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Campaign Finance Reform: Constitutional Issues Raised by Disclosure Requirements

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Summary

Current federal election law contains reporting and disclosure requirements related to campaign financing.[1] The Supreme Court has generally upheld such provisions, although imposing disclosure requirements on spending for communications that do not meet the strict standard of "express advocacy" may be held unconstitutional.

Campaign finance reform legislation often contains provisions that would impose additional reporting and disclosure requirements under the Federal Election Campaign Act (FECA). For example, S. 27 (McCain/Feingold), would require disclosure of disbursements of expenditures over $10,000 for "electioneering communications," which are defined to include broadcast ads that "refer" to federal office candidates, with identification of donors of $500 or more. S. 22 (Hagel/Landrieu) would increase and expedite current disclosure requirements under FECA. H.R. 380 (Shays/Meehan) would lower the current FECA threshold for contribution reporting from $200 to $50 and impose reporting requirements for soft money disbursements by persons other than political parties. This report will discuss some of the constitutional issues relating to these and other such disclosure requirements.

Reporting of Contributions and Candidate/Party Expenditures

In its landmark decision, *Buckley v. Valeo*,[2] the Supreme Court upheld the reporting and disclosure requirements of the Federal Election Campaign Act (FECA) applicable to contributions and expenditures by candidates and political parties. In *Buckley*, the Court determined that disclosure requirements can serve three governmental interests that were

[1] 2 U.S.C. §§ 432, 433, 434. Furthermore, since the promulgation of Federal Election Commission (FEC) regulations in 1991, disclosure of political party soft money has been required. 11 C.F.R. §§ 104.8(e),(f), 104.9(c),(d),(e) (2000).

[2] 424 U.S. 1 (1976). For further discussion of the Supreme Court's holdings in Buckley and subsequent related decisions, see CRS Report RL30669, *Campaign Finance Regulation Under the First Amendment: Buckley v. Valeo and its Supreme Court Progeny*, by (name redacted).

sufficient to outweigh possible free speech infringements: (1) providing the electorate with information about the sources of campaign money and how it is spent, (2) deterring the reality and appearance of corruption by exposing large contributions and candidate expenditures, and (3) providing the government with the data necessary to detect violations of law.[3] However, with regard to independent expenditures, the Court found that reporting requirements can only apply to those independent expenditures that expressly advocate the election or defeat of a clearly identified candidate.[4]

In a noteworthy portion of the decision, the Court expressly deferred to legislative judgment in upholding the reporting and disclosure requirements. In *Buckley*, the plaintiffs argued that FECA provisions, which require political committees to maintain records with the name and address of contributors donating over $10 and to report the name, address, occupation, and employer of contributors who donate, in the aggregate, over $100, were unconstitutional. While the Court agreed that these thresholds were "indeed low," it nevertheless found that "we cannot require Congress to establish that it has chosen the highest reasonable threshold."[5] Indeed, the Court concluded, such determinations are "best left in the context of this complex legislation to congressional discretion."[6]

Court deference to legislative determinations may be limited, however, when a court finds that the legislature has established a series of differing disclosure thresholds without sufficiently demonstrating its reasoning for such disparities. For example, in *Vote Choice, Inc. v. DiStefano*,[7] the U.S. Court of Appeals for the First Circuit struck down a Rhode Island law requiring political action committees (PACs) to disclose the identity of every contributor, even contributors donating as little as $1, a practice sometimes referred to as "first dollar disclosure," while only requiring candidates to disclose contributors donating more than $100. The First Circuit did not express concern with first dollar disclosure *per se*, but with the disparity between disclosure requirements applicable to PACs versus the requirements applicable to candidates. According to the *Vote Choice* court, the government's interest in disclosure is generally constant, that is, the interest is the same regardless of whether the disclosure requirement applies to individuals or to an association of individuals. The subject Rhode Island law, however, was not only inconsistent, the court found, but imposed "a particularly virulent strain of unevenness into its statutory scheme," without serving "any cognizable government interest."[8]

Disclosure requirements can also raise constitutional questions concerning the right of contributors to organizations subject to disclosure requirements to enjoy freedom of association.[9] According to the Supreme Court in its 1958 decision, *NAACP v. Alabama*,[10]

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[3] *Id.* at 66.

[4] *Id.* at 79.

[5] *Id.* at 84.

[6] *Id.*

[7] 4 F.3d 26, 29 (1st Cir. 1993).

[8] *Id.* at 35.

[9] We observe that the result of any litigation involving disclosure requirements could very well turn on the identity of the challenger, whether it be an organization or an individual contributor to an

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it is well established that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty rights guaranteed by the Due Process Clause of the 14th Amendment[11] and that there is an important relationship between freedom to associate and privacy in one's associations.[12] Accordingly, the *NAACP* Court held that compelled disclosure of an association's membership lists is unconstitutional, if it can be shown that disclosure is likely to constitute an effective restraint on members' freedom of association rights. The Court found that disclosure of the NAACP's members had exposed those members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Therefore, the Court held, compelled disclosure of members would detrimentally affect the association's ability to exercise its rights to advocate its beliefs and further, it might induce members to quit the association and dissuade others from joining.[13]

Drawing from its reasoning in *NAACP*, in *Buckley v. Valeo*, the Supreme Court upheld the current FECA disclosure requirements as applied to minor as well as major parties. In *Buckley*, the plaintiffs argued that the First Amendment rights of minor parties were significantly burdened by contributor disclosure requirements since they were more susceptible to harassment and that the government had little interest in information regarding minor parties having only a small chance of winning elections. The Court determined, however, that unlike the evidence presented in *NAACP*, "any serious infringement on First Amendment rights brought about by compelled disclosure of contributors is highly speculative."[14] That is, according to the Court, absent a case being made that the threat to constitutionally protected rights is so great and the governmental interest furthered by compelled disclosure is so insubstantial that the law cannot be constitutionally applied, disclosure laws will pass constitutional muster.[15] Nevertheless, the *Buckley* Court did recognize that, in the future, a specific minor party might be able to demonstrate with a "reasonable probability" that disclosure requirements would subject its party contributors to "threats, harassment, or reprisals," and accordingly, such a party could qualify for an exemption.[16]

The Supreme Court applied this principle again in *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*,[17] that disclosure rules generally will be upheld as applied to minor political parties, unless the minor political party can demonstrate, as the party in this case did, that such disclosure will subject the identified parties to a "reasonable probability"

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[9] (...continued)
organization.

[10] 357 U.S. 449 (1958).

[11] *Id.* at 460.

[12] *Id.* at 462.

[13] *Id.* at 463-64.

[14] Buckley, 424 U.S. at 70.

[15] *Id.* at 71.

[16] *Id.* at 74.

[17] 459 U.S. 87 (1982).

of "threats, harassment, or reprisals from either Government officials or private parties."[18] In view of these Supreme Court holdings, if a case could be made that a disclosure requirement would seriously infringe on the First Amendment rights of contributors to organizations subject to the requirements, then as applied to those cases, the regulations might be overturned.

Reporting of "Express Advocacy" Independent Expenditures Versus "Issue Advocacy" Expenditures

In *Buckley v. Valeo*, the Supreme Court upheld FECA disclosure requirements for independent expenditures.[19] Under FECA, when an organization or individual (other than a political committee) makes an independent expenditure,[20] aggregating over $250 in a year, expressly advocating the election or defeat of a clearly identified candidate, it is subject to disclosure requirements.[21]

On the other hand, the current prevailing view of the courts is that disclosure requirements for non-candidate expenditures, which do *not* expressly advocate the election or defeat of a clearly identified candidate, are unconstitutional. That is, according to most courts, expenditures for communications that merely relate to political issues, without meeting the "express advocacy" standard, are constitutionally protected issue advocacy communications, which cannot be subject to disclosure requirements or any other regulation.[22]

Reporting of "Issue Advocacy" Expenditures by Tax-Exempt Groups

Even if a disclosure requirement is found to result in an unconstitutional regulation of First Amendment protected issue advocacy, some have argued that conditioning receipt of tax-exempt status under the Internal Revenue Code (IRC) on compliance with a disclosure requirement might provide a basis for regulating beyond the express advocacy standard to permit disclosure regulation of First Amendment protected issue advocacy. It has been a principle of federal constitutional law, however, that the government may not condition the receipt of a public benefit upon a requirement to relinquish one's protected

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[18] *Id.* at 92.

[19] Buckley, 424 U.S. at 80-81.

[20] FECA defines "independent expenditure" as "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17).

[21] 2 U.S.C. § 434(c).

[22] For a discussion of the constitutional issues relating to the regulation of issue advocacy versus express advocacy, see CRS Report 98-282, *Campaign Finance Reform: A Legal Analysis of Issue and Express Advocacy*, by (name redacted).

First Amendment rights.[23] In other words, the government may not accomplish indirectly what it would not be permitted to do directly. For example, in *Speiser v. Randall*, the Supreme Court held that a state could not condition a veteran's tax exemption upon the recipient's execution of a loyalty oath, which the Court found to be in violation of recipient's First Amendment rights.[24]

On the other hand, *Regan v. Taxation With Representation of Washington*[25] is sometimes cited in support of the government's ability to limit the exercise of a First Amendment right as a condition of receiving the public benefit of tax-exempt status.[26] In *Regan*, the Supreme Court upheld the restrictions on lobbying by IRC Section 501(c)(3)[27] organizations, to which contributions are tax deductible, because they operate as a government subsidy directly supporting the activities in which the charity engages.[28] That is, if a charity engages in lobbying activities, then the government subsidy would be paying for those lobbying activities. As noted by the Court, "Congress has merely refused to pay for lobbying out of public moneys."[29]

A disclosure requirement of issue advocacy expenditures by tax-exempt groups, however, does not involve a situation where the government is subsidizing the exercise of a First Amendment right. Instead, such a requirement might be held to infringe on a First Amendment right, (*i.e.* the right not to disclose or speak concerning constitutionally protected issue advocacy communications), by requiring disclosure as a condition of receiving the benefit of tax-exempt status. Although the matter is not free from doubt, it seems likely that a court could find this type of disclosure requirement to be less in the

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[23] For discussion of the doctrine of unconstitutional conditions, *see* Perry v. Sinderman, 408 U.S. 593 (1972); Speiser v. Randall, 357 U.S. 513, 516 (1956); FCC v. League of Women Voters, 468 U.S. 364, 381 (1984); *see also* Legal Services Corp. v. Velazquez, No. 99-603 (slip op. Feb. 28, 2001), at 4157. The prohibition was distinguished in Rust v. Sullivan, 500 U.S. 173, 194-201 (1991), where restrictions on abortion counseling under a federal program were upheld because the restriction applied to the "program or service" and did not place "a condition on the recipient of the subsidy"; and Buckley v. Valeo, 424 U.S. 1, 95-96 (1976), where, although no party directly challenged the constitutionality of the current FECA provision providing federal funds to a qualifying presidential candidate in exchange for voluntary compliance with spending limitations, the Supreme Court appeared favorably disposed to the voluntary limitation since it believed that providing federal funds to private parties for campaigning enhanced, rather than restricted, opportunities to communicate and advocate to the public.

[24] 357 U.S. 513 (1958).

[25] 461 U.S. 540 (1991).

[26] *Id.* at 545.

[27] 26 U.S.C. § 501(c)(3).

[28] 461 U.S. 540, 545 (1991).

[29] *Id.* It may be constitutionally significant to note that in the case of the presidential public financing system, the government is actually paying for the campaign advocacy activities in question. That is, unlike the partial tax-exempt benefits that an Internal Revenue Code (IRC) Section 527organization, 501(c)(4), (c)(5) or (c)(6) organization may realize or the fully tax-exempt benefits that a Section 501(c)(3) may realize, as a result of their IRC tax-designated status, the benefit or money involved is an actual payment or direct subsidy from federal funds for the specific purpose of financing the campaign advocacy in question.

nature of a permissible provision that merely denies federal funds for a particular First Amendment activity and more in the nature of an impermissible provision that denies federal benefits to those who engage in protected activities.