

# AMERICAN LIBERTY PAC

## **This new bill puts the Feds in control of your Facebook postings**

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Campaign finance has captured Congress's attention once again, which rarely bodes well for democracy. Senators Amy Klobuchar, Mark Warner, and (of course) John McCain have introduced the Honest Ads Act. The bill requires "those who purchase and publish [online political advertisements] to disclose information about the advertisements to the public..."

Specifically, the bill requires those who paid for an online ad to disclose their name and additional information in the ad itself or in another fashion that can be easily accessed. The bill takes several pages to specify exactly how these disclosures should look or sound. The bill also requires those who purchase \$500 or more of ads to disclose substantial information about themselves; what must be disclosed takes up a page and a half of the bill.

The Federal Election Commission makes disclosed campaign contributions public. With this bill, large Internet companies (that is, platforms with 50 million unique visitors from the United States monthly) are given that task. They are supposed to maintain records about ads that concern "any political matter of national importance." This category goes well beyond speech seeking to elect or defeat a candidate for office.

Why does the nation need this new law? The bill discusses Russian efforts to affect the 2016 election. It mentions the \$100,000 spent by "Russian entities" to purchase 3,000 ads. The bill does not mention that Mark Penn, a former campaign advisor to Bill and Hillary Clinton, has estimated that only \$6,500 of the \$100,000 actually sought to elect or defeat a candidate for office. It also omits Penn's sense of perspective:

Hillary Clinton's total campaign budget, including associated committees, was \$1.4 billion. Mr. Trump and his allies had about \$1 billion. Even a full \$100,000 of Russian ads would have erased just 0.025% of Hillary's financial advantage. In the last week of the campaign alone, Mrs. Clinton's super PAC dumped \$6 million in ads into Florida, Pennsylvania and Wisconsin.

Still, Congress has criminalized foreign nationals trying to spend any money to influence American elections. You would think the "Russian intervention" would be a matter for the Department of Justice or other federal law enforcement agencies. Instead, everyone has to disclose their political activities, and tech companies have to make "reasonable efforts" to make sure foreign nationals do not buy political ads on any subject whatever. What will constitute "reasonable efforts"? Congress will presumably decide. Meanwhile tech companies will have to

guess, and they can hardly be expected to err on the side of free speech. After all, ads that do not appear are hardly a cost to Congress. But unintentionally running an ad by a foreign national could severely damage a tech company. The companies have incentives to make Congress happy. Some protected speech will be excluded.

The bill is not just about Russia and an unexpected election outcome in 2016. It states that “the electorate bears the right to be fully informed” about “political advertisements made online.” What is the source of this right? The Constitution contains no explicit “right to be fully informed.” Perhaps it is a penumbra or emanation of the First Amendment or other parts of the Constitution? Or maybe one of the unenumerated rights alluded to in the Ninth Amendment? No, this is just Congress doing what it wants to do anyway and using the language of the Constitution. The putative “right to be fully informed” is really a sign of how far we have traveled from constitutional government.

Congress finds in this bill that the content of online speech justifies regulation:

Social media platforms...can target portions of the electorate with direct, ephemeral advertisements often on the basis of private information the platform has on individuals, enabling political advertisements that are *contradictory, racially or socially inflammatory, or materially false* [emphasis added].

Later, the bill laments that information on social media sites is often “uncurated,” “inaccurate,” or “more easily manipulable than in prior eras.”

Those familiar with the struggles over campaign finance in recent decades will recall that Congress often sees regulation of spending as way to improve speech. Unregulated spending supposedly contributed to “negative ads” which in turn harmed our democracy. In truth, negative ads attracted attention and increased voter turnout and knowledge.

The bill’s focus on allegedly “bad speech” raises two issues. First, mandating disclosure of who bought the ad may not improve the speech. Second, and more importantly, the content of speech is protected by the First Amendment. Congress does not have the power to “improve” speech by regulating ad financing or by any other means.

The larger picture here is more disturbing. Congress appears to be using a panic induced by Russian electoral meddling to impose itself on a largely unregulated Internet. Mandated disclosure of ad spending is the first but not the last step toward Facebook and Google becoming public utilities. Anyone who cares about free speech should be skeptical about such disclosure.

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