

Vote-Swapping Web Sites And Free Speech

Friday, Nov 16, 2007 --- In a decision that could have significant implications for the upcoming 2008 presidential election, the U.S. Court of Appeals for the Ninth Circuit held that California's former secretary of state Bill Jones improperly threatened criminal prosecution against vote-swapping Web sites operating during the Bush-Gore 2000 presidential election. *Porter v. Bowen*, Case No. 06-55517 (9th Cir., Aug. 6, 2007) (Fisher, J.).

The Ninth Circuit explained, "Whether or not one agrees with these voters' tactics, such efforts, when conducted honestly and without money changing hands, are at the heart of the liberty safeguarded by the First Amendment."

In the last weeks of the 2000 presidential campaign, several Web sites launched that allowed third-party supporters in swing states (where the projected outcome was uncertain) to strategize with major-party voters in safe states (where the projected outcome was reasonably certain), to avoid handing the election to their least-preferred candidate.

Ultimately, the sites aimed to increase Al Gore's chances of winning the Democratic-pledged electors in swing states without reducing third-party candidate Ralph Nader's share of the national popular vote.

Four days after the Web site voteswap2000.com launched (eight days before the presidential election), then-Secretary of State of California Bill Jones sent a letter to the site's owner. He alleged that the site was "engaged in criminal activity," threatening criminal prosecution and stating "any person or entity that tries to exchange votes or brokers the exchange of votes will be pursued with the utmost vigor."

Immediately upon receiving the letter, the site's owner disabled the site's vote-swapping mechanism, barred access to Internet users outside of California, posted an explanation on the site and e-mailed all of the matched users about the potential illegality of vote swapping.

Owners of a similar Web site, voteexchange2000.com, did not receive a letter from Jones but disabled their site's vote-swapping mechanism immediately upon learning about Jones' letter to voteswap2000.com.

Three days after receipt of Jones' letter (five days before the presidential election), the Web site owners and two individual voters brought suit in the Central District of California asserting that the threatened prosecution violated the First Amendment.

The district court twice found the case to be moot. The district court also

granted summary judgment to the state on the Web site owners' damage claims and ruled that the secretary of state was entitled to qualified immunity.

On appeal, the Ninth Circuit held that the Web sites' vote-swapping mechanisms, as well as the communication and vote swaps they enabled, were constitutionally protected speech.

The court recognized that California possesses valid interests in preventing election fraud and corruption but nonetheless held that Jones' threatened criminal prosecution was an unlawful burden because it was not sufficiently tailored to the advancement of the state's legitimate interests.

The Ninth Circuit upheld the district court's determination that Jones was entitled to qualified immunity, however, finding that the constitutionality of halting vote swapping was not clearly established in 2000. Therefore, Jones did not have "fair warning" that his actions were unconstitutional.

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