FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 9, 2005

MEMORANDUM

TO: The Commission
General Counsel
Staff Director
Public Information
Press Office
Public Records

FROM: Brad C. Deutsch BCD by MAD
Assistant General Counsel

SUBJECT: Comment on Internet Communications

Attached please find one untimely comment submitted in response to the above Notice of Proposed Rulemaking on Internet Communications, Notice 2005-10, published on April 4, 2005 (70 FR 16967). The comment period ended on June 3, 2005.

Attachments

cc: Associate General Counsel for Policy
Congressional Affairs Officer
Executive Assistants

Federal Election Commission, 999 E St., NW, Washington DC 20463.

My comments, regarding the proposed internet regulation rulemaking process per Shays-Meehan v FEC, focus mostly on the disclaimer issues.

In AO 1998-22, Leo Smith, a layperson volunteer, requested an advisory opinion concerning his website.
I submitted comments cautioning the FEC to tread carefully. To require Smith to post a "paid for by" type disclaimer on his site would be an unconstitutional violation of his civil rights under Talley v California, McIntyre v Ohio, and Reno v ACLU.

It is safe to say the FEC disregarded my concerns. The Commission advised Smith that he must add a disclaimer to his site, and perhaps register as a political committee, and treated his site as a contribution.
Smith was not the only victim of the FEC's chilling response to online political speech. Zack Exley, a student and comic, had a complaint filed against him on behalf of candidate Bush, for failure to have a disclaimer on his site.
At this point others on the internet became concerned, thousands and hundreds of them. In 2001, the FEC conducted a request for comments on internet regulation.
I submitted comments and joined the joint statement submitted by a group of civil liberties organizations. 1200 comments, a then-record, were received. The tenor of the comments was that the FEC should keep its hands off the internet.
Twenty percent of respondents mentioned spam as an exception.
Like an unwanted phone call at dinner, spam, unsolicited bulk email, intrudes on personal privacy, in a way that justifies a minimal amount of regulation such as an identification requirement. So in my comments opposing disclaimers, spam is an exception.

The FEC's response was to mostly back off from internet regulation.
Congress, which periodically makes unconstitutional attempts to shut down the internet, passed McCain-Feingold. The bill banned all contributions by minors, and violated the constitution. A majority of the house and senate violated their oath of office by voting for the unconstitutional bill. The Supreme Court in McConnell struck down the ban on speech by minors, and upheld nearly all the rest of the bill. Because of the jurisdictional limits for fast-track review, the case did not directly challenge FECA 318, which attempts to require disclaimers.
The suit did challenge BCRA 311, a disclaimer provision, but only on an "express advocacy" argument the court rejected. In note 88, the court mentioned that McIntyre remains good law. In McIntyre, the court found that an Ohio statute requiring disclaimers on candidate literature was facially invalid. We know from the civil rights-era Talley v California that anonymous political speech is protected by the First Amendment. The FEC lacks power and jurisdiction to overrule the Supreme Court's holdings in Talley and McIntyre. In a system of checks and balances in which the constitution is supreme, and the Court is the final arbiter of disputes, the FEC is obligated to refrain from violating the civil right to engage in

anonymous political speech. Obligated not only by the oath of office, but by 17 USC 241 which makes it a felony to violate civil rights including speech and voting rights.

When the district court in Shays-Meehan ordered the FEC to engage in a new round of rule-making as to the internet, it did not intend, and lacked the power to order, the FEC to violate the Court's holdings in Talley and McIntyre.
Meanwhile, these cases have been joined by Victoria Buckley v. ACLF and Watchtower v Stratton. In ACLF, all nine justices ruled that McIntyre states the law and forbids disclaimer regulations. Disclosure - the filing of reports with a regulatory agency- is a different animal, also discussed in ACLF.
In Watchtower, 8 members of the court supported the right to go door to door anonymously, without first obtaining a permit from the mayor. The case was grounded in Talley and McIntyre's right of anonymous advocacy.

In its current rulemaking, I encourage, as I have been doing since 1998, the commission to obey the law, and to refrain from attempting to censor political speech with disclaimer regulations. Such censorship interferes with the integrity of the election process and has no place in a democracy.

In Robbin Stewart v Taylor, Indiana's disclaimer regulation was struck down.
In Anonymous v. Delaware, the court found that Delaware's disclaimer statute was so obviously unconstitutional, which the state somewhat conceeded, that there was no case or controversy, and dismissed the case.
I, at least currently, lack the resources to litigate against the FEC, and am concentrating on using the comment process, and attempts at moral suasion, to move the commission away from its current illegal and immoral practice of attempting to compel speech.
I ask, and insist, that the commission, in its internet rulemaking, refrain from trying to impose unconstitutional disclaimer requirements.
I ask that the commission remove from its website a publication which threatens retaliation against those who engage in speech without disclaimers.
My blog at http://ballots.blogspot.com, like the flyer on my wall, contains undisclaimed express advocacy for Andy Horning, who ran for congress where I live.
I ask the commission to revisit its policy in this area, as to print media as well as online.
I ask that the commission promptly return fines it has ilegally levied against, for example, former Indiana congressman Lee Hamilton's campaign.
With the exception of spam, I ask the commission, consistent with the directives of the district court, to be true to the tenor of the 2001 comments: Hands off the Internet!

Respectfully submitted,
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