

ONLINE FREEDOM OF SPEECH ACT

MARCH 13, 2006.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. EHLERS, from the Committee on House Administration, submitted the following

R E P O R T

[To accompany H.R. 1606]

[Including cost estimate of the Congressional Budget Office]

The Committee on House Administration, to whom was referred the bill (H.R. 1606) to amend the Federal Election Campaign Act of 1971 to exclude communications over the Internet from the definition of public communication, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE LEGISLATION

H.R. 1606 would exempt communications made over the Internet from the definition of a “public communication” in the Bipartisan Campaign Reform Act (“BCRA”) (Public Law 107–155). The purpose of this legislation is to ensure the Internet can continue to grow and continue to be a free and positive force in our political system. H.R. 1606 would allow bloggers and other online activists to express their view on the Internet without having to fear they might run afoul of our campaign finance laws.

BACKGROUND AND NEED FOR LEGISLATION

After BCRA passed in 2002, the Federal Election Commission (“FEC”) was required to develop regulations to implement the Act. The Commission determined that Congress did not intend for BCRA to cover Internet communications and, therefore, adopted regulations that exempted them.

Congressmen Christopher Shays (R–CT) and Marty Meehan (D–MA), concerned about this and other post-BCRA regulations adopted by the FEC, sued the Commission. The suit argued that the

FEC regulations did not follow Congress' intent in enacting BCRA. Over a year ago, U.S. District Judge Colleen Kollar-Kotelly agreed with Messrs. Shays and Meehan, and ordered the FEC to rewrite many of its rules, including the rule exempting Internet communications from regulation.¹

A new FEC rulemaking to cover the Internet began in March 2005, and the Commission has scheduled a meeting to vote on these new rules on March 16, 2006. Unless Congress acts quickly to prevent it, the FEC will be required to issue a new regulation to cover Internet communications.

Historically, Congress has regulated political speech only where it has the potential to cause corruption or the appearance of the corruption. There has been no demonstration that the growth of the Internet has had a corruptive influence on politics. There is, however, ample evidence that the Internet has had a positive, democratizing effect on our system.

The Internet has had a positive influence on our politics and engaged thousands of people as never before. It has allowed individuals of limited means to become involved in the political process because, unlike other forms of media such as television and radio, there are few barriers to entry. The Internet allows for communication with millions of people for little or no cost. Imposing regulations would stifle this activity.

The Internet achieves through technology what BCRA seeks to achieve by law. It levels the playing field, empowers ordinary citizens, minimizes the influence of wealth and enhances the voice of those of lesser means. Imposition of a regulatory scheme on this medium will stifle this activity and discourage participation, thereby enhancing the influence of the wealthy and connected, contrary to the stated purpose of our campaign finance laws.

The chilling effect of a regulatory scheme would be exacerbated by its arbitrariness—for example, the FEC trying to determine on a case-by-case basis which bloggers should be considered “news” organizations and be granted a media exemption and be taken out of the realm of regulated organizations, and which should not. This arbitrariness would negatively impact bloggers in particular because their sites often meld news and advocacy.

Instead of constantly drawing arbitrary lines and hard to follow rules for Internet activists to abide by, the FEC should just leave the Internet alone. H.R. 1606 would tell the FEC that it was right the first time—the Internet should be left alone to flourish and not be burdened by regulation.

Those who favor regulation, the so-called “reform community,” believe that Internet speech must be regulated in the same manner as all other speech, lest we create a “loophole” that will allow people to evade BCRA. They are not deterred by the fact that none of the grim scenarios they predict will ensue have been seen in the past four years. The 2004 election was conducted with the rule H.R. 1606 would codify in place, and none of the ill effects predicted were seen.

While there has been no evidence of corruption resulting from the Internet exemption there has been ample evidence of the posi-

¹*Shays v. FEC*, 337 F.Supp 2d 28 (2004). Judge Kollar-Kotelly of the DC District Court struck down 15 of the 19 regulations challenged by Shays and Meehan.

tive effects of a deregulated Internet. There was 42% growth from 2000 to 2004 in the number of people using the Internet to research candidates' issues positions.² About 44% of online political activists have not been politically involved in the past in typical ways—they have not previously worked for a campaign, made a campaign donation or attended a campaign event.³ Technorati, a popular blog search engine, is now tracking 30.4 million blogs and reports that every day, 70,000 new blogs are created.⁴

H.R. 1606 would make sure bloggers do not have to check with a federal agency before they go online. It would protect bloggers from being forced to constantly read FEC advisory opinions, or to hire federal election lawyers to make sure what they are doing is legal. This bill would allow bloggers to express their views on politics and politicians without having to worry about running afoul of federal election laws.

SUMMARY OF THE LEGISLATION

Section 1.—Short title: the “Online Freedom of Speech Act”

Section 2.—Modification of definition of public communication

—Excludes communications made over the Internet from being considered “public communications.”

Under current law, a regulated “federal election activity” includes “public communications,” such as broadcast, cable, satellite, or newspaper communication to the general public. In October 2002, the Federal Election Commission promulgated regulations to exempt communications over the Internet from the definition of “public communications.” H.R. 1606 would amend federal law to codify the current exemption of Internet communications from the definition of public communications.

COMMITTEE CONSIDERATION OF THE LEGISLATION

INTRODUCTION AND REFERRAL

On April 13, 2005, Mr. Hensarling introduced H.R. 1606, the “Online Freedom of Speech Act,” which was referred to the Committee on House Administration.

HEARINGS

The Committee on House Administration held a hearing on H.R. 1606 on September 22, 2005.

Members present: Mr. Ney, Mr. Ehlers, Ms. Miller, Ms. Millender-McDonald, and Ms. Lofgren.

Witnesses: The Honorable Scott E. Thomas, Chairman, FEC; The Honorable Michael E. Toner, Vice Chairman, FEC; The Honorable Ellen L. Weintraub, Commissioner, FEC; Michael Krempasky, blogger, RedState.org; Duncan Black, blogger, Eschaton; Bradley Smith, Professor, Capital University Law School; Lawrence Noble,

²Lee Ranie, Michael Cornfield, and John Horrigan, “The Internet and Campaign 2004,” Pew Internet and American Life Project, March 6, 2005 at iv.

³As of February 2004. See “Political Influentials Online in the 2004 Presidential Campaign,” Institute for Politics, Democracy & the Internet, Graduate School of Political Management, George Washington University, February 5, 2004 at 5.

⁴As of March 13, 2006. See <http://www.technorati.com/about/>.

Executive Director, Center for Responsive Politics; and Karl Sandstrom, Of Counsel, Perkins Coie LLP.

MARKUP

On March 9, 2006, the Committee met to mark up H.R. 1606.

Members Present: Mr. Ehlers, Mr. Mica, Mr. Reynolds, Ms. Miller, Ms. Millender-McDonald, Mr. Brady, Ms. Lofgren.

The Committee favorably reported H.R. 1606, by a voice vote, a quorum being present.

MATTERS REQUIRED UNDER THE RULES OF THE HOUSE

COMMITTEE RECORD VOTES

Clause 3(b) of House rule XIII requires the results of each record vote on an amendment or motion to report, together with the names of those voting for and against, to be printed in the committee report.

The Committee voted to favorably report H.R. 1606. The vote to report favorably was approved by a voice vote.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) rule XIII of the Rules of the House of Representatives, the Committee states that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the House of Representatives, are incorporated in the descriptive portions of this report.

GENERAL PERFORMANCE GOALS AND OBJECTIVES

The Committee states, with respect to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, that the goal and objective of H.R. 1606 is to ensure the Internet can continue to grow and continue to be a free and positive force in the political system. H.R. 1606 will allow bloggers and other online activists to express their view on the Internet without fear of running afoul of campaign finance laws.

CONSTITUTIONAL AUTHORITY

In compliance with clause 3(c)(1) of rule XIII, the Committee states that Article 1, Section 4 of the U.S. Constitution grants Congress the authority to make law governing the time, place and manner of holding Federal elections.

FEDERAL MANDATES

The Committee states, with respect to section 423 of the Congressional Budget Act of 1974, that the bill does not include any significant federal mandate.

PREEMPTION CLARIFICATION

Section 423 of the Congressional Budget Act of 1974 requires the report of any committee on a bill or joint resolution to include a committee statement on the extent to which the bill or joint resolu-

tion is intended to preempt state or local law. The Committee states that H.R. 1606 does not preempt any state or local law.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 10, 2006.

Hon. VERNON J. EHLERS,
*Chairman, Committee on House Administration,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1606, the Online Freedom of Speech Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

DONALD B. MARRON,
Acting Director.

Enclosure.

H.R. 1606—Online Freedom of Speech Act

CBO estimates that enacting H.R. 1606 would have no significant impact on the federal budget. Enacting the bill would not affect direct spending or revenues. H.R. 1606 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

Under the Federal Election Campaign Act, a regulated “federal election activity” includes “public communications,” such as broadcast, cable, satellite, or newspaper communication to the general public. In October 2002, the Federal Election Commission promulgated regulations to exempt communications over the Internet from the definition of “public communications.” H.R. 1606 would amend federal law to codify the current exemption of Internet communications from the definition of public communications. Because the legislation would not change any current policy or practice, CBO estimates that implementing H.R. 1606 would have no significant impact on the budget.

The CBO staff contact for this estimate is Matthew Pickford. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

FEDERAL ELECTION CAMPAIGN ACT OF 1971

**TITLE III—DISCLOSURE OF FEDERAL CAMPAIGN FUNDS
DEFINITIONS**

SEC. 301. When used in this Act:

(1) * * *

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(22) PUBLIC COMMUNICATION.—The term “public communication” means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. *Such term shall not include communications over the Internet.*

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