ATTEMPTED REGULATION OF INDEPENDENT GROUP SPEECH

REMARKS OF JAN BARAN

Independent expenditures are defined under the Federal Election Campaign Act[1] (FECA) as expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.[2] To be independent, these expenditures must be made without prior consultation, suggestion, request, or coordination with the candidate on whose behalf these expenditures are made.[3] Independent expenditures were the subject of much public comment in 1980 as a result of highly publicized activities in connection with senatorial races by certain political action committees, the most prominent of which was the National Conservative Political Action Committee (NCPAC). Early in the campaign NCPAC targeted certain liberal senators for defeat and then made substantial independent expenditures to advocate their defeat.

At the same time that these campaigns against senatorial candidates were waged, there occurred similar efforts in the course of the presidential race. Independent expenditures, advocating either defeat or support of presidential candidates, were undertaken by groups such as NCPAC and also by new political action committees which were founded primarily for this purpose and which had not existed prior to 1980. Although this type of political activity has gained in prominence this past election year, many attempts to regulate independent expenditures have been made during the ten-year history of campaign financing legislation. They were not always called independent expenditures, but at each stage of legislation, starting with the Federal Election Campaign Act of 1971, there were distinct provisions which in one way or another attempted to regulate independent political speech. As the Supreme Court has noted,[4] campaign expenditures are closely intertwined with political speech, and regulation of campaign expenditures therefore amounts to regulation of political speech. Such speech may take the form of newspaper ads, television advertising, radio advertising, direct mail, or other modes of expression. In the case of independent expenditures, the expressive activity is outside of the control of any candidate's official campaign.

In 1971, Congress attempted to regulate independent political speech through the Campaign Communications Reform Act,[5] which was Title I of

---

1. 2 U.S.C. §§ 431-55 (1976 & Supp. IV 1980).
2. *Id.* § 431(17).
3. *Id.*
4. Buckley v. Valeo, 424 U.S. 1, 14-24, 39 (1976).
5. Pub. L. No. 92-225, §§ 101-106, 86 Stat. 3 (1972) (repealed by Pub. L. No. 93-443, § 205(6), 88 Stat. 1263 (1974)).

the original FECA. Title I limited the amount of money candidates could spend on political communication. The method devised to monitor compliance with the limitation was a certification process. Before a candidate or any supporter could place an ad in a newspaper or place a spot with a television or radio station, the newspaper or the broadcaster was required to obtain a certification from the candidate who would benefit from the contemplated political speech. Such certification was required even though the speech would be undertaken independently of the candidate and was not sponsored by the candidate's campaign. In other words, any person who wished spontaneously to place an ad in the *New York Times* on behalf of a candidate could not legally do so without a certification from that candidate.

This governmental scheme presented a problem which was very quickly brought to the attention of the courts. In May 1972, a handful of citizens banded together. They were of a like mind and decided to purchase an ad in the *New York Times* advocating the impeachment of Richard Nixon. At the time they were considered to be rather eccentric. History has proved that, if anything, they were simply ahead of their time. These citizens called themselves the National Committee for Impeachment. They went to the *New York Times* and purchased a two-page ad in that paper. The Department of Justice then filed an action against this group, charging that it had failed to register as a political committee and had failed to report under the FECA.[6] At the same time, the Department issued a formal warning against the *New York Times* for having failed to obtain a certification that these people were undertaking this activity without the authorization of any candidate.

Although the committee ultimately was found not to be subject to the FECA,[7] the ACLU, which had intervened in that case,[8] filed a separate action to test the constitutionality of the certification process.[9] The *New York Times* had refused to run an advertisement criticizing Nixon for his position on busing which the ACLU wished to place in the paper. The *Times* based its refusal on the ACLU's noncompliance with the certification requirement.[10] Ultimately, the three-judge court held that the certification process was an unconstitutional prior restraint.[11]

Since the ACLU had sought to place the ad during the 1972 presidential campaign, and since the ad criticized the incumbent's position on a political

---

6. United States v. National Comm. for Impeachment, 469 F.2d 1135, 1137 (2d Cir. 1972).

7. The court held that, in order to be subject to the FECA, the National Committee's expenditures would have had to have been made "with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate or his agents." *Id.* at 1141.

8. *Id.* at 1136.

9. ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom.* Staats v. ACLU, 422 U.S. 1030 (1975).

10. *Id.* at 1043.

11. *Id.* at 1042, 1051-54.

issue, the ad triggered a duty on the part of the *New York Times* to establish whether the ad was being placed without the authorization of any candidate.[12] Publication of the ad without establishing this fact would have subjected the newspaper to possible criminal liability.[13] The three-judge court noted that favorable advertising, that is, advertising "on behalf of" a candidate, would have been completely controlled by the candidate since all such advertising had to be accompanied by the candidate's certification that the expense of the ad would not exceed the statutory limit. The court observed:

> By refusing to comply with the [certification] requirements, any such candidate wields potential veto power over attempts to communicate public views. This presents additional and grave constitutional questions of a candidate's ability to bridle a citizens' [sic] or an organizations' [sic] right to speak "on that candidates [sic] behalf," even as that term is defined in the [regulations]. Such support might prove embarrassing or detrimental to the candidate's campaign, in which case the candidate is free to reject such support. But the airing of opinion in a public forum must not be subordinated to political expediencies. The final authority given to a candidate under the Act to prohibit the expression of views made on his behalf, albeit by those from whom he may wish to be disassociated, presents an opportunity for such subordination and in so doing may dampen the free and robust ventilation of opinion.[14]

The court concluded that the certification procedure, "considered in conjunction with the relative ease with which a candidate may prevent publication, creates the prohibited previous restraints."[15]

The *ACLU* case would have been resolved by the Supreme Court on appeal had it not been mooted by the 1974 amendments to the FECA which repealed the certification requirement.[16] The amendments replaced certification with another device to regulate independent political activity: a limitation of independent expenditures to one thousand dollars.[17] That provision was challenged as unconstitutional in *Buckley v. Valeo*, and the Supreme Court struck it down.[18] The thousand-dollar limitation provision

---

12. *Id.* at 1050.
13. *Id.*
14. *Id.* at 1053.
15. *Id.* Prior restraints on publication carry a heavy presumption of unconstitutionality. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Near v. Minnesota, 283 U.S. 697 (1931).
16. *See supra* note 5.
17. Pub. L. No. 93-443, § 101(a), (b), 88 Stat. 1263 (1974) (repealed by Pub. L. No. 94-283, § 201(a), 90 Stat. 475 (1976)).
18. 424 U.S. 1, 51 (1976).

was construed by the Court as a limit on the ability of an individual or a group to expend funds for communications that expressly advocated a candidate's election or defeat without the request or authority of a candidate.[19] The Court held that the limitation infringed on protected rights of political speech and was not supported by a compelling governmental interest. The Court noted that such political activity was potentially counterproductive because of the absence of candidate control and did not stem corruption as did the limits on contributions,[20] which were sustained.[21]

Subsequent to the *Buckley* decision, the Republican National Committee challenged the public financing provisions of the Presidential Election Campaign Fund Act[22] (Fund Act). The Second Circuit ruled that the public financing scheme utilized in presidential elections is constitutional.[23] The principal basis for sustaining the expenditure limits that accompany publicly financed presidential candidates was that the supporters of such a candidate do not lose any of their first amendment rights to make unlimited independent expenditures.[24] The *Buckley* decision was relied upon for that proposition.[25]

By the time of the 1980 elections, some observers reasonably presumed that there could be no limits on independent speech.[26] The *Buckley* decision seemed to be very clear in standing for the proposition that Congress could not limit independent political speech of either individuals, associations, or groups.

Several groups in 1980 formed political committees and, relying on *Buckley*, endeavored to raise money subject to contribution limits in order to expend funds on behalf of publicly financed presidential candidates, primarily on behalf of Ronald Reagan. In July 1980, two suits were filed against some of these groups. The first was filed by Common Cause, *Common Cause v. Schmitt*;[27] the second was filed by the Federal Election Commission (FEC), *FEC v. Americans For Change*.[28]

The theories in both suits were similar although there were some significant differences. Both Common Cause and the FEC alleged that there was a

---

19. *Id.* at 46-47.
20. *Id.* at 47.
21. *Id.* at 29-38.
22. 26 U.S.C. §§ 9001-9042 (1976).
23. Republican Nat'l Comm. v. Federal Election Comm'n, 616 F.2d 1 (2d Cir.), *aff'd*, 445 U.S. 955 (1980).
24. *See id.* at 2; Republican Nat'l Comm. v. Federal Election Comm'n, 487 F. Supp. 280, 284-86 (S.D.N.Y.) (three-judge court), *aff'd*, 445 U.S. 955 (1980).
25. *See* 487 F. Supp. at 285; 616 F.2d at 2.
26. *See, e.g.*, Clagett & Bolton, Buckley v. Valeo, *Its Aftermath, and its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 VAND. L. REV. 1327 (1976).
27. 512 F. Supp. 489 (D.D.C. 1980) (three-judge court), *aff'd mem.*, 50 U.S.L.W. 4168 (U.S. Jan. 19, 1982).
28. *Id.* Ed. Note: The author served as counsel for defendants in both of these actions.

provision of the Fund Act, section 9012(f),[29] which placed a one thousand-dollar limit on political committees that wished to make any expenditure to further a publicly-financed presidential campaign. They further alleged that section 9012(f) applied to independent expenditures as well. Common Cause went further still in stating that the defendant committees were coordinating their activities with the Reagan campaign, not through direct contact but through the public media. Common Cause argued that because the defendants and the official campaign all read the same national publications and they all thought alike, they were therefore "coordinating." Common Cause referred to this as "conscious parallelism."

The cases were consolidated and argued before a three-judge court in the District of Columbia under special provisions of the Fund Act.[30] In the Common Cause action, the court unanimously concluded that the coordination charge was not within the subject matter jurisdiction of the court,[31] and that the claim under section 9012(f) was mooted by the decision in the FEC case.[32]

In the FEC action, the court unanimously held that the one thousand-dollar expenditure limit contained in section 9012(f) was unconstitutional,[33] citing both the *Buckley* case and the *Republican National Committee* case in support of its conclusion. Specifically, the court applied the same degree of strict scrutiny to section 9012(f) as the Supreme Court had applied to the thousand-dollar expenditure limitation in *Buckley,* and concluded that no governmental interest was compelling enough to sustain a limitation on independent expenditures.[34] The court also held that under *Buckley,* committees and groups were entitled to the same protection under the first amendment as individuals,[35] who, it was conceded by all parties, may make unlimited expenditures on behalf of publicly financed presidential candidates.

The primary recourse for those who still wish to contest independent expenditure activity is to go to the FEC and allege that there has been some coordination between the groups and the candidates on whose behalf they are operating. That is what the Carter-Mondale Committee did in the summer of 1980 by filing an administrative complaint with the FEC. After Common Cause lost the *Schmitt* case, it filed a similar complaint. Assuming that the Supreme Court will sustain the *Schmitt* decision,[36] coordination theories will provide the next legal battleground with respect to independent

29. 26 U.S.C. § 9012(f) (1976).
30. *Id.* § 9011(b).
31. Common Cause v. Schmitt, 512 F. Supp. 489, 502-03.
32. *Id.* at 501.
33. *Id.* at 500-01.
34. *Id.* at 493-501.
35. *Id.* at 499-500.
36. Ed. Note: As these Remarks were going to press, an evenly divided Supreme Cour affirmed the *Schmitt* decision without issuing an opinion. 50 U.S.L.W. 4168 (Jan. 19, 1982 (O'Connor, J., not participating).

expenditures, particularly in the context of group speech. It may be easy at times to decide whether an individual has made expenditures independently of a candidate, but the problems become increasingly complex when one deals with associations and groups who organize and raise limited contributions to effectively make independent expenditures.

There remains to be resolved the question whether it is both statutorily and constitutionally sufficient, as Common Cause would maintain, to allege merely that an organization is indulging in "conscious parallelism" with the campaign of the candidate whom it supports, and whether, as the spokesmen for Common Cause have stated, it is possible to indict a group because it has "a philosophy of coordination." The ACLU, which has consistently fought against regulation of independent individual and group speech, filed an amicus curiae brief on behalf of the defendants in the *Common Cause* and *FEC* suits. The ACLU addressed Common Cause's theory of coordination and argued that more than "conscious parallelism" is required. The fact that people support candidates and are astute politicians or read the newspapers every day is not, according to the ACLU, sufficient for a legal determination that a particular activity is "coordinated" and therefore constitutes a "contribution" subject to a thousand-dollar limit. The ACLU has correctly stated that there must be proof of deliberate, active collaboration with the candidate to support a finding of coordination. A precise factual demonstration is mandated by constitutional considerations. One cannot so easily and even inadvertently transform an independent expenditure into a contribution by the mere fact that members of an independent group take positions similar to a candidate's, or even because they have had some form of incidental or isolated contact with the campaign organization. It is novel indeed to suggest, as has Common Cause, that first amendment protections are casually forfeited and criminal sanctions imposed merely because committee members are "political professionals."

It would also be constitutionally suspect to so readily transform an independent expenditure into a contribution and thereby subject a candidate to criminal liability. Publicly financed candidates, in order to obtain their public money, must swear that they have not and will not accept any private contributions. Any theory of coordination as imprecise as "conscious parallelism" seriously jeopardizes the ability of candidates to control their own campaigns and thus to exercise fully their first amendment rights. Only unambiguous and overt "coordination" can be regulated if the law is to be both practically enforceable and respectful of protected political activity.