

NLWJC - Kagan

DPC - Box 006 - Folder 011

**Campaign Finance Reform - Issue
Advocacy/Independent Expenditures**

Campaign finance -
issue advocacy/independent
expenditures.

January 23, 1998

To: Campaign Finance Group

Fr: Bill Marshall
Lisa Brown
Janis Crum

Re: Issue Advocacy and Independent Expenditure Regulatory
Options

ISSUE ADVOCACY

I. Definition

Issue advocacy is the most highly protected form of political speech under the First Amendment. It is defined as a communication which does not "in express terms advocate the election or defeat of a clearly identified candidate."

Only communications that contain such express advocacy are currently regulated under the Federal Election Campaign Act.

II. Current Regulation of Issue Advocacy

None. Issue ads are subject to neither disclosure nor contribution limitations under the current regulatory scheme.

III. Regulatory Options

A. *Narrow the Definition of Communications Which Qualify as Issue Advocacy By Expanding the Definition of Express Advocacy.*

- Redefine express advocacy to include communications which, "when taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as advocating the election or defeat of one or more clearly identified candidate(s)." (11 CFR 100.22; FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987.)

- Redefine express advocacy to include communications which: (1) contain the name of a candidate and (2) are printed or broadcast within 30 days of an election.
- Include communications that contain the name of a candidate for elective office and are printed or broadcast within 30 days of an election, where the "intent is to advocate the election or defeat of the named candidate, as shown by one or more factors such as a statement or action by the person making the communication, the targeting or placement of the communication, or other devices intended to influence the outcome of an election." (H.R. 493, 104th Congress Repr. Shays/Meehan bill)

Constitutional Appraisal: Circuit courts are split as to the constitutionality of expansive definitions of express advocacy. (See, Furgatch, supra; ME Right to Life Cmtee v. FEC, 98 F.3d 1 (1st Cir. 1996.) The Supreme Court has not resolved the issue. Because of the core First Amendment interests at stake, the Court may be reluctant to uphold broad language.

B. *Mandate Disclosure for Broadcast Communications of Issue Ads*

- Require disclosure of the source(s) of funding for the communication.
- Where an issue ad is funded by an organization, association, for-profit or non-profit corporation, require disclosure of the five [or more] largest contributors to that organization, association or corporation.
- Where an issue ad is funded by contributions to an organization specifically earmarked for issue ads, require disclosure of the names of the five [or more] individuals making the largest monetary contributions for funding the ad.
- Where an issue ad is funded by an organization, require disclosure of major contributors to that organization who donated [\$500] or more (i.e., set a threshold dollar amount for persons whose contributions must be disclosed).

Constitutional Appraisal: McIntyre v. OH Elections Commission, 514 U.S. 334 (1995) held that a state could not require disclosure of the author of a leaflet. The Court left open the question of whether disclosure would be permitted in the broadcast context. The First Amendment will require an exception from disclosure for unpopular organizations which can demonstrate that disclosure of contributors will threaten the organization's existence. Brown v. Socialist Worker's Party, 459 U.S. 87 (1982) (holding that the Socialist Workers Party was exempt from campaign disclosure requirements).

C. *Require Disclaimers for Broadcast Issue Ads*

- Require a continuous printed disclaimer stating that the advertisement is not authorized by a candidate and naming the group responsible for it.

INDEPENDENT EXPENDITURES

I. Definition

An independent expenditure is a communication that expressly advocates the election or defeat of a clearly identified candidate, but which is made independently of any candidate's campaign.

Independent expenditures cannot be "made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of such candidate." 2 U.S.C. 431(17); 11 CFR 109.1(a).

Expenditures found to be "coordinated" with a candidate's campaign are considered contributions to that candidate, and are subjected to candidate contribution limits.

II. Current Regulation of Independent Expenditures

- Individuals who make contributions to political committees (i.e., PACs) are limited to giving \$5,000, regardless of whether the committee makes independent expenditures.
- However, current law imposes no limits on individuals who make independent expenditures, even if an individual has contributed the maximum amount to a political committee allowed under the statute.
- FECA requires PACs, multi-candidate committees,

political parties and candidate committees to disclose independent expenditures that aggregate over \$200 a year.

- Any independent expenditure of \$1,000 or more which is made after the 20th day, but more than 24 hours before the day of an election must be reported within 24 hours after the independent expenditure is made. Individuals who spend \$250 on independent expenditures must disclose to the FEC at the end of the reporting period.

III. Regulatory Options

A. *Expand the Definition of "Coordinated Expenditure"*

- Create a presumption that any express advocacy expenditure by a past or present donor is conclusively deemed "coordinated." Such coordinated expenditures would be subject to applicable candidate contribution limits.
- Impose this "presumption of coordination" on organizations and individuals registered as lobbyists; or, more specifically, on individuals and organizations that have lobbied a particular officeholder in the past.
- Impose the "presumption of coordination" on volunteers who are integrally linked (and who have direct knowledge of message and strategy) to the candidate's campaign.
- McCain/Feingold (S.25) provision: Defines "in coordination with a candidate" as: "A payment made by a person based on information about a candidate's plans, projects, or needs provided to the person making the payment by the candidate or the candidate's agent who provides the information with the intent that the payment be made."

The bill also defines "coordinated" to include payments made by a person who has served in any formal policy making or advisory position with the candidate's campaign or has participated in formal strategic or policymaking discussion in the same election cycle in which the payment is made.

Constitutional Appraisal: Limits on independent expenditures have been rejected by the Supreme Court, albeit in very fact-specific circumstances. See, Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. --, 135 L.Ed.2d 795, 801-803 (1996) (noting that the case represented an as-applied challenge to

the FEC's factual interpretation of "independent" versus "coordinated" expenditures). Nevertheless, unless the Colorado case is overturned or limited, the constitutionality of broad definitions of "coordinated expenditure" will be suspect.

B. *Limit Contributions To Organizations That Make Independent Expenditures for Broadcast Communications*

- Require individuals and organizations who are not currently registered as a political committee to register as an "independent expenditure committee" when they spend or receive \$1,000 for the purpose of making independent expenditures.
- For an independent expenditure committee that makes broadcast expenditures of \$10,000 [or some other threshold amount] in support of or opposition to any candidate, impose a limit of \$1,000 (the maximum amount applicable to candidates) on contributions to the independent expenditure committee.

Constitutional Appraisal: Although Buckley v. Valeo, 424 U.S. 1 (1976) rejected a monetary cap on independent expenditures, the Court upheld contribution limits as constitutionally valid. Accordingly, this proposal might survive Buckley v. Valeo.

C. *Require More Stringent Disclosure*

- Any expenditure for an express advocacy communication made within 30 days of an election must be reported within 72 hours of the broadcast or public dissemination of the communication.
(See similar provision of S.25/McCain-Feingold, requiring 24 hour disclosure within 20 days of an election for independent expenditures of \$10,000 or more.)
- Require the FEC to notify a candidate mentioned in an independent expenditure when the total spent on the communication reaches a certain dollar amount. (See Clean Congress Act, 104th Congress) triggering amount is \$25,000.)

Constitutional Appraisal: Under Buckley, these disclosure requirements should be upheld.