Subject: Here is my comment on AOR 1998-22
Date: Mon, 05 Oct 1998 16:44:24 -0500 (EST)
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Public Comment on FEC AOR-1998-22

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Comments to AOR 1998-22

Date: October 5, 1998

These comments are filed pursuant to an extention of time granted based on a request made October 2nd, following an initial inquiry October 1. A paper copy will follow in due course via First Class Mail.

Tavel & Stewart represents Liberty's Educational Advocacy Forum (LEAF), which wishes to mirror a web site which engages in anonymous political advoacy on behalf of minor party candidates, solely for state and local office, for the 1998 elections. The site does not list candidates for federal office for fear of prosecution or persecution based on 2 USC 441d, and is thus chilled in its expression of core political speech. The AOR filed by Smith involves construction and interpretation of this section, and thus is of interest to LEAF. LEAF is not requesting any advisory opinion or adjudication of its own concerns at this time, but is concerned that language used in the FEC's announcement of AO 1998-22 could impact other decision-makers.

Leo Smith takes the position that he is not covered by 2 USC 441d and its counterpart at 11 CFR 110.11. Smith maintains a web page which engages in express advocacy (or counter-advocacy; he is seeking defeat of an incumbent) and solicits viewers to contribute to the incumbent's opponent. The page does not contain an indentification disclaimer. Smith asserts that 110.11 applies only "whenever a person makes an expenditure". He has documented, by affidavit or correspondence with FEC counsel Bradley Litchfield, that he has incurred zero marginal expense in terms of hardware, software, or server space, but has only used resources he either happened to have on hand already or were available at no charge elsewhere on the Internet. Only his volunteer labor was required.

Smith is correct as to both the spirit and letter of the law. The Internet is a new and emerging communications network which is transforming campaigns and democratic processes generally. See ACLU v Reno, ACLU of Georgia v Miller, www.aclu.org/cyber/hmcl.html . On the Internet, free web pages, e-mail accounts, and public domain software are readily available.

The FECA was enacted to regulate the influence of large amounts of money by special interest groups which had the potential to distort democratic process by monopolizing limited media channels, what the Court called "the corrosive influence of concentrated corporate wealth." FEC v Mass. Citizens for Life, Inc, 479 U.S. at 257.

Buckley v Valeo subjected the act to strict scrutiny and invalidated many of its provisions, bu tleft intact disclosure requirements for political contributions. Buckley did not address or decide any issue of requiring disclaimers on political literature.

It is a well-established principle of statutory interpretation

It is a well-established principle of statutory interpretation that a statute should be construed so as to avoid a constitutional problem. In cases such as FEC v MCFL the Court interpreted another clause of 2 USC 441 narrowly in regard to what kind of corporation is required to rigidly comply with the act's express terms, in order to avoid undue burden on First Amendment rights of political expression and association. But see Austin. Narrow construction should be employed here as well. Smith is a solitary individual not unlike Margaret McIntyre, Grace, or Gilleo, a "lone pamphleteer." In the instant case, the plain meaning of the statute, probable congressional intent, and the above principle of contruction, support Smith's view that this conduct does not fall under Sec. 110.11.

His conduct is more analogous to neighbors talking over the back fence, schoolgirls passing notes in class, or a hand-delivered anonymous letter to the editor, than to the kinds of economic corruption Congress was concerned about. His page does not make any false, malicious, defaming or scurrilous attacks, but simply expressly advocates the defeat of a candidate. Opinions, unlike facts, cannot be false. False speech, subject to the limitations of NYT v. sullivan, can be regulated.

To criminalize Mr. Smith's conduct would substantially chill protected speech on the emerging Internet medium (media?) and contribute to the perception of a few critics that the FEC has become an incumbent protection vehicle dedicated to deterring political expression. Anonymity is one of the building blocks which make up the virtual architecture of the Internet. www.jmls.edu/cyber/index/anon.html .

To grant Smith's AOR will not conflict with the FEC's previously announced AO involving NewtWatch. The lack of expenditure makes them distinguishable.

Significantly, Smith's page does solicit funds. Following the logic of FEC v. Survival Education Fund Inc., 65 F3d 285 (2nd Cir. 1995) with which we do not disagree, such cases fall under Buckley v. Valeo rather than McIntyre v Ohio Elections comm'n, 514 U.S. 334 (1995), www.cpsr.org/cprs/free_speech/mcintyre.txt .

McIntyre invalidated Ohio's statute (and by implication those of 42 other states, see Scalia's dissent, footnote 2) requiring disclaimers on political literature, very similar to 110.11. 110.11 has two prongs, express advocacy, and solicitation of funds. Survival Ed. distinguished McIntyre based on the solicitation clause. But the rest of 110.11 is in direct contradiction to the holding in McIntyre, and any Advisory Opinion or enforcement action based on 110.11 is therefor problematic. McIntyre applied the holding of Talley v. California to the election context. McIntyre involved a referendum, but the language explicitly addressed candidate elections as well, and this has been substantiated in a series of subsequent lower federal court decisions including West Virginia Society for Life v. Smith, Virginia Society for Life v Caldwell, 906 F.Supp. 1071 (WD Va. 1995), Shrink Missouri PAC v. Maupin, 892 F.Supp 1246 (E.D.Mo 1995), and Stewart v. Taylor, 953 F.Supp 1047 (S.D.In 1997) (in which the undersigned was plaintiff.)

The instant case can be decided by statutory construction and does not and need not reach the constitutional issue.

An AO might not be the right forum to resolve a constitution concern - this author is unclear what internal mechanism the FEC employs to ensure that its conduct does not violate the oath of its members and staff to uphold the constitution. The intent of this comment is to bring this issue to the commission's attention in order that its ruling on Smith's claim not casually assume the validity of the regulation without fully considering the consequences.

We thank the commission for the opportunity to participate in the public comment process, as well as for the extension of time, given the Commission's limited time available, and for its attention to these concerns.

Respectfully Submitted,
Robbin Stewart