

The attached comments, in PDF format, are submitted by Andrew Langer and the Institute for Liberty. They include a statement of intent to testify at the FEC's February 11, 2015.

Comments provided by :
Langer, Andrew



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January 15, 2015

Hon. Ann Ravel, Chair
Federal Elections Commission
999 E St, NW
Washington, DC 20463

(Submitted via the Federal Elections Commission's Online Docket Portal)

Re: REG 2014-1 Earmarking, Affiliation, Joint Fundraising, Disclosure, and Other Issues (McCutcheon)

Dear Chairman Ravel:

These comments are submitted by the Institute for Liberty (IFL) in response to the Federal Elections Commission's request for comments on REG-2014-1. IFL is a non-profit, 501C(4) advocacy organization based in Washington, DC, focused on the federal regulatory state, the safeguarding of American exceptionalism, and educating the public on the principles undergirding our constitutional republic. We are immensely concerned with the protection of individual rights, especially the rights to free speech, and the overall assault on freedoms posed by the continuing movement to concentrate power in the federal executive branch.

These comments also serve as my formal request to testify at the FEC's February 11, 2015 hearing on this issue.

We stand opposed, foursquare, to the precepts outlined in the FEC's proposal. We see this as a continuation of the combined efforts by the administration, particularly, and the progressive movement, generally, to silence oppositional speech in America. As an organization, we continue to be troubled by the seeming fetishization of chilling or outright silencing of opposing viewpoints. This effort by the FEC is merely the latest, the *sixth* attempt by the White House, the administration, or other agencies to investigate, slow, or otherwise curtail opposing speech, efforts that have included (but are not limited to):

- The call by the White House in 2009 for "reporting" to them emails or contrary information that Obama Administration supporters might deem "fishy";
- The creation by the White House of the "AttackWatch.com" website in 2010, again for reporting to the White house by its supporters of contrary or oppositional information;

- The unprecedented utilization of non-political science and health agencies to target oppositional groups, manifested in the (by our opinion) fundamental misuse of National Cancer Institute grant funds to produce a report denigrating the Administration's principle opposition political movement, the Tea Party movement;
- The as-admitted-by-the-administration's inappropriate targeting of conservative, libertarian, constitutionally-focused organizations by the Internal Revenue Service for increased scrutiny, harassment, and perpetual denial of tax-exempt status;
- When caught engaging in this potentially-illegal behavior, rather than change their course, the IRS instead engaged in rulemaking eerily similar to this one—a rulemaking that prompted an unprecedented number of comments (more than twice the cumulative number that the IRS had received in all their rulemakings of the previous seven years), including comments from the NAACP underscoring that the IRS' attempt to expand their regulatory reach would make their activities “illegal”—in contravention of the seminal Supreme Court case, *NAACP v. Alabama*, 347 US 449 (1958).

With regards to this last, while the IRS is currently contemplating how to re-introduce this rulemaking in contravention of overwhelming opposition, it is completely unsurprising then that the FEC would step into the fray with this profoundly awful idea.

For whatever reason, the administration and its cheerleaders seem to be positively **obsessed** with putting an end to conservative, libertarian, free-market or limited-government speech, as there has been a seemingly endless stream of proposals and initiatives targeting that speech.

Fundamentally, this proposal could not be more wrong-headed— it is a “solution in search of a problem” that massively increases the FEC's power far-beyond its statutory mandates, it will require a bureaucracy far in excess of agencies that exist to actually protect the public's health and safety, and it will have profound and chilling impacts on the free speech rights of millions of Americans, while providing nothing in the way of a balance to the public interests that are required whenever the government decides to intervene in the expression of political beliefs.

Let us start with the basics. Individuals have a fundamental right to anonymous political speech—and a right to support political causes anonymously. This has been enshrined in our Republic since before it was founded—many of the criticisms of the British crown were done anonymously, and the debate over our Constitution (its contents, its necessity, the need for its ratification) was carried on by anonymous authors in the press!

While the case has been made (and, in fact, the very existence of the FEC is premised on the concept) that the public has a right to know who is giving money to **candidates** and how the **candidates** spend that money, even with the Supreme Court's upholding of that concept, the high court has nevertheless (as it has with **all** instances where individual rights are being curtailed by governmental action) made it clear that such impositions on individual rights are supposed to be narrowly-tailored and advancing a legitimate public interest, where the public's interest far outweighs that of the individual.

But, and this was the central problem with the IRS' recent proposals regarding 501C(4) advocacy groups, this proposal by the FEC is **not** narrowly-tailored. It impacts the speech of millions of people—all in the name of a spurious justification that has no basis in

constitutional law. While there are a handful of organizations and individuals pushing this extreme interpretation of the law, they are doing so not to advance a legitimate public “right to know” interest, but to advance their parochial political interest in silencing opposing viewpoints—the very “chilling” of political speech the Supreme Court warns against, and which **NAACP v Alabama** makes clear the law protects.

In **NAACP v Alabama**, the state of Alabama advanced an argument identical the proponents of this rule change make: that the public’s interest is served in knowing who funds political advocacy campaigns. But, in that case, the high court recognized that Alabama’s stated-interest wasn’t the public’s right to know—what Alabama wanted to do was to know who was funding the NAACP’s pro-civil rights agenda, so that the state, its agents, and other actors, could target and harass the NAACP’s funders, bullying them into no longer supporting that organization, and thus silencing it and ultimately shuttering it. Alabama, motivated by racism and a desire to squelch an opposition movement, could not use a spurious justification for “community right to know” to suppress speech.

People may have perfectly justifiable reasons for wanting to keep their involvement in an issue a secret—but they nevertheless might feel it be of singular importance for them to support a cause (financially or otherwise). The high court underscored that such realities do exist, and that the balance of justice weighs down on the side of those wishing to have their anonymity preserved.

Proponents of this rule are seeking the same thing. While they claim the public has a right to know who is funding advocacy ads and internet speech, what they want to do is know for themselves who is funding this speech... so that they can turn around and harass those funders. Demonization of donors is the stock-in-trade for these organizations, who made it a point to bully conservative donors like Richard Mellon Scaife in the 1990s, and who have worked hard to completely demonize David and Charles Koch¹, in an effort to remove them (and their money) from the political advocacy process (in contravention of their rights to free speech and political participation).

This is, in fact, the same behavior that led to the harassment of donors to the American Legislative Exchange Council (ALEC) between 2011 and 2013—the very thing the Supreme Court warned about in **NAACP v Alabama**! Somehow, and it remains unclear just how this occurred, legislators and so-called progressive organizations became aware of who was supporting ALEC, and began targeting those supporters, demanding (successfully in many cases) that these entities drop their support for ALEC.

Ultimately, this is what the architects of the proposal (and their allies in the Obama Administration) want—why they seek **this** particular proposal at **this** particular time. They create this problem (that the public is being misled) and call for the government to intervene with regulation.

But there is no problem to be addressed. The founders of our nation, the great progressive voices of the late 19th and 20th centuries, the most-staunch advocates for civil liberties

¹ Note, the Institute for Liberty does not and has never received money from either Koch brother, from any for-profit Koch business entity, or any Koch-supported or organized foundation.

today... all recognize that **more** political voices, not **less** is not just a good thing, it is the **very thing** that we want in a society that is free and politically-vibrant.

The internet has transformed the way people get involved in politics and political advocacy—allowing orders of magnitude more people to make their voices heard on issues. **THIS SHOULD BE ENCOURAGED**—it is precisely the kind of civic involvement the founding fathers desired for the populace.

Yet, this proposal would have the direct opposite effect—it would discourage involvement, since now people would find their voicing of political viewpoints to be under scrutiny from a federal agency, the very definition of the “chilling effect” warned against by the Supreme Court on multiple occasions.

To add insult to injury, it does so by taking the FEC far beyond the mandate upon which it was founded—to ensure the integrity of elections themselves (focusing on the financial aspects of candidates, both in how they raise money and how that money is spent). One can debate the legitimacy of onerous campaign finance laws, but in essence the court comes down on the side that the public’s interest is served by knowing who gives to candidates and how those candidates spend money, and we will not re-hash that debate here.

But with this proposal, one wonders if this problem has been solved—or, at least, solved to the degree that the FEC believes that it can now shift its attention to the political speech of individuals and organizations on the internet. Because, and this cannot be understated, the implementation of this proposal, even if only a tiny portion of it is adopted, will require a massive rededication of FEC resources towards investigations and compliance assurance.

The FEC currently has just under 350 employees. In order to monitor the millions of Americans who engage politically on the internet, it would require a massive increase in agency personnel. Let’s assume for a moment that the FEC tripled its employees, bringing the number to approximately 1400. This would mean that it would have more employees than the Consumer Products Safety Commission or the Mine Safety and Health Administration—agencies that are (at least statutorily) involved in the actual protection of people. In fact, it would bring the number to more than half the size of the entire Occupational Safety and Health Administration, the agency charged with protecting the hundreds of millions of working Americans (with none of the measurable, palpable benefits).

In fact, because of the disproportionate resource-to-target ratios (because even 1400 people cannot effectively monitor the online political activism of hundreds of millions of online Americans), this would mean that the same kinds of subjective targeting standards that led to the IRS’ “Tea Party Scandal” would have to be adopted by the FEC—and this would undoubtedly lead to the same results: organizations or individuals singled out for observation, harassment, and (potentially) prosecution, because they essentially engaged in their (supposedly constitutionally-protected) civic duty!

In the 1950s, America stood on the precipice of fundamental societal change, a rebirth of American freedom. Adherents to the outmoded and discredited ideologies, motivated by hatred and a desire to subjugate others to their way of life, tried to use the power of the government to suppress those trying to create change and to put intense fear of reprisals into those who supported them, but had felt it necessary to keep that support a secret.

We are now on a similar precipice, facing a similar rebirth of American freedom. More people than ever are engaged in politics, eschewing traditional party labels and focusing on issues that they believe in. Fearful of this potential change, once again adherents to outmoded and discredited ideologies, motivated by hatred and a desire to subjugate others to their way of life, are trying to use the power of government to suppress the involvement of those trying to create change, and, perhaps more importantly, those who wish to support them, but have a genuine fear of doing so because of the backlash that it might create.

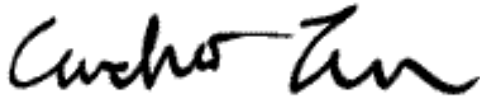
As Justice Harlan wrote in ***NAACP v Alabama***, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the [Constitution's protections of] freedom of speech."

This proposal stands in direct opposition to that concept. It should therefore be thoroughly rejected.

Thank you for your consideration of these comments. If you have any questions, do not hesitate to call the Institute for Liberty at 202-261-6592 or to email me directly at Andrew.Langer@InstituteForLiberty.org.

I look forward to testifying on these issues on February 11th.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew Langer". The signature is fluid and cursive, with the first name being more prominent.

Andrew Langer,
President
Institute for Liberty