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Litigation Backgrounder

Independence Institute v. Gessler and *Independence Institute v. FEC*

The Issue in Brief

The end of the Congressional session is fast approaching, and a nonpartisan group wants to run advertisements urging people to contact their senators to support a bill reforming federal sentencing rules. But if the group runs the ads now, before Congress adjourns, a campaign finance law would force the group to disclose the donors who want to finance the ads. The donors value their privacy and refuse to make such donations.

Instead of advocacy on an important public issue, there will be silence. Citizens won't know about the legislation, and, as a result, will not contact their representatives before Congress adjourns. The bill will have less chance of passing.

Campaign finance laws have long provided for the disclosure of those who contribute to candidate campaigns or make expenditures urging voters to vote for or against a candidate. However, the First Amendment–through a long line of U.S. Supreme Court cases—protects speech about public issues, including the privacy of speakers and those who finance that issue speech. The reason for the different treatment is clear. Voters have a right to know who funds the campaigns of public officials, in order to monitor those officials and their performance. But the government does not have a need or a right to force citizens to generally inform the government about their views and their contacts with other citizens.

Donors and speakers have many reasons to protect their privacy. Some fear retaliation from government officials who disagree with them. Others fear physical harm or threats to themselves and their families, vandalism to their property, loss of jobs, or boycotts of their business if they support unpopular positions. Some just value their privacy, or don't want their contributions to spur numerous requests for their assistance from other groups discussing other issues. Nonetheless, Colorado and federal law transform issue speech into campaign speech whenever a candidate for office is mentioned within two months of the general election. As a result, many groups choose silence over advocacy.

Not only do such regulations cause donors to refuse to finance the speech, but these regulations impose substantial paperwork burdens on nonpartisan public policy groups that do not seek to influence upcoming elections.

The Independence Institute—a well-established Colorado think tank—wishes to run two advertisements discussing issues of public policy. Neither ad will advocate the election or defeat

of candidates, or even mention the upcoming elections. Yet, in order to do so, it will be required to file reports with state and federal authorities providing personal information about its donors.

The Independence Institute brings two cases. *Independence Institute v. Gessler* challenges the Colorado regulation. *Independence Institute v. FEC* challenges the similar federal regulation. Unlike past challenges to such overzealous disclosure rules, these cases present a §501(c)(3) nonprofit organization—barred by law from electoral advocacy—seeking to run advertisements that genuinely and unambiguously advocate for policy choices and not electoral outcomes.

The Independence Institute's Proposed Communications

The first advertisement the Independent Institute seeks to run asks citizens to contact Colorado Governor John Hickenlooper and urge him to initiate an audit of the Colorado Health Benefit Exchange to be sure the substantial state money involved is spent properly. But because of Colorado Constitution Article XXVIII and the Fair Campaign Practices Act, the Independence Institute fears it must disclose its donors as a condition of discussing such an audit. To protect its donors, the think tank asked the U.S. District Court of the District of Colorado to declare that the First Amendment forbids the state from regulating its ad.

The Independence Institute also seeks to run a radio ad asking Colorado Senators Mark Udall and Michael Bennett to support the Justice Safety Valve Act, a federal sentencing reform bill. Because of the Bipartisan Campaign Reform Act (aka "BCRA" or "McCain-Feingold"), the Independence Institute would have to disclose its donors as a condition of running such an ad, even though the advertisement focuses purely on the public policy question, and not on Senator Udall's reelection campaign. Accordingly, the Institute filed its lawsuit in the United States District Court for the District of Columbia, requesting an order protecting the think tank's right to speak without fear of violating its donors' privacy.

The Federal and State "Electioneering Communications" Regimes

With the passage of BCRA nationally and Article XXVIII in Colorado, the campaign finance laws created a new category of communications called "electioneering communications." Under these new laws, the mere mention of or reference to a candidate can trigger burdensome regulation and disclosure. But these laws overlook the obvious: candidates are sometimes incumbent officeholders. So asking a senator or governor to take official action on a bill or concerning a state agency may trigger the electioneering communications regulation—even though the advertisement is not supporting or opposing the candidate in any way.

Once triggered, Colorado law will demand that the Independence Institute turn over the name, address, occupation, and employer of anyone who gave as little as $250 for the advertisement. Likewise, federal campaign law demands the name and address of anyone who gave $1,000 for the advertisement. This compelled disclosure is itself a serious First Amendment harm to the donors of the organization that cannot later be remedied—once donor lists hit the Internet, they will remain public forever.

Supreme Court Precedent

Both cases center on the freedom of association, a right protected by the First Amendment. During the civil rights era, the United States Supreme Court handed down multiple decisions defending the rights of nonprofit groups, such as the NAACP, to speak about public policy without being forced to disclose donor and membership lists. These cases, the best known of which is *NAACP v. Alabama*,[1] clarified that governments could not violate nonprofit groups' privacy without a compelling justification.

Later cases, such as the foundational campaign finance case of *Buckley v. Valeo*,[2] permitted the government to mandate disclosure *only* when a group makes expenditures that expressly advocate a particular election result. In this way, the *Buckley* Court differentiated between candidate advocacy (supporting or opposing candidates) and issue advocacy (discussing public policy issues like the environment or health insurance coverage). The test became whether the communication was "express advocacy"—containing such words such as "vote for," "support," "vote against," "defeat," and "reject."

Subsequent Supreme Court cases applied this standard more broadly to advertisements that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"; but did not stray from the principal holding of *Buckley*: disclosure may only be constitutionally obtained when a group advocates election results. Merely mentioning a candidate, or discussing a public policy question, may not trigger an invasion of associational liberties. Indeed, in 1975, the U.S. Court of Appeals for the D.C. Circuit struck down a federal law which sought to do precisely that, to force disclosure on groups which discussed candidate voting records without advocating electoral outcomes.[3] That holding remains the law to this day.

The Independence Institute's fears are not conjectural. Ideological opponents of the Institute have in the past abused Colorado's campaign finance disclosure system, demanding the organization disclose its donors. Thankfully, a Colorado Administrative Law Judge agreed with the think tank that it need not register and report its donors.

Consequently, the Independence Institute seeks the protections of a federal court order before speaking. Because the general election—and consequently, the electioneering communications window—is quickly approaching, the Independence Institute also seeks a preliminary injunctions to allow it to speak before its opportunity to do so is lost.

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[1] 357 U.S. 449 (1958).
[2] 424 U.S. 1 (1976).
[3] *Buckley v. Valeo*, 519 F.2d 821, 870-878 (D.C. Cir. 1975) (*en banc*).