"Political" Activities of Private Recipients of Federal Grants or Contracts

(name redacted)
Legislative Attorney

April 9, 2010

Congressional Research Service
7-....
www.crs.gov
RL34725

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

This report discusses the permissible "political activities" in which organizations, associations, or businesses may engage if such entities receive federal funds through a grant or a federal contract. When discussing "political" activities by private grantees or contract recipients, this report includes lobbying or advocating for legislative programs or changes; campaigning for, endorsing, making campaign related expenditures, or contributing to political candidates or parties; and voter registration or get-out-the-vote campaigns.

Generally, organizations or entities which receive federal funds by way of grants, contracts, or cooperative agreements do not lose their rights as organizations to use their *own*, private, non-federal resources for "political" activities because of or as a consequence of receiving such federal funds. However, such organizations are uniformly prohibited from using the federal grant or contract money for such political purposes, unless expressly authorized to do so by law. These recipient organizations must thus use private or other non-federal money, receipts, contributions, or dues for their political activities, and may not charge off to or be reimbursed from federal contracts or grants for the costs of such activities.

Certain entities, because of the nature of the organization or its tax status, may have particular limitations or restrictions on political or advocacy activities which would apply, in most instances, regardless of the entities' status as a federal grantee or contractor. Thus, charitable 501(c)(3) organizations (entities exempt under 26 U.S.C. § 501(c)(3), which are entitled to receive tax deductible contributions) are limited in the amount of lobbying in which the organization may engage, and are prohibited from participating or intervening in any political campaigns. Corporations and labor unions are expressly prohibited from making contributions to candidates, parties, or committees in federal elections (2 U.S.C. § 441(b)), and federal government contractors are prohibited from making political contributions in such elections (2 U.S.C. § 441(c)), although corporations, unions, and federal contractors are all allowed to establish and finance separate segregated funds which may act as political action committees (PACs) to gather voluntary contributions and make political campaign expenditures and contributions.

Non-profit social action organizations may lose their tax-exempt status under Section 501(c)(4) of the Internal Revenue Code (26 U.S.C. § 501(c)(4)) for engaging in certain lobbying activities, even with their own funds, if they receive federal grants; but these organizations may establish affiliated social action groups (other 501(c)(4)s) through which the organizations and their members may exercise First Amendment rights of advocacy and speech using non-federal resources. Additionally, under certain federal programs, other specific restrictions or limitations may apply to federal funds and activities within the scope of that particular program.

Legislative attempts to flatly require private organizations or entities to forgo or abdicate their First Amendment rights of speech, expression, or advocacy with their own, private resources as a condition to be eligible to receive federal grants or contracts would encounter serious First Amendment obstacles under the "unconstitutional conditions" cases, as well under any analysis of permissible limitations on so-called "government speech." The recent Supreme Court decision in *Citizens United v. Federal Election Commission* has reaffirmed the right under the First Amendment of private entities, including corporate entities, to engage in independent political speech by way of making independent political "expenditures."

Contents

Contacts

As a general matter, organizations or corporate entities which receive federal funds by way of grants, contracts, or cooperative agreements do not lose their rights as organizations to use their own, private resources for what may generally be termed "political" activities because of or as a consequence of receiving such federal funds. When discussing "political activities" by such private grantees or contract recipients, this report is including the activities of lobbying or advocating for legislative programs or changes; campaigning for, endorsing, making electioneering communications concerning, or contributing to political candidates or parties; and voter registration or get-out-the-vote campaigns.

Although (with some exceptions) organizations receiving federal grants or contracts are not, by virtue of such receipt, required to abdicate or refrain from exercising their First Amendment rights of political speech, participation, or expression with their own resources, such organizations are uniformly prohibited from using the federal grant or contract money for such "political" purposes, unless expressly authorized to do so by law. These recipient organizations must thus use private or other non-federal money, receipts, contributions, or dues for their political activities, and may not charge off to or be reimbursed from federal contracts or grants for the costs of such political activities.

Certain entities, because of the nature of the organization or its tax status, may have particular limitations or restrictions on political or advocacy activities which would apply, in most instances, regardless of the entities' status as a federal grantee or contractor. Thus, for example, entities which are incorporated for charitable, educational, or religious purposes, and are tax exempt under Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3)), are limited in the amount of lobbying in which the organization may engage, and are prohibited from participating or intervening in any political campaigns. Corporations and labor unions are expressly prohibited from making contributions for federal elections (2 U.S.C. § 441(b)), and federal government contractors are prohibited as well from making political contributions in such elections (2 U.S.C. § 441(c)). Corporations, labor unions, and federal contractors, however, are all allowed to establish and finance separate segregated funds which may act as political action committees (PACs) to gather voluntary contributions and make political campaign contributions or expenditures.

Non-profit social action organizations (which are tax-exempt under Section 501(c)(4) of the Internal Revenue Code [26 U.S.C. § 501(c)(4)]) are prohibited from engaging in certain lobbying activities, even with their own funds, if they receive federal grants, but may establish affiliated social action groups through which an organization and its members may exercise First Amendment rights of advocacy and speech using non-federal resources. Additionally, under certain federal programs some restrictions or limitations may attach to the receipt of federal funds, such as the application of the part of the so-called "Hatch Act" applicable to state and local employees who are in an organization which administers or distributes federal Block Grant funds, as well as other express restrictions on using federal program funds for political or for voter registration purposes.

Lobbying and Public Advocacy

There are a number of provisions of federal law or regulation that apply general, across-the-board restrictions upon the use of federal appropriations, contract, or grant funds for "lobbying" purposes, while others apply to a particular program or funds. The restrictions on lobbying with federal funds generally follow the funds themselves, restricting the use of such funds, and do not

require a private recipient to forgo the exercise of First Amendment advocacy activities with one's *own*, private resources in return for or as a condition to the receipt of federal grant or contract funds.[1] There are several general, government-wide restrictions on private recipients using federal funds for lobbying purposes.

Federal Restrictions on Contract and Grant Funds

OMB Circular A-122

Specific restrictions on the use of federal grant funds by non-profit organizations were adopted in 1984 as part of uniform cost principles for non-profit organizations issued by the Office of Management and Budget (OMB) in OMB Circular A-122.[2] Under these current federal provisions, non-profit grantees of the federal government may not be reimbursed out of a federal grant for their lobbying activities, or for political activities, unless authorized by Congress. These restrictions apply to attempts to influence any federal or state legislation through direct or "grassroots" lobbying campaigns, or political campaign contributions or expenditures, but exempt any activity authorized by Congress, or when providing technical and/or factual information related to the performance of a grant or contract when in response to a documented request. Specifically, OMB Circular A-122 provides that federal grant monies may not be used for, and direct or indirect costs may not be charged to, a federal grant for the following:

> 25a. Notwithstanding other provisions of this Circular, costs associated with the following activities are unallowable:
>
> > (3) Any attempt to influence: (i) The introduction of Federal or State legislation; or (ii) the enactment or modification of any pending Federal or State legislation through communication with any member or employee of the Congress or State legislature (including efforts to influence State or local officials to engage in similar lobbying activity), or with any Government official or employee in connection with a decision to sign or veto enrolled legislation;
> >
> > (4) Any attempt to influence: (i) The introduction of Federal or State legislation; or (ii) the enactment or modification of any pending Federal or State legislation by preparing, distributing or using publicity or propaganda, or by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, fundraising drive, lobbying campaign or letter writing or telephone campaign; or
> >
> > (5) Legislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support of or in knowing preparation for an effort to engage in unallowable lobbying.

[1] *Note*, however, possible tax consequences of "lobbying" by *tax-exempt* organizations even with "non-federal" money, discussed below.

[2] *See* now OMB Circular A-122, Attachment B, para. 25, as added 49 F.R. 18276 (1984), at http://www.whitehouse.gov/omb/circulars/a122/a122.html, and provisions incorporated by reference into the Federal Acquisition Regulations (FAR) 48 C.F.R. § 31.701 *et seq.*, for non-profits.

Federal Acquisition Regulations

The Federal Acquisition Regulations (FAR) apply to commercial contractors and nonprofit contractors of the federal government. The FAR imposes similar rules on cost allowances concerning "lobbying" and political activities as those described for non-profit grantees in OMB Circular A-122.[3] The costs of activities of a contractor which involve lobbying, influencing public policy, public advocacy, or political activities, are similarly *not* allocable to a federal contract.

Byrd Amendment: Lobbying for Other Grants or Contracts

The so-called "Byrd Amendment" applies to a "recipient of a Federal contract, grant, or cooperative agreement" and to the subcontractors and subgrantees of that contract or grant, and includes specifically within its terms any state or local government, including local and regional authorities.[4] The statutory and regulatory restrictions prohibit the use of federal funds to "pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress ... in connection with" governmental decisions regarding the awarding of a federal contract, the making of a federal grant, loan, or cooperative agreement. The regulations note that "influencing or attempting to influence" means "making, with the intent to influence, any communication to or appearance before an officer or employee of an agency ... or a Member of Congress ....," and thus might be intended only to reach what are considered "direct" lobbying activities, as opposed to "grassroots" activities.[5] However, any "information specifically requested by an agency or Congress is allowable at any time"[6]; and certain other contacts may be allowable depending on the timing and nature of the communication with respect to a particular solicitation for a federal grant, contract, or agreement. When covered under the provisions of the Byrd Amendment, federal contractors or grantees have to disclose and certify when they use even their *own* funds to lobby on covered matters.[7]

While a federal grantee may not, under the Byrd Amendment, lobby with respect to the awarding or making of a federal contract or grant, this particular restriction does not in itself necessarily bar general lobbying or public policy advocacy on issues when that conduct is not involved with a "covered action," that is, the making or awarding of a grant to that entity.[8] Since it is directed at lobbying only on specified federal actions concerning the making of grants, loans, contracts and agreements, and the extensions or modifications of such agreements, loans, contracts, or grants, the Byrd Amendment would have limited application to lobbying on general program legislation. While the provision might bar the use of federal funds to lobby a Member of Congress to intervene with an agency concerning the making, extension, or modification of a grant, loan, contract or agreement, or might bar the lobbying of Congress concerning a direct, earmarked appropriation, or a specific program or spending instruction in a congressional report, the Byrd

[3] 48 C.F.R. § 31.205-22 (commercial contractors); 48 C.F.R. § 31.701 *et seq.*, (non-profit contractors).

[4] 31 U.S.C. §§ 1352(a)(1); 1352(h)(1)(A); 1352(g)(3); 1352(g)(5)(A); *see* common rules by major agencies, 55 F.R. 6738, February 26, 1990 (and OMB government-wide guidance, 54 F.R. 52306, December 20, 1989 upon which the rules were based).

[5] 55 F.R. 6738, "common rules," § 105, definitions. *Note*, for example, distinction between covered "direct" lobbying "contacts," and non-covered grass roots communications in Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1602(8)(A), and 1602(B)(iii).

[6] 55 F.R. 6739, "common rules," § 200(b).

[7] 31 U.S.C. § 1352(b).

[8] 31 U.S.C. § 1352(a)(2)(A) - (E).

Amendment would not appear to apply to the lobbying of Congress concerning the consideration of program legislation generally.[9]

The Byrd Amendment, the OMB Circular, and the Federal Acquisition Regulation restrict the use of federal funds and do not place restrictions on the recipients themselves; that is, the provisions do not prohibit recipients, grantees, or contractors from using their *own* funds, or other non-federally appropriated funds to lobby the government on any matter.[10] Under the Byrd Amendment, if the entity has any monies or resources other than federal appropriated funds sufficient to cover lobbying activities, there is a presumption that non-federal monies were used in any lobbying effort.[11] Such presumption could, of course, be overcome with evidence or admissions to the contrary.

Appropriations Law Riders

Appropriations law provisions usually include a *general* rider and restriction applicable to funds appropriated "in this or any other act," prohibiting the use of such federal funds for "publicity or propaganda" purposes directed at "legislation pending before Congress."[12] While this language would clearly apply to federal agencies receiving and expending appropriations, the Government Accountability Office ([GAO], formerly the General Accounting Office) has opined that this particular restriction and rider establishes a responsibility in the grantor federal agency to assure that the funds that it distributes even to private parties are not being used in contravention of the limitation. [13] Thus, the general appropriations law restrictions enacted yearly have been "imputed" by the Comptroller General to apply to the grantees of federal agencies: "Federal agencies and departments are responsible for insuring that Federal funds made available to grantees are not used contrary to [the publicity and propaganda] restriction."[14] In one case the GAO found a violation of the general appropriations restriction when a local transportation authority, and grantee of the Department of Transportation, used grant funds from the agency to produce a

[9] In "further information" and guidance to "clarify OMB's interim final guidance," the Office of Management and Budget had explained, "The prohibition on use of Federal appropriated funds does not apply to influencing activities not in connection with a specific covered Federal action. These activities include those related to legislation and regulations for a program versus a specific covered Federal action." 55 F.R. 24542, June 15, 1990. OMB proposed to revoke this further explanation in 1992 since the "exemption was interpreted too broadly" (57 F.R. 1772), but made it clear that general program lobbying in Congress was still *not* covered, even while "activities to influence the earmarking of funds for a particular program, project or activity in an appropriation, authorization or other bill or in report language would be included within the Act's restrictions." 57 F.R. 1772, January 15, 1992.

[10] *Note*, however, potential tax consequences for 501(c)(3) and 501(c)(4) organizations.

[11] OMB guidance, 55 F.R. 24542, June 15, 1990.

[12] P.L. 111-117, "Consolidated Appropriations Act, 2010," Division C, Financial Services and General Governmental Appropriations Act, 2010, §§ 717, 720 (Dec. 16, 2009); P.L. 111-8, "Omnibus Appropriations Act, 2009," Division D, Financial Services and General Governmental Appropriations Act, 2009, §§ 717, 720, 123 Stat. 685, 686 (2009); P.L. 110-161, "Consolidated Appropriations Act, 2008," Division D, §§ 720, 723, 121 Stat. 2024 (2007); P.L. 109-115, "Transportation, Treasury, Housing and Urban Development, Judiciary, District of Columbia, and Independent Agencies Appropriations Act, 2006," §§ 821, 824; P.L. 108-447, "Consolidated Appropriations Act, 2005," Division H, "Transportation, Treasury, Independent Agencies, and General Governmental Appropriations Act, 2005," §§ 621, 624, 118 Stat. 3278 (2004).

[13] Government Accountability Office, Office of General Counsel, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, at 4-220 (January 2004): "...where a grant is made for an authorized grant purpose, grant funds in the hands of the grantee largely lose their identity as federal funds and are no longer subject to many of the restrictions on the direct expenditure of appropriations." But see now PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* at 4-226.

[14] B-128938, July 12, 1976; note PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* at 4-226.

newsletter "urging readers to write to their elected representatives in Congress to support continued funding...."[15] As explained in the appropriations treatise prepared by GAO:

> The case involved the Los Angeles Downtown People Mover Authority, a grantee of the Urban Mass Transportation Administration (UMTA), Department of Transportation. Fearing that its funding was in jeopardy, the Authority prepared and distributed a newsletter urging readers to write to their elected representatives in Congress to support continued funding for the People Mover project. The Comptroller General found that this newsletter, to the extent it involved UMTA grant funds, violated the anti-lobbying statute.[16]

In the later appropriations riders of this nature, the language of the provision was changed to now expressly include "by private contractor" in the restriction on the use of federal appropriations:

> No part of any appropriation contained in this or any other Act shall be used directly or indirectly, including by private contractor, for publicity or propaganda purposes within the United States not heretofore authorized by the Congress.[17]

This change may indicate an express emphasis by Congress that an agency may not accomplish indirectly through a private contractor what it may not do directly, that is, use federal appropriations for publicity or propaganda campaigns, or it may signal a broader reach to all contractor and grantor funds received from the federal government, even when the private recipient is not contracted or directed to engage in the particular questionable activity by a federal agency, but rather engages in such activity independently.

GAO has traditionally interpreted the "publicity and propaganda" restrictions (as far as they applied to federal *agencies*), as not necessarily restricting direct communications from the agencies to legislators, but rather as limiting and prohibiting "grassroots" type of lobbying campaigns:

> In interpreting "publicity and propaganda" provisions ... we have consistently recognized that any agency has a legitimate interest in communicating with the public and with legislators regarding its policies. ... An interpretation of [the anti-lobbying restriction] which strictly prohibited expenditures of public funds for dissemination of views on pending legislation would consequently preclude virtually any comment by officials on administration or agency policy, a result we do not believe was intended.
>
> We believe, therefore, that Congress did not intend ... to preclude all expression by agency officials of views on pending legislation. Rather, the prohibition of [the anti-lobbying restriction], in our view, applies primarily to expenditures involving direct appeals addressed to the public suggesting that they contact their elected representatives and indicate their support of or opposition to pending legislation, *i.e.*, appeals to members of the public for them in turn to urge their representatives to vote in a particular manner.[18]

---

[15] PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* at 4-226, citing B-202975, November 3, 1981.

[16] *Id.*

[17] *See, e.g.*, P.L. 111-117, "Consolidated Appropriations Act, 2010," Division C, Financial Services and General Governmental Appropriations Act, 2010, § 720 (Dec. 16, 2009).

[18] 56 Comp. Gen. 889, 890 (1977); Decisions of the Comptroller General, B-128938, July 12, 1976, at 5; B-164497(5), August 10, 1977, at 3; B-173648, September 21, 1973, at 3. See also 63 Comp. Gen. 626-627 (1984), similar language concerning federal judges.

When communications are made to the public concerning public policy matters, even if such communications give arguments for or against specific legislation, the Comptroller General found no violation of the publicity or propaganda "anti-lobbying" rider when the material was "essentially expository in nature" and did not urge or suggest anyone contact their representative in the legislature.[19] In one example concerning Department of Transportation expenditures for displays and pamphlets and informational material at the time Congress was considering passive restraint systems (airbags) for cars, GAO noted, "While, considering the timing and location of the displays, one would have to be pretty stupid not to see this as an obvious lobbying ploy, that did not make it illegal since there was no evidence that Transportation urged members of the public to contact their elected representatives."[20]

In addition to these general appropriations law riders, there may be more specific statutory or appropriations limitations on *particular* federal monies or on particular federal programs, which also limit the use of federal monies appropriated in a particular appropriations law for lobbying, or "publicity or propaganda" campaigns directed at Congress by private grant or contract recipients, or the use of grant funds to pay the salary of one who engages in such activities.[21] Two examples of this included an appropriation rider on grantees in the HHS appropriations legislation which GAO found to have been violated "when a local community action agency used grant funds for a mass mailing of a letter to members of the public urging them to write their Congressmen to oppose abolition of the agency."[22] Similarly, the Comptroller General found that the provision was "violated when a university, using grant funds received from the Department of Education, encouraged students to write to Members of Congress to urge their opposition to proposed cuts in student financial aid programs."[23]

The Comptroller General has thus interpreted the appropriations riders on grantees and contractors in a similar manner as the "publicity and propaganda" riders on federal agencies, that is, to apply to "grassroots" lobbying campaigns where the public is urged to contact Members of Congress. It should be noted that the Office of Legal Counsel of the Department of Justice has offered an opinion that the particular rider on grantees and contractors in the Labor, Education, and HHS Appropriations laws is broader than the general "publicity and propaganda" riders, and could apply even to funding communications from contractors and grantees receiving funds under that particular act directly to Members of Congress on pending legislation or appropriations.[24]

Criminal Law

The principal, permanent statutory prohibition on what is considered "lobbying with appropriated funds" is a federal criminal statute at 18 U.S.C. § 1913, which prohibits the use of federal

---

[19] PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* at 4-211, citing Comptroller General Decisions B-21639, January 22, 1985; B-212252, July 15, 1983; B-178648, December 27, 1973; B-139458, January 26, 1972.

[20] PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* at 4-211, citing Comptroller General Decision B-139052, April 29, 1980.

[21] *See e.g.*, 42 U.S.C. § 2996f(a)(5), *re* Legal Services Corporation grants; and note Departments of Labor, HHS, and Education and Related Agencies Appropriations Act, 2006, P.L. 109-149, Section 503(b), as to specific appropriations rider on salary of grant recipients.

[22] PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* at 4-224, citing B-202787(1), May 1, 1981.

[23] PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* at 4-225, citing *Improper Use of Federal Student Aid Funds for Lobbying Activities*, GAO/HRD-82-108 (August 13, 1982).

[24] 5 Op. O.L.C. 180 (1981).

appropriations to pay for any "personal services, advertisement, telegram, telephone, letter, printed or written matter ... intended or designed to influence" Members of Congress or other officials on a variety of programs, legislation, or appropriations. Originally adopted in 1919, the law had always been interpreted to apply only to officers and employees of the federal government,[25] and then only to lobbying the Congress. The provision at 18 U.S.C. § 1913 was amended in 2002.[26] The 2002 amendments, while eliminating the criminal penalties and substituting the civil penalties of the so-called "Byrd Amendment,"[27] substantially broadened the substantive prohibition to cover the use of federal appropriations to lobby or influence all levels of governmental authority,[28] and removed the penalties provision which had indicated an applicability only to federal officers and employees. As noted by GAO, the provisions of 18 U.S.C. § 1913 might be considered to apply now to others who use "federal appropriations" for lobbying purposes, and not just to federal employees as had been done in the past.[29]

The exact parameters of this law, adopted in 1919, are not precisely known as there appears never to have been an enforcement action or indictment returned based on the provision. Although the payment for various activities financed with federal funds is barred, section 1913 expressly exempts from the prohibition the activities of officers and employees of the federal government "communicating to members of Congress on the request of any member," or to Congress "through the proper official channels, requests for legislation or appropriations" deemed necessary for the efficient conduct of the public business. This provision of law has thus been consistently interpreted in the past by the Justice Department as permitting *direct* contacts and communications from federal executive officials and executive agencies to Members of Congress concerning pending or proposed federal legislation.[30] Most likely, the provision would prohibit substantial letter writing or other types of significant "propaganda" or publicity campaigns (also called "grassroots" lobbying campaigns) funded with appropriated monies which are directed at the general public and which specifically urge or exhort the public or individuals to write or contact their congressman on an issue before the Congress.[31]

The exemption for communications through "proper official channels" applies expressly only to officers and employees of the federal government. It is thus not apparent that this exemption for direct communications to lawmakers and policy makers would extend to persons other than federal employees who use federal appropriations for such communications, such as federal grantees or contractors.

---

[25] *See* Section 6 of the Third Deficiency Appropriations Act, FY1919, 41 Stat. 68, chapter 6, § 6, July 11, 1919. As to its applicability only to federal employees, *see* Grassley v. Legal Services Corporation, 535 F.Supp. 818, 826 n.6 (S.D. Iowa 1982).

[26] P.L. 107-273, § 205(a); 116 Stat. 1778, November 2, 2002.

[27] *Note* 31 U.S.C. §1352(a), concerning prohibitions on contractors and grantees using federal monies for lobbying purposes.

[28] *Note* H.Rept. 107-685, 107th Cong., 2d Sess. 177 (2002); S.Rept. 107-96, 107th Cong., 1st Sess. 11 (2001).

[29] PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* at 4-225, n. 145.

[30] 5 Op. O.L.C. 180, 185 (1981); 13 Op. O.L.C. 361 (1989). See Opinion of Assistant Attorney General of the United States, Henry J. Miller, (1962), printed at 108 CONG. REC. 8449-8451 (May 15, 1962).

[31] *Note* legislative history of § 1913, at 58 CONG. REC. 404 (May 29, 1919); 2 Op. O.L.C. 30 (1978); 5 Op. O.L.C. 180 (1981); 13 Op. O.L.C. 300 (1989); Office of Legal Counsel, Department of Justice, "Guidelines on 18 U.S.C. § 1913," (April 14, 1995).

Tax Code Limitations on Lobbying by Non-profit Organizations

Depending on the provision in the tax code under which an entity holds its tax-exempt status, there may be specific restrictions and/or limitations on the amount of lobbying that the organization may do, because such activity may not be considered to be within the realm of the organization's exempt functions.

Section 501(c)(3) Charitable Organizations

Organizations which are exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3)) are community chests, funds, corporations or foundations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." These charitable organizations, which have the advantage of receiving contributions from private parties which are tax-deductible for the *contributor* under 26 U.S.C. § 170(a), are limited in the amount of lobbying in which they may engage if they wish to preserve this preferred federal tax-exempt status.[32]

The general rule for a charitable organization exempt from federal taxation under § 501(c)(3) is that such organization may not engage in lobbying activities which constitute a "substantial part" of its activities.[33] In 1976, a so-called "safe harbor" was offered to 501(c)(3) organizations where they could elect to come within specific percentage limitations on expenditures to assure that no violations of the "substantial part" rule would occur, or they could remain under the old, unspecified "substantial part test."[34] The specific statutory limitations upon organizational expenditures for covered lobbying activities (the "expenditure test" limitations) for electing 501(c)(3) organizations are as follows:

- 20% of the first $500,000 of total exempt-purpose expenditures of the organization, then
- 15% of the next $500,000 in exempt-purposes expenditures, then
- 10% of the next $500,000 in exempt-purpose expenditures, and then
- 5% of the organization's exempt-purpose expenditures over $1,500,000;
- up to a total expenditure limit of $1,000,000 on lobbying activities.

[32] 26 U.S.C. §§ 501(c)(3), 501(h), 4911, 6033; see IRS Regulations at 55 F.R. 35579-35620 (August 31, 1990), 26 C.F.R. Parts 1, 7, 20, 25, 53, 56, and 602.

[33] 26 U.S.C. § 501(c)(3). The Supreme Court has upheld the loss of the special tax-exempt status of charitable, 501(c)(3) organizations if they engage in "substantial" lobbying. Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983). The Court noted that although lobbying is a protected First Amendment right, and although the Government may not indirectly punish an organization for exercising its constitutional rights by denying benefits to those who exercise them, lobbying activities are not necessarily one of the contemplated "exempt functions" of these charitable or educational organizations for which they have received the preferred tax status. Since contributions to the 501(c)(3) organization by private individuals are eligible for a deduction from the donor's federal income tax, the Government is in effect "subsidizing" those private contributions to the organization (through loss of tax revenue), and the Court found that Congress does not have to "subsidize" such lobbying activities through preferred tax status for contributions if it does not choose to do so, as long as other outlets for the organization's unlimited, protected First Amendment expression exist. *Id.* at 544-546.

[34] Religious organizations are not permitted to make the election to come within the specific monetary lobbying guidelines under 26 U.S.C. § 501(h), 26 U.S.C. § 501(h)(5). *See* IRS Form 5768, for election to come within "expenditure test."

- There is currently a separate "grassroots" expenditure limit of 25% of the "direct" lobbying limits.[35]

The activities covered under the tax code limitations on "lobbying" by charitable organizations generally encompass both "direct" lobbying as well as "grassroots" lobbying (for which there is a separate included expense limitation). "Direct" lobbying entails direct communications to legislators, and to other government officials involved in formulating legislation (as well as direct communications to an organization's own members encouraging them to communicate directly with legislators), which refer to and reflect a particular view on specific legislation. Indirect or "grassroots" lobbying involves advocacy pleas to the general public which refer to and take a position on specific legislation, and which encourage the public to contact legislators to influence them on that legislation.

The definitions of and the specific exemptions from the term "lobbying" are important in observing the expenditure limitations on an organization's activities. For example, not all public "advocacy" activities of an organization are considered "grassroots lobbying." As expressed by the IRS, "... clear advocacy of specific legislation is not grassroots lobbying at all unless it contains an encouragement to action."[36] Furthermore, not all communications to legislators are considered "direct lobbying." The definition of "lobbying" for purposes of the tax code limitations expressly *exempts* activities such as:

> (a) making available nonpartisan analysis, study or research involving independent and objective exposition of a subject matter, even one that takes a position on particular legislation as long as it does not encourage recipients to take action with respect to that legislation;
>
> (b) technical advice or assistance given at the *request* of a governmental body;
>
> (c) so-called "self-defense" communications before governmental bodies, that is, communications on those issues that might affect the charity's existence, powers, duties, tax-exempt status, or deductibility of contributions to it; and
>
> (d) contacts with officials unrelated to affecting specific legislation, even those that involve general discussions of broad social or economic problems which are the subject of pending legislation.[37]

Section 501(c)(4) Civic Organizations

Organizations which are tax exempt under section 501(c)(4) of the Internal Revenue Code are generally described as "[c]ivic leagues or organizations not operated for profit but operated exclusively for the promotion of social welfare...." If a civic league or social welfare organization is tax exempt under § 501(c)(4) of the Internal Revenue Code, there is generally no tax

[35] *See* 26 U.S.C. § 4911(c)(2).

[36] T.D. 8308, in 1990-39 INTERNAL REVENUE BULLETIN, at p. 7. A communication "encourages a recipient to take action" if it (1) states that the recipient should contact legislators; (2) provides a legislator's phone number, address, etc; (3) provides a petition, tear-off postcard, or similar material to send to a legislator; or (4) specifically identifies a legislator who is opposed, in favor, or undecided on the specific legislation, or is on the committee considering the legislation, if the communication itself is "partisan" in nature and cannot be characterized as a full and fair exposition of the issue. *Id.* at 7.

[37] 26 U.S.C. § 4911(d)(2); 26 C. F. R. § 56.4911-2(c)(1) - (4).

consequence for lobbying or advocacy activities (as long as such expenditures are in relation to their exempt function). In fact, in upholding the limitations on lobbying by 501(c)(3) charitable organizations against First Amendment challenges, the Supreme Court noted that a 501(c)(3) organization could establish a 501(c)(4) affiliate through which its First Amendment expression could be exercised through unlimited lobbying and advocacy.[38] The 501(c)(4) affiliate should be separately incorporated, keep separate books, and spend and use resources which are not part of or otherwise paid for by the tax-deductible contributions to the 501(c)(3) parent organization.[39] While 501(c)(4) organizations' lobbying activities are generally unrestricted, if a 501(c)(4) organization receives federal funds in the form of a "grant" or loan, then there are express restrictions on its "lobbying activities," discussed below.

501(c)(4) Organizations Receiving Federal Grants

Restrictions on "lobbying activities" by certain non-profit groups, as a condition to receiving federal grants and loans, were enacted into law in 1995. Section 18 of the Lobbying Disclosure Act of 1995[40] places statutory restrictions upon the lobbying activities of non-profit civic and social welfare organizations which are tax-exempt under section 501(c)(4) of the Internal Revenue Code. This provision, which is commonly called the "Simpson Amendment," prohibits section 501(c)(4) civic leagues and social welfare organizations from engaging in any "lobbying activities," even with their *own* private funds, if the organization receives any federal grant, loan, or award.[41]

The restrictions of the Simpson Amendment originally covered all 501(c)(4) organizations which received federal monies by way of an "award, grant, *contract*, loan or any other form."[42] The term "contract," however, was subsequently removed from the provision by P.L. 104-99, Section 129, leaving the prohibition on lobbying activities with an organization's own funds as a condition to the receipt of federal monies only upon 501(c)(4) grantees and those seeking an award or loan, but allowing unlimited lobbying activities with organizational funds for 501(c)(4) contractors of the federal government. The Simpson Amendment now reads as follows: "An organization described in section 501(c)(4) of the Internal Revenue Code of 1986 which engages in lobbying activities shall not be eligible for the receipt of Federal funds constituting an award, grant, or loan."

While there may have been some constitutional objections to the provisions of the "Simpson Amendment" and its effect on First Amendment activities funded by an organization's own private, non-federal funds, the interpretation of the provision to allow for unlimited lobbying by affiliate organizations with their own, non-federal monies, has apparently obviated legal challenges. The legislative history of the provision clearly indicates that it was intended that a 501(c)(4) organization may separately incorporate an affiliated 501(c)(4), which would not receive any federal funds, and which could engage in unlimited lobbying.[43] The method of

[38] Regan v. Taxation With Representation of Washington, *supra* at 544-546 (Opinion of the Court), see also 552-553 (Blackmun concurring).

[39] *See* discussion of a 501(c)(3) setting up a 501(c)(4) lobbying affiliate in Smucker, THE NONPROFIT LOBBYING GUIDE, Second Edition, 68-69 (Independent Sector 1999).

[40] P.L. 104-65, 109 Stat. 691, 703-704, as amended by P.L. 104-99, Section 129, 110 Stat. 34.

[41] *See* now 2 U.S.C. § 1611.

[42] P.L. 104-65, Section 18, 109 Stat. 704 (emphasis added).

[43] H.Rept. 104-339, at 24 (1995).

separately incorporating an affiliate to lobby, or to receive and administer federal grants, which was described by the amendment's sponsor as "splitting," was apparently intended to place a degree of separation between federal grant money and private lobbying, while permitting an organization to have a way to exercise its protected First Amendment rights of speech, expression and petition.[44] As stated by the sponsor of the provision, Senator Simpson, "If they decided to split into two separate 501(c)(4)s, they could have one organization which could both receive funds and lobby without limits."[45]

It may also be noted that although section 501(c)(4)s which receive certain federal funds may not engage in "lobbying activities," the term "lobbying activities," as defined in the LDA includes only direct "lobbying contacts and efforts in support of such contacts" such as preparation, planning, research, and other background work intended for use in such *direct* contacts.[46] Organizations which use their own private resources to engage only in "grassroots" lobbying and public advocacy (including specifically any communication that is "made in a speech, article, publication or other material that is distributed and made available to the public, or through radio, television, cable television, or other medium of mass communication")[47] would, therefore, not appear to be engaging in any prohibited "lobbying activities" under this provision. The Lobbying Disclosure Act's definitions of "lobbying activities" and "lobbying contacts" exclude, and do *not* independently apply to activities which consist only of "grassroots" lobbying and public advocacy.[48]

Similarly, since the term "lobbying activities" relates only to the direct lobbying of covered *federal* officials, the "Simpson Amendment" would not appear to limit in any way an organization's use of its own private resources to lobby state or local legislators or other state or local governmental bodies or units. While direct lobbying of the Congress, or of certain high level executive branch officials, is covered under the Lobbying Disclosure Act as a "lobbying contact," and thus by definition a "lobbying activity," the acts of testifying before a congressional committee, subcommittee, or task force, or of submitting written testimony for inclusion in the public record of any such body, or of responding to notices in the Federal Register or other such publication soliciting communications from the public to an agency, or responding to any oral or written request from a government official for information, are expressly exempt from the definition of a "lobbying contact," and thus in themselves cannot qualify as a "lobbying activity."[49]

---

[44] *See* comments by the sponsors of provision, Senator Simpson and Senator Craig, at 141 CONG. REC. 20041-20042, 20052-20053 (July 24, 1995).

[45] 141 CONG. REC., at 20045 (Senator Simpson); *see also* Senator Simpson's explanation of "splitting," 141 CONG. REC., at 20052, 20053.

[46] 2 U.S.C. § 1602(7), P.L. 104-65, Section 3(7). A "lobbying contact" under the Lobbying Disclosure Act is an "oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official" which concerns the formulation, modification or adoption of legislation, rules, regulations, policies or programs of the federal government. 2 U.S.C. § 1602(8), P.L. 104-65, Section 3(8).

[47] *Note* this express exception to the term "lobbying contact," at 2 U.S.C. § 1602(8)(B)(iii), P.L. 104-65, Section 3(8)(B)(iii).

[48] Broader limitations on public "advocacy" and lobbying by organizations receiving federal grant money, and on entities wishing to do business with federal grantees, which had been considered by the House as appropriations riders in the 104th Congress (commonly known as the "Istook Amendment," *e.g.*, H.R. 2127, 104th Congress, H.J.Res. 114, 104th Congress), were not enacted into law.

[49] *See* 2 U.S.C. § 1602(8)(B), for list of 18 exceptions to the term "lobbying contacts."

Reporting Lobbying Activities

Groups, individuals, or persons who are federal contractors or federal grantees may, if they engage in a certain amount of lobbying activities, be required to file certain reports and disclosures concerning such activities.

Lobbying Disclosure Act of 1995, as Amended

Organizations which engage in a certain amount of lobbying activities through personnel compensated to lobby on the organization's behalf are required to register and to file disclosure reports under the Lobbying Disclosure Act of 1995, as amended.[50] Additionally, outside lobbying firms or individual lobbyists who are retained and compensated over a threshold amount to lobby for an organization/client, and who engage in the requisite lobbying contacts are required to file as lobbyists and to identify the client organizations for whom they lobby.[51] There is no general exclusion or exception from the disclosure and registration requirements for non-profit organizations who otherwise meet the threshold requirements on lobbying contacts, except for churches and their integrated auxiliaries, which are exempt from reporting and disclosure.[52]

Byrd Amendment

While federal grant law or contract law does not necessarily require a recipient organization to report details of all expenditures, such as for lobbying or advocacy that the organization conducts with its own non-federal resources,[53] such recipients of grants or contracts have to declare and certify, under the provisions of the so-called Byrd Amendment, when they use even their own funds to compensate a registered lobbyist to influence covered federal actions.[54]

Tax Law

Most tax-exempt, non-profit organizations (other than churches) having annual gross receipts of over $25,000 must file with the IRS a Form 990 which, unlike most tax filings, is open to public inspection. Charitable 501(c)(3) organizations must also file Schedule A with Form 990, providing the reporting of lobbying expenditures, that is, expenses for "influencing legislation" under the Internal Revenue Code definitions. "Electing" organizations (electing the "expenditure test" for lobbying limits for 501(c)(3)s under 26 U.S.C. § 501(h)) must also compute and allocate expenses attributable to "grassroots" lobbying, as well as to "direct" lobbying; but non-electing organizations (under the "substantial part" test) must provide to the IRS a "detailed" description of their lobbying activities, information not required from "electing" organizations.

---

[50] 2 U.S.C. § 1603(a)(2), note definitions in §§ 1602(10) and 1602(2).

[51] 2 U.S.C. § 1603(a)(1).

[52] Exemptions from definition of covered "lobbying contact," 2 U.S.C. § 1602(8)(B)(xviii), include those for churches and religious orders that are exempt from filing federal income tax returns under 26 U.S.C. § 6033(a)(2)(A).

[53] *See* generally, Thompson Publishing Group, GRANTS MANAGEMENT HANDBOOK, at p. 42-43, Tab 460, noting that although grantees need not, and may not be required by individual agencies to, report a detailed itemization of expenditures ("object class expenditure reporting"), a federal agency, the agency's office of inspector general, and the GAO, have the right to audit and examine all grantee records, and thus detailed records must be kept to facilitate any such audits and oversight. *Id.* at 3-4. As noted above, criminal penalties may apply to certain misuse of federal funds.

[54] 31 U.S.C. § 1352(b).

Election Campaign Activities

Under both general as well as specific restrictions and limitations, recipients of federal grants and contracts may not use federal funds for political campaign purposes, nor may they charge off to or seek reimbursement from a federal contract or grant for expenses of campaign expenditures or campaign contributions. Similar to "lobbying" activities by groups receiving federal funds, entities which receive federal contracts or grants are not, by virtue of the receipt of such contract or grant, generally prohibited from using their *own* resources and funds for political or campaign activities.

Restrictions on Use of Grant or Contract Funds

OMB Circular A-122

The explicit restrictions on the use of federal grant funds for "lobbying" by non-profit organizations that were adopted in 1984 as part of uniform cost principles for non-profit organizations issued by the Office of Management and Budget (OMB) in OMB Circular A-122, apply also to bar the use of grant funds for political activities, unless authorized by law. OMB Circular A-122 provides that federal grant monies may not be used for, and direct or indirect costs may not be charged to a federal grant for the following:

> 25a. Notwithstanding other provisions of this Circular, costs associated with the following activities are unallowable:
>
> > (1) Attempts to influence the outcomes of any Federal, State, or local election, referendum, initiative, or similar procedure, through in kind or cash contributions, endorsements, publicity, or similar activity;
> >
> > (2) Establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcomes of elections....[55]

Federal Acquisition Regulation

The Federal Acquisition Regulation applies to for-profit businesses and entities contracting with the federal government, and in a similar manner and in identical wording to the OMB limitations for non-profit grantees, prohibit the use of federal contract funds for political campaign purposes, and prohibit the writing off to a federal contract the expenses for such activities. The regulations thus expressly provide as "unallowable costs" the expenses for:

> (1) Attempts to influence the outcomes of any Federal, State, or local election, referendum, initiative, or similar procedure, through in kind or cash contributions, endorsements, publicity, or similar activities;

[55] OMB Circular A-122, Attachment B, para. 25, as added 49 F.R. 18276 (1984), online at http://www.whitehouse.gov/omb/circulars/a122/a122.html.

> (2) Establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcomes of elections.[56]

Hatch Act and Grant Recipients

The federal law commonly known as the "Hatch Act" has provisions which apply to employees of state and local governments when their principal employment is in connection with a federally funded activity.[57] These Hatch Act provisions, which relate to the permissible political activities of a "State or local officer or employee,"[58] generally apply only to state or local *governmental* personnel, and do not apply on their face to personnel who work for private, non-profit organizations merely because they receive federal grant or contract monies.[59] However, there are some circumstances where non-profit organizations which are funded under a particular federal program might be expressly designated under federal statutory law to be "state or local" governmental agencies for purposes of these Hatch Act provisions.

Private, non-profit agencies which receive and administer federal funds under certain social programs, for example, have at times been specifically included by law in the definition of "state or local agency" for purposes of the Hatch Act.[60] The law establishing the Community Services Block Grant Program, which supplanted much of the Economic Opportunity Act programs, for example, provides that any private non-profit agency "receiving assistance under this chapter which has responsibility for planning, developing, and coordinating community antipoverty programs shall be deemed to be a State or local agency" for the purposes of the Hatch Act at chapter 15 of title 5, United States Code:[61]

> For purposes of chapter 15 of Title 5, [5 U.S.C. § 1501 *et seq.*], any entity that assumes responsibility for planning, developing and coordinating activities under this chapter [42 U.S.C. § 9901 *et seq.*] and receives assistance under this chapter [42 U.S.C. § 9901 *et seq.*] shall be deemed to be a State or local agency. For purposes of paragraphs (1) and (2) of section 1502(a) of such title, any entity receiving assistance under this chapter [42 U.S.C. § 9901 *et seq.*] shall be deemed to be a State or local agency.[62]

---

[56] 48 C.F.R. §31.205-22

[57] 5 U.S.C. § 1501 *et seq.*

[58] 5 U.S.C. § 1501(4).

[59] *See* definitions in 5 U.S.C. § 1501. A "State or local agency" under the Hatch Act is expressly defined to mean "the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof." 5 U.S.C. § 1501(2).

[60] *See*, for example, former provisions of law applying to community action agencies under the Economic Opportunity Act of 1964, 42 U.S.C. § 2943 (1976 ed.); former provisions of law applying to Manpower and Job Corps programs under the Comprehensive Employment and Training Act of 1973, 29 U.S.C. §§ 848(g), 990 (1976 ed.); and provisions of law applying to staff attorneys of entities receiving funds from the Legal Services Corporation, 42 U.S.C. § 2996e(e), and agencies under the Head Start program, 42 U.S.C. § 9851.

[61] P.L. 97-35, 95 Stat. 515, August 13, 1981, see 42 U.S.C. § 9904(e) (1982 Code ed.). While that original provision was repealed by the Hatch Act Amendments of 1993 (P.L. 103-94, § 6, 107 Stat. 1005, October 6, 1993), the designation for Hatch Act purposes of similar agencies under the Community Services Block Grant Program was reinstated in a similar form in 1998. P.L. 105-285, title II, § 201, 112 Stat. 2747, October 27, 1998.

[62] 42 U.S.C. § 9918(b)(1). Agencies under this federal program that receive funds and plan, develop, or coordinate program activities, are to be considered "state and local agencies" for all of the restrictions that the federal "Hatch Act" places on state and local *governmental* employees, at 5 U.S.C. § 1501(a)(1) - (3). For agencies or entities which merely receive "assistance" under the Community Services Block Grant Program (but are not responsible for planning, (continued...)

Similarly, an agency under the Head Start program which "assumes responsibility for planning, developing, and coordinating Head Start programs and receives assistance" under the program is to be considered a "State or local agency" for the purposes of the application of the Hatch Act.[63] Any programs assisted under the act, that is, any grant recipients, have a specific statutory responsibility to carry out the programs and to use program funds in a manner that does not involve partisan political activities or other activities associated with a partisan candidate or political party.[64]

For those covered by the Hatch Act applicable to an employee of a "state or local agency," the provisions of that federal law set out three specific restrictions on political activities of employees, whether they are on or off duty, or on annual leave, sick leave, or other leave from work.[65] The first two, paragraphs (1) and (2) of section 1502(a) of title 5, United State Code, relate to coercive activities for or against candidates or in making of campaign contributions,[66] while the third relates to employees' candidacies for elective office:

> 1. Employees may not use their "official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office" (5 U.S.C. § 1502(a)(1));
>
> 2. Employees may not "directly or indirectly coerce, attempt to coerce, command, or advise" fellow employees to make contributions in support of a party or candidate (5 U.S.C. § 1502(a)(2));
>
> 3. Employees may not be candidates for public office in a partisan election (5 U.S.C. § 1502(a)(3); *see* § 1503, permitting candidacy in nonpartisan election).

Other than the three specific restrictions described above, "State and local employees subject to the provisions of the Hatch Act may take an active part in political management and political campaigns."[67] In addition to allowing general political activities related to candidates and elections during their free time, the Hatch Act does not generally apply to public policy activity relating to "issues" (as opposed to candidates and political parties), either legislative issues or issues that come before voters in referenda elections.[68] Furthermore, the Hatch Act (even the

---

(...continued)

coordinating and/or developing community programs), the employees of such entities are only subject to the restrictions of that portion of the "Hatch Act" which prohibit the use of one's authority or influence to interfere with the results of an election, and which prohibit other coercive conduct relating to the payment of contributions for political purposes by employees of state or local agencies. 5 U.S.C. § 1502(a)(1) and (2).

[63] 42 U.S.C. § 9851(a).

[64] 42 U.S.C. § 9851(b). Voter registration and get-out-the-vote campaigns are discussed in the next section.

[65] Agencies which have responsibility for planning, developing and coordinating Head Start programs are subject to all three restrictions, including candidacy, while employees of agencies just receiving assistance under the program are subject only to the no coercion provisions of paragraphs (1) and (2) of 5 U.S.C. § 1502(a). 42 U.S.C. 9851(a).

[66] The prohibition on use of official authority to influence an election is described by the Office of Special Counsel (the agency with Hatch Act enforcement authority) as "aimed at activities such as threatening to deny a promotion to any employee who does not vote for certain candidates, requiring employees to contribute a percentage of their pay to a political fund, influencing subordinate employees to buy tickets to political fund raising dinners and similar events, and advising employees to take part in political activity." U.S. Office of Special Counsel, POLITICAL ACTIVITY AND THE STATE AND LOCAL EMPLOYEE, at 5 (August 2000).

[67] POLITICAL ACTIVITY AND THE STATE AND LOCAL EMPLOYEE, *supra* at 5.

[68] U.S. Office of Special Counsel, Letter Opinion, March 18, 2003; United States Civil Service Commission, Office of the General Counsel, Letter Opinion, March 13, 1974.

more restrictive portion for *federal* employees) does not apply to nonpartisan voter registration or get-out-the-vote campaigns.[69]

Federal Contractors and Political Contributions

Persons who have negotiated or are negotiating a contract with the federal government are prohibited during the duration of that contract from making or offering to make political contributions to any party or candidate for public office in connection with a federal election.[70] This restriction reaches contributions made from the firms' business or partnership assets, but would permit, in the case of partnerships, donations made from the personal assets of the partners.[71] This statutory restriction on federal contractors reaches, it should be emphasized, only the conduct of making, directly or indirectly, "any contribution of money or other things of value" to candidates, political parties, or committees, and does not reach so-called "independent expenditures" in relation to political campaigns which are made by a contractor with no "coordination" or "prearrangement" with a candidate.

Federal government contractors, whether corporations, labor unions, membership organizations, cooperatives, or corporations without capital stock, which remain prohibited from making contributions for federal elections,[72] may establish a "separate segregated fund" to which voluntary contributions may be made, and from which political campaign contributions may then be made to parties or candidates.[73]

Diversion of Grant or Contract Funds for "Political" Uses

As a general matter, recipients of federal grants and contract monies must use the funds for the purposes and programs that were intended to be supported within the statutory scheme that authorized the grants or contracts.[74] It may be possible in certain contexts that concerted activity

[69] 5 C.F.R. §734.203; United States Office of Special Counsel [OSC], advisory opinion 2006, available at http://www.osc.gov/documents/hatchact/federal/fha34014.pdf; OSC, advisory opinion May 25, 2004, OSC File No. AD-04-xxx, at 1, available at http://www.osc.gov/documents/hatchact/federal/fha-32.pdf; OSC, Federal Hatch Act Advisory, "Voter Registration Drives in the Workplace," April 14, 2004, at 2 available at http://www.osc.gov/documents/hatchact/federal/fha-31.pdf.

[70] 2 U.S.C. § 441c. Federal "employees," as opposed to contractors, may generally not make political contributions to their "employer" or "employing authority." 18 U.S.C. § 603.

[71] See discussion of this restriction in U.S. Department of Justice, FEDERAL PROSECUTION OF ELECTION OFFENSES, at p. 162 (7th ed. 2007), citing F.E.C. regulations at 11 C.F.R. § 115.4.

[72] Citizens United v. Federal Election Commission, 130 S.Ct. 876 (2010), which overturned the federal restriction on independent "expenditures" by corporations in federal campaigns (2 U.S.C. § 441b), left intact that statute's restriction on direct "contributions" to candidates, committees, and political parties. (130 S.Ct. at 909: "Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.") However, cases subsequent to *Citizens United* have overturned contribution restrictions on First Amendment grounds. See, e.g., SpeechNow.org v. Federal Election Commission, No. 08-5223 (D.C. Cir. March 26, 2010) (contributions to groups making "independent" expenditures); Dallman v. Ritter, No. 09SA224 (Supreme Court of Colorado, February 22, 2010) (campaign contributions to all candidates from "sole source" government contractors).

[73] 2 U.S.C. § 441c.

[74] "[G]rantees are, of course, obligated to spend grant funds for the purposes and objectives of the grant and consistent with any statutory or other conditions attached to the use of the grant funds. *See, e.g.*, B-303927, June 7, 2005; 42 Comp. Gen. 682 (1963); 2 Comp. Gen. 684 (1923)." PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, Volume II, *supra* at p. 10-71.

by individuals which causes federal funds from a federal program to be disbursed or used in contravention of the purposes of that program, in violation of established regulations or laws, and to be used instead for partisan or improper advocacy purposes, might entail, for example, a scheme to "impair[ ], obstruct[ ], or defeat[ ] the lawful function of any Department of the Government," such as to constitute a conspiracy to "defraud the United States" in violation of 18 U.S.C. §371.[75] As noted by the Supreme Court, a conspiracy to "defraud the United States" does not necessarily require a showing that the government was cheated out of money or property, nor does it necessarily require that an illegal act be done, as the Supreme Court found that conspiracy to defraud the United States "also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest."[76]

One court has upheld a charge of conspiracy to defraud the United States where individuals had conspired to use a federal program "to accomplish political objectives ... unrelated to legitimate Commission business," by having employees hired with funds from a federal program (CETA) work on political campaigns.[77] In *Pintar*, the court found that even though no monetary loss to the government or monetary gain to the defendants was proven, the conspiracy count of defrauding "the United States of its right to have programs of an agency financed ... by the United States Government ... administered, honestly, fairly, without corruption or deceit,"[78] could be sustained even with no actual harm to the government shown, as long as some dishonest or deceitful means were demonstrated. The dishonest or deceitful means involved in that case was "a pattern of concealment" of the activity.[79]

Federal Limitations Because of the Character or Nature of the Organization

Corporate and Labor Union Political Contributions

Corporations and labor organizations are now prohibited from using their organization's treasury funds to make campaign contributions to federal candidates, political parties, or political committees in connection with a federal election.[80] Under this law, entities and organizations which are corporations or labor unions had previously been prohibited from making a "contribution" or an "expenditure" in connection with any election to a federal office. The statutory restriction on corporations making independent "expenditures" from the corporation's general treasury funds, however, was found unconstitutional by the Supreme Court in early 2010

[75] *See* Dennis v. United States, 384 U.S. 855, 861 (1966); Iannelli v. United States, 420 U.S. 770 (1975); Blumenthal v. United States, 332 U.S. 539 (1947); United States v. Treadwell, 760 F.2d 327 (D.C.Cir. 1985). If false statements, writings, accounting or vouchers are used in furtherance of the misuses of appropriated monies, then other federal criminal laws, such as 18 U.S.C. §§ 1001, 287, may also be relevant.

[76] Hammerschmidt v. United States, 265 U.S. 182, 188 (1924). The obstruction or interference with the functions of a government department or agency which constitutes a scheme to "defraud the United States" has thus included schemes which thwart or interfere with the objectives and express purposes of a governmental program, or which tend to interfere with the fair and impartial administration of government programs.

[77] United States v. Pintar, 630 F.2d 1270, 1275 (8th Cir. 1980).

[78] 630 F.2d at 1275.

[79] 630 F.2d at 1278-1279.

[80] 2 U.S.C. § 441b.

in *Citizens United v. Federal Election Commission*.[81] Under such ruling, corporations may now make unlimited independent campaign "expenditures" in relation to federal elections from their corporate treasury funds, but are still prohibited from using their treasury funds for making campaign "contributions."[82] Although prohibited from using treasury funds for campaign contributions, corporations are still permitted to use such treasury funds to establish and maintain a "separate segregated fund" (generally referred to as political action committees [PACs]), to which voluntary contributions from individuals may be made, and from which political campaign contributions could be made to candidates, parties, and committees.[83]

Tax Code Limitations on Non-Profit Organizations

If an organization is a non-profit, charitable organization which holds its tax-exempt status under Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3), that is, organizations which may receive contributions which are tax-deductible for the donor), then that organization has an express restriction that it may not "participate in or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." There are certain activities which have been deemed to be "nonpartisan" activities related to elections (including nonpartisan voter registration activities) in which such organizations may engage and still retain their preferred tax-exempt status.[84]

Voter Registration and Get-Out-The-Vote Drives

Although voter registration and get-out-the-vote drives might generally be seen as a subset of "political" or "campaign" activities, such drives when conducted on a *nonpartisan* basis are often treated differently than partisan political campaign activities for the purposes of several federal provisions. Such activities may be considered "nonpartisan" if the organization does not distinguish, discriminate, or is not directed or focused only on a particular political party, among other political parties in registering voters or urging voters to go to the polls.[85] An activity could thus be nonpartisan even though the particular "population" or "community" at which such activities are directed may consist of persons who could conceivably, historically, or theoretically favor one political party over another.

Nonpartisan voter registration drives and the encouragement of voting are seen as more "civic minded" and beneficial activities, which increase and further participatory democracy, than

---

[81] 130 S.Ct. 876 (2010). The parties and issues presented in *Citizens United* involved a corporation, but it is assumed that the ruling and findings by the Court apply as well to labor organizations. See Citizens United, *supra* at 919 (Roberts, C.J., concurring).

[82] It should be noted that a "foreign" corporation, that is, a company incorporated in or having its principal place of business in a foreign country (see definition of "foreign principal" in 22 U.S.C. § 611(2)), is still prohibited from making contributions or expenditures to influence federal elections in the United States. 2 U.S.C. § 441e.

[83] 2 U.S.C. § 441(b)(2)(C). See also CRS Report RS21571, *Campaign Finance and Prohibiting Contributions by Tax-Exempt Corporations: FEC v. Beaumont*, by (name redacted).

[84] For a detailed discussion of the tax code restrictions and limitations on non-profit organizations and campaign activity, see CRS Report RL33377, *Tax-Exempt Organizations: Political Activity Restrictions and Disclosure Requirements*, by (name redacted).

[85] *See, e.g.*, Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, discussed in CRS Report RL33377, *Tax-Exempt Organizations: Political Activity Restrictions and Disclosure Requirements*, by (name redacted).

merely partisan political campaigning.[86] Thus, for example, 501(c)(3) "charitable" organizations, which are *not* allowed to engage in any political campaign activities, *are* allowed to conduct nonpartisan voter registration drives and get-out-the-vote campaigns.[87] Similarly, activities which might constitute prohibited political activities under the federal Hatch Act, specifically do *not* include nonpartisan voter registration drives.[88] Corporations and labor organizations, even before the Supreme Court case of *Citizens United v. Federal Election Commission*, have been expressly allowed to use corporate or union treasury funds to engage in nonpartisan voter registration and get out the vote campaigns targeted at a corporation's own executives or stockholders, or a labor organization's own members and their families.[89]

General Limitations on Use of Grant and Contract Funds

Generally, the rules for contractors and grantees concerning registration and get-out-the-vote drives are similar to those for lobbying and campaign activities. A business, association, corporation, organization, or other entity which receives a federal contract or a federal grant is *not* prohibited, by virtue of the receipt of such federal contract or grant, from using its *own* resources and funds for voter registration or get-out-the vote campaigns. As a general matter, and as noted above, however, federal grant monies and monies given by federal agencies under federal contracts may only be applied for the purposes provided in the underlying federal law and appropriation. As explained by the Government Accountability Office,

> As stated in 31 U.S.C. § 1301(a), appropriations may be used only for the purpose(s) for which they were made. One of the ways in which this fundamental proposition manifests itself in the grant context is the principle that grant funds may be obligated and expended only for authorized grant purposes. What is an "authorized grant purpose" is determined by examining the relevant program legislation, legislative history, and appropriation acts.[90]

Thus, unless the purpose of a grant, or a contract given by a federal agency, is to carry out a particular legislative directive or intent to increase voter registration generally, or to increase voter registration in a particular community or population, then the grantee or contractor would not be authorized to use such grant funds, or to be reimbursed for costs under a federal contract, for the purpose of registering voters or getting voters to the polls.

Although the more particularized restrictions on, for example, non-profit grantees in OMB Circular A-122, and on for-profit businesses in the Federal Acquisition Regulations, using federal funds for "attempts to influence the outcomes of any ... election ... through in kind or cash contributions, endorsements, publicity, or similar activity," do not expressly encompass nonpartisan voter registration activity, the general requirement to use federal grant and contract

---

[86] *See, e.g.*, National Voter Registration Act, 42 U.S.C. § 1973gg, "Findings and Purposes," to increase voting registration and voter participation in elections. Under this act, state governments are required, and federal agencies are urged, to assist in facilitating the registration of eligible citizens. See also Higher Education Act which requires institutions to "make a good faith effort to distribute a mail voter registration form, requested and received from the State, to each student enrolled in a degree or certificate program and physically in attendance at the institution, and to make such forms widely available to students at the institution." 20 U.S.C. § 1094(a)(23).

[87] Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, discussed in CRS Report RL33377, *Tax-Exempt Organizations: Political Activity Restrictions and Disclosure Requirements*, by (name redacted).

[88] See footnote 69, this report.

[89] 2 U.S.C. § 441b(b)(2)(B).

[90] PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* at p. 10-36.

funds only for the underlying legislative purposes would appear to prohibit such activity financed with federal dollars, unless authorized by law. Furthermore, a federal agency or department, in making grants, may have specific restrictions in regulations, in "guidance" for grantees and contractors, or in the specific grant or contract agreement, which must be examined since they may contain particular and specific limitations on other activities under the particular program.[91]

Statutory Restrictions on Specific Programs

There are certain federal programs which may have additional or specific statutory restrictions on the use of program funds for certain specified activities, including voter registration or get-out-the vote campaigns. The law establishing the Community Services Block Grant Program, for example, places specific restrictions on voter registration activities or assistance to voters in getting to the polls within the programs supported by federal funds under the Community Services Block Grant program. The relevant provisions of law state that:

> Programs assisted under this chapter shall not be carried on in a manner involving the use of program funds, the provision of services, or the employment or assignment of personnel, in a manner supporting or resulting in the identification of such programs with—
>
> (B) any activity to provide voters or prospective voters with transportation to the polls or similar assistance in connection with any such election; or
>
> (C) any voter registration activity.[92]

The particular restrictions concerning the Community Services Block Grant Program thus appear to apply to the use of program funds as well as to activities within the federally assisted *program*, but do not appear to extend to organizations and their activities outside of and separate from such programs (that is, that do not use program funds, services or personnel connected to this program),[93] and particularly do *not* apply to "affiliate" or connected organizations which are not participating in the program.

Similarly, programs assisted under the Head Start statutory provisions may not use program funds and may not provide services which identify the program with any voter assistance or voter registration efforts;[94] and the provisions establishing the Corporation for National and Community Service expressly prohibit the use of the program funds or any program administered by the Corporation to be used for "any voter registration activity."[95] Attorneys engaged in legal assistance under the Legal Services Corporation provisions may not engage in any "activity to

---

[91] Note, for example, HUD regulations at 24 C.F.R. § 570.207, "Ineligible activities," concerning activities not eligible for funding under Community Development Block Grants; 24 C.F.R. § 1003.207, "Ineligible activities," concerning specifically activities not eligible for funding under the Community Development Block Grants for Indian Tribes and Alaska Native Villages. See also 45 C.F.R. § 1226.5, providing that "volunteers or other assistance, in any program under the Act [Corporation for National and Community Services] shall not be assigned or provided to an organization if a principal purpose or activity of the organization includes" voter registration. See also 45 C.F.R. § 2551.121; 45 C.F.R. § 2552.121; 45 C.F.R. § 2553.91.

[92] 42 U.S.C. § 9918(b)(2).

[93] *See,* for example, discussion in *Rust v. Sullivan*, 500 U.S. 173, 196-197 (1991).

[94] 42 U.S.C. §9851(b).

[95] 42 U.S.C. § 5043(a).

provide voters with transportation to the polls, or to provide similar assistance in connection with an election, or ... any voter registration activity."[96]

Constitutional Issues in Legislative Attempts to Prohibit Any Advocacy, Lobbying, or Voter Registration Activities by Private Entities As a Condition to Receiving Federal Contracts or Grants

Efforts by the federal government to restrict private, nongovernmental entities from using their *own* private or non-federal resources to engage in any public advocacy, electioneering communications, or voter registration activities, as a condition precedent to receiving, or because the entity receives, some federal funding would raise serious First Amendment concerns. The activities involved in lobbying and public policy advocacy, whether by persons individually or in association with one another, concerning political, social, and economic issues of interest to the individuals or group, are intertwined with and implicate fundamental rights protected by the First Amendment to the United States Constitution, including freedom of speech and the rights of association and petition.[97] In *Eastern Railroads President Conference v. Noerr Motor Freight, Inc.*, the Supreme Court ruled that because of First Amendment considerations the prohibitions of the Sherman Anti-Trust Act could *not* prohibit rival businesses from acting in concert to lobby legislatures for favorable transportation legislation. The Court noted that lobbying activities involve the "right of petition [which] is one of the freedoms protected by the Bill of Rights," and could not be restricted by statute without serious First Amendment implications.[98] The Court explained the importance of lobbying activities in our representative form of government:

> In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.[99]

Rather than a detriment to be limited and suppressed by the government, the activities involved in lobbying, public advocacy and political expression about public policy issues, government, legislation, and candidates have been found by the Supreme Court to be among the most important freedoms in preserving an open democracy, and have been characterized as activities which our nation seeks to encourage rather than discourage.[100] The Supreme Court has on

---

[96] 42 U.S.C. § 2996f(a)(6) and (b)(4).

[97] United States v. Harriss, 347 U.S. 612 (1954); United States v. Rumely, 345 U.S. 41 (1953); Eastern Railroads President Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-138 (1961). *Note* discussion in Browne, *The Constitutionality of Lobby Reform: Implicating Associational Privacy and the Right to Petition the Government*, 4:2 WILLIAM & MARY BILL OF RIGHTS JOURNAL 717 (1995).

[98] 365 U.S. at 138.

[99] 365 U.S. at 137.

[100] "Discussion of public issues ... [is] integral to the operation of the system of government established by our constitution." Buckley v. Valeo, 424 U.S. 1, 14 (1976). As early as 1938 Chief Justice Stone postulated on the possible stricter scrutiny under the First Amendment for "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." United States v. Carolene Products Co., 304 U.S. 144, 152, n.4.

numerous occasions emphasized the importance of protecting public advocacy rights, and has noted the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open,"[101] and has in the past even noted that "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'"[102] The Supreme Court has therefore found that the advocacy communications involved in lobbying, political speech, and expression entail the exercise of protected First Amendment rights of association, speech and petition, and that any regulations imposed by Congress on such lobbying and advocacy activities may not unduly burden the exercise of those rights.[103]

In the area of *political* advocacy, as in the area of public policy advocacy and lobbying, the courts have been careful and deferential to the rights of private parties in terms of their freedoms of association and expression.[104] In *Buckley v. Valeo,* the Supreme Court, even while upholding limitations on political contributions to federal candidates and committees, invalidated a provision of the Federal Election Campaign Act which would have restricted the amount of money certain entities could spend independently on political advocacy concerning candidates in federal elections. The Court found that:

> The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech.... It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions, while neutral as to the ideas expressed, limit political expression "at the core of our electoral process and of the First Amendment freedoms."[105]

These First Amendment considerations and the judicial deference to unfettered political debate and advocacy by private parties in the context of political campaigns were reaffirmed and strengthened in the recent case of *Citizens United v. Federal Election Commission*:

> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. See *Buckley, supra* at 14-15 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential"). The right of citizens to inquire, to hear, to speak, and to use information to reach a consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Company v. Roy*, 401 U.S. 265, 272 (1971) ....

[101] New York Times v. Sullivan, 376 U.S. 254, 270 (1964); Garrison v. State of Louisiana, 379 U.S. 69 (1964).

[102] NAACP v. Clairborne Hardware Co., 458 U.S. 886, 913 (1982); Carey v. Brown, 447 U.S. 455, 467 (1980); FCC v. League of Women Voters of California, 468 U.S. 364, 381 (1984).

[103] United States v. Harriss, 347 U.S. 612 (1954); United States v. Rumely, 345 U.S. 41 (1953); Eastern Railroads President Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-138 (1961).

[104] In McConnell v. Federal Election Commission, 540 U.S. 93, 205 (2003), the Supreme Court noted that the "'constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office,' *Monitor Patriot Co. v. Roy,* 401 U.S. 265. 272 (1971), and '[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or the advocacy of the passage or defeat of legislation.' *Buckley*, 424 U.S., at 48." See Citizens United v. Federal Election Commission, *supra.*

[105] Buckley v. Valeo, 424 U.S. 1, 39 (1976).

> For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence.[106]

Even when a federal regulation on lobbying, or public policy or political advocacy involved merely a *disclosure* and reporting requirement, and not a restriction which directly limits or prohibits advocacy activities, such a regulation underwent rigorous constitutional scrutiny. Thus, although the Court has noted in First Amendment cases that disclosure seems to be the "least restrictive means" of obtaining certain permissible and important governmental objectives (such as the prevention of fraud and undue influence of monied special interests on basic governmental processes), such rigorous constitutional scrutiny of laws which merely required *disclosures* relating to political speech and advocacy were necessary since the Court recognized the "deterrent effects on the exercise of First Amendment rights" which may arise "as an unintended but inevitable result of the government's conduct in requiring disclosure."[107]

Restrictions on Federal Funds

Congress clearly may limit, regulate or condition the use of the *funds* it appropriates,[108] and as noted earlier in this report, there are now under federal law and regulation several direct prohibitions and multiple restrictions on the use by private recipients of federal funds or federal subsidies for political or advocacy/lobbying purposes.[109] When legislative or regulatory provisions do not place restrictions and conditions merely upon the *use* of federal funds, nor merely attempt to control or "define" the content of a government program, but rather institute direct restrictions and prohibitions on political advocacy and expression of certain private entities with their own resources as a requisite and as a condition for those private parties to receive federal funds, then such legislation must be examined under the heightened scrutiny of First Amendment principles. The Supreme Court has noted that restrictions on otherwise constitutionally protected activities could not be "justified simply because" persons were receiving federal funds, nor was "a lesser degree of judicial scrutiny ... required simply because Government funds were involved."[110] As explained by the Supreme Court in a more recent case, "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."[111]

"Unconstitutional Conditions" on the Receipt of Federal Funds

Although it is clear Congress may limit, regulate, or condition the use of the funds it appropriates, such as in the existing and detailed prohibitions on lobbying or political advocacy by private

---

[106] Citizens United v. Federal Election Commission, *supra* at 898.

[107] Buckley v. Valeo, *supra*, at 65; United States v. Harriss, *supra*; NAACP v. Button, 371 U.S. 415 (1963).

[108] Cincinnati Soap Co. v. United States, 301 U.S. 308, 321-322 (1937).

[109] See discussion in this report, at pp. 2-8, 13-14, and 18-21, discussing OMB Circular A-122, Attachment B, para. 25, as added 49 F.R. 18276 (1984); Federal Acquisition Regulation for commercial contractors and nonprofit contractors of the federal government, 48 C.F.R. § 31.205-22 (commercial contractors); 48 C.F.R. § 31.701 *et seq.*, (non-profit contractors); the so-called "Byrd Amendment," 31 U.S.C. §§ 1352, *see* common rules by major agencies, 55 F.R. 6738, February 26, 1990 (and OMB government-wide guidance, 54 F.R.52306, December 20, 1989 upon which the rules were based); and 18 U.S.C. § 1913 and various yearly appropriations law riders.

[110] FCC v. League of Women Voters, 468 U.S. 364, 401 n.27 (1984).

[111] Legal Services Corporation v. Velazquez, 531 U.S. 533, 547 (2001).

recipients with federal grant or contract funds, the Supreme Court has in the past ruled "that the government may not deny a benefit to a person because he exercises a constitutional right."[112] The principle had thus developed in a line of Supreme Court constitutional law cases that the government may not *condition* the receipt of a public benefit upon the requirement of relinquishing one's protected First Amendment rights.[113] In a lower federal court decision (affirmed by the United States Court of Appeals for the Seventh Circuit) dealing specifically with lobbying by "consumer groups" that sought a state contract, for example, the court ruled that a state provision could not be interpreted to bar an entity that lobbies or hires lobbyists from being eligible for a particular government contract (thus in effect barring lobbying by state contractors with their own funds and resources), since that would place an unconstitutional condition upon the receipt of government funds in violation of the protected First Amendment public advocacy rights of those contractors:

> A valid state law ... cannot be applied in a way to thwart the exercise of a right guaranteed by the Constitution ....
>
> The Attorney General's policy burdens and deters the exercise of the first amendment right to petition the government. Persons and organizations such as plaintiffs are confronted with a dilemma: forsake lobbying or give up the right to seek contracts or subgrants from the State of Indiana.
>
> Under the first and fourteenth amendments, a state may not directly abridge lobbying activities or indirectly abridge such activities by withholding government benefits from those persons who lobby or retain lobbyists.[114]

Although it is true that a private organization may simply choose to forgo participating in or conducting political advocacy, voter registration drives, or lobbying to be eligible to participate in a particularly restricted federal program, and although no one has a "right" to participate in or receive funding provided by a federal program, the Supreme Court under the so-called "unconstitutional conditions" cases has in the past established the principle that the receipt of a federal benefit may not be conditioned upon abdicating one's constitutional rights, particularly one's First Amendment freedom of speech:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the Government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.[115]

---

[112] Regan v. Taxation With Representation of Washington, 461 U.S. 540, 545 (1983).

[113] Note "unconstitutional conditions" cases, including Perry v. Sinderman, 408 U.S. 593 (1972); Speiser v. Randall, 357 U.S. 513 (1956); Regan v. Taxation With Representation of Washington, 461 U.S. at 545, *see also* 461 U.S. at 552-553 (Blackman, J. concurring) (1983); FCC v. League of Women Voters, 468 U.S. 364, 381 (1984). *Compare* with Rust v. Sullivan, 500 U.S. 173, 196 (1991).

[114] Citizens Energy Coalition v. Sendak, 459 F. Supp. 248, 258 (S.D. Ind. 1978), *aff'd* 594 F.2d 1158 (7th Cir. 1979).

[115] Perry v. Sinderman, 408 U.S. 593, 597 (1972).

In 1996, the Court recognized, under the circumstances of the case before it, "the right of independent contractors not to be terminated for exercising their First Amendment rights."[116] In explicating the principles that work to prohibit the denial of governmental benefits for private parties who exercise their First Amendment rights of speech and advocacy, the Court noted

> Our unconstitutional conditions precedents span a spectrum from government employees, whose close relationship to the government requires a balancing of important free speech and government interests, to claimants for tax exemptions, *Speiser v. Randall*, 357 U.S. 513 (1958), users of public facilities, *e.g. Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 390-394 (1993); *Healy v. James*, 408 U.S. 169 (1972), and recipients of small government subsidies, *e.g., FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984), who are much less dependent on the government but more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing.[117]

Thus, while the government may place certain conditions on the recipients of federal benefits, grants, or subsidies, and may refuse to subsidize or pay for one's private lobbying or advocacy activities, the participation in First Amendment expression may arguably *not* be the basis for denying a public benefit. As explained by Justice Blackmun concurring in *Regan v. Taxation With Representation*, the "denial of business expense deduction for lobbying is constitutional, but an attempt to deny all deductions for business expenses to a taxpayer who lobbies would penalize unconstitutionally the exercise of First Amendment rights"; and that while "denial of welfare benefits for abortion is constitutional, ... an attempt to withhold all welfare benefits from one who exercises right to an abortion probably would be impermissible."[118] It may be noted in this regard that in *Speiser v. Randall*,[119] the Supreme Court expressly found that the state may not place a condition on eligibility even for a tax-exemption on a basis that violates one's First Amendment freedoms of speech, expression, and association: "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech."[120]

Under this line of cases the Supreme Court thus invalidated a federal law which would have placed an advocacy restriction on any recipient of particular grants from a federally funded program (public broadcasting) in *Federal Communications Commission v. League of Women Voters of California*.[121] In that case the federal statutory ban on public broadcasters "editorializing" was expressly found unconstitutional by the Supreme Court. In the original provisions establishing the Corporation for Public Broadcasting, the non-commercial broadcast stations which received any grants or funding from CPB were prohibited from "editorializing."[122] Although broadcast stations may be required in the public interest to afford opportunities for opposing viewpoints and equal time under the so-called fairness doctrine, the Court found that such broadcasters, merely because they receive some federal funding through the Corporation for Public Broadcasting, could not be prohibited from providing their own expression and opinions on matters of public interest, as the ban was not narrowly tailored to sufficiently address the

---

[116] Board of Commissioners v. Umbehr, 518 U.S. 668, 686 (1996).

[117] 518 U.S. at 680.

[118] 461 U.S. at 552, note, discussing Cammarano v. United States, 358 U.S. 498 (1959); Harris v. McRae, 448 U.S. 297, 317, n. 19 (1980) and Maher v. Roe, 432 U.S. 464, 474-475, n. 8 (1977).

[119] 357 U.S. 513 (1956).

[120] 357 U.S. at 518.

[121] 468 U.S. 364 (1984).

[122] *See* P.L. 90-129, November 7, 1967, 81 Stat. 368.

government's asserted justifications for such restrictions on protected First Amendment conduct. The Court found that although the government may regulate the use of its own appropriations, and need not subsidize private advocacy, the complete ban on editorializing would impermissibly prohibit the private broadcast stations from using their *own* resources and funding for such public advocacy activity.[123]

In the recent case of *Citizens United v. Federal Election Commission*, one of the arguments for maintaining the statutory restriction on corporate campaign expenditures was that the corporation had been granted *by law* certain benefits and privileges, and as a condition to receive such government-granted benefits, the corporations could be denied their First Amendment right to engage in political expression in making independent campaign expenditures.[124] The Supreme Court, however, summarily dismissed such notion that government benefits could be given in this situation on the condition of forfeiting or forgoing First Amendment privileges:

> ... [T]he *Austin* majority undertook to distinguish wealthy individuals from corporations on the ground that "[s]tate law grants corporations special advantages – such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets." 494 U.S. at 658-659. This does not suffice, however, to allow laws prohibiting speech. "It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights."[125]

It is therefore questionable under this line of cases whether general or broad-based restrictions on *independent expenditures* for political speech and advocacy of all private individuals, firms, associations, or corporations could be instituted as a "condition" to receiving a federal grant or a federal contract. It is noted that under current federal law, a government contractor is prohibited from making a campaign "contribution."[126] Under the theory that campaign *contributions* directly to candidates have a more significant potential for *quid pro quo* corruption, the Supreme Court, in overturning the corporate campaign independent "expenditure" prohibition, left intact the limitation on such corporate campaign "contributions." Campaign contributions to candidates or parties (and their potential for corrupting influences) have been distinguished by the Supreme Court from "independent" campaign "expenditures." Such independent expenditures in campaigns are afforded greater First Amendment protection as speech, and are apparently not subject to the same considerations of potential corruption or corrupting influence because of the absence of pre-arrangement or coordination with the candidate or the candidate's campaign:

> The *Buckley* Court recognized a "sufficiently important" government interest in "the prevention of corruption and the appearance of corruption." *Id.*, at 25; see *id*. at 26. This followed from the Court's concern that large contributions could be given "to secure a political *quid pro quo*." *Ibid*.
>
> The *Buckley* Court explained that the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures. The Court emphasized that "the independent expenditure ceiling ... fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process," *id*., at 47-48, because "[t]he absence of prearrangement and coordination ... alleviates the danger that

[123] 468 U.S. at 399-401.

[124] *Citizens United*, *supra* at 905.

[125] *Id.*

[126] 2 U.S.C. § 441c.

> expenditures will be given as a *quid pro quo* for improper commitments from the candidate," *id*., at 47.[127]

The Supreme Court then concluded in *Citizens United:*

> Limits on independent expenditures ... have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption. The anticorruption interest is not sufficient to displace the speech here in question.
>
> * * *
>
> For the reasons explained above, we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.[128]

The same considerations in allowing an exception to First Amendment principles in prohibiting contractor "contributions" to candidates, therefore, may not necessarily be present to justify a similar government restriction on contractor "expenditures" for independent political speech. Furthermore, it should be noted that subsequent to *Citizens United*, courts have been willing to more critically examine limitations on "contributions" than in the past. One state Supreme Court, for example, has invalidated that state's law against campaign contributions to state candidates by "sole source" government contractors as an unconstitutionally overbroad intrusion into the First Amendment rights of state contractors.[129] Additionally, campaign "contribution" limitations under federal law which the Federal Election Commission sought to apply to contributions to groups making only independent expenditures was, subsequent to *Citizens United*, found unconstitutional by the United States Court of Appeals for the District of Columbia.[130]

Federal Program Restrictions and "Government Speech"

It is obvious that Congress may and does institute various conditions and requirements on the receipt of federal funds. Although the cases discussed in the preceding section found, to one degree or another, an "unconstitutional condition" on the receipt of federal funds by private parties (by restricting the use of the recipient's own resources for protected First Amendment advocacy as a condition to receive funds), the Supreme Court has permitted the government to require a restriction on the use of a recipient's *own* funds for certain speech *within a particular program* when that program is even partially funded with federal funds. In *Rust v. Sullivan*,[131] a provision restricting participants in certain programs funded by the government from providing abortion counseling was upheld by the Supreme Court. The Court did note that the restriction examined there was, however, a restriction going only to the *program* which was partially federally funded, and not a restriction on the *recipient* of the funds, who could continue separately

[127] *Citizens United*, *supra* at 901-902.

[128] *Citizens United*, *supra* at 908, 909.

[129] Dallman v. Ritter, No. 09SA2244 (Sup. Ct. Colo. February 22, 2010). The court noted, Slip op. at 36, that the statutory ban "would require us to assume, for instance, that a small contribution to a candidate for the general assembly automatically leads to a public perception that the donor will receive some quid pro quo benefit from a city or special district with which the donor holds a sole source contract. ... [W]e cannot sacrifice First Amendment freedoms to an implausible perception of impropriety that links every contribution to an illicit arrangement extending to all levels of state government."

[130] SpeechNow.org v. Federal Election Commission, No. 08-5223 (D.C. Cir. March 26, 2010).

[131] 500 U.S. at 173 (1991).

and independently to counsel on abortion or even to perform abortions apart from the federally funded program. The Court explained that the government did not place a "condition on the recipient of the subsidy," but rather placed the restrictions on the "particular program or service" which "merely require that the grantee keep such activities separate and distinct from the" publicly funded activities.[132] As stated by the Court: "[T]he government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized."[133] Chief Justice Rehnquist, writing for the Court, distinguished this situation from the "unconstitutional conditions" cases:

> In contrast, our "unconstitutional conditions" cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.[134]

More recently, the Supreme Court has noted that when the government funds activities and programs, it may limit, restrict, and fashion the speech of those speaking *on its behalf* either as "government speech," or when the government uses "private speakers to transmit specific information pertaining to its own programs."[135] In 1995, the Court explained that "[w]hen the government disburses public funds to private entities *to convey a governmental message*, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."[136]

What might be considered an "exception" to the First Amendment, that is, allowing for government regulation of either "government speech," or some private speech within the parameters of certain government programs or government created forums, would not, in any event, extend to *all* activities and programs of individuals or private entities which receive government grants or contracts. In *Legal Services Corporation v. Velazquez*,[137] the Court overturned a restriction on the Legal Services Corporation's grantees "lobbying" for changes in welfare legislation as part of legal representation of indigent clients. The Court found that even though the legal services program was government funded, and thus the speech that the government wished to regulate and limit by statute was, in fact, within the confines of that program (as in *Rust*), the activity and speech involved, that is, lobbying the legislature on behalf

---

[132] 500 U.S. at 196.

[133] *Id.*

[134] 500 U.S. at 197. Another restriction and limitation following federal funds in the area of advocacy are the provisions of the Federal Election Campaign Act which allow for a "voluntary" expenditure limitation on campaign expenses when a candidate agrees to accept federal funds for his or her political campaign. As noted by the Supreme Court in *Buckley v. Valeo, supra*, however, that particular provision was not directly challenged by any party in the case, and the issue of its constitutionality was not before the Court. 424 U.S. at 87, n. 119. The Court appeared, however, to be favorably disposed to the idea of voluntary limitations since it believed the overall provisions providing federal funds to private parties for political advocacy and campaigning enhanced, rather than restricted, First Amendment opportunities to advocate to the public: "Subtitle H is a congressional effort, not to abridge, restrict or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation...." 424 U.S. at 92-93.

[135] Legal Services Corporation v. Velazquez, 531 U.S. 533, 541 (2001).

[136] Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 833 (1995), citing *Rust, supra* at 196-200. Emphasis added. In the *University of Virginia* decision the Court found that providing state funds for the printing of various student publications did not constitute "Government speech" that could be regulated on a content basis so as to exclude groups with religious-based publications.

[137] 531 U.S. 533 (2001).

of a client, could still not be considered "government speech," and thus was not subject to regulation under the government speech doctrine.[138]

In light of the development of the "government speech" doctrine, the Supreme Court has engaged in a certain amount of reinterpretation of some of the previous precedents on what have been characterized as "unconstitutional conditions" cases. The Supreme Court in *Velazquez*, for example, discussed the holding in *Rust v. Sullivan* in terms of "government speech":

> The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding. We have said that viewpoint-based funding decisions can be sustained in instances in which the government itself is the speaker, see *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229, 235 (2000), or instances, like *Rust*, in which the government "used private speakers to transmit specific information pertaining to its programs." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).[139]

Along a somewhat similar line as the "government speech" concept may be situations where private organizations serve as what might be described as surrogates or stand-ins for government agencies, to perform governmental functions of administering and disbursing public funds. Thus, as noted above, in some of these instances federal law has treated these organizations, for purposes of restrictions on the *partisan* political activities of their employees, as "state or local" governmental agencies under the provisions of the Hatch Act which apply to employees of state and local governments.[140] If a contract or a grant were thus given to perform what might be considered "governmental functions," or to have private parties serve as surrogates for government officials in administering or managing certain public programs, then arguments could be made that the government could then limit political speech or activities of such private participants in the program under the "government speech" guidelines, or under a similar rationale as the Hatch Act, to protect the fair administration of government programs. The Supreme Court in *Citizens United* noted that there is "a narrow class of speech restrictions" which may be permissible, such as in the Hatch Act (citing the *Letter Carriers* case, 413 U.S. 548 (1973)), "based on an interest in allowing governmental entities to perform their functions."[141] Such rationale, however, would not appear to be strong, nor particularly relevant, in the case of contractors who are merely providing goods or selling products to the government.

---

[138] 531 U.S. at 542-543.

[139] 531 U.S. at 541. The Court in *Velazquez*, *supra*, at 543, also reinterpreted the finding in the Public Broadcasting case in terms of "government speech," and noted that, concerning the restriction on editorializing in public radio which it found impermissible in *Federal Communications Commission v. League of Women Voters of California*, 468 U.S. 364 (1984): "The First Amendment forbade the Government from using the forum in an unconventional way to suppress speech inherent in the nature of the medium."

[140] 5 U.S.C. §§ 1501 *et seq.* See discussion in this report, *infra* at pp. 14-16. Unlike broad restrictions on recipients using their own resources and funds to engage in protected First Amendment conduct outside of the particular federally assisted programs, it should be noted that the particular restrictions concerning, for example, the Community Services Block Grant Program, or the Head Start program, appear to apply only within the federally assisted *program*, and do not appear to extend to organizations and their activities outside of and separate from such programs (that is, that do not use program funds, services or personnel connected to this program).

[141] *Citizens United*, *supra* at 899: "These precedents stand only for the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech."

Governmental Interest Promoted by the Legislation; Least Restrictive Means of Accomplishing Objective

The Supreme Court has found that while First Amendment rights are "fundamental, they are not in their nature absolute."[142] The Court has increasingly resorted to "balancing" conflicting interests of the government and private parties when possible limitations on First Amendment activities are somewhat indirect; when the governmental interest in the regulation is of a compelling enough nature; and when the statute is drawn with sufficient precision. When a provision of law limits, burdens, or interferes with protected First Amendment rights, the Supreme Court will engage in what it terms "strict scrutiny" to examine the law and its purposes to determine, initially, if there are significant, "overriding" or "compelling" governmental interests in the restriction that outweigh the impositions on protected First Amendment rights.[143] If there are such governmental interests in the restrictions on First Amendment activities, then the Court will examine whether the restriction is sufficiently narrowly tailored to promote those interests asserted as the statute's justification.

There are several governmental interests which might arguably be promoted by a prohibition on "independent expenditures" by government contractors or grantees, and such interests would need to be analyzed under the Supreme Court's standards. In cases involving the limitation of political advocacy in campaigns and the *disclosure* of lobbying activities, for example, the protection of basic governmental processes by disclosing the sources of pressures and influences on the legislative process,[144] and the prevention of the corruption of the electoral process and undue influences on candidates and officeholders which may accompany large cash payments and contributions to candidates and political parties, have been found to be such important governmental interests which may justify in some cases certain limitations or burdens on First Amendment activities.[145] Even while such interests have been found to be significant and important, however, the Court has struck down restrictions and direct or indirect limitations on advocacy speech and political activities which were not narrowly tailored to meet the objective of preventing undue influence or the appearance of corruption.[146]

---

[142] Whitney v. California, 274 U.S. 357, 373 (1927) [*J. Brandeis* concurring]; Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

[143] *Citizens United*, *supra* at 898-899.

[144] United States v. Harriss, *supra*.

[145] Buckley v. Valeo, *supra.;* McConnell v. Federal Election Commission, 540 U.S. 93, 143 (2003), as to the Government's contention that the campaign act's restrictions on "soft money" contributions and certain expenditures "were necessary to prevent the actual and apparent corruption of federal candidates and officeholders," the Court noted: "Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits." The Court also noted the legitimate governmental interest in preventing "undue influence on an officeholder's judgment, and the appearance of such influence." *Id.* at 150.

[146] In terms of public or political advocacy, the Supreme Court has struck down as overly broad and not sufficiently connected to the legitimate interest of preventing corruption of candidates and officeholders, for example, a federal law which would have limited the amount of money private parties may independently spend on advocating the election or defeat of a candidate, *Buckley v. Valeo*, *supra* at 39-51; limitations on the amount of money the candidate or the candidate's family may spend of his or her own resources, *Buckley v. Valeo, supra* at 51-54; has struck down restrictions on the expenditure of private moneys by corporations concerning referenda and ballot issues, as opposed to expenditures on candidates, *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); has struck down provisions of laws and interpretations which would limit advocacy groups which are non-stock, non-profit corporations from spending money to influence the election or defeat of federal candidates, *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); see also interpretation in *McConnell* that BCRA limitations on expenditures do not apply to "MCFL" organizations. 540 U.S. at 209-211; and has invalidated the prohibition on (continued...)

As discussed earlier, the Supreme Court has found that although the governmental interest of preventing corruption may be forwarded by a restriction on direct *contributions* from individuals or corporations to candidates, the interest of preventing "corruption" or the appearance of corruption is *not* necessarily advanced by a restriction on "independent expenditures" by private entities in relation to political campaigns. In *Buckley v. Valeo*, the Supreme Court found "that the governmental interest in preventing corruption and the appearance of corruption [was] inadequate to justify [the ban] on independent expenditures."[147] Similar to the Court decision in *Buckley* overturning the over-all "independent expenditure" limit for campaigns in federal law, the Court found in *Citizens United v. Federal Election Commission* that a prohibition on independent expenditures does not generally advance in a sufficient manner the interest of preventing corruption: "[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[148] For this reason, it would seem that legislation which would restrict all private parties and entities receiving federal contracts or grants from engaging in public policy or political advocacy, for example, with their own non-governmental resources, would not necessarily advance the interest in the prevention of "corruption" of candidates or officeholders, or undue influences on basic governmental processes. As noted by the Supreme Court in *Citizens United*, the absence of any pre-arrangement or coordination with the candidate in the making of an "independent expenditure" by a private entity mitigates against a corrupting influence or *quid pro quo* agreement, and thus does not necessarily reach the concerns in so-called "pay to play" corruption schemes.[149]

A governmental interest in attempting to "balance" competing voices in public policy or campaign debate, by limiting expression of one group over another, was found by the Supreme Court *not* to be a compelling interest to justify suppression of speech. The Supreme Court thus rejected the so-called "antidistortion" rationale that would attempt to limit the influence of monied interests and aggregated wealth over less well-funded persons or groups in a political campaign.[150]

If the governmental purpose is not to prevent corruption of candidates or governmental processes, or to "balance" the relative weight of voices in the political arena, then such interest might be to protect government funds and programs. In such case the interests may be two-fold: one would be to prevent the use and diversion of federal government funds for private political or public policy advocacy activities which are not authorized by Congress; and the second would be to prevent the federal government "subsidizing" political advocacy, lobbying, or voter registration activities of private parties by providing such private parties with federal dollars for *other* purposes.

As to the governmental interest of not paying for private political or lobbying activities, clearly the federal government need not "pay for" nor directly "subsidize" the political advocacy or

(...continued)

corporate campaign expenditures. *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010).

[147] Buckley v. Valeo, 424 U.S., *supra* at 45, as quoted in Citizens United v. Federal Election Commission, *supra* at 908.

[148] Citizens United v. Federal Election Commission, *supra* at 909.

[149] Citizens United v. Federal Election Commission, *supra* at 901-902, 908-909. It should be emphasized that any campaign "expenditure" which is coordinated or pre-arranged with a candidate is *not* an "independent expenditure" under federal law (11 C.F.R. § 100.16), but rather is to be treated as an in-kind "contribution" to a candidate (11 C.F.R. Part 109.20(b)), prohibited for corporations and contractors.

[150] Citizens United v. Federal Election Commission, *supra* at 905-908. See also Davis v. Federal Election Commission, 128 S.Ct. 2759, 2773 (2008); SpeechNow.org v. Federal Election Commission, Slip op., *supra* at 9-10, citing *Davis*.

lobbying of private entities.[151] To that end, it should be noted, as discussed earlier, that current federal law and regulations already expressly prohibit the use of contract or grant funds by any governmental contractor or grantee for lobbying and political purposes, or the paying for or "charging off" of expenses for political advocacy or lobbying to any government contract or grant. The federal government may clearly limit the use of the funds it appropriates in this way for the specific public purposes it desires.[152] Similarly, the government need not "subsidize," through such things as tax exemptions or specific deductions for lobbying, the private advocacy activities of organizations or persons. In *Cammarano v. United States*, the Supreme Court noted that the denial of a tax deduction as a business expense for the lobbying expenses of a private entity was permissible because:

> Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code.[153]

In the case of *Regan v. Taxation With Representation of Washington*, *supra*, the Supreme Court similarly approved the restrictions on "charitable," 501(c)(3) organizations' lobbying as a basis for their tax exemption, and the deductibility of contributions to them from the donor's federal income tax, since "Congress has merely refused to *pay for the lobbying out of public moneys*."[154]

If the interest of the government in a legislative restriction is merely to avoid directly subsidizing or paying for private lobbying or political activities out of public monies, then a restriction in any proposed legislation which barred all privately funded advocacy by grant or contract recipients might arguably, in the first instance, be considered "over-inclusive" because it reaches activities, speech, and conduct paid for completely with *private, non-federal* monies, as well as privately-funded activities wholly outside of the realm of the federal program. As such, the restriction may arguably be found, with respect to otherwise protected First Amendment speech and conduct, to be unnecessarily overbroad and burdensome on such First Amendment rights. As discussed by the Supreme Court in *FCC v. League of Women Voters*, *supra*, it may be argued that a less restrictive means to reach this goal of not paying for private lobbying or political activities out of government funds may be to enact and enforce more effective audits, restrictions, regulations, and accounting procedures prohibiting the use of any *federal funds* for such activities. This would reach the presumed goal of limiting the use of federal funds, but would not be a potentially overly broad restriction that would encompass within its prohibition the exercise by private recipients of protected First Amendment speech and conduct financed entirely with their own resources, and would not punish entities for entering the public debate on community, civic and national issues by engaging in protected public advocacy.

A further interest of the government forwarded by legislation might also be to prevent an "indirect" subsidy for groups who engage in political advocacy by providing such groups with federal funds for *other* non-advocacy activities, studies, or services which the government desires. As such, this purpose is distinguished from the prevention of the use of government funds

---

[151] Regan v. Taxation With Representation, *supra* at 544-546: "... Congress is not required by the First Amendment to subsidize lobbying." Cammarano v. United States, 358 U.S. 498 (1959).

[152] *See* generally, Cincinnati Soap Co. v. United States, 301 U.S. 308, 321-322 (1937).

[153] 358 U.S. at 513.

[154] Regan v. Taxation With Representation, *supra* at 545. Emphasis added.

directly for lobbying or advocacy, or the "subsidy" for lobbying that a tax exemption for such activities or all activities of the organization would provide. The argument is that money is "fungible" and grants and contracts for proper public purposes to private groups "frees up" other non-federal money which the private grantee may use for any purposes, including lobbying or voter registration activities.

There may be significant questions raised, however, as to whether a government grant or contract for one specific public purpose or service performed, or product provided, by the recipient is or may be considered a "subsidy" for *other*, private activities of the grant or contract recipient which are funded wholly by private, non-federal contributions and funds. The Supreme Court, in another context, has found that such a grant is *not* a subsidy of the other, non-federally funded activities. In *Committee for Public Education and Religious Liberty v. Regan*,[155] the Supreme Court specifically found that providing grant funds to a religious organization for one (secular) purpose, does *not* constitute a federal "subsidy" of the other, private, non-federally funded religious activities of the organization. Even the fact that federal grant funds to an organization for public purposes might arguably "free up" non-federal money for other, private activities which the government does not want to fund, does not make the federal grant or payment a subsidy of those other purposes. In specifically rejecting the "fungibility" of cash argument, the Supreme Court said,

> None of our cases requires us to invalidate these reimbursements simply because they involve payments in cash. The Court "has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Hunt v. McNair*, 413 U.S. 734,743 (1973).[156]

The Supreme Court has thus expressly rejected this theory as a realistic or necessary outcome or result of government assistance to *some* activities of an organization vis-a-vis other, independent activities. It is logical to assume, therefore, that such concern would not necessarily be recognized as a "compelling" or "overriding" interest by the Court which could justify direct restrictions on protected First Amendment conduct that a private entity engages in with its own resources, outside of the government-sponsored program, whenever a government contract or grant is received.

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....

[155] 444 U.S. 646 (1980).

[156] 444 U.S. at 658. The Government also does not appear to be "subsidizing" the First Amendment activities of private parties as had been found by the courts in the past by, for example, providing a tax deduction for private parties who make contributions to an organization (and thus subsidizing the activities of the charity by loss of tax revenue for contributions supporting those activities), or by providing a direct tax deduction for monies expended for lobbying activities. *See*, e.g., discussion in *Regan* and *Cammarano, supra*.