.” The proposed regulations are so sweeping that “a church ... could not publish a legislative report card

during an election year.... The NAACP would have to stop its 2004 voter registration campaigns,” the Coalition declared. A group of 120 House Democrats protested to the FEC,

There has been absolutely no case made to Congress, or record established by the commission, to support any notion that tax-exempt organizations and other independent groups threaten the legitimacy of our government when criticizing its policies.

The Drug Policy Alliance warned that the proposed rules “represent one of the worst assaults on the freedoms of speech and association ever proposed in the United States” and that the rules could “silence our work to end the government-funded War on Drugs.” Suppressing speech

The Bush legal team quickly used the new law to seek to suppress private groups from criticizing the president any time during an election year. In early 2004, left-wing and anti-war groups launched advertisements criticizing Bush and his record. The Republican National Committee on March 5, 2004, formally warned 250 television stations not to play the ads. RNC chief counsel Jill Holtzman Vogel asserted that the ads by MoveOn.org violated the new campaign-finance act. Vogel declared,

Between now and November, our nation will engage in a debate that pits President Bush’s strong and steady leadership against others who seek to attack the President and engage in a vicious, negative campaign.

Vogel hinted that the stations’ survival could be on the line:

As a broadcaster licensed by the Federal Communications Commission, you have a responsibility to the viewing public and to your licensing agency to refrain from complicity in any illegal activity.

Vogel explained that under the new campaign law, “any entity that spends or raises more than \$1,000 in a calendar year ‘for the purpose of influencing any election for federal office’ must register as a federal political committee” with the FEC. Vogel asserted that MoveOn.org could not use “soft money” for its supposedly illegal ad campaign.

A few days later, Bush’s reelection campaign formally requested the Federal Election Commission to launch an investigation of the Media Fund, another group running advertisements critical of Bush. The Bush campaign’s general counsel, Tom Josefiak, condemned the ads as “an attempt to blow up the ban on the newly passed campaign finance reform bill.”

Media Fund spokesman James Jordan denounced the Bush campaign's allegation as "a lie, a deliberate misrepresentation of the law. This is nothing more than a cynical and transparent attempt to intimidate our donors and silence dissenting voices."

On April 5, Bush campaign chairman Marc Racicot urged supporters to contact the FEC to urge them to crack down on the ad campaigns criticizing the president. Racicot's appeal generated 66,000 emails to the agency. (The FEC decided to postpone imposing restrictions on certain nonprofit groups until after the 2004 election.)

At the same time that Republicans pressured the FEC to ban the activities of the new groups, they hinted that they could file criminal referrals directly with the Justice Department. The new campaign law includes prison time for types of offenses previously punished only by fines. *The Hill* reported on March 25 that "some Republican operatives, including a senior Bush adviser, have said they expect complaints to be filed directly with the Department of Justice." Some Republicans suggested criminal prosecution would be appropriate for the large donors to the new groups.

At the same time the Republican National Committee sought to suppress the Moveon.org ads, Bush was traveling around the country on taxpayer-financed fundraising gigs. The president has the right to dishonestly send hundreds of Americans to their deaths in foreign wars, but American citizens have little or no right to expose his lies during a time when he is seeking to perpetuate his power over them.

At the same time the Bush campaign and the Republican National Committee sought to use federal law to bludgeon critics into silence, the president's reelection campaign began running television ads hyping Bush's leadership and showing a dead person being carried out of the World Trade Center wreckage. If a private group ran an ad with exactly the same video images and different audio comments criticizing Bush, the president's lawyers almost certainly would have used the new law to seek to suppress the ads.

By banning the mention of politicians' names in ads in the months before an election, the Act makes it far more difficult to inform Americans about who is responsible for what the government has done. It could have been construed as a federal crime for a private group to pay to broadcast in September and October of 2004 the fact that a given congressman had voted for the USA PATRIOT Act. Even a simple "tombstone" television ad — stating in large print, "Rep. Smith Voted for the PATRIOT Act" — could have been judged illegal. Regardless of how much power the PATRIOT Act confers upon the government, it could be a criminal offense to publicize a congressman's support for it. Similarly, an October 2004 television advertisement merely listing Attorney General John Ashcroft's mildly deranged statements could have been considered illegal as an unfair attack on the president's reelection campaign.

## **Immunizing the feds**

Though independent groups are prohibited from criticizing congressmen, congressmen have unlimited freedom to attack such groups and anyone else they please. U.S. Term Limits's Paul Jacob noted that an incumbent congressman "could run ads at election time slamming [a] group and wildly distorting the truth. While spot after spot by the congressman plays on television screens mercilessly smearing the organization, the federal speech Gestapo will be there to make certain that the insolent group is not permitted to air a single ad which dares mention the powerful congressman by name or, heaven forbid, show his or her royal likeness." This is Congress's idea of a level playing field.

The McCain-Feingold Act was enacted in part because congressmen claimed that political "issue ads" are so poisonous that they destroy the chances for clean elections. But the government's own actions make campaign "issue ads" look downright innocuous. No "issue ad" ever affected as many Americans as did the film footage of FBI tanks smashing into the Branch Davidians' home in Waco, Texas. No "issue ad" shook as many people as the photograph of a federal agent pointing a submachine gun towards terrified six-year-old Elián Gonzalez, whom Attorney General Janet Reno sent 130 G-men to seize in the middle of the night on April 22, 2000.

The Supreme Court sacrifices freedom to protect Americans against "sham ads." But this does nothing to ban or rein in sham politicians. And what about sham wars? What about the sham TSA? What about the other sham antiterrorism efforts? What about the sham farm subsidies? Regardless of how many shams politicians concoct, a purity test is now required for all critics.

There is no way to clean up American politics without greatly decreasing the power of politicians to buy votes. This is the heart of the corruption, and nothing in the BCRA comes within a million miles of touching that power. The fundamental problem with the federal government is that its power is nearly boundless. The BCRA expands that power by suppressing criticism of government.

While congressmen portrayed the BCRA as a strike against greedy special interests, there was no recognition that government itself is the most powerful and most dangerous special interest. In the name of curbing special interests, Congress made it more difficult to curb government power.

The issue-ad ban is nothing more than unilateral political disarmament of the victims of the federal government. Congress criminalized the effective exposure of its own wrongdoing. Instead, groups can criticize members of Congress only during times when most voters are not paying attention. In most elections, political illiterates are the largest single voting bloc.

The Supreme Court effectively decreed that the American people will be better served if their rulers are less criticized. That is not a doctrine fit for a free people. As Justice Scalia noted in his dissent,

The premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source. If that premise is wrong, our democracy has a much greater problem to overcome than merely the influence of amassed wealth.

What gives our rulers the right to dictate how and when they may be criticized? The fact that Congress would pass, the president would sign, and the Supreme Court would uphold the ban on issue ads is itself proof of profound corruption in Washington.

Maintaining trust in government is not more important than preserving freedom. We cannot “clean up democracy” by making political speech more regulated than hazardous waste disposal.

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