Money, Speech, and Federal Overreach

By Paul Engel

June 20, 2022

- When does spend money become speech?
- Does Congress have the legal authority to regulate loans made by a candidate to their campaign?
- What are the long term consequences of the Bipartisan Campaign Reform Act of 2002

Have you ever considered how money relates to speech? The federal government has. One of the issues with federal election law is the limitation on the use of money for a candidate to get their message out. What does the case FEC v Cruz have to do with free speech? More important, what does it show about the state of elections in America?

During his 2018 reelection campaign, in compliance with federal law, Senator Ted Cruz loaned his campaign $260,000. To repay this loan, along with other campaign debts, federal laws allows campaigns to receive contributions after Election Day. According to Section 304 of the Bipartisan Campaign Reform Act of 2002 (BCRA), the amount of loans that a candidate can be repaid from the campaign is limited to $250,000. The Federal Election Commission (FEC) has promulgated regulations that allow the repayment of loans above the $250,000 threshold as long as repayment happens with 20 days of the election.

The campaign committee began repaying Mr. Cruz’s loans after

the 20-day post-election window. It therefore repaid the maximum allowed by FEC regulation of $250,000. Mr. Cruz and the campaign committee filed suit in Federal District Court, alleging that this law violates the First Amendment. The District Court granted Mr. Cruz and the campaign committee's request for summary judgement on their constitutional claim. The District Court held that the loan-repayment limitations burdens political speech without sufficient justification. The District Court also ordered the challenges to the regulation to be dismissed as moot. The federal government appealed this decision to the Supreme Court.

Supreme Court Opinion

Section 304 of BCRA burdens core political speech without proper justification.

Federal Election Commission V. Ted Cruz For Senate Et Al. Opinion

The court found that the loan repayment section of the Bipartisan Campaign Reform Act burdens "speech" without proper justification. Let's dig into that a little further.

The loan-repayment limitation abridges First Amendment rights by burdening candidates who wish to make expenditures on behalf of their own candidacy through personal loans. Restricting the sources of funds that campaigns may use to repay candidate loans increases the risk that such loans will not be repaid in full, which, in turn, deters candidates from loaning money to their campaigns. This burden is no small matter. Debt is a ubiquitous tool for financing electoral campaigns, especially for new candidates and challengers. By inhibiting a candidate from using this critical source of campaign funding, Section 304 raises a barrier to entry—thus abridging political speech.

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In other words, the ability to use money in a campaign is a form of speech. I do see an indirect correlation, since campaign funds are used to fund speaking engagements, but does that directly link spending to speech? After all, isn't it more accurate to say that limiting the ability to spend money abridges the freedom of the press?

The art or business of printing and publishing.

Press – Webster's 1828 Dictionary

It's not so much that money allows you to speak, but it allows you to publish your ideas.

To discover or make known to mankind or to people in general what before was private or unknown; to divulge, as a private transaction; to promulgate or proclaim, as a law or edict.

Publish – Webster's 1828 Dictionary

By the court's logic, all communication is considered speech. So any law that directly or indirectly deters communication is an abridgment of speech. However, the court has also long held that government can abridge speech, as long as it's for a good enough reason.

The Government has not demonstrated that the loan-repayment limitation furthers a permissible goal. Any law that burdens First Amendment freedoms, even slightly, must be justified by a permissible interest.

Federal Election Commission V. Ted Cruz For Senate Et Al. Opinion

In other words, it's not that Congress cannot pass a law that abridges speech, but that it must be for a goal the court finds permissible.

The only permissible ground for restricting political speech recognized by this Court is the prevention of "quid pro quo"

corruption or its appearance.

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In this case, the government argues that repaying the candidate's loan raises a heightened risk of corruption. I, like the court, don't see how that could be so. First of all, the candidate is not simply asking for money from the campaign, but the repayment of a loan. If you lent someone money, but the government prevented them from repaying you the full amount simply because they had passed some arbitrary due date, you wouldn't find that just, would you? Secondly, while the campaign can continue to collect contributions, which are used for, among other things, paying back loans to the campaign, those contributions are capped at $2,900 per election. That means that the loan repayment limitation of Section 304 is just another layer of regulation, and therefore, not necessary.

As a fallback argument, the Government analogizes post-election contributions used to repay a candidate's loans to gifts because they enrich the candidate as opposed to the campaign's treasury. But this analogy is meaningful only if the baseline is that the campaign will default.

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I love this one… paying back a loan is suddenly a gift. I think I'll remember that the next time I borrow money from a bank. Congress basically is demanding that campaigns default on certain loans because they are afraid it might look bad.

The Rest of the Story

While the court focused on the impact of the Bipartisan Campaign Reform Act on campaign speech, I want to look at the constitutionality of the act itself. Does Congress have the

legal authority to regulate campaign finances for the election of U.S. Senators?

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Constitution, Article I, Section 4

The legislature of each state is supposed to set the time, places, and manner of elections for Senators and Representatives, but Congress may change the rules. Well, for everything but the place of choosing Senators, that is prescribed by the Constitution. Mr. Cruz was a U.S. Senator running for re-election, Obviously campaign finance laws do not involve the times or places of holding the election. But does the method of financing an election fall under that manner of holding elections?

Form; method; way of performing or executing.

Manner – Webster's 1828 Dictionary

While I can see how financing could be part of how we execute elections, I think it's pushing what the Framers of the Constitution meant. The idea that the power to determine the times, places, and manner of choosing Senators and Representatives would reside in Congress certainly was a concern during the ratification debates.

What can be more defective than the clause concerning the elections? The control given to Congress over the time, place, and manner of holding elections, will totally destroy the end of suffrage.

The Debates In The Convention Of The Commonwealth Of Virginia, On The Adoption Of The Federal Constitution.

Mr. Wythe of Virginia went so far as to suggest the following amendment be included in the Bill of Rights:

That Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse, or be disabled, by invasion or rebellion, to prescribe the same.

The Debates In The Convention Of The Commonwealth Of Virginia, On The Adoption Of The Federal Constitution

So then why do we still have this language in the Constitution? James Madison explained on the floor of the federal convention:

The necessity of a Genl. Govt. supposes that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices. The policy of referring the appointment of the House of Representatives to the people and not to the Legislatures of the States, supposes that the result will be somewhat influenced by the mode, This view of the question seems to decide that the Legislatures of the States ought not to have the uncontrolled right of regulating the times places & manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot or vivâ voce, should assemble at this place or that place; should be divided into districts or all meet at one place, shad all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures. and might materially affect the appointments. Whenever the State Legislatures had a favorite measure to carry, they would take care so to mold their regulations as to favor the candidates they wished to succeed.

[The Records Of The Federal Convention Of 1787]

While there were concerns about Congress setting the manner of electing Representatives, there was also concern that those chosen to represent the people would be manipulated by the state legislatures based on their power to regulate how they are elected. I guess the Framers planned on Congress keeping its meddling with state elections to a minimum.

Conclusion

Should the funding of political campaigns be regulated? I'm not 100% sure. On the one hand, the ability to purchase media coverage to get ones message out is important, but unlimited funding could also be used to corrupt an election. I suppose, if the American people weren't so easily swayed by the blatant bribery of our current campaign strategies, then how they were financed wouldn't be as much as a problem. On the other hand, placing the controls on campaign financing in the hands of those who are elected by those campaigns isn't much better either. After all, history has shown that those in Congress will tend to use such laws to advantage the incumbents or those within their political party whenever possible.

Did the Bipartisan Campaign Reform Act of 2002 burden the free speech of candidates? I'm not sure I would say it burdened free speech, but it certainly did place a burden on their freedom of press. It therefore violated the First Amendment. So while I disagree with the court on the question of freedom of speech, I do agree that the BCRA violates the First Amendment.

I think this case brings up the question of financing elections. Let's face it, things have changed since the 18th century. As more and more people have become professional politicians, the need to regulate how they campaign has grown. As power has accumulated in our political class, the corruption of the election process was sure to follow. And as

money has flowed into political campaigns, the temptation to use donations purchase influence has been gone along with it. It appears John Adams was correct:

Our Constitution was made only for a moral and religious People. It is wholly inadequate to the government of any other.

John Adams to Massachusetts Militia, 11 October 1798

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