

Nonprofit Speech is Being Debated: *Speak While You Can*

by Kay Guinane

Nonprofits' ability to use television, radio, cable, satellite, or Internet communications has been increasingly threatened by obscure regulatory actions that confuse genuine issue advocacy with partisan electioneering.

THE BOUNDARY BETWEEN PERMISSIBLE and impermissible election activities may seem arcane and irrelevant to most nonprofits, but federal action around this topic could lead to unexpected limits on the ability of nonprofits to communicate on issues that are vital to those they serve, while potentially limiting the critical role of nonprofit voices in policymaking. While the current discussion is driven by campaign finance reform and the pervasive role of "soft money," the ambiguity defining the issues and potential solutions threatens all nonprofits.

Nonprofits (i.e., 501(c)(3) organizations for the purposes of this article) currently have extensive latitude to communicate with the public and elected representatives. This freedom empowers them to speak out on issues that affect those they serve—with two important limitations:

- nonprofits may choose to spend a portion of their funds lobbying and influencing legislation, and;
- nonprofits are prohibited from taking actions to influence elections.

Where does one leave off and the other begin? The question of definitions is critical for nonprofits that want to speak on current issues.

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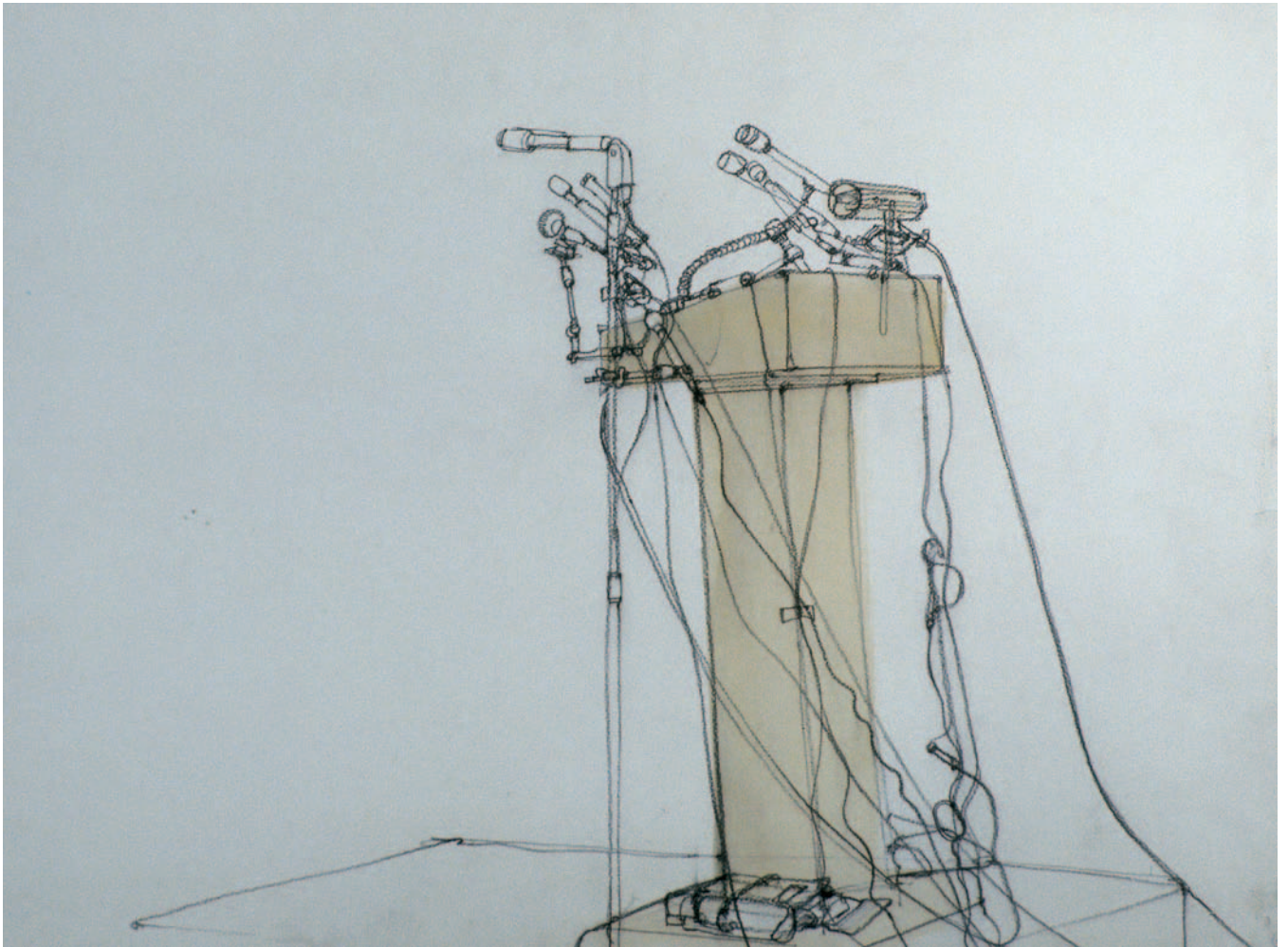
been increasingly threatened by obscure regulatory actions that confuse genuine issue advocacy with partisan electioneering. Now the Supreme Court will weigh in as well, considering the constitutionality of a key provision of the Bipartisan Campaign Reform Act of 2002 (BCRA).

Campaign Finance Regulation Invades the World of Issue Advocacy

The line between issue advocacy and electioneering has been blurred by 527 groups and political parties that have couched their campaign messages in the context of issues. While there is nothing wrong with focusing on issues in campaigns, the practice avoided campaign finance rules and led to passage of the electioneering communications section of Bipartisan Campaign Reform Act of 2002 (BCRA). This provision imposes an absolute ban on corporate funding, including nonprofit corporations, for broadcast messages that refer to federal candidates with 60 days of an election or 30 days of a primary.

The electioneering communications rule was intended to prevent unregulated soft money from being used to pay for thinly disguised campaign messages masquerading as issue ads. However, because the rule covers any communication that refers to a federal candidate, *messages unrelated to elections—such as grassroots lobbying and public service announcements—would be a criminal offense*. For this reason, in 2002 the FEC exempted charitable and religious organiza-

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tions from the rule, since, unlike 527s and other nonprofits, the tax code prohibits them from engaging in partisan election activity. The FEC also exempted unpaid broadcasts, since no soft money is spent. This meant that during the 2004 election season, charities and religious organizations were able to continue their grassroots lobbying and other broadcast communications without worrying about FEC rules.

A court case challenging a host of regulations, including the exemption for 501(c)(3) organizations and Internet communications, was brought by two BCRA sponsors, Reps. Chris Shays (R-CT) and Martin Meehan (D-MA) (*Shays v. FEC*). The court sent the rules back to the FEC for reconsideration. On August 12, the FEC published a notice seeking public comment on a range of options, including retaining, narrowing, or repealing the exemption for 501(c)(3) organizations or replacing it with a broad new exemption covering all communications that do not “promote, support,

attack, or oppose” a federal candidate. Many groups filed comments asking the FEC to retain the exemption and protect their First Amendment right to make grassroots lobbying communications.

The constitutional issues took on increased importance on September 27, when the U.S. Supreme Court agreed to review a challenge to the electioneering communication provision brought by the Wisconsin Right to Life Committee, which is not a charity and so did not qualify for the exemption. The case challenges the prohibition as applied to grassroots lobbying by a nonprofit group. WRTL’s grassroots lobbying ads began in the summer of 2004 and urged both of Wisconsin’s U.S. senators to oppose filibusters of President Bush’s judicial nominees. The broadcasts did not state either senator’s position on the filibusters, nor their political affiliation, nor any words supporting or opposing either senator, and made no reference to the upcoming election. The lower federal court ruled that the

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challenge was barred by the Supreme Court's ruling in *McConnell v. FEC*, which upheld BCRA.

Issue Advocacy vs. Soft Electioneering

The FEC is considering limiting its exemption to communications that do not "promote, support, attack, or oppose" federal candidates, but it has not defined what that means. A vague standard would be the wrong approach to determine when charities and religious organizations can broadcast grassroots lobbying and other messages about the issues of the day. Does "promote, support, attack, or oppose" only refer to candidates in their capacity as candidates, or could it include references to public officials acting in their official capacity? Does it mean that grassroots lobbying messages that ask people to call a senator and urge him or her to change a past position on a bill are attacks on the senator?

The impact of the overly broad rule might not be felt right away, since many charities cannot afford broadcast ads. But the rule will also apply to unpaid broadcasts, such as public service announcements. And if the "promote, support, attack, or oppose" standard is accepted, it could easily be extended to phone banks, e-mails, and other forms of grassroots communications that citizens groups rely on to communicate their message on issues.

How can citizens, who act through organizations, hold public officials accountable if they cannot mention names when important legislative action is coming up? *Members of Congress should not be able to insulate themselves from criticism when they are both running for office and running the government.* The government does not shut down during the 60 days before an election or 30 days before a primary or convention. What is to stop elected officials from waiting until the blackout period to act on controversial issues in order to avoid public criticism? Charities, as nonpartisan organizations, have no stake in elections, and should not be silenced from speaking out about actions of public officials.

While drawing the line between electioneering and issue advocacy may be difficult, it's not rocket science. Lobbying is not campaigning. The IRS has set out factors that distinguish between electioneering and issue advocacy. For example, factors that indicate nonpartisan communications are those that:

- identify specific legislation or a specific event outside the control of the organization,
- are timed to coincide with the specific event, and
- identify the candidate solely as a government official in a position to act on the policy or specific event.

The FEC must recognize that nonpartisan nonprofits have the right to speak out on the issues of the day, any day. The right to criticize federal officeholders in television, radio, satellite, and cable media should not depend on arbitrary application of the undefined "promote, support, attack, or oppose" standard, or on the desire of federal officials to avoid public criticism.

The Right to Criticize Elected Officials

Prior to the November 2004 election, the IRS initiated an audit of the National Association for the Advancement of Colored People (NAACP), based on Chairman Julian Bond's criticism of the Bush Administration's policies in a speech to the group's July convention. The NAACP claimed the audit, which has still not been resolved, was politically motivated.

The problems began in October, when the NAACP, a 501(c)(3) organization, received a notice from the IRS stating that an examination focused on "whether or not your organization has intervened in a political campaign" was commencing. The IRS notice said: "We have received information that during your 2004 convention in Philadelphia, your organization distributed statements in opposition of George W. Bush for the office of presidency. Specifically in a speech made by Chairman Julian Bond, Mr. Bond condemned the administration policies of George W. Bush on education, the economy and the war in Iraq." The October 8 letter also noted that a tax of 10 percent can be imposed on the group for "political" expenditures and a tax of 2.5 percent on any manager who agreed to it. This is a direct threat of personal sanctions for the NAACP's 64-person board.

Since the right of charities to criticize elected officials, including the president, has always been recognized, the NAACP audit caused a stir. Several members of congress contacted IRS commissioner Mark Everson to remind him that charities have a right to "discuss or oppose various aspects of the Bush Administration's policies." Representative Charles Rangel (D-NY) went a

step further and issued a statement saying, "This is a tactic of a police state if I've ever seen one."

In November 2004, IRS Commissioner Mark Everson responded to a letter from Sen. Max Baucus, saying that the IRS had not received any request to audit any group from the executive branch, but that two members of congress requested "we look at one or more organizations in this area." Everson said those requests were treated the same as any other third-party referral. Everson also went on to describe the IRS's new program to enforce the ban on partisan activities by charities. He said the effort was overseen by a committee of career employees that reviewed more than 100 cases, 60 of which were selected for examination. Details, including the identity of the groups being audited, have not been made public because tax law protects the privacy of the groups, although Everson did say the groups represent diverse viewpoints.

Since the IRS has not issued any reports on its enforcement program, it is impossible to know how many audits stemmed from circumstances similar to those of the NAACP. Concern about the chilling impact of such audits has led the NonprofitAdvocacy.org coalition to meet with the IRS and request more information. (NonprofitAdvocacy.org members are the Alliance for Justice, the Center for Lobbying in the Public Interest, the National Council of Nonprofit Associations, the National Committee for Responsive Philanthropy, and OMB Watch.) While the IRS has not released details, they claim they do not consider issue advocacy to be a violation of the ban on intervening in elections. Statements from some IRS officials indicate that the NAACP is in no danger of losing its tax-exempt status.

The Internet Could be Next

The FEC proposed new Internet rules on March 24, seeking public comment. The revisions were proposed to comply with the *Shays v. FEC* decision. They generated an outcry from bloggers, members of congress, and others concerned about possible over-regulation of Internet political activity.

The proposal takes a generally limited approach to FEC regulation of Internet communications. For example, it would treat campaign ads on the Internet under the same rules as offline ads, which would require they be paid for with funds subject to contribution limits. Links

to candidate sites and re-publication of campaign materials through Web sites or e-mail would only be a regulated contribution if paid for. Individual volunteers would be exempt if they use a personal computer, or one available at a public site, such as a library or Internet café.

The Online Coalition sent a letter to the FEC expressing concern about the potential impact the rulemaking could have on Internet-based political speech. It has nearly 3,000 signatories. The bipartisan coalition, whose tagline reads, "From left to right, preserve our rights," said, "The Internet is a fundamental tool in the American political process. Just this week, we learned that 75 million Americans used the Internet to gather news, read commentary, discuss issues, register to vote, and generally join in the democratic process during the last election cycle. We believe the Internet is the primary driving force behind the increased participation among traditionally under-represented groups of voters . . ."

Members of congress also weighed in. A hearing on the issue was held during the last week of September. In March, Rep. John Conyers (D-MI), ranking minority member of the House Judiciary Committee, and 13 other representatives sent a letter to the FEC urging caution. Also in March, Senate Minority Leader Harry Reid (D-NV) introduced S.678, a bill that would exempt Internet communications from FEC regulation. Reid also sent a letter to Thomas saying, "Congress did not intend to regulate this new and growing medium in the Bipartisan Campaign Reform Act (BCRA) . . . Regulation of the Internet at this time, with its blogs and other novel features, would blunt its tremendous potential, discourage broad political involvement in our nation and diminish our representative democracy."

Vigilance in Protecting First Amendment Rights

Nonprofits can keep up with these issues by signing up for e-mail lists such as OMB Watch's nonprofit listserv (subscribe at <http://www.omb-watch.org/article/articleview/136>), responding to action alerts, signing on to group letters, and filing comments with federal agencies.

Let's Talk!

Let's move this topic forward! Any ideas or arguments you'd like to share with the authors and editors? Send us an email, referring to this article at: feedback@nonprofitquarterly.org.

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