Van Hollen-Schumer: McCain-Feingold rerun

As Sen. Chuck Schumer and Rep. Chris Van Hollen continue to craft a bill to circumvent the Supreme Court's ruling in Citizens United v. Federal Election Commission, the Center for Competitive Politics (CCP) analyzed their legislative framework and concluded that Congress produced a similar Act in 2002.

Some provisions in the framework—like restricting the First Amendment political activity of U.S. subsidiaries—would be new. But most of these proposed restrictions on political speech are carbon copies of those enacted as part of the Bipartisan Campaign Reform Act of 2002 (McCain-Feingold), several provisions of which the Supreme Court ruled unconstitutional—most recently in Citizens United.

CCP conducted a March poll on campaign finance issues and asked whether the McCain-Feingold law, which "placed new restrictions on corporate and union political spending and contributions to political parties, with the goal of reducing special interest influence," succeeded. Most people disagreed—by a 3-to-1 margin. Forty-four percent of likely voters thought the legislation failed, while just 14 percent thought it succeeded; 32 percent weren't sure.

As Congress again prepares to stifle dissenting political speech, it's worth examining how some provisions of the Van Hollen-Schumer framework echo the flawed speech controls of McCain-Feingold:

Restrictions on corporate and union speech

In McCain-Feingold, Congress banned speech paid for by corporations and unions that dared mention a candidate's name near an election. Citizens United struck that provision down.

In VH-S, a de facto ban on corporate speech is propsed by attempting to restrict political expenditures by U.S. subsidiaries and government contractors.

In order to satisfy Equal Protection and Due Process concerns, such provisions would also need to apply to public employee unions, doctors, and other groups that rely on government funding—as well as international unions and nonprofit groups.

An existing provision of campaign finance law bans all foreign nationals from participating financially in any U.S. election, from dog catcher to president. Restrictions on U.S. subsidiaries and companies with more than 20 percent "foreign" ownership would only restrict the rights of U.S. nationals to associate for political involvement because of a non-controlling foreign shareholder.

'Stand by Your Ad'

The "Stand by Your Ad" (SBYA) provision in VH-S is modeled after the McCain-Feingold provision requiring federal candidates to appear in their ads to 'approve' the message.

Even some prominent "reformers," such as Prof. Rick Hasen, thought this provision was unconstitutional. Former political consulant—and current Obama advisor—David Axelrod called the provision "absurd" and "just one more example of reform gone amok." Nonetheless, the Supreme Court upheld it in McConnell v. Federal Election Commission.

Still, that provision dealt only with candidates, and a provision compelling the speech of independent groups may face a tougher constitutional obstacle.

The provision's sponsor, Sen. Ron Wyden, claimed it would discourage negative ads. Yet SBYA has failed miserably to curb negative campaigning—not that such restrictions would be a sound governmental interest anyway, especially when incumbents are...

writing laws to restrict independent groups and not just candidates.

In 2008, researchers at the University of Wisconsin found that more than 60 percent of Barack Obama's ads—and more than 70 percent of ads for John McCain, who earlier praised "Stand By Your Ad" as "cut[ting] way down on negative ads"—were negative. In VH-S, lawmakers seek to force corporate CEOs—and, presumably, union leaders and other nonprofit officials—to appear in political ads, thereby discouraging them from criticizing incumbents and candidates.

Congress should compile a factual record to show why the written disclaimer on broadcast advertisements is not sufficient to satisfy the public interest of who is funding the ads and why it is necessary to compel corporate and union heads to spend 10 to 15 percent of their advertising time to personally explain that, yes, they approved the ad of their organization.

'Millionaire's Amendment' and 'Lowest Unit Rate'

In McCain-Feingold, Congress included a provision easing contribution limits for candidates facing self-funded opponents. In a 2008 case, Davis v. Federal Election Commission, the Supreme Court struck down this provision as an unconstitutional speech-leveling scheme.

Nevertheless, in a Feb. 11 press conference touting the VH-S framework, Sen. Schumer explained that Congress could constitutionally require broadcast stations to give candidates and parties the "lowest unit rate" if they're subject to ads run by corporations or unions. (Candidates already enjoy the "lowest unit charge" to book preemptable ads. This provision could conceivably allow candidates to buy non-preemptable ads in any time slot at the lowest rate.)

"We have found this to be very, very effective in terms of the so-called Millionaires' Amendment, and we're applying the same type of rules here," Schumer said. "And that is constitutional." Wrong.

This proposal is an example of why campaign finance legislation written by members of Congress almost never avoids self-dealing. The "lowest unit rate" provision marginalizes the speech of outside groups and favors candidates—especially incumbents. So, for example, Sen. Schumer could buy ads bashing "big banks" or "Company X" at the lowest unit rate, but an association or a company would have to pay the highest rate to respond to the ad. Davis invalidated the "Millionaires' Amendment" of McCain-Feingold, which allowed candidates looser contribution limits when facing an opponent spending a large amount of his or her own money. If Congress cannot do that, it seems clear that it also cannot punish outside groups for political spending that criticizes Members of Congress or congressional candidates. ★

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124 S. West St., Suite 201
Alexandria, VA 22314
(703) 894-6800

http://www.campaignfreedom.org