79-3014

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

FEDERAL ELECTION COMMISSION,

Plaintiff,

vs.

CENTRAL LONG ISLAND TAX REFORM IMMEDIATELY COMMITTEE, EDWARD COZZETTE and TAX REFORM IMMEDIATELY,

Defendants and Defendant-Counterclaimant,

and

JOHN W. ROBBINS,

Intervenor.

On Certification from the United States District Court for the Eastern District of New York

BRIEF FOR DEFENDANT-COUNTERCLAIMANT TAX REFORM IMMEDIATELY AND INTERVENOR JOHN W. ROBBINS

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Statement of Constitutional Issues

As certified by District Judge George C. Pratt, the constitutional questions are:

1. Is 2 U.S.C. §434(e) unconstitutional on its face as a vague, overbroad infringement of defendants' and intervenor's First and Fifth Amendment rights?

2. Is 2 U.S.C. §441d unconstitutional on its face as a vague, overbroad infringement of defendants' and intervenor's First and Fifth Amendment rights?

3. If applied to CLITRIM's distribution of the TRIM bulletin in issue here, does §434(e) infringe defendants' First Amendment rights?

4. If applied to CLITRIM's distribution of the TRIM bulletin in issue here, does §441d infringe defendants' First Amendment rights?

5. Does the FEC regulation, 11 C.F.R. §109.1(b)(2), which interprets the statutory term "expressly advocate" to include CLITRIM's activities here and similar activities of other TRIM committees, infringe defendants' and intervenor's First Amendment rights?

6. Are the enforcement attempts by the FEC unconstitutional:

(a) In this instance, because the FEC has applied its regulation to conduct that was completed before the effective date of the regulation?

(b) In this instance, because the FEC has commenced this enforcement proceeding against TRIM without making any effort at conciliation?

(c) Generally, because there are inadequate statutory standards to guide or limit the FEC in commencing an

investigation whose effect may be to chill defendants' and intervenor's First Amendment rights?

Judge Pratt, by his order dated September 10, 1979 (Da180), has agreed that this Court may consider questions properly raised, even though not included in his Certification. The constitutional questions presented by the record, stated in greater detail, are as follows:

1. Is Section 434(e) of The Federal Election Campaign Act of 1971 as amended, 2 U.S.C. §431, *et seq.* (the "Act") unconstitutionally vague and overbroad on its face?

2. Is Section 434(e) of the Act unconstitutionally vague and overbroad on its face even if interpreted so as to apply only to communications containing "express words of advocacy of election or defeat," as suggested in *Buckley* v. *Valeo,* 424 U.S. 1 at 44, fn. 52 (hereinafter the "Buckley List")?

3. Is Section 434(e) of the Act unconstitutionally vague and overbroad as interpreted by the Regulations issued by the Federal Election Commission ("FEC") (the "Regulations") so as to apply to communications "containing a message advocating election or defeat" whether or not the communications include express words of advocacy such as appear in the Buckley List? (See 11 C.F.R. §109.1(b)(2).)

4. Is Section 434(e) of the Act unconstitutionally vague and overbroad as applied to communications by organizations which (a) regularly engage in issue-oriented information dissemination, (b) are not related to any "political party", "political committee" or "candidate" (as those terms are defined in the Act), (c) serve primarily the educational interests of their respective constituencies and (d) are identified in their publications? (Hereinafter organizations so described will be referred to as "Non-political Organizations".)

5. If the dissemination of the John Birch Society's ("JBS") publications (including the TRIM Bulletins) can be construed as "expressly advocating the election or defeat of a clearly identified candidate" as used in §§434(e)(1) and 441d absent the use of words such as appear in the Buckley List, are not (a) said Sections, and (b) the Regulations thereunder (11 C.F.R. §100.1 et seq.) unconstitutionally vague and overbroad?

6. If (a) the JBS publications (including the TRIM Bulletins) are not within the exemption accorded by 2 U.S.C. §431(f)(4) to "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication . . ." and if (b) the JBS publications (including the TRIM Bulletins) are not within the exemption accorded by 11 C.F.R. §100.7(b)(3) to "Any news story, commentary, or editorial of any broadcasting station, newspaper, magazine or other publication . . .", is it a violation of the Due Process Clause of the Fifth Amendment to the United States Constitution to accord such exemptions to some publications but not also to the JBS publications (including the TRIM Bulletins)?

7. Is it a violation of the Due Process Clause of the Fifth Amendment to the United States Constitution to accord the exemption of §431(f)(4) of the Act and §100.7(b)(3) of the Regulations to some but not to all publications so long as the publications in question are those of a Non-political Organization as defined in 4 above?

8. Are (a) the disclosure requirements of Section 434(e) of the Act and (b) the notice requirements of Section 441d of the Act an unconstitutional burden upon the rights of (1) free speech, (2) free press, (3) privacy and (4) association even if the communications in question contain words of express advocacy such as appear in the Buckley List in the case of communications by Non-political Organizations as defined in 4 above?

9. Are (a) the disclosure requirements and (b) the notice requirements referred to in 8 above an unconstitutional burden upon the rights enumerated in 8 above even if the communications in question contain words of express advocacy such as appear in the Buckley List in the case of communications by organizations which can demonstrate that such requirements are in fact a substantial deterrent to the exercise of such rights?

10. Are (a) the disclosure requirements and (b) the notice requirements referred to in 8 above an unconstitutional burden upon the rights enumerated in 8 above even if the communications in question contain words of express advocacy such as appear in the Buckley List as to communications of the JBS (including the TRIM Bulletins) in each of the following cases:

(1) on the facts of record respecting the nature of JBS and its publications as issue-oriented, educational, not politically related and clearly identified?

(2) on the facts of record respecting the showing of deterrence to the exercise of such rights?

(3) on the facts of record as to both (1) and (2) above?

11. Does the FEC action in (a) seeking to enforce its Regulations which defined "expressly advocating" more broadly than did the Act as interpreted in *Buckley* v. *Valeo,* and (b) seeking to apply its theory that extrinsic factors are relevant to whether express advocacy has occurred, constitute an unconstitutional prior restraint on the exercise of the rights enumerated in 8 above?

12. Does the attempt of the FEC to seek penalties for acts which occurred in 1976 in alleged violation of its Regulations which did not become effective until April 13,

1977, constitute a violation of Article 1, Section 9, Paragraph 3 of the United States Constitution which prohibits ex post facto laws?

13. Are the provisions of Section 437g(a) unconstitutionally vague on their face in defining standards for initiating an investigation and suit for enforcement?

14. In light of the facts of record, are the provisions of Section 437g(a) unconstitutionally vague in defining standards for initiating an investigation and suit for enforcement?

15. On the facts of record where the FEC proceeded under 2 U.S.C. §437g(a) to find "reason to believe," "reasonable cause to believe" and "probable cause to believe" that a violation of Sections 434(e) and/or 441d had occurred and proceeded with an investigation and the institution of suit and has proceeded with other similar investigations, does such action by the FEC operate as an impermissible prior restraint upon and unconstitutionally restrict the exercise of the First Amendment rights of freedom of speech, freedom of the press and freedom of association?

16. Where the FEC is authorized to initiate an investigation and threatens to or in fact institutes suit alleging a violation of provisions of the Act based upon communications by a Non-political Organization as defined in 4 above, does the grant of such authority to the FEC operate as an impermissible prior restraint upon and unconstitutionally restrict the exercise of the First Amendment rights of freedom of speech, freedom of the press and freedom of association?

-17. Where the FEC is required by statute to "make every endeavor for a period of not less than 30 days to correct or prevent such violation by informal methods of

conference, conciliation, and persuasion" [2 U.S.C. §437g (a)(5)(A)] as a condition precedent to instituting a civil action for relief, does not the institution of such actions on the facts of record operate as an impermissible prior restraint upon and unconstitutionally restrict the exercise of the First Amendment rights of freedom of speech, freedom of the press and freedom of association?

Statement of Facts

This is a civil enforcement action brought in the United States District Court for the Eastern District of New York by the Federal Election Commission ("the FEC") against Edward Cozzette, the Central Long Island Tax Reform Immediately Committee (hereinafter "Cozzette" and "CLITRIM"), and Tax Reform Immediately (hereinafter "TRIM") of Belmont, Massachusetts. The FEC's complaint (Da3)* alleges violations of certain reporting, disclosure and identification requirements of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. Section 431, *et seq.* ("the Act"), seeks findings to that effect and requests injunctive relief against the defendants. TRIM has counterclaimed for declaratory relief (Da19). Intervenor John W. Robbins has filed a claim (Da36) seeking similar declaratory relief, to the effect that the Act is unconstitutional on its face, and as applied.

Upon ruling that the Intervenor's claim triggered the certification procedure of Section 437h of the Act, the Court of Appeals for the Second Circuit, by order dated April 23, 1979 (Da26), as amended by a modifying order dated May 2, 1979 (Da27), directed the District Court to

> "(1) Identify constitutional and fact issues raised in this case.

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* References to TRIM's appendix will be to "Da1" et seq.

(2) Direct the entrance of stipulations and take whatever evidence the court finds necessary to a decision of those issues.

(3) Make findings of fact.

(4) Certify to this court, as soon as reasonably possible, the record and constitutional questions arising therefrom. See *Buckley* v. *Valeo,* 519 F.2d 817, 818 (D.C. Cir. 1975); *Bread Political Action Committee, supra,* at 12. The conduct of the hearing is left to the discretion of the District Court. We do not imply that he need hold a full-scale trial."

District Judge George C. Pratt, (hereinafter "Judge Pratt") under date of August 22, 1979, prepared a Certification to the United States Court of Appeals for the Second Circuit (Da98 *et seq.*), which included his findings of fact (the "Findings").

As reflected in the Findings, TRIM, a committee established by the John Birch Society ("JBS") researches and prepares "camera ready" copy for a quarterly publication known as the TRIM Bulletin. CLITRIM, now disbanded, was formerly a local committee of TRIM organized by Cozzette and several of his friends in Central Long Island. Cozzette and CLITRIM, during the Fall of 1976, published one issue of the TRIM Bulletin using camera ready copy prepared by TRIM (Da116).

The Findings show further, that JBS has been engaged in issue-oriented information dissemination since its formation in 1958, is not related to any political party, committee or candidate, and primarily serves the educational (as distinguished from the financial) interests of its constituency (Da111-112); that JBS has a history of vilification in the press, and has been erroneously linked with the Nazi party, the Ku Klux Klan and other subversive, fascist, un-American or anti-Semitic organiza-

tions, that membership in, or association with JBS is controversial and has subjected members to harassment, humiliation and even physical violence; that many persons fear to identify themselves with JBS and will contribute only if they can do so anonymously; and that JBS derives its financial support from membership dues and voluntary contributions and would experience a significant drop in support if it were required, contrary to its policy, to disclose its members or contributors (Da112-113).

TRIM and Intervenor John W. Robbins have asked for declaratory relief putting in issue the constitutional questions raised by the Act as it relates to the activities of TRIM. The urgency of the need for declaratory relief is underscored by Judge Pratt's finding that there are five pending proceedings against other local TRIM committees (one actually in the courts) and fifteen other local committees whose publications are in the FEC files. Judge Pratt also found that TRIM, like JBS, is an issue-oriented nonpartisan group dependent on public support for its continued existence (Da113), and that the enforcement of the Act against TRIM would discourage contributions and cause members to fall away and terminate active participation (Da179).

A fuller statement of the evidence adduced at trial and the effect of the FEC's actions on TRIM's activities is set forth in the Fact Brief appearing at Da45 *et seq.*

TRIM and Intervenor Robbins seek declaratory judgment. Accordingly, this Court should not limit its inquiry to the CLITRIM matter, but, as contemplated by §437h of the Act, should consider the broader question raised by TRIM and Robbins: may issue-oriented groups, unrelated to any political party, committee or candidate, clearly identified in their publications, and primarily devoted to educational ends, constitutionally be subjected to the Act at all?

POINT ONE

Sections 434(e) and 441d of the Act are unconstitutional on their face as vague, overbroad infringements of TRIM's and Intervenor's First and Fifth Amendment rights.

The Supreme Court opinion in *Buckley* v. *Valeo,* 424 U.S. 1, 96 S.Ct. 612 (1976), construing a prior version of the Act, reworked definitions applicable to Sections 608(e)1, 434(e) and 441d in an effort to avoid constitutional infirmity. The result was to make these sections applicable only to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." (424 U.S. at 44; 96 S.Ct. at 646-647). To clarify what it meant by "express terms", the Supreme Court added footnote 52, as follows:

> "This construction would restrict the application of §608(e)(1) to communications containing *express words of advocacy* of election or defeat, such as 'vote for', 'elect', 'support', 'cast your ballot for', 'Smith for Congress', 'vote against', 'defeat', 'reject.'" (424 U.S. 1, 44; 96 S.Ct. 612, 647) (Emphasis added.)*

The words appearing in footnote 52, above, make up what the Findings refer to as "the Buckley List". Judge Pratt found as a fact that neither the TRIM Bulletin in issue, nor any other TRIM Bulletins used words like those in the Buckley List (Da122-123).

Judge Pratt also stated, in advisory fashion, that the TRIM Bulletin did not "expressly advocate" the election or defeat of Congressman Ambro within the meaning of the Act (Da106-107). Defendants CLITRIM and Coz-

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* The Supreme Court held that former §608(e)(1), as so limited, was still unconstitutional, since it served no valid governmental interest to counterbalance its patent intrusion upon First Amendment rights.

zette have argued, and TRIM and Robbins concur, that the present Act was never intended to apply to publications like the TRIM Bulletin. On behalf of TRIM and Robbins, we will not discuss the statutory construction arguments of CLITRIM and Cozzette which we anticipate will be briefed by their counsel, but we shall adopt them by this reference. The following argument is directed to the declaratory judgment relief requested. Only if the relief so sought is granted can public issues be discussed in the context of voting records free from fear that the heavy hand of the FEC's enforcement procedure will be felt.

(a) If Sections 434(e) and 441d were intended to apply to communications using language which falls short of the express terms of advocacy or defeat such as those in the Buckley List, then they are unconstitutionally vague and overbroad.

A consideration of the constitutional validity of the Sections of the Act at issue in ths case (434(e) and 441d) requires a brief review of the judicial treatment given reporting requirements in prior versions of the Act.

In *United States* v. *National Committee for Impeachment,* 469 F.2d 1135 (2d Cir. 1972) and *American Civil Liberties Union, Inc.* v. *Jennings,* 366 F.Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom. Staats* v. *A.C.L.U.,* 422 U.S. 1030, 95 S.Ct. 2646 (1975), the courts were faced with publications containing "honor rolls" of Congressmen who had signed a resolution to impeach President Nixon (*National Committee*) or who had opposed President's Nixon's anti-busing policies (*A.C.L.U.* v. *Jennings*). In both cases, the courts (including this Court) avoided the Constitutional questions by construing the Act (in its prior version) not to apply to the publication of voting records.

Congress then amended the Act (in former §437a) to apply to publications designed to influence the outcome of an election by "setting forth the candidate's position on any public issue, his voting record, or other official acts. . . ."

As so amended, the Act clearly applied to "honor rolls" of persons supporting issues, but might also have reached practically any message mentioning a candidate by name, disclosing his voting record or impliedly recommending his election or defeat. For this very reason, the Court of Appeals held this section unconstitutional in *Buckley* v. *Valeo,* 519 F.2d 821, 874-875 (D.C. Cir. 1975).

> "The principles charting our course are well settled. "Vague laws in any area suffer a constitutional infirmity," *Ashton* v. *Kentucky,* 384 U.S. 195, 200, 86 S. Ct. 1407, 1410, 16 L.Ed.2d 469 (1966) (footnote omitted), and commonly in the First Amendment area doubly so. There, perhaps more than elsewhere, statutory vagueness and statutory overbreadth are constitutional vices often related and sometimes functionally inseparable. See, e.g., *NAACP* v. *Button,* 371 U.S. 415, 423-433, 83 S. Ct. 328, 9 L. Ed.2d 405 (1963). For "where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms' it 'operates to inhibit the exercise of [those] freedoms,'" *Grayned* v. *City of Rockford,* 408 U.S. 104, 109, 92 S. Ct. 2294, 2299, 33 L. Ed.2d 222 (1972), quoting in turn *Baggett* v. *Bullitt,* 377 U.S. 360, 372, 84 S. Ct. 1316, 12 L. Ed 2d 377 (1964) and *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 287, 82 S. Ct. 275, 7 L. Ed. 2d 285 (1961); and "[u]ncertain meanings inevitably lead citizens to '"steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden area were clearly marked.'" *Grayned* v. *City of Rockford, supra,* 408 U.S. at 109, 92 S. Ct. at 2299, quoting *Baggett* v. *Bullitt, supra,* 377 U.S.

at 372, 84 S. Ct. 1316, in turn quoting *Speiser* v. *Randall,* 357 U.S. 513, 526, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958) (footnote omitted). See also *Gooding* v. *Wilson,* 405 U.S. 518, 521, 92 S. Ct. 1103, 31 L. Ed.2d 408 (1972); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 604, 87 S. Ct. 675, 17 L. Ed.2d 629 (1967); *Speiser* v. *Randall, supra,* 357 U.S. at 526, 78 S. Ct. 1332; *NAACP* v. *Button, supra,* 371 U.S. at 433, 83 S. Ct. 328. "The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform [citizens of] what is being proscribed." *Keyishian* v. *Board of Regents, supra,* 385 U.S. at 604, 87 S. Ct. at 684.

Consequently, "standards of permissible statutory vagueness are strict in the area of free expression." *NAACP* v. *Button, supra,* 371 U.S. at 432, 83 S. Ct. at 337. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity," *id.* at 433, 83 S. Ct. at 339; "[p]recision of regulation must be the touchstone in [that] area. . . ." *Id.* at 438, 83 S. Ct. at 340. See also *Keyishian* v. *Board of Regents, supra,* 385 U.S. at 603-604, 87 S. Ct. 675: "[T]he statute must be carefully drawn or be authoritatively construed to [proscribe] only unprotected speech and not be susceptible of application to protected expression." *Gooding* v. *Wilson, supra,* 405 U.S. at 522, 92 S. Ct. at 1106; *Cantwell* v. *Connecticut,* 310 U.S. 296, 304, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). "When First Amendment rights are involved," a court must "look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton* v. *Kentucky, supra,* 384 U.S. at 200, 86 S. Ct. at 1410 (footnote omitted).

Section 437a, with a "purpose of influencing" and a "design[] to influence" as criteria undertaking to partially shape its operation, does not meet the governing standards. These criteria do not mark boundaries between affected and unaffected conduct "with narrow specificity"; they do not "clearly inform . . . [of] what is being proscribed." Rather, they leave the disclosure requirement open to application for protected exercises of speech, and to deterrence of expression deemed close to the line. *Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct.* Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections. In this milieu, where do "purpose" and "design[]" "to influence" draw the line? Do they connote subjectively a state of mind, or objectively only a propensity to influence? Do they require, irrespective of state of mind, a capability of influencing, and if so how substantial a capability? What do they demand with respect to materials which "advocat[e] the election or defeat of [a] candidate," or which "set[] forth the candidate's position on [a] public issue" or "his voting record," beyond the inherent tendency of those materials to influence? What references to "other official acts" of the candidate, with what mental element, bring the section into play? To these questions, among a multitude of others, neither the text nor the legislative history of section 437a supplies any clear answer. And while we have continued our struggle for an interpretation of section 437a which might bypass its vagueness and overbreadth difficulties, we have been unable to do so."

* * *

The concurring opinion by Judge Tamm added:

> "I can hardly imagine a more sweeping abridgement of first amendment associational rights. Section 437a creates a situation whereby a group contributes to the political dialog in this country only at the severest cost to their associational liberties. I can conceive of no governmental interest that requires such sweeping disclosure of all groups who take a stand on a public issue or report voting records, even only to its own membership. This is a far harsher statute than the one condemned in *ACLU* v. *Jennings,* 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot,* sub nom. *Staats* v. *ACLU,* —— U.S. ——, 95 S. Ct. 2646, 45 L. Ed.2d 686 (1975). It represents a greater intrusion than any found in the line of cases commencing with *NAACP* v. *Alabama,* 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed.2d 1488 (1958)." (519 F.2d 821, 914)

Although the *Buckley* decision was otherwise appealed, the constitutionality of Section 437a was not further defended, as noted in footnote 7, *Buckley* v. *Valeo,* 424 U.S. 1, 10, 96 S. Ct. 612, 630 (1976):

> "7. The court held one provision, § 437a, unconstitutionally vague and overbroad on the ground that the provision is "'susceptible to a reading necessitating reporting by groups whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance.'" 171 U.S. App. D.C., at 183, 519 F.2d, at 832. No appeal has been taken from that holding."*

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* It should be noted that Judge Pratt made express findings that JBS (which publishes the TRIM Bulletins as well as other publications) has for more than 20 years been involved in issue-oriented

(Footnote continued on following page)

In addition to considering the section of the prior Act that expressly regulated the publication of voting records (which was held unconstitutional and not appealed) the *Buckley* courts considered other sections involving political contributions and expenditures. The Circuit Court and the Supreme Court were both disturbed by additional problems of vagueness in the Act. In former §608(e)(1), certain limitations were imposed on expenditures "relative to a clearly identified candidate . . . advocating the election or defeat of such candidate . . ." The Supreme Court held that this provision must be limited to "express terms" of advocacy, and set forth the Buckley List (in footnote 52) to clarify what it meant. In former §434(e), the Act also required reporting and disclosure as to "contributions or expenditures," defined as those made "for the purpose of influencing" an election (essentially the same language as in former §437a, which had been held unconstitutionally vague and overbroad).

The Supreme Court recognized the ambiguity and vagueness problems and attempted to cure them by reading §434(e) *in pari materia* with §608(e)(1):

> "To insure that the reach of §434(e) is not impermissibly broad, we construe 'expenditure' for purposes of that section in the same way we construed the terms of §608(e)—to reach only funds

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(Footnote continued from preceding page)
information dissemination, is not related to any political party, committee or candidate, and was incorporated to serve, and does serve, primarily the educational interests of its constituency (Da110-111). Judge Pratt further characterized TRIM's activities as "traditional non-partisan speech where no express advocacy of particular electoral candidates is undertaken [and] which substantially advances the exchange of ideas about social and political issues." (Da178). The full significance of these findings to the constitutional inquiry is developed under Point Two of this brief, but they are noted here in view of the reason given by the D.C. Court of Appeals, and accepted by the Supreme Court, for holding Section 437a facially unconstitutional.

> used for communications that expressly advocate the election or defeat of a clearly identified candidate." (424 U.S. 1, 80, 96 S.Ct. 612, 664)

The phrase "expressly advocate" is again footnoted to footnote 52, the Buckley List. Therefore, although the court's discussion of the vagueness question was initially relative only to §608(e)(1), the same problem was encountered and the same interpretation made relative to §434 (e). Both sections were limited to express advocacy, i.e., publications using words like those in the Buckley List.

The foregoing treatment of the Act in *Buckley* v. *Valeo* settles the issue that the Act is unconstitutionally vague and overbroad if it was meant to reach communications that do not contain express terms of advocacy or defeat. But that does not end the inquiry .

(b) Even if the Act is limited to communications using words like those in the Buckley List, the list is itself undefined and unconstitutionally vague.

The Buckley List is an open-ended list, including words "such as" the given examples. What other words might be included, although not stated, in that list? If you may not say "Vote for Jones," can you say "Jones is a fine fellow" or "Jones has the right idea on housing"?

Mr. Mann testified that even if the standard by which "express advocacy" is to be determined were the use of words "such as" appear in the Buckley List, he would have an editorial problem.

> "I would be constantly concerned and worried about what I was editing, what my people were writing . . . It is a constant worry of trying to ascertain what 'such as' means. I just do not believe you can do that readily without being a little hesitant and

> just worried about what you are saying . . ." (III: 242-21 to 243-10).*

Similarly, Dr. Robbins testified:

> "The list is not complete and I would have to determine as an editor and as a writer what words or what phrases, or what combinations of words could be used as synonyms for those words. I think I have some familiarity with the language, and the list of synonyms that one could come up with, a list of comparable phrases, would be very, very long; and when—one could, in so doing, and so guarding what's written, consume an inordinate amount of time trying to figure out what exactly, which words are permissible and which words are impermissible. It would be very, very difficult to sit down and write a piece about a candidate and not coming into conflict with this undefined list of words." (V:592-11 to 20).

How can one know the scope of Section 434(e) even as limited by *Buckley* footnote 52?

If candidate Jones were sufficiently newsworthy, it might be impossible to discuss public issues without running the risk of violating the Act. For example, *National Committee for Impeachment, supra,* involved a group primarily interested in changing the administration's Vietnam policy; while *Jennings, supra,* involved a group opposed to its busing policy. In both cases, the mention of President Nixon's name was used as a pretext for suggesting that these issue-oriented groups were in effect campaigning against President Nixon in violation of the Act.

The newspaper advertisement in *National Committee for Impeachment, supra,* reproduced at 469 F.2d 1143, was headed:

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* The transcript of the evidentiary hearing conducted before Judge Pratt is cited by volume, page and line.

> "A Resolution to Impeach Richard M. Nixon as President of the United States."

Similarly, in *ACLU* v. *Jennings, supra,* the advertisement reproduced at 366 F. Supp. 1058, listed 102 Congressmen who had opposed President Nixon, and contained the statement: "They deserve your support in their resistance to the Nixon administration's bill."

Is using the phrase "Impeach Richard Nixon" like saying "Reject Nixon?" Would it be advocating Congressman Jones's re-election to say he "deserves your support?" Can one distinguish between "support" for a candidate's position on the issues and "support" for the candidate as a candidate?

Actually, the issue is not so much whether a given formula of words constitutes "express advocacy." The problem is that one must take care that he does not use arguably forbidden language. Each publisher must take care not only that he avoids words that one might suppose are on the Buckley List, but also that he avoids any other words which Federal officials or the courts might reasonably (or even unreasonably) choose to include in that list. The result would be the very opposite of an unfettered interchange of ideas. Rather, publishers would be required to hedge and trim, and to avoid anything sounding like praise or blame. Clearly the governmental interest to be served, whatever it may be, does not warrant the imposition of such restraints upon issue-oriented non-political communications.

In *National Committee for Impeachment, supra,* this Court has refused to extend the Act to cover issue-oriented non-political communications:

> "We dispose more readily of the Government's suggestion that the Act applies to the National Committee because—quoting from the affidavit supporting its motion for a preliminary injunction—'with

respect to the upcoming election for President and Vice-President of the United States, the National Committee derogates President Nixon's stand on a principal campaign issue—the Vietnam war.' On this basis every position on any issue, major or minor, taken by anyone would be a campaign issue and any comment upon it in, say, a newspaper editorial or an advertisement would be subject to proscription unless the registration and disclosure regulations of the Act in question were complied with. Such a result would, we think, be abhorrent; the Government fails to point to a shred of evidence in the legislative history of the Act that would tend to indicate Congress meant to go so far. Any organization would be wary of expressing any viewpoint lest under the Act it be required to register, file reports, disclose its contributors, or the like. On the Government's thesis every little Audubon Society chapter would be a 'political committee,' for 'environment' is an issue in one campaign after another. On this basis, too, a Boy Scout troop advertising for membership to combat 'juvenile delinquency' or a Golden Age Club promoting 'senior citizens' rights' would fall under the Act. The dampening effect on first amendment rights and the potential for arbitrary administrative action that would result from such a situation would be intolerable. The suggestion in the Government's supporting affidavit and on oral argument is inconsistent with what Judge Learned Hand so eloquently described as 'the spirit of liberty' and which he so beautifully defined as 'the spirit of Him who, near two thousand years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest.' L. Hand, The Spirit of Liberty 190 (I. Dilliard ed. 1952). We reject the suggestion for we believe

> Congress had no intention of regulating the expression of opinion on fundamental issues of the day." (469 F.2d 1135, 1142)

Public discussion is stultified if any favorable or unfavorable references to named candidates or actual or supposed synonyms or equivalents of the Buckely List could be pounced upon to trigger the FEC's response. It is practically impossible to discuss public issues without mentioning the people who shape those issues, or without using words that might be deemed synonyms or equivalents for those on the Buckley List. If Senator Kennedy introduces a new public health plan, any discussion of his plan will necessarily produce words which declare or suggest an attitude towards his candidacy. Discussion of the Egyptian-Israeli Peace Treaty and Salt II could similarly be taken as urging a position on the candidacy of President Carter. Political discussion involves naming names and identifying positions on issues. If the Act imposes on private citizens and issue-oriented associations reporting and disclosure requirements as the price of discussing those who make the news, then it is overbroad as well as vague, and should be declared invalid on both counts, the courts having recognized as a matter of law that freedom of expression should not be so burdened.

A determination that the TRIM Bulletins under challenge do not violate the Act is not enough. The Counterclaim for declaratory judgment (Da19) and the Intervenor's claim (Da36) seek a determination that the Act is, among other things, so vague and overbroad that it stifles privileged rights under the First Amendment. Such rights have always been carefully protected.

As the Supreme Court noted in *Buckley* v. *Valeo,* 424 U.S. 1, 14-15; 96 S. Ct. 612, 632-633 (1976):

> "Discussion of public issues and debate on the qualifications of candidates are integral to the op-

eration of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth* v. *United States,* 354 U.S. 476, 484, 77 S. Ct. 1304, 1308, 1 L. Ed.2d 1498 (1957). Although the First Amendment protections are not confined to 'the exposition of ideas,' *Winters* v. *New York,* 333 U.S. 507, 510, 68 S. Ct. 665, 667, 92 L. Ed. 840 (1948), 'there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates. . . .' *Mills* v. *Alabama,* 384 U.S. 214, 218, 86 S. Ct. 1434, 1437, 16 L. Ed.2d 484 (1966). This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270, 84 S. Ct. 710, 721, 11 L. Ed.2d 686 (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272, 91 S. Ct. 621, 625, 28 L. Ed.2d 35 (1971), 'it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'

The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *NAACP* v. *Alabama,* 357 U.S. 449, 460, 78 S. Ct. 1163, 1170,

> 2 L. Ed.2d 1488 (1958), stemmed from the Court's recognition that '[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.' Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee 'freedom to associate with others for the common advancement of political beliefs and ideas,' a freedom that encompasses '[t]he right to associate with the political party of one's choice.'" *Kusper* v. *Pontikes,* 414 U.S. 51, 56, 57, 94 S. Ct. 303, 307, 38 L. Ed.2d 260 (1973), quoted in *Cousins* v. *Wigoda,* 419 U.S. 477, 487, 95 S. Ct. 541, 547, 42 L. Ed.2d 595 (1975).

In concurring with the Court of Appeals that provisions of the Act had to be narrowed to avoid unconstitutional vagueness, the Supreme Court said:

> ". . . [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest. In an analogous context, this Court in *Thomas* v. *Collins,* 323 U.S. 516, 65 S. Ct. 315, 89 L.Ed.2d 430 (1945), observed:
>
> > "[W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general

> advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.*
>
> "Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." Id., at 535, 65 S. Ct., at 325.
>
> See also *United States* v. *Auto Workers,* 252 U.S. 567, 595-596, 77 S. Ct. 529, 543-544, 1 L. Ed.2d 563 (1957) (Douglas, J., dissenting); *Gitlow* v. *New York,* 268 U.S. 652, 673, 45 S. Ct. 625, 632, 69 L. Ed. 1138 (1925) (Holmes, J., dissenting)." (424 U.S. 42-43, 96 S. Ct. 646)

So too, in the present case, the speaker and writer should not have to do a sword dance around forbidden meanings *or* words. If *express* advocacy is unlawful (without filing reports), and the determination whether a message has crossed over the line into advocacy depends, as the FEC contends, upon time, place, or intensity or upon the intent of the speaker and the ear of the hearer, then discussion of public issues is unquestionably stifled. As in *Thomas* v. *Collins,* the FEC is not limiting its attack to certain words of advocacy like "Vote for" or "Elect." It seeks to regulate anything it finds to convey a "message" of advocacy. The FEC's reading of the Act dem-

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* The contention that language deemed to convey a proscribed meaning may be forbidden, though totally rejected by the Supreme Court, is precisely the position taken by the FEC in its Regulations; i.e., that "any communication containing a message advocating election or defeat . . ." is subject to the Act's reporting and disclosure requirements. 11 C.F.R. §109.1(b)(2). See discussion of the Regulations *infra,* Point III.

onstrates that the Act is unenforceably vague and overbroad.

Even if the FEC scrupulously followed the guidelines of *Buckley* footnote 52 and the reasoning of *Collins,* enforcement would turn on the whole possible range of synonyms and equivalents of the footnote list of words and phrases. The vagueness and overbreadth problem would still remain. The principles enunciated in the cases discussed above illustrate why *Buckley* footnote 52 does not and cannot cure Sections 434(e) and 441d of their constitutional infirmity.

(c) If the statutory exemption that permits an undefined class of periodicals to engage in express advocacy does not extend to TRIM, then it is unconstitutionally vague as well as discriminatory.

Yet another constitutional flaw appears in the Act. Under the definitions in §431 an "expenditure" does not include "any news story, commentary or editorial distributed through . . . any . . . magazine or other periodical publication . . ." Although Judge Pratt found that the TRIM Bulletin is published quarterly and contains predominantly commentary and editorial matter (Da110) he would have denied that the TRIM Bulletins were within the exemption (Da107).

We contend, of course, that the exemption *does* include the TRIM Bulletins, but if it does not, as Judge Pratt suggested, then one is faced with the problem of drawing a line between exempt publications and non-exempt publications. On what basis can such a line be drawn? What are the criteria? How is a publisher to know whether his periodical is within the exemption or not? If the exemption does not apply to TRIM, then few publications can be sure of qualifying and most publications are unconstitutionally threatened with regulatory interference.

In addition to the vagueness problem, there is a concomitant equal protection problem. Since some publications are statutorily exempt from the Act, not only is it necessary to draw a clear line between exempt and non-exempt periodicals, but it is also necessary to discern a constitutionally valid reason for making such a distinction.

In the Court of Appeals decision in *Buckley* the prior act had attempted a discrimination on the basis of whether a publication was "bona fide", i.e., whether it was sold at newsstands or by subscription and not distributed by persons who devote a substantial part of their time to influencing elections or influencing public opinion. The Court noted in a footnote that even great newspapers would not then come within the exemption, since they regularly, and rightly, attempt to influence elections and public opinion. 519 F.2d at 872.

The Court is undoubtedly aware that many, perhaps most, newspapers and periodicals have traditionally published their recommendations for all general elections. In other words, the New York Times is permitted to recommend the election of Candidate Jones, even in express words of advocacy, without filing anything with the FEC. Why cannot TRIM do the same?

If the Act permits such a distinction to be made, and grants unburdened speech only to a selected class of publications, then it has made an unconstitutional classification contrary to the First and Fifth Amendments.

POINT TWO

Sections 434(e) and 441d of the Act are unconstitutional as applied to these defendants on the facts of this case.

Apart from the question whether the challenged sections of the Act are unconstitutional on their face, the further question arises whether those sections are unconstitutional *as applied* to these defendants on the facts of this case.

In a long line of decisions, the Supreme Court has struck down attempts by the several states to obtain the membership rolls or contribution lists of controversial organizations like the N.A.A.C.P. See for example, *Bates* v. *Little Rock,* 361 U.S. 516, 80 S. Ct. 412 (1960); *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 83 S. Ct. 328 (1963); *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 78 S. Ct. 1163 (1958); *Gibson* v. *Florida Legislative Investigation Comm.,* 372 U.S. 539, 83 S. Ct. 889 (1963) and *Pollard* v. *Roberts,* 283 F. Supp. 248 (E.D. Ark. 1968) *aff'd per curiam,* 393 U.S. 14, 89 S. Ct. 47 (1968). In these cases, the Court considered three main questions: What was the effect upon the citizen's rights, what governmental interest was to be served by infringing those rights, and finally, was the governmental interest vital enough to justify the infringement.

(a) The evidence clearly supports the findings that the Act, as applied to defendants, seriously infringed their First Amendment rights.

TRIM is an arm of The John Birch Society. Anyone who contributes more than $100 to TRIM for use in a particular Congressional district is arguably required to put that fact before the public by filing reports in Washington, which will then be available for copying in his home state capital. By appropriate cross-indexing, any-

one sufficiently curious could readily acquire a list of all TRIM contributors who gave more than $100, thereby subjecting those contributors to potential harassment or economic discrimination.

Judge Pratt made specific findings that the John Birch Society has a history of vilification in the press, and has been attacked as fascist, subversive, anti-Semitic and un-American (Da111). Membership is unpopular and has caused persons who belong to the Society to be harassed, humiliated and even subjected to physicial violence. Many people who are sympathetic to the Society do not want to be identified with it and will not contribute unless their names are kept confidential (Da112-113).

The courts have required only minimal evidence to establish that organization members would be subject to harassment if their associations became known. In *Pollard* v. *Roberts, supra,* the court took judicial notice that the Republican Party in Arkansas was a minority party and supported unpopular positions. Therefore, it could prevent the release of bank records containing the names of its contributors.

In *Buckley* v. *Valeo,* 424 U.S. 1, 96 S. Ct. 612 (1976), the Supreme Court recognized that the Act's reporting requirements might indeed raise constitutional questions with respect to minority parties or unpopular causes, and, although on the record before it, the Court refused to grant a blanket exemption, it encouraged courts to be "sensitive" to showings in "future cases" of the likelihood of chill and harassment. This is precisely the kind of case so anticipated.

> "We are not unmindful that the damage done by disclosure to the associational interests of the minor parties and their members and to supporters of independents could be significant. These movements are less likely to have a sound financial base and thus are more vulnerable to falloffs in contribu-

tions. In some instances fears of reprisal may deter contributions to the point where the movement cannot survive. The public interest also suffers if that result comes to pass, for there is a consequent reduction in the free circulation of ideas both within and without the political arena.

There could well be a case, similar to those before the Court in *NAACP* v. *Alabama* and *Bates*, where the threat to the exercise of First Amendment rights is so serious and the state interest furtherered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied.

* * *

We recognize that unduly strict requirements of proof could impose a heavy burden, but it does not follow that a blanket exemption for minor parties is necessary. *Minor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim. The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties. The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself.* A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views.

Where it exists the type of chill and harassment identified in *NAACP* v. *Alabama* can be shown. We cannot assume that courts will be insensitive to similar showings when made in future cases. We

> therefore conclude that a blanket exemption is not required." (424 U.S. 1, 71-74, 96 S. Ct. 612, 659-661) (Emphasis added.)

The "reasonable probability" test enunciated by the Supreme Court in the language emphasized above, when applied to the factual findings in this case, shows that the rights of participants in TRIM's activities to free speech and association are seriously threatened, while the governmental interest in disclosure is so insubstantial that the Act cannot constitutionally be applied to TRIM.

The Findings establish that Defendants Cozzette and CLITRIM have been effectively silenced by the FEC's attack. CLITRIM is defunct and nobody plans to revive it. Cozzette never wants to get involved in similar activities again (Da133). Intervenor Robbins has found that prospective TRIM members have been chilled and he himself has restricted his participation in TRIM's activities (Da125).

A fuller statement of the facts adduced at trial is contained in the Fact Brief reproduced at Da45 *et seq.* It more than justifies Judge Pratt's findings that the FEC's imposition of regulatory restrictions significantly impedes and deters the expression of issue-oriented non-partisan speech (Da178). The uncontroverted evidence clearly shows a reasonable probability that compelled disclosure will subject JBS and TRIM members to threats, harassment or reprisals, will discourage contributions, curtail and close down TRIM operations and discourage active participation by present or prospective members (Da179).

It must be taken as proved that the effect of the Act, particularly as applied, has had and will have a chilling effect upon protected First Amendment rights. The FEC offered no evidence whatsoever to show what interest it was seeking to protect by enforcing these provisions of the Act against the defendants.

Even without direct proof that reporting and disclosure may or will result in harassment or reprisals, the very requirement of such reporting and disclosure is, by itself, a serious infringement on First Amendment rights, requiring justification. A voter's political preferences are meant to be kept secret. That is why the voting booth is curtained. No one has a right to know how one's vote is cast, even when it is cast for a majority party candidate. When a voter joins with others to exercise his political rights, and publishes issue-oriented materials, not related to any political party, political committee or candidate, is he then compelled, as the price of exercising those rights, to forego his anonymity?

The importance of anonymity and the honorable role which anonymous publications have played in our political history are well described in *Talley* v. *State of California,* 362 U.S. 60, 80 S.Ct. 536 (1960). That case involved a Los Angeles ordinance prohibiting the distribution of any handbills unless they included the names and addresses of the persons publishing them. The Supreme Court struck down the ordinance, despite the alleged governmental interest in identifying those responsible in case of possible fraud, false advertising or libel.

> "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' *Lovell* v. *City of Griffin,* 303 U.S. at page 452, 58 S.Ct. at page 669.
>
> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press

licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. *Bates* v. *City of Little Rock,* 361 U.S. 516, 80 S.Ct. 412; *N.A.A.C.P.* v. *State of Alabama,* 357 U.S. 449, 462, 78 S.Ct 1163, 1171, 2 L.Ed.2d 1488. The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is subject to

> the same infirmity. We hold that it, like the Griffin, Georgia, ordinance, is void on its face." (362 U.S. 60, 64-65, 80 S.Ct. 536, 538-539)

It should be noted that the ordinance was declared "void on its face", that is, regardless whether the anonymous pamphleteers were able to demonstrate any actual chill or harassment. The handbills in question, it should be further noted, were issue-oriented materials, urging a boycott of products manufactured by persons who did not provide equal employment opportunities for Negroes, Mexicans and Orientals.

The Supreme Court took pains to distinguish *Talley* in its *Buckley* decision. The court in *Buckley* (at 424 U.S. 81, 96 S.Ct. 664) observed that §434(e), required disclosure only with respect to certain publications using express words of advocacy, and was "narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." The court added by footnote that the possibility of chill and harassment would require a still further exemption. In other words issue-oriented materials, as in *Talley,* should not require disclosure at all. Even campaign related materials should not require disclosure if there is any risk of harassment. Only where the materials are campaign-related, using express words of advocacy, *and* there is *no* risk of harassment may disclosure be constitutionally required. These conditions are not met in the case of JBS and TRIM.

This analysis, which would preclude application of Sections 434(e) and 441d to publications of JBS and TRIM, is quite consistent with the holding of the Circuit Court in *Buckley* striking down §437a of the Act which, at that time, required reporting and disclosure by those who set forth a candidate's position on any public issue. Judge Tamm, in language quoted in Point One above, said he could hardly imagine a more sweeping abridgement of

First Amendment rights and could conceive of no governmental interest that could require such disclosure.

Similarly, in Judge Bazelon's concurring and dissenting opinion in that case, he observed that, "One evil of disclosure—the invasion of the privacy of belief—requires no proof," 519 F.2d 821, 909.

Finally, in *National Committee for Impeachment, supra,* in language cited in Point One above, this Court held that it would be "abhorrent" to suggest that persons who take a stand on any public issue would be subject to proscription unless the registration and disclosure regulations of the Act were complied with.

The courts that have considered this issue have clearly recognized the danger in requiring the identification of those who publish issue-oriented materials. *Talley* held that such legislation was void on its face. *Buckley* carefully limited the types of publications as to which reporting and disclosure might be required, and even as to those publications held that some might be exempt if there were a reasonable probability of a chilling effect or harassment.

We have previously noted that, in the area of First Amendment freedoms, any laws or regulations must be unusually precise to ensure that the restriction of those freedoms is exactly limited to the minimum necessary to fulfill a vital governmental interest. If the Act and the Regulations extend to issue-oriented publications, like the TRIM Bulletins, the government must prove that the interests served by its restrictions are precisely adjusted to the restrictions applied. The FEC did not even try to prove such an interest.

(b) The FEC failed to meet the burden of proving what the governmental interest was, and that it was vital.

It is elementary that the burden of proving the importance of the governmental interest asserted remains with the government. As stated in *Elrod* v. *Burns,* 427 U.S. 347, 362, 96 S. Ct. 2673, 2684 (1976):

> "It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. *Buckley* v. *Valeo,* 424 U.S., at 64-65, 96 S. Ct., at 656; *NAACP* v. *Alabama,* 357 U.S. 449, 460-461, 78 S. Ct. 1163, 1170-1171, 2 L. Ed.2d 1488 (1958). 'This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct. . . .' *Buckley* v. *Valeo, supra,* 424 U.S., at 65, 96 S. Ct., at 656. Thus encroachment 'cannot be justified upon a mere showing of a legitimate state interest.' *Kusper* v. *Pontikes,* 414 U.S., at 58, 94 S. Ct., at 308. *The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. Buckley* v. *Valeo, supra,* 424 U.S., at 94, 96 S. Ct., at 670; *Williams* v. *Rhodes,* 393 U.S., at 31-33, 89 S. Ct., at 10-11; *NAACP* v. *Button,* 371 U.S. 415, 438, 444, 83 S. Ct. 328, 340, 343, 9 L. Ed.2d 405 (1963); *Bates* v. *Little Rock,* 361 U.S. 516, 524, 80 S. Ct. 412, 417, 4 L. Ed.2d 480 (1960); *NAACP* v. *Alabama, supra,* 357 U.S., at 464-466, 78 S. Ct., at 1172-1173; *Thomas* v. *Collins,* 323 U.S. 516, 530, 65 S. Ct. 315, 322, 89 L. Ed. 430 (1945). In the instant case, care must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice. Moreover, it is not enough that the means chosen in futherance of the interest be rationally related to that end. *Sherbert* v. *Verner,*

> *supra,* 374 U.S. at 406, 83 S. Ct. at 1795. The gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights, see *United Public Workers* v. *Mitchell,* 330 U.S., at 96, 67 S. Ct., at 567, and the government must 'emplo[y] means closely drawn to avoid unnecessary abridgement. . . .' *Buckley* v. *Valeo, supra,* 424 U.S., at 25, 96 S. Ct., at 638. '[A] State may not choose means that unnecessarily restrict constitutionally protected liberty. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." (427 U.S. 347, 362, 96 S. Ct. 2673, 2684) (Emphasis added.)

The cases cited in *Elrod,* as illustrative of this principle, include *Buckley* v. *Valeo, supra; Williams* v. *Rhodes,* 393 U.S. 23, 89 S. Ct. 5 (1968); *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 83 S. Ct. 328 (1963); *Bates* v. *Little Rock,* 361 U.S. 516, 80 S. Ct. 412 (1960); *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 78 S. Ct. 1163 (1958) and *Thomas* v. *Collins,* 323 U.S. 516, 65 S. Ct. 315 (1945).

Elrod itself involved a challenge to a practice in Cook County, Illnois, whereby plaintiffs had been fired from the sheriff's office for not being affiliated with the current sheriff's political party. It was argued that such patronage dismissals encouraged efficient operation of the sheriff's office. The Supreme Court was not persuaded that this was so (particularly since it had previously upheld the constitutionality of the Hatch Act on the opposite theory, that non-political governmental employes made for greater efficiency). Nevertheless, the court found that:

> "[J]ustification is a matter of proof . . . since, as we have noted, it is the government's burden to

> demonstrate an overriding interest in order to validate an encroachment on protected interests, the burden of establishing this justification as to any particular respondent will rest on the petitioners [the County Democratic organization and others] on remand, cases of doubt being resolved in favor of the particular respondent." (427 U.S. 347, 368, 96 S. Ct. 2673, 2687)

In *Williams, supra,* the State of Ohio had imposed restrictions in its election laws that petitions signed by at least 15% of those voting in the last gubernatorial election were required to place a new party on the ballot. This made it virtually impossible for a new party to field a candidate for President. The State failed to prove any 'compelling interest,' although it had argued that its regulations were justifiable because they encouraged the two-party system, guaranteed that the winner would be supported by a majority of the voters, and avoided confusing voters with a jumble of splinter party candidates. The Supreme Court held that these purposes were insufficient, or too speculative, to justify the "immediate and crippling impact on the basic constitutional rights involved in this case." (393 U.S. 23, 31-33, 89 S. Ct. 5, 11-12).

In *N.A.A.C.P.* v. *Button, supra,* the State of Virginia had attempted to enforce laws agains the solicitation of legal business, i.e., ambulance chasing, by interpreting them to apply to school desegregation cases brought by the N.A.A.C.P. Defense Fund. The Supreme Court found that the State's interest in limiting First Amendment freedoms would have to be "compelling." However, the Court found that the State's alleged interest, i.e., to ensure high professional standards, was insubstantial. School desegregation suits do not involve monetary stakes. Therefore:

> ". . . the State has failed to advance any substantial regulatory interest, in the form of substantive

> evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed." (371 U.S. 415, 444, 83 S. Ct. 328, 344)

In *Bates, supra,* the City of Little Rock tried to discover membership lists of the N.A.A.C.P., alleging its justification in the enforcement of a license tax on persons engaging in any trade or business within the city limits. The Supreme Court held that the First Amendment protected citizens:

> ". . .not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." (361 U.S. 516, 523, 80 S. Ct. 412, 416)

The court was unable to discover any relevant correlation between the power to impose a license tax and the need to see the membership lists. Counsel for Little Rock were wholly unable to suggest any theory upon which the N.A.A.C.P.'s activities would even be taxable. Therefore the city:

> ". . . failed to demonstrate a controlling justification for the deterrence of free association which compulsory disclosure of the membership lists would cause." (361 U.S. 516, 527, 80 S. Ct. 412, 419)

In *N.A.A.C.P.* v. *Alabama, supra,* the State of Alabama tried to compel production and disclosure of N.A.A.C.P. membership lists. The only justification alleged was the State's interest in determining whether the N.A.A.C.P. was conducting intrastate business in violation of the foreign corporation registration statutes. The production of membership lists, however, had no bearing on that question. Therefore, the Supreme Court held that:

> ". . . Alabama has fallen short of showing a controlling justification for the deterrent effect on the

> free enjoyment of the right to associate which disclosure of the membership lists is likely to have." (357 U.S. 449, 466, 78 S. Ct. 1163, 1174)

In *Thomas* v. *Collins, supra,* the State of Texas sought to limit union organizers by requiring them to identify themselves and obtain an organizer's card prior to "soliciting" members. The defendant was charged with soliciting members for his union at a public meeting without such a card and in violation of a court order. The Supreme Court agreed that reasonable registration and identification might be compatible with constitutional guidelines, but not with respect to a speaking engagement at a public meeting. Such occasions, except when they create "a grave and immediate danger to an interest the state is entitled to protect, are not instruments of harm which require previous identification of the speakers." (323 U.S. 516, 539, 65 S. Ct. 315, 327). See also *Pollard* v. *Roberts,* 283 F. Supp. 248 (E.D. Ark. 1968); *aff'd per curiam,* 393 U.S. 14, 89 S. Ct. 47 (1968); and *Gibson* v. *Florida Legisative Investigation Committee,* 372 U.S. 539, 83 S. Ct. 889 (1963), both involving disclosure of membership lists.

The principle is clear that the government has the burden of proving what its interests are, and must prove that those interests are vital (*Buckley, Elrod*), paramount (*Elrod*), overriding (*Elrod*), compelling (*Button*), or controlling (*Bates, Alabama*). Moreover, the interests must be relevant to the matter at hand (*Pollard, Gibson*). That is, if the government has a vital interest in preventing political corruption, it would have to demonstrate that organizations like TRIM present a serious problem in that area, for example, that groups like TRIM buy influence with candidates by publishing their voting records (or those of their opponents). To state the proposition is enough to refute it. Similarly the government may have a vital interest in preventing subversion by Communist organizations, but that interest is irrelevant to an inspec-

tion of membership lists of the N.A.A.C.P. without first offering proof that the N.A.A.C.P. is a Communist-controlled organization (*Gibson*).

Moreover, even if the FEC had been able to prove a vital interest that is relevant to the subject matter at hand, in the area of First Amendment rights, the means selected to further that interest must be carefully chosen to avoid unnecessary infringement. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." (*Elrod, supra,* 427 U.S. 347, 363, 96 S. Ct. 2673, 2684 (1976).

(c) The governmental interest in reporting and disclosure under the Act does not justify the infringement of the defendants' and Intervenor's First Amendment rights.

The Supreme Court decision in *Buckley* v. *Valeo,* 424 U.S. 1, 96 S. Ct. 612 (1976) carefully analyzed what governmental interests were to be served by the Act in its earlier form. As previously discussed, the Court had limited the Act to express advocacy, communications using words like those on the Buckley List.

In *Buckley,* the Supreme Court considered both Section 608(e) (1) (limiting the amount of independent expenditures to $1,000 per candidate) and the earlier version of Section 434(e) (requiring reports from those who make certain independent expenditures). It upheld §434(e) only when limited to refer to expenditures that in express terms advocate the election or defeat of a clearly identified candidate, i.e., "Vote for Jones." It was thus limited in the hope of avoiding constitutional vagueness problems. Following *Buckley,* Congress rewrote Section 434(e) in its present form in an effort to follow the Supreme Court's lead.

As to Section 608(e)(1), it was quite clear that peopl could spend any amount of money in support of a cand date so long as they did not say "Vote for Jones." Th Act, as so limited, did not purport to cover such expend tures, but just put a $1,000 limit on those who engage in *express* advocacy. The court found this limitation nea ly worthless in preventing corruption, while on the othe hand, it heavily burdened the constitutional right of thos who chose to engage in express advocacy. Therefore th court found the governmental interest vastly outweighe by the oppressive effect on individual rights and struc down §608(e)(1).

> "We find that the governmental interest in pr venting corruption and the appearance of corruptio is inadequate to justify §608(e)(1)'s ceiling on i dependent expenditures. . . . Cf. *Mills* v. *Alabam* 384 U.S. at 220, 86 St. Ct., at 1437." (424 U.S. 1, 4 96 S. Ct. 612, 647)

In considering the earlier version of §434(e), th Supreme Court considered the interest to be served b the reporting requirements. As noted above, it limite §434(e) similarly to contributions or expenditures that "e pressly advocate the election or defeat of a clearly ide tified candidate." As so construed, it did not requi reports from those who did not say "Vote for Jones. However, the function of the reporting requirements wa not just to prevent corruption (which it could not do but to provide information for voters to use in decidin how to cast their ballots. The Supreme Court found tha the voters might well want to know who was independentl printing "Vote for Jones" posters, and so upheld §434(e

> "Unlike 18 U.S.C. §608(e)(1) (1970 ed., Sup IV), §434(e), as construed, bears a sufficient rel tionship to a substantial governmental interest. A narrowed, §434(e) like §608(e)(1), does not reac

all partisan discussion* for it only requires disclosure of those expenditures that expressly advocate a particular election result. This might have been fatal if the only purpose of §434(e) were to stem corruption or its appearance by closing a loophole in the general disclosure requirements. But the disclosure provisions, including §434(e), serve another, informational interest, and even as construed §434(e) increases the fund of information concerning those who support the candidates. It goes beyond the general disclosure requirements to shed the light of publicity on spending that is unambiguously campaign related but would not otherwise be reported because it takes the form of independent expenditures or of contributions to an individual or group not itself required to report the names of its contributors. By the same token, it is not fatal that §434(e) encompasses purely independent expenditures uncoordinated with a particular candidate or his agent. The corruption potential of these expenditures may be significantly different, but the informational interest can be as strong as it is in coordinated spending, for disclosure *helps voters to define more of the candidates' constituencies.*" (424 U.S. 1, 80-81, 96 S. Ct. 612, 664) (Emphasis added.)

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* We note the caution by the Supreme Court that §434(e) "does not reach all partisan discussion." Accordingly, communication by independent (i.e. not party or candidate related) persons need not pass a "partisan" or "nonpartisan" test. Much of the FEC's case assumes that anything having a leaning toward one part of the political spectrum is "partisan" and therefore subject to regulation. Actually the term is not relevant to a discussion of Sections 434(e) and 441d at issue in this case. In any event Judge Pratt found as a fact that JBS and TRIM are non-partisan organizations (Da 178), that they are unrelated to any political party, committee or candidate, and that JBS has for over 20 years served primarily the educational interests of its constituency (Da110-111).

The Supreme Court therefore suggested that the legiti matizing governmental interest in Section 434(e) is *no* simply to stem corruption nor to close the loophole i the general disclosure requirements, since (as with §60 (e)(1)) such purposes alone are not enough. Rathe justification, if any there be, would have to be found i enlarging the fund of information on a candidate's backer Whether this interest is counterbalanced by the impact o the regulatory scheme depends, of course, on the fact of the case at hand. The primary purpose of the TRI Bulletins themselves is informational. Thus, we have th ironic situation where the assumed governmental pu pose of *increasing* the fund of information on the su porters of candidates is to be satisfied by stifling th fund of information on the candidates themselves an their position on public issues!

It is already the John Birch Society's practice to clearl identify itself in all its publications (Dal10). What goo would it then do for TRIM or any similar organization t file the required reports? These might be of two type Some reports would be required of TRIM and some woul be required of contributors to TRIM (if they give mor than $100). We can see no real benefit to any voter i learning that John Smith contributed $110 to TRIM, pa ticularly at the cost of possible harassment and reprisal against Smith for asserting his Constitutional rights o association. The reports by TRIM, if required, would b scarcely more useful.

The disclosure and reporting requirements are pa ticularly objectionable with respect to issue-oriented, ed cational and non-politically affiliated organizations lik TRIM. Such organizations do not exist to support o oppose candidates, but to discuss public issues, as Judg Pratt found. For example an environmental organiz tion might care to publish the stand of local congressme on environmental issues. Such issues are, of course, in portant, but not likely to be the major issues in any can

paign. Voters might well deplore a candidate's position on the environment, but still choose to vote for him because he is a better candidate on other issues, or because his opponent is even worse on the environment. It would be quite misleading to voters to advise them (by the required reports) that the Sierra Club, for instance, opposes Ronald Reagan when it is merely publicizing his attitude towards forest conservation. No governmental purpose would be served by requiring such organizations to file the required reports.

Actually, because of the broad scope and the "shotgun" nature of the attack on the Act in *Buckley,* the governmental interest in the individual sections was scarcely developed. This is certainly true with respect to Sections 434(e) and 441d. The Supreme Court did not have before it, and therefore did not consider, the argument being made in this case, namely that there is *no* governmental interest at all in compelling disclosure by an issue-oriented organization, disseminating information for educational purposes, unaffiliated with any political party, committee or candidate and clearly identified in all its publications. As noted in *Buckley,* the burden is on the government to demonstrate that there *is* a governmental interest and that it applies to *such* an organization.

Similarly, the Supreme Court did not have before it in *Buckley,* and therefore did not consider, whether in light of the "reasonable probability" of intimidation and harassment and curtailment of free discussion and association resulting from disclosure of TRIM participants, even granting some degree of governmental interest, that interest is not paramount and is outweighed by the incurred loss of protected rights. In summary, while *Buckley* suggested a rewording of Sections 434(e) and 441d intended to save them constitutionally, the reworded statute has not been tested in its application until now. Even if, as reworded, the Sections could facially pass muster, their application to TRIM and similar organizations has not heretofore been addressed by any court.

(d) The publication of truthful information may not be restrained or punished except to satisfy governmental interests of the highest order.

In a series of recent cases, the U.S. Supreme Court has cast grave doubt upon the alleged right of the state to impose any prior restraints on, or subsequent penalties for, the publication of truthful information lawfully obtained. For instance the state may not restrict the publication of the names of youthful offenders, *Smith* v. *Daily Mail Publishing Co.*, —— U.S. ——, 99 S.Ct. 2667 (1979); nor restrict the publication of confidential proceedings investigating judicial misconduct, *Landmark Communications, Inc.* v. *Virginia,* 435 U.S. 829, 98 S.Ct. 1535, (1978); nor restrict publishing photos of youthful offenders, *Okl. Pub. Co.* v. *Dist. Court in & for Oklahoma Cty.,* 480 U.S. 308, 97 S.Ct. 1045 (1977); nor restrict newspapers from pretrial discussions of a murder case, *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539, 96 S.Ct. 2791 (1976); nor from printing the names of rape victims, *Cox Broadcasting Corporation* v. *Cohn,* 420 U.S. 469, 95 S.Ct. 1029 (1975).

In *Smith, supra,* the Court said:

> "Our recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards. In *Landmark Communications* we declared unconstitutional a Virginia statute making it a crime to publish information regarding confidential proceedings before a state judicial review commission that heard complaints about alleged disabilities and misconduct of state court judges. In declaring that statute unconstitutional, we concluded:
>
> '[T]he publication Virgina seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced

> by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom.' *Id.*, at 838.

In *Cox Broadcasting Corp.* v. *Cohn, supra,* we held that damages could not be recovered against a newspaper for publishing the name of a rape victim. The suit had been based on a state statute that made it a crime to publish the name of the victim; the purpose of the statute was to protect the privacy right of the individual and the family. The name of the victim had become known to the public through official court records dealing with the trial of the rapist. In declaring the statute unconstitutional, the Court, speaking through MR. JUSTICE WHITE, reasoned:

> 'By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. . . . States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.' *Id.*, at 495.

One case that involved a classic prior restraint is particularly relevant to our inquiry. In *Oklahoma Publishing Co.* v. *District Court,* 430 U.S. 308 (1976), we struck down a state court injunction prohibiting the news media from publishing the name or photograph of an 11-year old boy who was being tried before a juvenile court. The juvenile judge had permitted reporters and other members of the public to attend a hearing in the case, notwithstanding a state statute closing such trials to the public. The court then attempted to halt publication of the information obtained from that hearing. We held that once the truthful information was 'publicly revealed' or 'in

> the public domain' the court could not constitutionally restrain its dissemination.
>
> None of these opinions directly controls this case; however, all suggest strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order. These cases involved situations where the government itself provided or made possible press access to the information. That factor is not controlling. Here respondents relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant. A free press cannot be made to rely solely upon the sufferance of government to supply it with information. See *Houchins* v. *KQED, Inc.,* 438 U.S. 1, 11 (1978) (plurality opinion); *Branzburg* v. *Hayes,* 408 U.S. 665, 681 (1972). If the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here." (99 S.Ct. 2670-2671)

It goes without saying that the voting records of Congressmen are similarly in the public domain, and matters of great public significance. That TRIM's reporting is accurate has not been challenged. Therefore the state may not restrict the publication of such information except to satisfy interests of the highest order. The FEC again failed to prove what that interest is and how it would be served by the challenged statutes and regulations.

POINT THREE

The FEC Regulations (11 C.F.R. §109 *et seq.*) are unconstitutional on their face and as applied to infringe defendants' and Intervenor's First Amendment rights.

The Regulations are unconstitutional as applied to the defendants for two principal reasons. First, as Judge Pratt found, the Regulations did not become effective until April 13, 1977, while all acts that allegedly violated those Regulations occurred in or around October, 1976 (Da122). This is a clear violation of the Constitutional prohibition against *ex post facto* laws (Art. 1, Section 9, Par. 3) as well as a demonstration of the FEC's cavalier attitude towards initiating baseless prosecutions.

More importantly, the FEC's Regulations have gone far beyond the Buckley List and far beyond the Act itself in defining the kinds of communications that fall within its regulatory ambit. We have seen that the Act and the Buckley List (which are arguably consistent) would regulate *express* advocacy, using particular words of advocacy included in the Buckley List.

The Regulations go far beyond the Act and the Buckley List, to regulate:

> "*. . . any communication containing a message advocating election or defeat, including but not limited to* the name of the candidate, or expressions such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' and 'Smith for Congress,' or 'vote against,' 'defeat,' or 'reject.'" (11 C.F.R. §109.1 (b)(2)). (Emphasis added.)

The Regulations therefore attempt to reach *messages,* that is, the subjective meaning or purport of what was said, rather than just what was said; even though the *Buckley* decisions have held that the Act must be limited to

communications containing *express words* of advocacy, and cannot reach implicit messages.

The Supreme Court has already determined that the Act is unconstitutionally vague if it regulates anything beyond language such as appears in the Buckley List. The argument in Point One above demonstrates that the Buckley List itself is unconstitutionally vague because it is an open-ended list, capable of indefinite expansion. But the Regulations go even further, and purport to regulate "messages" contained in the communication. Nobody can foretell what the FEC might consider to be such a "message". All kinds of subjective factors enter into that determination.

The evil inherent in using a subjective and slippery term such as "message" in the Regulations is well illustrated in this case. The FEC asked the court below to broaden the scope of the judicial inquiry beyond the express words of the TRIM Bulletins, and beyond even the inferences which may arise from those express words, and to attempt to determine the *intent* of those who published and distributed the leaflets. The types of proofs offered by the FEC on that tangent included descriptions of when, where and how the leaflets were distributed and what was said by the members and leaders of local TRIM groups in their meeting rooms and in their written reports. See, e.g. Findings (Da133-144.)* The ultimate result of permitting

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* It is respectfully submitted that as to one relatively small area of the proofs, certain of the Findings do not contain a balanced statement of the evidence with respect to Northwest Jersey TRIM. We request that the Court consider the following additional testimony which is relevant to those Findings:

With respect to Finding V.B.8. (Da135):

Mr. Hogan [the former Northwest Jersey TRIM Chairman] knew that if a JBS coordinator for Northwest New

(Footnote continued on following page)

such unbridled expansion upon the words of the Act by means of regulations and FEC interpretations of their own regulations would be that once a person or a group published anything which named a candidate and mentioned any issue, they could no longer speak or write in public or in private free of the chill of a potential FEC investigation and prosecution. At that point the most precious constitutional protections of this democratic society would have been obliterated in an excess of bureaucratic zeal.

(Footnote continued from preceding page)

Jersey had said words to the effect that the Committee was going to "get" the local Congresswoman, such a statement was contrary to the written policy of the JBS (II:126-20 to 25). John Robbins [the former National Director of TRIM] testified that if the coordinator had made any statement to that effect, such a statement would have been unauthorized by the JBS and subject to censure. (V:583-9 to 16 and 584-23 to 585-5).

With respect to Findings V.B.10. and 11. (Da 136):

Although Mr. Hogan testified at trial on direct examination that the JBS coordinator indicated that the Congresswoman was not to be invited to the TRIM Committee candidates' debate, on cross examination he reaffirmed his earlier deposition testimony that he could not recall whose idea it was not to invite the Congresswoman. (II:115-10 to 118-10). Similarly, Mr. Hogan testified that he was not categorically certain that the JBS coordinator was the person who made a suggestion to the TRIM Committee that the Republican candidate for Congress be approached for a contribution to the TRIM Bulletin. (II:113-6 to 20) Dr. Robbins testified that if a JBS coordinator had suggested either type of conduct to the Committee, such actions would have been unauthorized by the Society and subject to censure. (V:583-17 to 584-8 and 584-23 to 585-5).

POINT FOUR

The FEC's enforcement practices are unconstitutional.

We have previously argued (in Point Two) that the Act touches constitutionally protected rights, an area where state interference must be surgically precise if it is to be constitutionally permissible at all, and where it very well may not be permissible. Into this area, the FEC has clumsily blundered. In part, this is attributable to the Act itself, which establishes no clear guidelines to determine when an enforcement proceeding ought to be initiated; but even more, the FEC's heavy-handed interference is due to its own arrogant disregard for such guidelines as are imposed by the Act.

Judge Pratt found that the FEC made no determination prior to the institution of this action that it had "reasonable cause to believe" that TRIM had violated the Act (as required by §437g(a)(2) of the Act). Nor did it ever seek a conciliation with TRIM (as required by §437g(a)(5) of the Act (Da122). We have previously noted how the complaint as filed charged violations of Regulations that were not even in effect at the time of the alleged events.

Lest it be argued that the TRIM Bulletin speaks for itself, and on its face might have given some basis for initiating an enforcement proceeding, it should be noted that the Act and Regulations both contain various monetary thresholds. Any expenditure of $100.00 or less is simply not subject to the Act or the Regulations. There is simply no way, on the face of it, for anyone to conclude by inspecting a single sheet of paper that any individual spent more than $100.00 to produce it, or even that any group of individuals did so in concert. In fact, Judge Pratt found as a fact that the Bulletin in issue cost only $135, and that at least half of it was devoted to matters unrelated to the voting record of Congressman

Ambro (Da129-130). The FEC offered no evidence even at trial that the $100 threshold was crossed, and Judge Pratt found that CLITRIM's members contributed only $20 each (Da129).

Finally, it must be noted that, even though the Act presupposes that enforcement proceedings will be initiated by a notarized complaint alleging that a violation has occurred (§437g(a)(1)), nothing of the sort was filed with the FEC to start the proceedings that culminated in this litigation. No one ever alleged that the TRIM Bulletin violated the Act.

Judge Pratt made precise findings as to what the FEC did to investigate the matter of the TRIM Bulletin (Da 146-151). The FEC made no effort to notify or conciliate with TRIM at all (Da122). As to defendants CLITRIM and Cozzette, the FEC wrote to Cozzette enclosing a list of questions, stating that it believed that Cozzette and CLITRIM had already violated the law, and stating that the matter could not be closed until Cozzette answered certain questions. Ignoring Cozzette's protestations, it ordered him to answer the propounded questions, regardless of his First and Fifth Amendment rights. When he finally answered the questions, under protest, he was served with a "conciliation agreement" which he viewed as equivalent to a confession of guilt. Under threat of prosecution, fine and possible imprisonment, Cozzette was expected to admit his guilt, pay a $100 fine, agree to testify whenever or wherever the FEC might specify, and forever to abide by each and every provision of the Act (Da146-151).

Whatever the legality of this procedure, it was clearly effective. Cozzette quit CLITRIM, and CLITRIM disbanded. Cozzette has no intention of similarly exercising his First Amendment rights ever again (Da149-150).

The constitutional principles are clear that the state must move carefully in the area of the First Amendment to avoid unnecessary infringement of its citizens' rights.

In spite of this requirement, the FEC has plunged roughly ahead, threatening and badgering citizens whose only offense was to publish information.

(a) There is no adequate standard of initiating a proceeding.

The FEC's manner of initiating and carrying through its enforcement procedures is aggravated by the fact that Congress left no adequate guidelines. The statutory standards, such as they are, are impermissibly vague and unconstitutional.

Under Section 437g(a)(2), when someone files a complaint with the Commission, or the Commission, "on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, *has reason to believe* that . . . a violation [of the Act] has occurred . . .," it must notify the person suspected of the violation and begin an investigation. (Emphasis added.)

The standard is merely that the Commission "has reason to believe" that someone has violated the Act. This, of course, includes conduct that violates the Act as interpreted by the Commission.

The Commission is then charged with conducting an investigation, offering the suspected violator "a reasonable opportunity to demonstrate that no action should be taken . . ." (§437g(a)(4)). Thereafter:

> "If the Commission determines that there is reasonable cause to believe that any person has committed or is about to commit a violation of this Act . . ." (Section 437g(a)(5)(A))

then it must "make every endeavor . . . to correct or prevent such violation by informal methods of conference, conciliation and persuasion, and to enter into a conciliation agreement with the person involved. . . ."

The standard is merely "reasonable cause to believe" that the Act, again as construed by the Commission, was violated, or is about to be violated.

Finally, under Section 437g(a)(5)(B), if the Commission is unsuccessful in resolving the matter informally:

> "the Commission may, if the Commission determines there is probable cause to believe that a violation has occurred or is about to occur, institute a civil action for relief. . . ."

The relief may include penalties and injunctive relief. The standard is merely "probable cause to believe" that the Act was, or is about to be, violated.

The evidence shows that the Commission has swung into action because of inquiries, not even complaints, filed on behalf of Congressmen, without ever either finding or identifying words of express advocacy in the allegedly offending communications. Accordingly, either the Commission acted unreasonably, or the Act is unconstitutionally vague in defining the Commission's enforcement procedure, or both.

The Commission's apparent authority is so broad that almost any published reference to a Federal candidate might be interpreted by the Commission as being favorable or unfavorable, in either case involving the investigation and enforcement proceeding under §437g.

In Clagett and Bolton, *Buckley* v. *Valeo, Its Aftermath and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing,* 29 Vanderbilt L. Rev. 1327 (Nov. 1976), the authors (at pp. 1353-1360) develop the argument that the excessive discretion granted to the Commission places it "astride the political process," constituting an impermissible prior restraint on First Amendment rights.

In a long line of cases, e.g. *Saia* v. *People of State of New York,* 334 U.S. 558, 68 S. Ct. 1148 (1948); *Kunz* v.

People of State of New York, 340 U.S. 290, 71 S. Ct. 312 (1951); *Hynes* v. *Mayor and Council of Borough of Oradell,* 425 U.S. 610, 96 S. Ct. 1755 (1976), the Supreme Court has applied the doctrine of "excessive discretion" to invalidate municipal ordinances that granted undefined power to local officials to permit the use of sound trucks (*Saia*); curbside religious meetings (*Kunz*) or door to door political canvassing (*Hynes*). Where First Amendment rights are in issue, the delegation of authority must contain explicit standards for those who must apply it.

The FEC has a panoply of coercive devices at hand: investigation, notice of violation, discovery orders, and civil litigation, with absolutely no standard for applying them, other than "reason to believe," "reasonable cause to believe" or "probable cause to believe" that the Act (in the FEC's interpretation) has been, or is about to be violated.

In practice, case or no case, given a verified complaint, the FEC sets its repressive machinery in motion. The evidence has demonstrated the profound and chilling impact on First Amendment rights which the FEC's action has had in this case and threatens to have in others like it.

(b) The FEC's power to promulgate regulations and advisory opinions creates a prior restraint.

Besides the prior restraint inherent in the power of the FEC to initiate investigations as it sees fit, there is a further restraint inherent in the power of the FEC, in effect, to declare what the Act permits or prohibits. By rendering advisory opinions or promulgating regulations that have the force of law and which may subject citizens to penalties for violations, the FEC necessarily deters the public from publishing anything except what the FEC expressly approves.

This danger was pointed out to Congress by Senator Allen of Alabama during Senate debate on the Act on March 17, 1976. He observed that the effect of the rule-making powers of the FEC was challenged in the *Buckley* case, but never decided since the FEC's powers were held unconstitutional on other grounds. Nevertheless, he felt that the power of a Federal agency to legislate what kinds of publications were lawful or not lawful without compliance with the Act exerted a chilling effect on First Amendment rights that might invalidate the Act. His comments, as reported in the Congressional Record, were as follows:

> "Mr. Allen: Mr. President, my attention was called to the need for this amendment by the Hon. Bryce M. Clagett, who was the chief attorney for the firm of Covington and Burling in the Supreme Court case of Buckley against Valeo. He called my attention to the fact that, without this amendment, the Election Commission's power to make rules and regulations creates a prior restraint on political expression. Citizens who disagree with the Commission about the meaning of the law would generally not dare to act on that disagreement, since the very fact that the Commission has spoken will prejudice their position in enforcement litigation. The Supreme Court, of course, has recognized that first amendment rights are involved in political spending. With a statute as complex and vague as the campaign spending law, I think it is unconstitutional for an agency such as the Commission to have vast discretionary power over political expression. The Supreme Court found it unnecessary to decide that question, since it invalidated the Commission's powers on other grounds, but if the Commission is reconstituted without solving this problem, months and perhaps years of further uncertainty and litigation will be necessary.
>
> * * *

Here, Mr. President, we have a case of prior restraint under the existing law and under the law as provided by the bill. We have a case of prior restraint on the exercise of first amendment rights because, if the Commission says that its interpretation of the law is thus and so, that would put a chilling effect—a chilling, negative effect—on any person acting contrary to the Commission's statement of its view of the law.

* * *

'The Supreme Court has clearly recognized that any regulation of campaign expenditures and contributions operates in a critically sensitive area of constitutional concern. The Court left no doubt that such regulation inevitably encroaches on free speech and makes inevitable a balancing process between compelling governmental needs and first amendment freedoms. When activity by citizens in this most sensitive area is subjected to regulation, especially with criminal sanctions, the inhibiting effect on political expression is acute.

Moreover, the election law is both highly complex and in many respects perhaps unavoidably vague—as was fully recognized in the Senate debate last fall on the Commission's office account regulations.

In the circumstances the power to interpret the law is largely the power to make new law. A commission with that kind of power has vast influence over the political process, not necessarily excluding the power to determine the results of particular elections.

The existing Commission has used these powers with a vengeance. In many respects its pronouncements made new law—sometimes where the statute as enacted by the Congress was silent;

sometimes in rather striking disregard of what the statute did say.'

* * *

'It is highly inappropriate, and perhaps unconstitutional, for any agency in effect to make law in an area trenching so sharply on so basic a constitutional right as freedom of speech, and on a subject so crucial to our survival as a free democratic country as the electoral process itself. The fact is that, when either a candidate or an ordinary citizen is told by the Commission that certain political activity which he wishes to undertake would violate the law, he will in the overwhelming majority of cases refrain from engaging in that activity although he is convinced the Commission's interpretation is wrong. Even if he is otherwise disposed to litigate the issue, if he is well advised by counsel he will be aware (1) that a court probably will enforce a Commission rule as having the force of law, at least unless it flatly and unquestionably is contrary to the words of the statute, and (2) that a court will give great weight to any Commission pronouncement, because of alleged agency expertise, in deciding on the proper interpretation of the statute. He will thus be chilled from exercising what a court might well ultimately hold were his rights under both the Constitution and the statute. He will in effect be subjected to a prior restraint on the exercise of his first amendment rights.'" (122 Cong. Rec. 6941-6947 (1976))

CONCLUSION

For the reasons stated above, and in the co-defendants briefs, the Act should be construed not to apply to the defendants or to similar non-political organizations, or their publications. If the Act does apply to them or to their publications, it should be held unconstitutional on its face, or as applied to the defendants or to similar non-political organizations. The FEC should be enjoined from further proceedings against the defendants.

Respectfully submitted,

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