



April 9, 2013

Honorable Sheldon Whitehouse
Chairman
Senate Judiciary Committee
Subcommittee on Crime and Terrorism
224 Dirksen Senate Office Building
Washington, DC 20510

Honorable Lindsey Graham
Ranking Member
Senate Judiciary Committee
Subcommittee on Crime and Terrorism
152 Dirksen Senate Office Building
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Re: Current Issues in Campaign Finance Law Enforcement

Dear Chairman Whitehouse and Ranking Member Graham:

The American Civil Liberties Union writes to offer comments in advance of today's hearing on current issues in campaign finance law enforcement, and we thank the subcommittee for its attention to this topic. Although the ACLU opposes campaign finance measures that violate the First Amendment, we strongly agree that constitutional campaign finance laws should be enforced vigorously and consistently to assure the integrity of our electoral, legislative and administrative systems at all levels of government.

We briefly comment on several specific issues below, highlighting a number of areas of common ground between the ACLU and proponents of campaign finance reform.

1. Continue to Crack Down on Conduit Contributions

The ACLU supports efforts by the Internal Revenue Service and other federal law enforcement agencies to investigate and prosecute conduit contributions, in which an entity or individual attempts to mask the true source of a direct political contribution by using a straw contributor. Even in a system of unlimited contributions, such transactions, which present a significantly heightened risk of outright bribery and limit the public's ability to properly gauge the loyalties of the candidates they support, are particularly pernicious. The ACLU has long recognized that the prevention of real or perceived corruption may present a compelling government interest that can support properly tailored restrictions on political activity.

There is little that is more corrupting than masking direct contributions to political candidates through the use of straw contributors.

2. Appropriately Enforce the Coordination Rules

Many advocates on both sides of the campaign finance debate properly recognize that independent expenditure-only committees (“IECs”)—colloquially and inaccurately termed “Super PACs”—present a heightened risk of corruption when they coordinate their activities with a particular candidate. As the Supreme Court recognized in *Buckley v. Valeo*, however, truly uncoordinated independent expenditures are unlikely to present a risk of quid pro quo corruption, may actually harm a candidate, and represent literal political speech in support or opposition to a candidate for public office, which, if anything, is what the First Amendment was adopted to protect from government censorship.¹ As the Supreme Court explained in *Buckley*:

Unlike contributions, such independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, § 608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse.²

That said, many IECs—encouraged by the current challenges facing the Federal Election Commission—engaged during this past cycle in conduct that could result in coordination.³ For instance, on numerous occasions, IECs shared vendors with the campaigns they supported.⁴ While some of this conduct may be illegal under current regulations,⁵ many vendors claim to have availed themselves of the firewall safe harbor, which may be insufficient to prevent tacit or even active coordination.⁶ The current regulation is phrased in very broad terms, and merely requires—for coordinated communications—that the firewall be “designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously

¹ 424 U.S. 1 (1976).

² *Id.* at 47.

³ See Mike McIntire & Michael Luo, *Fine Line Between ‘Super PACs’ and Campaigns*, N.Y. Times, Feb. 25, 2012, at A1 (“Rules the commission adopted in 2003, still on the books, allow for regulation of [non-advertising activities of candidates and IECs], but they have been largely ignored.”).

⁴ T.W. Farnam, *Vendors Finesse Law Barring ‘Coordination’ By Campaigns, Independent Groups*, Wash. Post., Oct. 13, 2012 (“The Democratic Congressional Campaign Committee shares 10 vendors with the major super PAC helping Democrats win House races, the House Majority PAC.”).

⁵ See 11 C.F.R. § 109.21(d)(4) (2013).

⁶ See 11 C.F.R. § 109.21(h) (2013).

providing services to the candidate. . . .”⁷ Current regulations may need to be revised to cover other activities beyond those envisioned in the coordinated communications regulation.⁸

Similarly, although this presents significant First Amendment considerations and must be addressed with care, candidate communications with, or directed at, IECs raise additional concerns and may present another area where regulations could be tightened to promote public integrity without running afoul of the Constitution. During the last election cycle, several practices that were claimed not to present unlawful coordination raised heightened concerns of constitutionally relevant quid pro quo corruption. These included direct fundraising appeals by candidates to IECs, candidates making public statements about the value of IEC communications and candidates appearing in IEC promotional material.⁹ Not only do these practices facilitate actual coordination through communications between the candidate and IEC staff, they also often spur donations to the IEC, which in certain cases—under the logic of *Buckley* and, indeed, *Citizens United*¹⁰—could be considered in-kind direct contributions.¹¹

Great care, however, must be taken not to repeat the mistakes of earlier efforts to reform the coordination rules. Past proposals have, for instance, failed to exempt true issue advocacy groups, which often communicate with a candidate for public office (particularly in the context of lobbying) in advance of identifying them in issue advocacy material.¹²

Appropriate regulations should also consider the practical difficulty in distinguishing between “functionally equivalent” issue advocacy (that is, advocacy that could be construed as supporting or opposing the election of a candidate without using express terms of support or opposition) and legitimate issue advocacy (communications urging a candidate to take a position on a particular issue, or that praise or criticize a candidate for past positions). Revised coordination rules should

⁷ 11 C.F.R. § 109.21(h)(1) (2013).

⁸ See 11 C.F.R. § 109.20(b) (2013) (requiring reporting as in-kind contribution *any* coordinated expenditure that is not made for a coordinated communication).

⁹ See Michael W. Macleod-Ball, *One Key to Campaign Finance Reform?*, ACLU.org, June 21, 2012, <http://www.aclu.org/blog/free-speech/one-key-campaign-finance-reform>.

¹⁰ *Citizens United v. Fed. Elections Comm’n*, 130 S. Ct. 876, 909-10 (2010).

¹¹ Direct fundraising appeals by a candidate to an IEC skirt much closer to the “hallmark of corruption” cited in *Citizens United*—namely, “dollars for political favors.” *Id.* at 910 (quoting *Fed. Elections Comm’n v. Nat’l Conservative Political Comm.*, 470 U.S. 480, 497 (1985) [hereinafter “NCPAC”]). When a candidate appears at an IEC event, promotes the IEC, increases the fundraising prowess of the IEC and is consequently and directly rewarded by independent expenditures expressly promoting the candidate, logic suggests that the danger of quid pro quo corruption—that the candidate will “take notice of and reward those responsible for PAC expenditures by giving official favors to the [PAC contributors] in exchange for the supporting messages”—is amplified. *NCPAC*, 470 U.S. at 498.

¹² See Letter from Laura W. Murphy & Joel M. Gora to the Senate in Opposition to the McCain-Feingold Bipartisan Campaign Reform Act of 2001, § II (Mar. 20, 2001), available at <http://www.aclu.org/free-speech/letter-senate-opposition-mccain-feingold-bipartisan-campaign-finance-reform-act-2001>.

draw clear lines between issue and express advocacy to prevent the chilling of legitimate issue advocacy.

3. Provide Adequate Resources for and Mandate Timely § 501(c) Determinations

Finally, we also urge Congress to directly address the concerns of many that structural problems at the Internal Revenue Service—including lack of funding and incentives—may have allowed organizations claiming tax exemption to skirt rules designed to limit express political advocacy by such organizations.¹³ Congress has the power and ability to provide appropriate resources and direction to the Tax Exempt and Government Entities Division of the IRS, and to mandate that determinations be made in a timely fashion. Congress may also appropriately tailor the timing requirements for tax filings by organizations claiming exemption to provide for appropriate determinations in advance of federal elections. This would address the concern with both backlog and the related problem that organizations are able to operate as tax exempt groups for a significant amount of time before their applications are considered.


Importantly, we do not offer a view on the propriety of the “primary purpose” test, and we urge Congress and the IRS to continue to exempt true issue advocacy from the sweep of “political activit[y]” as that term is interpreted under 26 C.F.R. § 1.501(c)(4)-1 (2013).

4. Conclusion

There is much that can be done within the bounds of the Constitution to address the understandable concerns of many about the influence of large aggregations of wealth on the political system. We present a few of these options above, and we urge Congress and federal law enforcement to focus on these achievable and effective measures before, as some advocate, restricting political speech. Targeting straw donations, perfecting the anti-coordination rules and addressing the serious tax-exempt backlog at the IRS would all leave the Constitution unharmed while doing much to improve the integrity of our elections and our government.

Please do not hesitate to contact Gabe Rottman, legislative counsel/policy advisor, at 202-675-2325 or grottman@dcaclu.org with any questions.

Sincerely,



Laura W. Murphy
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¹³ See Dan Berman & Kenneth T. Vogel, *Crossroads GPS Said Elections Wouldn't Be 'Primary Purpose'*, Politico, Dec. 14, 2012; Kenneth P. Vogel & Tarini Parti, *The IRS's 'Feeble' Grip on Big Political Cash*, Politico, Oct. 15, 2012; T.W. Farnam & Dan Eggen, *Lax Internal Revenue Service Rules Help Groups Shield Campaign Donor Identities*, Wash. Post., Mar. 9, 2011; Michael Luo & Stephanie Strom, *Donor Names Remain Secret as Rules Shift*, N.Y. Times, Sept. 20, 2010, at A1.



Gabriel Rottman
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cc: Members of the Senate Judiciary Subcommittee on Crime and Terrorism