CFI
THE CAMPAIGN FINANCE INSTITUTE

AFFILIATED WITH THE GEORGE WASHINGTON UNIVERSITY

August 20, 2002

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Notice 2002-13

Dear Ms. Dinh:

I am enclosing the comments of The Campaign Finance Institute on the Commission's proposed rules for Electioneering Communications.

As indicated in the comments, The Campaign Finance Institute requests the opportunity to testify at the proposed hearings. If it would be possible to testify on Wednesday, August 28, that would be greatly appreciated, since I am scheduled to attend the Annual Meeting of the American Political Science Association, which begins on Thursday. However, if Wednesday is not possible, I would be pleased to testify whenever you can schedule us.

Sincerely,

/s/ Michael J. Malbin

Michael J. Malbin
Executive Director

mmalbin@CFInst.org

Attachments

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CFI
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COMMENTS OF

THE CAMPAIGN FINANCE INSTITUTE

Re: ELECTIONEERING COMMUNICATIONS

NOTICE 2002-13

Michael J. Malbin
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The Campaign Finance Institute
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August 21, 2002

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I am pleased to offer these comments on the proposed electioneering regulations on behalf of the Campaign Finance Institute (CFI). I also request the opportunity to offer these comments and be available for questions at the Commission's hearings.

The Campaign Finance Institute is a non-partisan, non-profit institute affiliated with the George Washington University that conducts objective research and education, empanels task forces and makes recommendations for policy change in the field of campaign finance. The Institute takes no positions on pending legislation, including the Bipartisan Campaign Reform Act when it was before Congress.

However, during the election season of 2000, the Institute appointed a distinguished and politically diverse Task Force on Disclosure. For more than six months, this Task Force wrestled with many of the same definitional questions about electioneering that the Commission is considering in its proposed regulations. The conclusions are available in the Task Force's first report, on Issue Ad Disclosure, which was adopted unanimously. A copy is attached and is available at www.CFInst.org/disclosure/index.html or www.CFInst.org/disclosure/issueads_rpt.pdf. I particularly draw your attention to pages 8-28. Subsequent Task Force reports are being planned on other aspects of disclosure.

These comments will draw from two aspects of our work. The first part will be about the definition of and proposed exemptions for electioneering. The second will be about the requirement for the Federal Communications Commission to "compile and maintain" information needed to make the electioneering rules work properly.

Definition of Electioneering and Proposed Exemptions

The purpose of these comments is not to repeat the Task Force Report's conclusions, but to let you know the reasoning behind them. Rather than speak about the proposed regulations in their entirety, I will focus on a few key issues on which I think the Task Force's reasoning has something important to contribute. Because of the commission's time frame, we have not circulated these comments, so I am not presenting them as if they come from the Task Force's members. Nevertheless, I am confident that I am summarizing their reasoning accurately.

The Task Force's recommended definition of electioneering ended up being not all that different from what was known as the Snowe-Jeffords provisions – the equivalent of sections 201 and 202 of the BCRA. But we did not get there easily. The issue that took the longest time was that of overbreadth. The problem the Task Force members asked themselves was whether it was possible to write a constitutionally acceptable definition of electioneering that protected lobbying or issue speech without creating a loophole so large as to render the electioneering coverage meaningless. The Commission is grappling with essentially the same issue in its draft electioneering regulations, Sec. 100.29 (c)(2), (4), (5) and (6).

As the Supreme Court said in *Buckley* v. *Valeo*, issue speech and election speech necessarily overlap. Some have interpreted this to mean that the Court's "express advocacy" test is mandated by the Constitution. The Task Force, and Congress, took a different view. The CFI Task Force concluded that the *Buckley* Court was interpreting the Federal Election Campaign Act narrowly to avoid the constitutional problems of overbreadth and vagueness. However, as with any case of statutory construction, the Court was also implying that Congress could pass another statute to replace the original one, as long as the new statute met the constitutional tests that put the old one in danger.

The original Snowe-Jeffords provision of 1997 took care of the vagueness problem. As introduced, it defined electioneering to include any radio or television broadcast within a specified time period that named or identified a candidate. There were not many fuzzy edges around that definition. The problem was overbreadth. Too much was swept in that could not be justified as serving a constitutionally sufficient public purpose.

The Task Force spent most of its time thinking about two different types of overbreadth concerns. The first was a concern for speech that nobody really wanted to regulate, but that seemed to be caught up in the definition. The second concern was to find a reasonable way to distinguish lobbying or issue speech that should *not* be considered electioneering, from speech that mentioned issues, but still *should* be thought of as being part of the election arena. It was impossible to make a perfect separation, the Task Force concluded. What was needed was a rationally defensible line that separated most of what ought to be separated, while giving people who might inadvertently sidle up to the borders a clear description of what they could and could not do.

For the first set of problems -- speech that no one wanted to regulate -- the Task Force's prime example was the late night comedy monologue. One of the Commission's examples is the Public Service Announcement. Others have mentioned educational documentaries. I doubt that anyone wants these to be swept in. The Task Force's solution was not to create an endless list of exemptions, but to limit electioneering to paid advertising. I note that in your proposed regulations, you specifically ask whether you should take a similar approach. We think you should. If the definition were limited to paid advertising, public service announcements, documentaries and entertainment all would be excluded. If you did take this approach, I would urge you to define advertising in such as way as to include program-length "infomercials."

The more difficult questions were about "issue advertisements." The Task Force felt strongly that electioneering definitions should make a serious effort to exclude grassroots lobbying that was not geared toward affecting elections. It acknowledged the complaints of those critics who said it would be wrong to stifle public debate between Labor Day and Election Day about pending bills known popularly by their sponsors' names. The solution, however, is not as obvious as the question.

The Task Force considered, and ultimately rejected, several of the alternatives in your draft regulation. For example, the proposed section 100.29(c)(5) would automatically exempt any communication in which the sole reference to a candidate is in a description of the "popular name" of a bill or law. The CFI Task Force thought about this idea, but

rejected relying on it alone. Unfortunately, there is no such thing as a single "popular name" for most bills. Indeed, many members habitually claim credit in their home districts for co-sponsored bills by adding their own names to the lead sponsors'. In this manner, a bill's "popular name" might be seen to vary from place to place – for example, Shays-Meehan-Morella in one place and Shays-Meehan-Hoyer in another. Therefore, if the use of the popular name as a single criterion would be sufficient for exemption, we could easily imagine tailored, district-specific advertising praising or attacking bills that a Member co-sponsored, using vivid language, while mentioning the bill and its sponsors often. It would not be hard at all for a political consultant to get around this one.

However, this approach could be more useful if one additional criterion were added to the exemption. To get around the problem of advertisements that vary the "popular" name by district, the Task Force added the concept of targeting to the original Snowe-Jeffords criteria. Because I think this Task Force was one source for the law's targeting test, I want to explain what the Task Force was trying to accomplish. The idea was that advertising should not be considered electioneering unless it is targeted to the districts of the candidate-sponsors named in the ads. If an ad were to use the sponsors' names in a uniform manner in advertising that ran across the country, then it would not count as electioneering. Unfortunately, although the BCRA uses the word "targeting" as a label for one of its electioneering criteria, the test is misnamed. It is not a targeting test at all. The law says that a message will be targeted if it reaches 50,000 people in a district. Thus, a "Harry and Louise" type of advertisement bought on a prime time, national program, would be considered targeted under this definition, even though under any common sense definition of the word, it is just the opposite -- a blanket ad that is completely untargeted. The political consultants in our task force could not imagine purchasing a uniform national advertisement naming a bill's sponsors if the purpose were to elect or defeat someone. But one might easily do that to lobby for a bill. Therefore, if the FEC want to create an exemption that was consistent with the intent of the law, as the intent is expressed through the use of the word targeting, then it might well want to look at our task force's deliberations, and exempt uniform ad buys naming a bill's sponsors. The Task Force thought this would protect most lobbying without opening a huge loophole for electioneering.

The next question is whether an exemption for uniform ads that name a bill's sponsors is enough of an exemption for lobbying, or whether some additional references to named members in their districts should be allowed. This is the issue raised by the four alternatives proposed for 100.29(c)(6), 3-A through 3-D. The Task Force did not consider such an exemption to be needed and therefore did not discuss these alternatives in detail. Speaking apart from the Task Force, it appears to me that "Alternative 3-B" is less open to abuse than the others. Even here, however, one must question what good is to be accomplished. Exemption (c)(5), if corrected, would fully allow national grassroots lobbying campaigns without turning them into thinly disguised attempts to affect an election. However, one could not use corporate or labor union funds to pressure named individuals in their home districts.

In short, the Task Force's position essentially would have permitted an exemption for using the popular name of a bill, but only if that name were kept the same across the

country in a uniform manner. I would also reiterate that this exemption should be *in addition to* the ones that come from limiting the BCRA's electioneering coverage to paid advertising.

Two final items under the proposed exemptions: First, the Commission is considering of an exemption for speech about initiatives and referendums that mentions a federal candidate. Admittedly, *First National Bank of Boston* v. *Bellotti* protects corporate speech about initiatives and referendums, but that does not automatically mean the protection should extend to comments about federal candidates. Increasingly, political consultants have been putting initiatives and referendums on the ballot specifically to effect candidate races. It is too easy to imagine an initiative designed to provoke a backlash against a targeted candidate for the House or Senate.

Finally, there has been discussion of a blanket exemption for nonprofit corporations recognized under Section 501(c)(3) of the Internal Revenue Code. The Task Force thought about creating an exemption for specifically defined entities and concluded that it did not make sense to let an organization's tax status define the issue. The potential problem is not with the activities of the traditional nonprofit community, but with new organizations we all expect to start springing up once the BCRA takes effect. We already have examples to show us how 501c(3) organizations could work together with affiliates organized under different sections of the code, to create well-organized and multifaceted election-related campaigns. While one has sympathy for the concerns of these already well regulated organizations, I suspect that 501(c)(3) organizations could accomplish most of what they want to do if you were to limit the BCRA's electioneering coverage to paid advertising, and then crafted exemptions along the lines I have described, to protect uniform ad buys that names a bill's sponsors. To put this another way, the intention of the BCRA is to require paid advertising, that names *and targets* specific members within 60 days of an election, to be paid out of individual contributions and disclosed, whoever does them. Any exemption that permitted such an advertising campaign to be financed directly or indirectly by labor or corporate money would be inconsistent with the BCRA.

FCC Disclosure

We turn now to a major opportunity for improving disclosure. In its NPRM, the Commission refers to Section 201(b) of BCRA, which mandates the Federal Communications Commission to "compile and maintain ***any*** [emphasis added] information the Federal Election Commission may require to carry out" the disclosure of electioneering communications [2 USC 434(f)] and to "make such information available to the public" on the FCC website. The Commission has "preliminarily concluded" that, in accordance with this section, the FCC should compile a searchable web database of broadcast stations, cable systems and satellite systems that can reach more than 50,000 persons in a State or congressional district. The expressed purpose is to "promote compliance with" disclosure requirements by enabling those meeting the "timing and medium" parts of the electioneering communications definition to "easily determine" whether they meet the targeting part as well. The Commission seeks comments as to

whether any additional information or searchable options for the FCC's website are necessary and should be listed in proposed 11CFR 100.29 (b) (5).

We agree with the Commission's specific recommendation, but it does not go far enough. To assist the Commission in carrying out, and promoting compliance with, the law, the FEC should require the FCC to compile and maintain a database, available on the World Wide Web, of certain information that has to be collected anyway under Section 504 of the BCRA. This includes information regarding purchases of broadcast advertising by federal candidates, and by others, regarding "political matters of national importance," including national legislative issues. Under Section 504 (which amends the Federal Communications Act, 2 USC 315,) this information will be made available for public inspection only at local TV and radio stations, unless more is required. However, nothing in the law prevents more from being required. Indeed, the FEC is invited to do so if more is needed to fulfill the BCRA's purpose. Because few people interested in national elections can access these individual stations, this information essentially will be unavailable. To learn anything systematic would require a national team of research with massive amounts of time. For any practical monitoring purpose, it is almost as if there were no disclosure at all. Therefore, we suggest that the Commission require the FCC to have local stations forward data they will already collect, and then require the FCC to put it on the web in a searchable form to make the accessible to the larger public (and to the Commission).

The database itself should be searchable by: rate charged for broadcast time, date and time communication is aired, name of candidate to which a communication refers, name of person purchasing the time, and chief executive officers or members of the executive committee or of the board of directors of that person. This information would be highly useful to the Commission, and to others who rely on disclosure to inform the public. The information would help users to determine whether the definition of electioneering communication, the identification of purchasers and ultimate sponsors, and the financial thresholds for reporting, have been effective. If they are effective, a properly structured database, accessible on a well designed website, would help make the information available to the general public, which is supposed to be the ultimate beneficiary of disclosure.

Consistent with the BCRA's definition of electioneering communications, only information falling within limited time periods would need to be placed on the FCC website. However it might be administratively less burdensome for the FCC to make its entire Section 504 database (except possibly for non-federal candidates) available.

In explaining why it decided to require the FCC to create a searchable database regarding the law's definition of "targeted to the relevant electorate," the Commission emphasized its desire to promote disclosure by helping get information to those who must disclose. However the statutory language states that the FCC shall compile and maintain "**any** information the Federal Election Commission may require to carry out" the disclosure provision. Therefore the information the Commission may require is in no way restricted to that which directly aids disclosers. In *Buckley*, the Supreme Court's *first stated purpose* for disclosure was "to provide citizens with the information they need to make

informed election choices." That is, the purpose of disclosure is to benefit the users -- ultimately potential voters. People who need information to comply with the law deserve to be served, but they are not the only ones. The FCC should be required by the FEC to make the information it is already expected to collect, available in a useful format for the full public to use.

ISSUE AD DISCLOSURE

Recommendations for a New Approach

THE CAMPAIGN FINANCE INSTITUTE
TASK FORCE ON DISCLOSURE

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February 2001

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MEMBERS OF THE TASK FORCE ON DISCLOSURE

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***Jeffrey Bell** was a senior consultant to Bauer for President 2000. He was a candidate for U.S. Senate from New Jersey in 1978 and 1982, and serves on the board of directors of the American Conservative Union. He is co-founder of Capital City Partners, a new Washington consulting firm, and a member of The Campaign Finance Institute Board of Trustees.

* **Becky Cain** was President of the League of Women Voters of the United States from 1992 through 1998. A member of the West Virginia State Elections Commission, Cain is now the President of the Greater Kanawha Valley Foundation in Charleston, West Virginia and is a member of The Campaign Finance Institute Board of Trustees.

Kenneth W. Cole is Corporate Vice President, Government Relations, for Honeywell International, Inc., where he is responsible for international, federal and state government relations. He is also past President of the Business-Government Relations Council and of the National Association of Business Political Action Committees.

Kent Cooper, one of the two founders of FECInfo, the nation's premier, website-based source of federal campaign finance and lobbying data. Before that, Cooper for twenty years headed the Public Disclosure division at the Federal Election Commission.

* **Anthony J. Corrado** is an Associate Professor of Government at Colby College and one of the nation's leading academic experts on political finance he is the author of numerous studies of political funding and campaign finance law. He previously held positions in the Mondale, Dukakis and Kerrey presidential campaigns, and served on the White House staff during the Carter Administration. He is co-chair of The Campaign Finance Institute Board of Trustees.

* **Vic Fazio** was a member of Congress from California for twenty years, and chair of the Democratic Congressional Campaign Committee and House Democratic Caucus. He currently is a senior partner at Clark and Weinstock, a Washington lobby firm and is a member of The Campaign Finance Institute Board of Trustees.

Nicole A. Gordon is Executive Director of the New York City Campaign Finance Board. She was President in 1996 of the Council on Government Ethics Laws, the umbrella organization of campaign finance, ethics, lobbying and freedom of information agencies in the U.S. and Canada, and is currently chair of the Government Ethics Committee of the Association of the Bar of the City of New York.

George B. Gould has, since 1979, been Assistant to the President for Legislative and Political Affairs of the National Association of Letter Carriers, AFL-CIO. A fifteen veteran of Capitol Hill, Gould was involved in drafting the Federal Election Campaign Act of 1971.

Kenneth Gross is a partner in the Washington office of Skadden, Arps, Slate, Meagher and Flom, where his election law clients have included congressional and presidential campaigns, corporations, issue groups, and others. An associate general counsel of the Federal Election Commission from 1980-1986, Gross is a member of the Campaign Finance Institute's Board of Trustees.

Frances R. Hill is a professor of law at the University of Miami. A specialist in tax law for nonprofit corporation, Prof. Hill is the author of an important January 2000 Special Report published in Tax Notes, "Probing the Limits of Section 527 To Design a New Campaign Finance Vehicle." Professor Hill has a Ph.D. in Government from Harvard University as well as a J.D. from Yale.

Michael J. Malbin, the Campaign Finance Institute's Executive Director, is also a Professor of Political Science at the State University of New York at Albany and runs its Washington Semester Program. Before going to SUNY in 1990, he was a reporter for National Journal, resident scholar at the American Enterprise Institute, and then worked for Dick Cheney on the Iran-Contra Committee, in the House Republican Leadership and in the Pentagon.

Ronald D. Michaelson is the Executive Director of the Illinois State Board of Elections. A past national chairman of the Council on Government Ethics laws, Michaelson is the author of numerous articles on election administration and campaign finance and is an Adjunct Professor of Public Affairs at the University of Illinois at Springfield.

Phil Noble is one of the nation's leading experts on the role of the Internet in politics. The principal owner of Phil Noble and Associates in Charleston, S.C., his firm, in 1995, was the first political consulting fmn with a web page. In 1996, he founded PoliticsOnline, which provides fundraising and Internet tools for politics and nonprofits

This is a unanimous report from the Campaign Finance Institute's Task Force on Disclosure. It reflects more than twenty hours of meetings spaced over six months, with much background reading and communication between meetings. It is a collective product that takes clear positions, reflecting a considered consensus on controversial issues. Individual members of the Task Force might have made some points differently, or might not endorse every specific point, or might take some points further, had they been sole authors. Nevertheless, they unanimously endorse this report.

EXECUTIVE SUMMARY

Disclosure – the Crumbling Cornerstone

Disclosure has rightly been called the "cornerstone" of campaign finance law.[1] Based on the idea that voters should be able to judge who is behind an election, disclosure enjoys wide public support. Yet other than the most general agreement, policy makers are sharply divided about the specifics of a disclosure system. Campaign innovations and legal developments since the 1974 Federal Election Campaign Act have meant that a lot of candidate-specific issue advertising and other election activity are no longer subject to disclosure law. The question behind this report is whether these activities should be disclosed and, if so, how disclosure may be implemented constitutionally, and in a way that will provide accurate, useful and timely information to voters.

This report contains a factual review of the current state of political campaigning, an analysis of policy goals and constitutional law, and a series of recommendations. It is not a complete report on disclosure. It is about one key threshold question: how to define the boundary between what the law may and may not cover. We divided this question from the others because of its timeliness. We need to emphasize, however, that this report cannot stand by itself. Without adequate real-time enforcement, the best rules will be abused. Informing voters means using the Internet and other new technologies to improve the timeliness and quality of information, while safeguarding accuracy. Unless Congress comes to grips with these other matters, resolving the constitutional question will still not produce adequate disclosure. The Campaign Finance Institute's Task Force on Disclosure plans to address these additional topics in coming months.

Section 1: Overview of Recent Campaigns

Section 1 provides a survey of the rapid growth in campaign spending outside the Campaign Act's disclosure system. This section, supplemented by Appendix I, provides the factual basis for why reform is needed. The most important conclusions are:

- The order of magnitude of undisclosed communications puts them in a league that rival what was raised and spent by any one of the four Democratic or Republican congressional campaign committees. These undisclosed communications are major forces in U.S. elections, not little oddities or blips on the screen.
- To the average recipient, these messages are indistinguishable from ones coming from the candidates or parties. They are perceived, regardless of their source, as being about the candidates and as providing generally equivalent information that will shape the recipients' opinions about the candidates.

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[1] See opinion of Justice Sandra Day O'Connor in *Buckley* v. *American Constitutional Law Foundation*, 525 U.S. 182, 223, citing H. Alexander, *Financing Politics: Money, Elections and Political Reform* (Washington, DC: Congressional Quarterly Press, 4th ed., 1992), p. 164.

Section 2: Constitutional Background and Policy Goals

Any disclosure law must be consistent with the First Amendment's guarantees of free speech and free association. Mindful of Supreme Court precedent, the Task Force therefore sought to craft a proposal that:

1. **Serves a *sufficiently important or compelling public interest*** -- specifically, the three legitimate interests the Court has recognized in the disclosure context, (1) serving the voters' need for information relevant to their voting decisions; (2) safeguarding against corruption or the appearance of corruption; and (3) deterring and detecting campaign finance law violations.
2. **Is not *overbroad***, i.e. does not cover communications that are not campaign related, or pose an undue burden to communication that is campaign related.
3. **Is not *vague***, i.e., clearly marks what is and is not required to be disclosed.

This is what the First Amendment requires. However, the Supreme Court has never said that the "express advocacy" standard was the only constitutionally permissible standard for disclosure. That standard was a means to an end – a way to fix an otherwise vague and overly broad statute in a situation in which the underlying statute (the Federal Election Campaign Act) focused on the speaker's purpose instead of the purpose of disclosure, which relates more to a communication's effects on voters.

We recommend that it is not useful or important to focus on the speaker's intentions. We do not need to know *why* a person shouts fire in a crowded theater; we only need to know it was done, and is likely to have a predictable effect. Similarly, we do not need to know whether a speaker intends to lobby, influence an election, or both. All we need to know is whether we can narrowly, with precision, and in a manner that is content-free, define the kinds of communications that are most likely to affect voters' judgments, so the voters can be told who is paying for them. To reach this point, it is important for Congress to get courts beyond express advocacy statutory interpretations by giving them clear and narrowly tailored statutory language, based on new findings of fact.

Section 3: Problems with Approaches Now on the Table

In light of these constitutional and policy goals, the Task Force considered and rejected three of the major approaches most frequently cited in current debate. The Task Force thought a fourth approach was on the right track, but narrowed it.

- The ***"magic words" express advocacy*** formulation was rejected because it no longer captures most campaign related communication. It fails, therefore, to meet the first of the three tests. It is as if the Court had said that the definition of a comedy were something that told the audience, in so many words, when it should laugh.
- The ***"reasonable person"*** test that is in some proposed bills, and Federal Election Commission regulations, was rejected because it fails to meet the no-vagueness criterion.
- ***Entity-based*** rules, which base disclosure obligations on organizational structure, were rejected because organizations can change their legal forms too easily and

because the public's interest in disclosure stems from the character and amount of communication activity, not from any characteristic of the sponsoring organization.

- Finally, some recent bills use a ***bright line*** test. The Task Force supported this approach, but thought it needed to be narrowed, as described below.

Section 4: New Facts and New Tests

In essence, we would narrow the "bright line" test by looking at four criteria: (1) communications that mention a clearly identified candidate, (2) using specified media or crossing a cost threshold, (3) in the time before an election, and (4) targeted at the relevant constituency. The first three have been offered before; the "targeting" test is new. We offer these not as tests of a speaker's purpose, but as descriptions of communications that are relevant to voters' choices during the election season. Whatever a speaker's purpose, these criteria will select messages that the preponderance of political science research shows will affect voters, and about which voters therefore need more information to evaluate. After more than a quarter century of experience under the old statute, there is now a solid record based upon which we feel comfortable stating the following:

> As a diverse and experienced group of professionals with broad experience in this field, after having considered the relevant research and bringing our extensive observations to bear, we conclude – and believe Congress has an ample basis for concluding – that these four criteria do a better job of delineating electorally relevant communications than do the existing standards. They are also narrowly tailored and clear, and otherwise meet the Constitution's requirements.

Based on these conclusions we make the following recommendations.

Section 5: Proposal

Section 5 provides, with some legislative language, a proposal for greater disclosure in light of the above First Amendment imperatives.

The Task Force would require disclosure from any person or organization spending $50,000 per year or more on electorally relevant communications.

An electorally relevant communication is defined as one that:

- Refers to a clearly identified candidate.
- Appears within sixty days of a primary or general election; (but, because the presidential primary, convention and general election periods form one continuous election season, the covered period for that office would last for the full year;)
- Appears on specified media (e.g., radio, TV, phone bank, direct mail); and
- Is targeted – i.e., a substantial portion of the expenditure must be aimed at the constituency of the candidate(s) to which the communication refers.

The purpose of the targeting test is to allow scope for lobbying communications that mention the sponsors of bills, or that appear in national outlets. Because "targeting"

represents a significant innovation, not in current proposals, a detailed definition is offered in this section of the report. (Note that targeting is not part of the test we would apply for presidential elections because of that election's national scope).

Section Six: Conclusion

These recommendations represent the Task Force's best judgments about how to get voters the information they need today, without overly broad or vague rules. Policies should be fact-driven if Congress is to preserve the rights of speech and association while getting needed information out to the voters. We recognize, however, that the value of our approach, like others, could be eroded by time. Laws cannot be like geometric axioms. A good definition will be the best description we can muster, for now, of a changing reality. They can never be perfect. If you try to include everything, you will include too much. If you try to exclude all ambiguous cases, you will be left with no disclosure. The best that human nature can manage is to describe the world as it is, and then come back after a while, take another look, and describe it again. There are no perfect, permanent resting points in this world, but some resting places can serve the public's interest well for a while. The old legal standards for disclosure may have once served a purpose. That day is over. It is time for a new start, based on the new facts of political campaigning.

* * * * *

Next Steps for the Task Force

The recommendations in this report describe the first step in the long chain of a disclosure system wherein information is travels from the campaign to the voter. It prescribes how to decide what activities should be covered under a disclosure regime. However, these recommendations do not encompass all necessary aspects of a disclosure regime. A general statement does not accomplish anything by itself. The hard work comes when it is time to talk about the particulars. The following issues all have to be addressed:

- How can the system best provide accurate and useful information to voters in a timely way?
- How can one ensure compliance, through real-time enforcement that takes notice of sophisticated evasions, without unduly burdening political participation?
- In general, how can you administer an effective disclosure regime, while simultaneously protecting the freedoms of speech and association?

These topics will be covered in future reports of the Task Force on Disclosure.

INTRODUCTION

The presidential and congressional election campaigns of 2000 were Hydra-headed affairs with each candidate's being only one of those multiple heads. Candidates' campaign committees worked seamlessly with national party committees. State and national party committees jointly blended their "hard" and "soft" money. The same campaign advertisements, with only a minor phrase change, might be funded with hard money as a campaign advertisement or soft money as an issue advertisement. Interest groups -- sometimes using the same political consultants as the campaigns and parties -- bought advertisements that praised or criticized the candidates. Sometimes these were called "independent expenditures". In others, the commercials avoided words of "express advocacy" and were described as "issue ads," as were some of the party ads. Sometimes the groups active in 2000 were new ones, *ad hoc* organizations with uninformative names, funded by others long active in politics or public policy. The activities – national and local; candidate, party and non-party; express advocacy and issue advocacy -- all came together in a lumpy campaign stew, as people worked with each other across organizational lines, creating a mix that could send the most patient of observers reeling from confusion.

This campaign world was not contemplated by the 1974 post-Watergate amendments to the Federal Election Campaign Act ("Campaign Act"). The Act assumed that campaigns would be made up of candidates, parties, political committees and individuals. Most campaign activity would be subject to the Act's contribution or spending limits – with the exception of "independent expenditures" after the Supreme Court's 1975 decision in *Buckley* v. *Valeo.* All of it would be reported to the Federal Election Commission and disclosed to the general public. Clearly, the world envisioned by the 1974 Act only remotely resembles the one of 2000 – let alone the one the Internet is reshaping for future campaigns. At the heart of why the new campaign world is so confusing is the problem of disclosure. Many of the new developments fall outside the Act and therefore are not made public.

Justice Sandra Day O'Connor has rightly called disclosure the "cornerstone" of campaign finance law.[1] In some ways, it is even more than that. Voting is the act through which citizens, in a manner of speaking, lend a piece of themselves to others so those others may act as their representatives in government. A political campaign is that period during which potential representatives, their supporters and opponents, make their case to the voters about whom the voters should choose. The importance of the voters' act of choosing is key to the importance of disclosure. In the words of the Supreme Court's *per curiam* opinion in *Buckley* v. *Valeo*, disclosure "allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also

[1] See Opinion of Justice Sandra Day O'Connor in *Buckley* v. *American Constitutional Law Foundation* 525 U.S. 182, 223, citing H. Alexander, *Financing Politics: Money, Elections and Political Reform* (Washington, DC: Congressional Quarterly Press, 4th ed., 1992), p. 164.

alert the voter to the interests to which a candidate is most likely to be responsive, and thus facilitate predictions of future performance in office."[2]

When those words appeared in *Buckley*, they enjoyed wide public support. Today, there remains a consensus on the most general level, but policy makers are sharply divided about disclosure specifics. In part, that is because the public, and the Supreme Court, does not support compelled disclosure just to satisfy curiosity. It is legitimate to require disclosure to serve compelling public needs, but equally important to be concerned about the privacy of affected speakers and associations. As we shall discuss later in this report, the Supreme Court had literally no practical experience under the Act when it drew the line in *Buckley* between the situations under which disclosure might or might not be compelled. Controversy stems from the fact that much of what looks like campaigning today falls outside the Court's boundaries and gets labeled as "issue ads." When used by political parties, "issue ads" let the parties avoid contribution limits by using "soft money" to help pay for them. These contributions are disclosed, but the parties' reports make the expenditures all but impossible to follow. When issue ads come from anyone other than a national party committee, whether the funding sources are disclosed anywhere will depend on the organization's tax status. The question behind this report is whether these new campaign-like activities should be disclosed under the Campaign Act by anyone who engages in them to a significant extent. If so, how can disclosure be accomplished constitutionally, and in a way that will provide accurate, useful and timely information to voters?

This report is the first to be produced by the Campaign Finance Institute, a nonpartisan institute affiliated with The George Washington University. As a new organization, we had several reasons for appointing a Task Force on Disclosure before others. First, we believe that disclosure is vital for citizens as they deliberate about their election choices. Second, we see disclosure as the essential building block for everything else in this field. Disclosure is not the last word in campaign finance law, but the essential first word – a necessary, but not a sufficient condition for campaign finance reform. Third, we believe there is an opportunity to get past the ideological disagreements to come up with meaningful proposals that address normally opposing concerns. Fourth, if the country cannot reach a constitutionally satisfactory answer to defining the boundary line between what can and cannot be regulated under a disclosure regime, then nothing else in the field of campaign finance law will make any difference.

This report is not a complete one on disclosure. It is about one key threshold question: how to define the boundary between what the law may and may not cover. We divided this question from the others because of its timeliness. We need to emphasize, however, that this report cannot stand by itself. Without adequate, real-time enforcement, the best rules will be abused. And satisfying the goal of informing voters means using the Internet and other new technologies to improve the timeliness and quality of information, while safeguarding accuracy. Unless Congress comes to grips with these matters, resolving the constitutional question will still not produce adequate disclosure. The Task Force plans to address these additional topics in coming months. This report proceeds in the following order:

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[2] *Buckley* v. *Valeo*, 424 U.S. 1, 66-67 (1976).

- A description of the major election related communications during recent elections that have fallen outside the FECA.
- An overview and analysis of Supreme Court and lower court decisions.
- An exploration of the principle issues underlying the legal disputes and alternative approaches to them.
- An exploration and critique of alternative approaches that have been offered for defining the boundary lines.
- Finally, the report will present the Task Force's proposed legal standard for defining electorally relevant communications.

SECTION ONE

Outside of Current Boundaries

Candidate-specific issue advertising emerged as one of the toughest puzzles of the Federal Campaign Act as soon as the law was written.[3] Campaign professionals did use some candidate-specific issue advertising from the 1970s through the early 1990s.[4] However, it was only in the 1996 cycle, in response to a convergence of key court cases,[5] administrative rulings,[6] and political necessities, that these began appearing on a massive scale.

The first large-scale, candidate-specific, broadcast "issue ad" campaigns were the 1995 Democratic Party ads in support of President Clinton, funded partly by soft money.[7] The first interest group with an extensive issue advertising campaign for 1996 was the AFL-CIO. Traditionally, the AFL-CIO had concentrated on mobilizing its own members through internal communications. In early 1996, the labor organization's new President, John Sweeney, announced a special assessment to fund a $35 million advertising campaign that would be aimed at the general public. The goal would be to help set the issue agenda for the 1996 elections. Labor was soon joined by others, although none of the other groups were active on as large a scale that year. According to an estimate from University of Pennsylvania's Annenberg Public Policy Center, the other non-party groups spent a total of about $20 million during 1995 and 1996. The most active were

- Americans for Limited Terms, $1.8 million;
- Americans for Tax Reform, $4.6 million;
- Citizens for Reform, a conservative organization, $2 million;
- The Coalition, a collection of large business organizations, $5 million;
- Planned Parenthood, $1 million; and

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3 In fact, even before *Buckley v. Valeo* was decided, *United States v. National Committee for Impeachment*, 469 F.3d 1135 (2d. Cir., 1972) posed what likely was the first issue ad case, though it was decided on other grounds. Instead, the Second Circuit, demonstrating how courts can misjudge political realities, ruled that spending could only be subject to the Campaign Act when it is made with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate or his agents. In effect, the court rejected the notion that the 1971 Act covered independent expenditures.

4 Early uses of candidate-specific issue advertising during campaign season include the advertisements at issue in the *Furgatch* case and the *Christian Action Network* case. However, the *Furgatch* and *MCFL* rulings, which did not strictly construe the express advocacy standard, explain in part why candidate-specific issue advertising was not widespread until later cases such as *Christian Action Network*.

5 *Faucher v. Federal Election Commission*, 928 F.3d 468 (1st Cir. 1991); *Federal Election Commission v. Christian Action Network*, 92 F.3d 1178 (4th Cir 1996).

6 See, e.g., FEC Advisory Opinion 1995-25, http://herndon3.sdrdc.com/ao/ao/950025.html (indicating party issue advertising by RNC could be funded as legislative issue advocacy in part with soft money).

7 These ads were described in a post-election book by Dick Morris, the consultant responsible for creating them. See Dick Morris, *Behind the Oval Office: Getting Reelected Against All Odds*, 2d ed., 1998.

- The Sierra Club, $1 million.

Note that Annenberg's numbers include "pure issue ads" -- appearing early in the cycle and mentioning no candidate. They also include direct mail and other grass roots activity, as well as media advertising. As a result, the numbers are not comparable to the ones below for 1998 and 2000.

In 1998, Jonathan Krasno and Daniel Seltz used a different methodology for the Brennan Center to analyze television and radio advertising in the country's 75 largest media markets. According to their published study, *Buying Time*, interest groups managed to spend about $35 million in those markets in 1998.[8] With the AFL-CIO removed from the total (because the labor organization concentrated on internal communications as opposed to its media blitz of 1996), the level of activity for other organizations took a steep upward path between 1996 and 1998.

During the 2000 election, the Brennan Center found about $57 million in interest group media advertising in the largest media markets. This was an increase of about 60 percent from 1998. It included about $13 million by Citizens for Better Medicare, an organization supported by the pharmaceutical industry, $8 million by the AFL-CIO and $7 million by Planned Parenthood. Note that for both 1998 and 2000, the Brennan Center's estimates do not include non-media spending (such as telephone banks and direct mail). They also do not include media spending outside the 75 top markets, and for 2000 included only a few House and Senate races.[9]

A dispassionate observer could view these numbers in two different ways. On the one hand, the interest group issue advertising tracked by the Center made up only about 10 percent of all of the candidate-centered political advertising that its researchers found in these market between June 1 and Election Day. On the other hand, this was a significant amount of money, focused in close races, from sources that often were not disclosed. The relative importance of this money is only likely to grow in future years, particularly if political party soft money is regulated. It is important, therefore, to get a concrete sense of some of the kinds of activities by major participants that are not now disclosed.

Profiles of Issue Advertising in 2000:

To help us understand the dimensions of the problem we were addressing, the Campaign Finance Institute decided to put together group profiles for five organizations that were engaged in major interest group issue advertising campaigns during the 2000 election. The organizations were chosen not because they particularly deserved to be singled out, but because their practices help illustrate matters about which the Task Force was thinking.

We drew on the following sources for these profiles. First, the Campaign Finance Institute created a website during the 2000 election for "Key Races" for the House and Senate. Part of the page for each race contains links to every relevant local or national newspaper articles we could find that described party or interest group activity in the state or district. We supplemented this with

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[8] Jonathan S. Krasno and Daniel E. Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections* (New York, NY: Brennan Center, 2000)

[9] For the 2000 data, see the "Political Television Advertising Tables" attached to "2000 Presidential Races First in Modern History Where Political Parties Spent More on TV Ads Than Candidates," Press Release, December 11, 2000, www.brennancenter.org/presscenter/pressrelease_2000_1211cmag.html.

material from the Brennan Center, Annenberg Public Policy Center, Center for the Study of Elections and Democracy at Brigham Young University, Center for Public Integrity, and Campaign for America (for disclosure forms filed after July 1 by so-called section "527" political committees required to register under a new law that passed in 2000.) The group profiles, which appear in the Appendix, are for the following organizations:

- American Family Voices
- Americans for Job Security
- Citizens for Better Medicare
- NAACP
- Republican Leadership Council

The resulting portraits are by no means definitive. In fact, we were struck as we created the "Key Races" Website with just how little information about group activities was available to the public before Election Day. If any of this information is inaccurate, therefore, we can only say that we had to rely on what was available, which in turn was a lot more than was available to most voters. The problem is not with the sources we used, but the lack of required disclosure.

Conclusions from the Group Profiles: What lessons can we draw from our brief review of a few organizations conducting "issue advertising" during the 2000, combined with the information we know from other sources about 1996, 1998 and 2000?

- Undisclosed election related communications represent a large, and rapidly growing, part of the election scene. If you add up what the major groups were doing in media advertising, direct mail and telephone banks in 2000, without public disclosure, the documented total has to be substantially more than $57 million, which is the amount the Brennan Center catalogued for radio and TV advertising in major media markets alone. For all we know, the amount could well double that, once direct mail, phone banks and other activities across the whole country are included. Whatever the exact figure, it is clear the order of magnitude of these undisclosed communications puts them in a league that rival the amount raised and spent by any one of the four Democratic or Republican major party congressional campaign committees – and the party committee numbers include administrative overhead and fundraising costs. These undisclosed interest group communications are major forces in U.S. elections, not little oddities or blips on the screen.
- The advertising often uses the name or likeness of candidates, runs or is distributed shortly before an election, and is targeted at the constituents who will be in a position to vote for or against the candidate.
- The messages do not use words such as "vote for" or "vote against" the candidate. When the messages contain action words, they usually are something like "send a message," "call" or "write" to the candidate.
- To the average recipient, these messages are indistinguishable from ones coming from candidates or parties. The messages, regardless of their source, are perceived by those who

see or hear them as being about the candidates and as providing generally equivalent information that will more or less equivalently help shape the recipients' opinions about those candidates.[10]

- Organizations with very different legal structures produce messages that are very similar to each other.
- In many cases, neither the sources of the funding for this advertising, nor the amount spent on them, is disclosed to the general public. The exception is for "527" committee activity after July 1.
- The information the public gets about these groups from the press is inconsistent and unreliable, as one should expect in the absence of a disclosure regime. The surprise, as has been said in another context, is not that the information is unreliable, but that reporters are able to get any useful information at all to the public.

[10] This conclusion comes from surveys and focus group interviews conducted by Wirthlin Worldwide and Knowledge Networks for David Magleby, *Dictum Without Data: The Myth of Issue Advocacy and Party-Building*, Center for the Study of Elections and Democracy, Brigham Young University, http://www.byu.edu/outsidemoney/dictum/dictum.htm#myth.

SECTION TWO:

Legal Background

How can interest group advertisements do all of these things and still not be subject to the same disclosure requirements as candidates, political parties, or groups and individuals that engage in independent expenditures? For an answer, we need to consider *Buckley* v. *Valeo* and subsequent cases.

***Buckley* v. *Valeo*:** The Federal Election Campaign Act of 1974 was the most significant rewrite of campaign finance law in American history. The Act included mandatory contribution and spending limits for congressional elections, limits on how much a candidate could spend on his or her own campaign, limits on independent expenditures, a voluntary system of public financing with spending limits for presidential candidates, a new disclosure system for all contributions and spending to influence elections, and a new agency, the Federal Election Commission, to oversee and enforce the law. Critics of the 1974 Act immediately went to court to challenge its provisions. The result was the landmark 1976 Supreme Court decision of *Buckley* v. *Valeo* (424 U.S. 1). In *Buckley*, the Court struck down overall expenditure limits, limits on use of a candidate's personal funds, and limits on independent expenditures. The FEC was declared to be unconstitutionally constituted because executive branch officials could not be appointed by Congress. The court upheld contribution limits and disclosure requirements for campaigns, as well as public funding for presidential campaigns.

For our purposes, the Court's reasoning on disclosure is worth reviewing. The law's section 434(e) required disclosure of any independent expenditure "for the purpose of influencing" an election. The Court upheld the requirement, but narrowed its scope.

The Court noted that "compelled disclosure, in itself can seriously infringe on privacy of association and belief,"[11] particularly for unpopular, minority organizations.[12]. Nevertheless, the *Buckley* court said it is permissible to require disclosure to serve three different public purposes:

- To provide citizens with the information they need to make informed election choices;
- To help safeguard against corruption and reduce the appearance of corruption; and
- To provide the government with information it needs to enforce other valid provisions in the law.

The first item is important, and too often forgotten. Informing the voters is an independent justification, distinct from preventing corruption and enforcing the law. Congress may require disclosure so voters will know who is supporting or opposing a candidate. This justification was applied by the Court for disclosure -- not only of a candidate's contributions, but also for independent expenditures. However, it came with several important provisos concerning:

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[11] at 66.

[12] See *NAACP* v. *Alabama*, 357 U.S. 449 (1958). See also *McIntyre v. Ohio* 514 U.S. 334 (1995).

- Undue administrative burdens;
- Exposure to danger, harassment, or reprisal;
- Overbreadth; and
- Vagueness.

Undue Administrative Burden: Following *Buckley*, the Court explained circumstances in which disclosure may pose an undue and unconstitutional administrative burden. In the case *Massachusetts Citizens for Life*,[13] the Court ruled that application of PAC registration requirements would discourage some groups from engaging in campaign activity. The Court noted: "...The administrative costs of complying [with disclosure requirements] may create a disincentive for the organization itself to speak..."[14] Subsequent appeals court cases have demonstrated that the burden must be real and severe before disclosure requirements would be ruled unconstitutional.[15]

Endangering Donors: The plaintiffs in *Buckley* argued that there was a danger that disclosure would expose groups or their contributors to harassment or reprisal. Responding to this issue, the Court did not strike down the statute *in toto*, but instead required that groups be able to seek an exemption from disclosure requirements.[16] In *Brown v. Socialist Workers Party '74 Campaign Committee*,[17] the Court granted such an exemption to the Socialist Workers Party, because it had offered concrete evidence that it had suffered the sort of threats, harassment and reprisals *Buckley* anticipated -- threatening phone calls, hate mail, police harassment, FBI surveillance, etc.[18]

Overbreadth: *Buckley* indicated that a statute impinging on speech must be tailored narrowly to achieve its legitimate public purpose, without harming speech that is not encompassed by that purpose. For example, the purposes of disclosure that the Court recognized primarily had to do with tracking significant contributions or campaign activities. Dollar thresholds or triggers could conceivably be too low, the court said, and Congress subsequently raised the disclosure thresholds for individuals in 1979. Similarly, in the 1995 *McIntyre* case, the Court indicated that a time limitation could be another narrowing device. Finally, as we shall see, the Court was concerned that the regulations for electoral speech should not unduly restrict speech that does not have an electoral connection.

Vagueness: In *Buckley,* the Court carefully analyzed whether the Campaign Act's disclosure language was so vague as to fail the Constitution's due process guarantees by not giving political

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[13] 479 U.S. 238 (1986).

[14] 479 U.S. 238, 255

[15] *Republican National Committee v. Federal Election Commission* rejected the RNC's claims that the FEC's "best efforts" regulations constituted an undue administrative burden on the RNC. Analyzing if compliance with the requirement imposed a severe burden on the RNC, the court found the burden was slight. 76 F.3d. 400 (D.C. Cir. 1996).

[16] 459 U.S. at 74.

[17] 459 U.S. 87 (1982).

[18] 459 U.S. at 99.

speakers notice of whether they do or do not have to make disclosure.[19] The provision in question required disclosure of any independent spending "*for the purpose of influencing a federal election.*"[20]

The Court noted the vagueness of the subjective terms "purpose" and "influence," and said the statute could be read unconstitutionally to reach an extremely broad range of political spending. Rather than rule the provision unconstitutional, however, the Court crafted a "narrowing construction" – an interpretation that limited the independent expenditure disclosure provisions to cover only express advocacy.[21] (It is worth noting, as an aside, that the Court did not hold "express advocacy" to be required for regulation of political parties.) The Court's ***entire*** explication of express advocacy's meaning consisted of the following footnote:

> This construction would restrict the application of sec. 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."

This is the sentence that contains what some later came to refer to as "magic words."

Express Advocacy and "Magic Words": The Court's "express advocacy" standard thus was meant to correct two problems: to ensure that the statute did not reach too broadly, and that its coverage was clear to potential speakers. The Supreme Court did not proclaim – nor has it ever proclaimed – that the express advocacy standard was the only constitutionally permissible standard for disclosure. It was a means to an end – a way to fix an otherwise vague and overly broad statute in a situation in which the underlying statute was focused on the speaker's purpose. The Court did not assert, nor has it ever asserted, that all disclosure laws must incorporate this particular test. This is particularly important in light of the fact that the underlying statute's emphasis on the speaker's purpose does not match up with the Court's statement of the public's interest in disclosure, which is an interest that relates to the voter. [22]

After *Buckley:*

Buckley and MCFL case are literally the only cases in which the Supreme Court has directly applied the express advocacy test for the FECA's disclosure provisions. Not surprisingly, the federal appeals and other lower courts have been divided as to their exact application.

One federal appeals court has given a relatively broad reading of the statute. In the 1987 case of *FEC v. Furgatch*,[23] the Ninth Circuit Court of Appeals defined "express advocacy" as follows:

> Speech need not include any of the words listed in *Buckley* to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.

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[19] 424 U.S. 1, 76.
[20] 2 U.S.C. 434(e) (1976).
[21] 424 U.S. 1, 76.
[22] FEC v. Akins 520 U.S. 1273 (1997).
[23] 807 F.2d 857 (9th Cir 1987).

> This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act.
>
> Finally, it must be clear what action is advocated.
>
> Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.[24]

The Federal Election Commission incorporated the *Furgatch* test it in regulations in 1995. In the regulations, express advocacy was defined to include any communication that:

> When taken as a whole, and with limited reference to external events, such as proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because (1) The electoral portion of the communication is unmistakable, unambiguous and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.[25]

This is the definition that this report refers to as the "reasonable person" test in the sections to follow.

Shortly after these regulations, other circuit courts heard challenges to the new definitions, as well as to state statutes that raised similar questions. These cases, in turn, helped spur the growth of issue advertising in 1996-2000. According to some of these courts, *any* regulation of political communications – including disclosure -- is invalid if the communication does not meet the "magic words" definition of "express advocacy." Cases taking this approach include *FEC v. Central Long Island Tax Reform Immediately* (*CLITRIM*) (2d Cir., 1980),[26] *FEC v. Christian Action Network* (4th Cir., 1996),[27] *North Carolina Right to Life Inc. v. Bartlett* (4th Cir., 1999),[28] *Vermont Right to Life v. Sorrell* (2d Cir., 2000)[29], and *Florida Right to Life v. Lamar* (11th Cir., 2001).[30]

Some commentators treat these cases as if they definitively settle all of the key constitutional debates relating to issue ad disclosure. However, it is crucial to note that in all these cases, the statutes at issue were extremely vague, and that -- in a substantial number of the cases – the FEC or

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[24] *FEC* v. *Furgatch*, 807 F.2d 857 (9th Cir., 1987), cert. denied, 484 U.S. 850 (1987).

[25] 11 C.F.R. 100.22.

[26] 616 F.2d 45 (2d Cir. 1980)

[27] 894 F. Supp. 946 (W.D. Va. 1995), aff'd; 92 F.3d 1178 (4th Cir. 1996).

[28] 168 F.3d 705 (4th Cir. 1999)

[29] 221 F.3d 376 (2000)

[30] 2001 U.S. App. LEXIS 613

state agencies were going well beyond disclosure to argue that the statute *prohibited* corporations (including non-profit corporations) from engaging in the communications involved.

Other courts have been willing to define express advocacy more broadly than "magic words" for disclosure purposes. See *FEC v. Survival Education Fund*, *Krumpton v. Keisling*,[31] *Kentucky Right to Life*.[32] See also *Wisconsin Elections Board*.[33] Still others have indicated that express advocacy is *sufficient* to narrowly tailor disclosure, *but not always necessary* to ensure narrow tailoring. In *McIntyre* the Court noted the express advocacy standard was a narrowing construction, but did not impose – nor suggest it necessary to impose – an "express advocacy" standard in the context of ballot initiative disclosure.[34]

We have argued that the Supreme Court's "express advocacy" and "magic words" tests are means for tailoring an imprecise statute. When we move away from the Campaign Act, we can see clearly the Court is not declaring "magic words" to be a constitutionally necessary for all forms of disclosure. For example, the Federal Communications Act, the Federal Communications Commission's and various states' sponsor identification rules, require disclosure of the sponsors of all advertising, including political advertising, whether it is express advocacy or not.[35] In the 1999 case of *Adventure Communications v. Kentucky Registry of Election Finance*,[36] the U.S. Court of Appeals for the Fourth Circuit upheld a Kentucky law requiring broadcasters to send copies of their FCC sponsor identification disclosures to the state election agency. Likewise, in a case heard by the U.S. Court of Appeals for the Fifth Circuit, *KVUE v. Moore*,[37] broadcasters challenged a Texas state statute concerning broadcast sponsorship regulations. The Fifth Circuit upheld the regulations, finding the state interest in disclosure "compelling,"[38] and saying the regulations were of "an extremely limited nature."[39]

Earlier examples involving federal laws support the same conclusion. For example, in the 1913 case *Lewis v Morgan Publishing,* the Supreme Court upheld an early version of postal disclosure laws, strongly asserting the public's "informational interest" in disclosure:

> Many periodicals are secretly owned or controlled, and... the public is deceived through ignorance of the interests the publication represents... Since the general public bears a large portion of the expense of distribution of [bulk or discount mailings]... it is not only equitable but highly desirable that the public should know the individuals who own or control them. [T]he intent of

[31] No. 97C-11659; CA A99474 (Ore. Ct. App, 1999) http://www.publications.ojd.state.or.us/A99474.htm
[32] 108 F.3d 637 (1997).
[33] No. 98-0596 (Wis. Sup. Ct, 1999)
[34] See, e.g., McIntyre, 415 U.S. 334,356 (1995).
[35] A few key cases – *Loveday v. FCC* and *In Re Trumper Communications* – provide insight into the sponsor identification rules' legal and operational background.
[36] No. 98-2778 (4th Cir. 1999)
[37] 709 F.2d 922 (5th Cir. 1983).
[38] Id. at 938.
[39] Id.

> the legislation... is... to enable the public to know whether matter which was published was what it purported to be.[Emphasis added.] [40]

Likewise, the various political activities disclosure provisions of the Lobbying Disclosure Act, the Foreign Agents Registration Act, National Labor Relations Act, and Public Utilities Act have either never been challenged, or have been upheld without reference to any analogue of the express advocacy test.

Summary: It is easy to lose one's place in court cases about "express advocacy." The Supreme Court has never said that its specific definition was mandated by the Constitution. It offered the definition as a statutory interpretation to avoid constitutional problems in a vague statute that focused on the speaker's purpose. The question is whether Congress can devise a test that can stand on firmer empirical ground, while still serving *all* of the underlying constitutional objectives:

- achieving the legitimate public interests served by disclosure;
- avoiding overbreadth;
- not placing undue administrative burdens on the speaker;
- protecting the related First Amendment right of association; and
- avoiding vagueness.

We turn now to the Task Force's deliberations on these matters.

[40] 229 U.S. 288, 316 (1913).

SECTION THREE

Task Force Deliberations

The Campaign Finance Institute's Task Force on Disclosure is made up of a remarkably experienced and politically diverse group of people. It met for more than twenty hours, over the course of six months, with each meeting preceded by reading and email discussion. Theirs was a deliberative process, in the best sense of that word. The members batted ideas back and forth, challenged each other, challenged themselves, learned from each other, and often changed or refined their opinions. In Federalist No. 10, James Madison described the best effect of deliberation as being its tendency to "refine and enlarge." That is what happened here.

The Task Force's goal seemed deceptively simple, but neither the process nor product was simple at all. The goal was to devise a workable system that would satisfy the voters' legitimate need to know who is behind major electoral communications, without violating the Constitution through either overbreadth or vagueness. In addition to the constitutional filter, the Task Force members imposed several others, based upon their practical experience with national campaigns. For every proposal, campaign consultants and election lawyers on the Task Force were asked whether they could easily get around it. If the professionals could get around an idea the first election it took effect, then it would not be worth the effort to pass it. It is one thing for an idea to become outmoded over the course of some time, as campaigning evolves. It is quite something else to pass an idea that is obsolete instantly.

In addition to the "end-run" test, ideas had to be practical. Election administration officials weighed in frequently against one or another idea by showing how hard it would be to administer fairly, as well as to maintain accuracy, during the rush of a campaign's closing weeks, when the flow of information and the voters' need to know were both at their peak. Former candidate and issue group representatives were also asked whether proposals would stifle the flow of a campaign, lawyers and others with experience with charitable, public welfare and business or labor organizations were asked how any idea would affect those vital sectors, while political scientists on the panel let others know about research that was relevant to the Task Force's discussions. Any idea is bound to have some unanticipated consequences; but we felt a responsibility to anticipate as much as we could.

Three easy rejections – Magic Words, Reasonable Person Test and Entity-Based Disclosure: The Task Force rejected three of the four most common approaches to setting a boundary line, and insisted on narrowing the fourth.

Magic words: The so-called "magic words" test was rejected because it simply failed to define anything that exists in reality. During the early days of television advertising, viewers were exhorted directly to buy certain products, or to vote for certain candidates. This does not happen any more, either in commercial or political messages. People are shown images of smiling faces, topped by lustrous hair, with the names of hair products – but no action words, let alone "buy this." The same is true of modern campaign commercials. Candidates are described as fighters, or

compassionate, or however else they wish to be known. Or they are described in negative terms. Nobody bothers to underline the obvious.

The change in hair product advertising mirrors what has been going on in politics. As one study shows, only 4 percent of the advertising by candidates in 1998 would meet the Supreme Court's definition.[41] To put this another way, ninety-six percent of the candidates' own advertising fails to meet the magic work test. At the same time, data gathered by another research organization during 2000 showed that more than ninety percent of interest group "issue advertising" after Labor Day was perceived to have been primarily about whether to elect a particular candidate.[42] That is not just a slight error to create a margin for safety. It is an error of such magnitude as to show that the Court has simply missed the boat. The mismatch was not a practical problem in 1975, at the time of *Buckley*, but it is clearly a problem now. With the post-1996 growth in advertising outside the Court's definition, there will either have to be a new definition or else Congress and the courts will have to acknowledge that disclosure will become steadily less relevant.

Reasonable Person Test: The Task Force also had significant reservations about the *Furgatch* standard incorporated in the FEC's regulations. The FEC regulations had said that express advocacy should be interpreted to include all communications that no reasonable person, in context, could interpret as being anything else. This approach makes some intuitive sense. For example, there was very little disagreement about classification in recent research tests.[43] Howeve, the problem with any "reasonable person" test is that it fails to give the advance warning to the speaker required by the due process clause. The election administrators on the Task Force also were concerned that it would be impossible to administer such a subjective test in the context of a rapidly unfolding election. They wanted clear guidelines to offer to potential speakers, and to their staff.

Entity-based disclosure: The Task Force also rejected the idea that disclosure should depend upon an organization's legal form because, as demonstrated by recent experience, it is too easy for an organization to move from one form to another. The public's interest lies in getting disclosure for certain kinds of *activities*, no matter what kind of organization sponsors the activities. To offer just one example on this point: Some have suggested that nonprofit public welfare organizations as defined by section 501(c)(4) of the Internal Revenue Code should receive different treatment from political organizations (covered by section 527) because politics is a major purpose of the 527 groups, but it is only a minor purpose of the social welfare groups. Under this approach, what is "major" and "minor" is defined by whether it makes up a small or large portion of an organization's activities. This test may be useful for determining whether an organization deserves a tax exemption, but it does not settle what the public should know about an election. After all, if a large 501(c)(4) organization spends only 10 percent of its annual budget on electorally relevant issue ads, that could still represent a major level of political activity. Or, what about a hypothetical expenditure of only one percent of

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[41] *Buying Time, op. cit.*

[42] Press briefing giving at the National Press by David Magleby on February 5, 2000, in connection with the release of D. Magleby, ed., *Election Advocacy: Soft Money and Issue Advocacy in the 2000 Congressional Elections* (Center for the Study of Elections and Democracy, Brigham Young University.) Available at www.byu.edu/outsidemoney/2000general

[43] *Dictum Without Data, op. cit.*

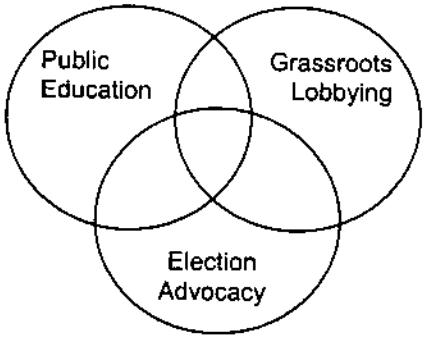
the $100 million in annual revenues of a Fortune 500 corporation? What makes these expenditures electorally relevant is their content and size, not the ratio between the size and the organization's other activities.

The Logic of Definitions

After rejecting these easy cases, the Task Force began to work through the logical options. It began with what seemed, but turned out not to be, a reasonable question: how can you tell the difference between "electioneering" and "issue ads"? The question turned out not to be reasonable because the two categories -- election and issue speech -- referred not to different categories of speech, arrayed along a single dimension, but to two different dimensions or characteristics that can be present or absent in the same communication, independently of each other. A communication put out to the general public can be about issues and serve any number of different results. For example, the intended result of a communication about an issue could be to:

- educate or persuade the audience about the issue;
- mobilize citizens to lobby; or
- affect voters' opinions about, and willingness to support, an office holder or candidate.

Even more confusing, as the Supreme Court has said, these categories are not mutually exclusive. The same communication can serve more than one of these ends at a time. As one of the Task Force members suggested at a meeting, we should think about these categories as overlapping circles in a Venn diagram.



The categories relate to the different kinds of effects a communication might have. Any communication can have any one, any two or all three effects at once. It is intrinsic to this form

of communication that you cannot surgically separate the three circles. The question is whether you can capture the part of the circle that overlaps with other circles. The Supreme Court said you can tell the election circle by the presence or absence of certain words. The problem is that there are only very rarely such magic words – not the Court's or any others — even in those communications where the circles do not overlap.

The difficulty is not merely a technical one. It flows from the basic structure of language and communication. The "action" effect of any communication is not and can never be defined solely by its words. To borrow from a parallel situation, consider how to tell the difference between straight exposition, on the one hand, versus irony, satire, or any other form of comedy, on the other. The difference is not defined by words but by tone, context, and the audience's expectations, among other things. These cannot be pinned down into neat verbal formulae.

Thus, the attempt to *define* election advocacy seems to leave us with an unsatisfactory choice. The definition that might correspond to reality cannot be pinned down by words and therefore cannot give clear, advance notice to a potential speaker. Alternatively, the "magic words" give notice, but cover almost nothing. It is as if the Supreme Court said that the definition of a comedy is something that tells the audience, in so many words, when it should laugh.

SECTION FOUR

New Facts and New Tests

One major alternative has been offered that seeks to avoid the problems raised by the past definitions of election advocacy. It would move away from the logical structure of definitions and move instead toward what social scientists call "indicators" -- markers whose presence or absence can reliably tell us whether what we are looking for is present or not. It would also move away from Congress's past statutory emphasis on a speaker's purpose. We know, from past experience and research, that potential voters cannot tell the difference between so-called issue ads and so-called express advocacy.[44] The public believes that any expensive communication that discusses the candidates, and is aimed at them at election time, is being bought and paid for to influence their votes, and the relevant political science research suggests that it does. Potential voters therefore have an interest in knowing who is paying for these communications so they can to evaluate the content of the messages and the credibility of the speaker. The question is whether that interest depends upon the purpose of the speaker.

We recommend that it is not useful or important to focus on the speaker's intentions. We do not need to know *why* a person shouts fire in a crowded theater; we only need to know it was done, and is likely to have a predictable effect. Similarly, we do not need to know whether a speaker intends to lobby, influence an election, or both. All we need to know is whether we can narrowly and precisely (and in a manner that is content-free) define the kinds of communications that are most likely to affect voters' judgments, so the voters can be told who is paying for them. To reach this point, it is important for Congress to get courts beyond "express advocacy" statutory interpretations by giving them clear and narrowly tailored statutory language to interpret, based on new findings of fact.

Tightening the Bright Line

An approach like this one first appeared publicly in a joint American Enterprise Institute - Brookings Institution proposal on campaign finance one month after the 1996 election.[45] A modified version was put into amendment form by Senators Olympia Snowe (R-ME) and James Jeffords (R-VT) and then became part of the bill introduced in 1999 by Sens. John McCain (R-AZ) and Russell Feingold (D-WI). As it appeared in those latter bills, a communication is called "electioneering" if it:

> "(i) refers to a clearly identified candidate for Federal office; . . .

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[44] Magleby, *Dictum Without Data, op. cit.*

[45] Norman J. Ornstein, Thomas E. Mann, Paul Taylor, Michael J. Malbin and Anthony Corrado, "Reforming Campaign Finance," reprinted in A. Corrado, T. Mann, D. Ortiz, T. Potter and F. Sorauf, eds. *Campaign Finance Reform: A Sourcebook* (Washington, DC: The Brookings Institution, 1997), pp. 379-84.

> "(ii) is made (or scheduled to be made) within 60 days before a general, special, or runoff election for such Federal office; or 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for such Federal office; and
>
> "(iii) is broadcast from a television or radio broadcast station whose audience includes the electorate for such election, convention, or caucus."

In short, anything that referred to a clearly identified candidate, on TV or radio, shortly before an election, would be treated as "electioneering." The Campaign Finance Institute's Task Force on Disclosure found merit in this approach. (In the interest of full self-disclosure, two of the members of the AEI-Brookings Task Force are on the Campaign Finance Institute's Task Force as well as its board of trustees.) We should note, however, that our discussion will substitute "electorally relevant" or "election related" communication for "electioneering" to avoid the implication that the speaker's purpose is what we are trying to delineate.

The indicators – clearly identified candidate, time frame and medium -- clearly were more accurate than "magic words" at capturing electorally relevant advertising. Yet, even though they were an improvement empirically, they need further refinement. One significant problem is that the test seems to capture too much; it seems overly broad. Consider the following scenario: a national advertising campaign against, let us say, the McCain-Feingold bill, is broadcast during the month before an election, when the bill is scheduled for floor debate in the Senate. Let us assume that the advertising names the bill's sponsors, the bill is known popularly by the sponsors' names, and at least one of the sponsors is a candidate for reelection. Because the advertising campaign is national, the audience would, to use the above language, "include the electorate." However, by hypothesis, we are assuming that the primary thrust of the advertising is to stimulate lobbying. Under this set of hypothetical facts, the definition would be identifying a communication as election advocacy when it is not.

The Task Force does not have a solid empirical foundation for knowing how often such false identifications might occur, but they clearly could occur. The Task Force wrestled with this, mindful of the need to avoid overbreadth. Essentially, it wanted to identify lobbying communications, and then exempt them from the definition of election advocacy when and if they were not in fact about elections. Early in our deliberations, we tried to achieve this result by looking at the content of the messages themselves, but it became clear that this would not work. As we showed with the Venn diagram, many communications are both about lobbying and about elections. We concluded there is no reason to exempt an election message from disclosure because it was simultaneously about a bill and a candidate. More to the point, any effort to define the distinction in words by attempting to identify a message's primary purpose would lead us into subjective tests that would fail for vagueness reasons.

As an alternative to subjective tests, it struck us that knowing the audience for a message could serve as an objective indicator of its potential effect on an election. Moreover, we want to focus on the potential effect on voters, more than on the intentions of speakers. The Snowe-Jeffords bill talked about an audience that "included" the electorate for the candidate named in the communication. This seemed to us to be on the right track, but not precise enough. Any national

communication would "include" all electorates. We thought it better to ask whether *a substantial portion* of the audience for a purchased advertisement was made up of the relevant electorate. Through this test, we were asking whether the cost of a paid advertisement is focused or targeted toward the people who would be in a position to vote for or against the candidate being identified. If a communication is going to influence an election, without being absurdly wasteful, it will be directed toward the electorate.

A New Legal Approach

The Task Force concluded that an effective targeting test could help to tailor the test more narrowly, strengthening it against constitutional challenges. Two factors (clearly identifiable candidate, within a specific time period) are enough to identify most electorally relevant communications, but the two factors alone will also capture some non-election speech. Adding a third factor (targeting) helps weed out false positives. Once this point is reached, policy makers will have to make a judgment. The targeting test will reduce overbreadth, but may not catch every single false positive. The question, therefore, is whether it is acceptable to be less than 100 percent perfect. We would argue that this is acceptable, for the following reasons. First, perfection is not possible. The only alternative to a less-than-perfect test is to live with the status quo, and watch disclosure be eaten away. Second, the test is clear and predictable. If a person or organization wishes to avoid disclosure, all he, she (or it) would have to do, for the limited time period, is to craft an advertising campaign that does not focus on the districts of named candidates. Third, if the person or organization chooses to focus on those districts anyway, the only "penalty" is disclosure. The potential infringement on First Amendment rights therefore is minimized. We conclude, therefore, that this test does a better job of satisfying the Supreme Court's underlying First Amendment rationale than does a mechanistic application of the Court's own "express advocacy" construction of "purpose," let alone the "magic words" footnote.

The remaining question is whether such an approach will withstand constitutional scrutiny. On this matter, Congress needs to remind itself that "express advocacy" was offered by the Court not as a constitutional requirement, but as a way narrowly to tailor a vague statute to ensure that the statute would avoid constitutional infirmities. As such, the Court's reading had to be rooted in the statute, which focused on the primary "purpose" of a contribution or expenditure.

In this manner we offer these standards -- mentioning a clearly identified candidate, in a message using specified communications media, targeted at the relevant constituency in the time before an election – because, whatever a speaker's purpose, these criteria will select messages that the preponderance of political science research shows will affect voters, and about which voters therefore need more information to evaluate. After more than a quarter century of experience under the old statute, there is now a solid record based upon which we feel comfortable stating the following:

> As a diverse and experienced group of professionals with broad experience in this field, after having considered the relevant research and bringing our extensive observations to bear, we conclude -- and believe Congress has an ample basis for concluding -- that these four criteria do a better job of delineating electorally relevant communications than do the existing standards.

They are also narrowly tailored and clear, and otherwise meet the Constitution's requirements.

Based on these conclusions we make the following recommendations, presented in detail over the next several pages.

SECTION FOUR:

The Task Force's Recommendations

1. General Rule:

Every person who spends an aggregate of more than $50,000 in a calendar year on targeted, candidate-specific advertisement during the covered pre-election period shall file disclosure reports on such advertisements with the FEC.

2. Definitions

(a) "***Advertisement***" for purposes of this section means: (i) Any paid advertisement (or purchased program time) broadcast from a television or radio station or a cable station or facility; (ii) Any paid message from a telephone bank, direct mail or electronic mail; (iii) Any paid advertisement that costs more than $5,000 through another communications outlet.

(b) "***Candidate-specific***" means reference is made to a clearly identified candidate for Federal office, by using name, likeness or other clear means of identification.

(c) "***Covered pre-election period***" means: (i) for a candidate for Senate or House, the communication must occur 60 or fewer days before a general, special, or runoff election; or 60 or fewer days before a primary or preference election or a convention or caucus of a political party that has authority to nominate a candidate for such Federal office. (ii) For a candidate for President, the time period begins 60 days before the first primary or preference election or a convention or caucus of a political party and continues through the Election Day of the general election.

(d) "***Targeted***" means:

(i) *Broadcast Ads*: A broadcast advertisement distributed from a television or radio broadcast or cable station or facility is targeted if the station's or facility's audience includes a portion of the electorate for such election, convention or caucus and it is not part of a national or regional broadcast of that advertisement.

(ii) *Print Advertisement*: An advertisement in a newspaper, magazine, or other means of written communication is targeted if the publication's audience includes a substantial portion of the electorate for such election, convention or caucus. An advertisement that is distributed nationally is excluded.

(iii) *Phone bank or Mail*: A telephone-bank or direct-mail piece is targeted if a substantial portion of the phone contacts or mail pieces are delivered to an audience in the states

or congressional districts in which the clearly identified candidates are running for office.

(e) "***Political advertisement***" does not include: (i) News, editorials and entertainment programming; (ii) communication to an organization's own members; (iii) non-partisan voter registration; (iv) educational institution - Appearances by candidates or representatives; (v) organizations sponsoring debates.

TABLE 1: THE PROPOSAL DESCRIBED

PROPOSAL	RATIONALE
GENERAL RULE: *Every person who spends an aggregate of more than $50,000 in a calendar year...*	The word "person" is to be defined broadly to include organizations, as it is in the current Act. This Task Force adopted a comparatively high $50,000 threshold to (1) focus on major communications, and (2) provide a "small player" exception, as required under *Buckley*.
...on targeted, candidate-specific advertisement during the covered pre-election period...	The targeting, candidate-specific, and time limitation/pre-election period limitations reflect narrow tailoring as required by *Buckley*.
...are be required to file a report with the FEC.	The Task Force's recommendations on the mechanics of disclosure are discussed in part II.
DEFINITIONS	
"Advertisement" for purposes of this section means: • Any paid advertisement (or purchased program time) broadcast from a television or radio station or a cable station or facility; or • Any paid message from a telephone bank, direct mail or electronic mail; or • Any paid advertisement that costs more than $5,000 in another communications outlet.	Past proposals have been limited to television or radio. The Task Force thought expenditures for the other named media were too important to be ignored. The final item, for paid advertising in any communications outlet, would cover banner ads on the Internet and other new media, if they cost enough and if they meet the other tests.
"***Candidate-specific***" means reference is made to a clearly identified candidate for Federal office, by using name, likeness or other clear means of identification.	This definition is simply descriptive, and does not judge the intent of the advertiser – whether it be to engage in "electioneering" or sponsor issue discussion.
"***Covered pre-election period***"" means: [a] For a candidate for Senate or House, the communication must occur 60 or fewer days before a general, special, or	Time limitations such as this were indicated by *McIntyre v. Ohio Board of Elections* as a means to narrowly tailor disclosure laws.

runoff election; or 60 or fewer days before a primary or preference election or a convention or caucus of a political party that has authority to nominate a candidate for such Federal office.	narrowly tailor disclosure laws.
(b) For a candidate for President, the time period begins 60 days before the first primary, caucus or convention and continues through Election Day for the general election;	The presidency is covered for the full year because the primary, convention and general election in fact form one continuous election season.
For Senate and House candidates, "targeted" means:	The targeting test, gauges whether an ad is focused specifically to a candidate's constituents/voters. (Note: The constituency for the presidential election is considered to be the whole nation, even during the primary period.)
(i) ***Broadcast Ads***: A broadcast advertisement distributed from a television or radio broadcast or cable station or facility is targeted if the station's or a facility's audience includes a substantial portion of the electorate for such election, convention or caucus. Advertisements that appear on a station or as part of a uniform national or regional broadcast of that advertisement are excluded.	This standard would exempt, for instance, advertising during a national network broadcast urging Congress to "vote for the Smith-Jones bill." It would also exempt the same advertisement run in any district or state except Smith's and Jones's.
(ii) ***Print Advertisement***: An advertisement in a newspaper, magazine, or other means of written communication is targeted if the publication's audience includes a substantial portion of the electorate for such election, convention or caucus. An advertisement that is distributed nationally is excluded.	This test tracks the broadcast test. Thus, an ad in *USA Today* would be covered only if it were targeted for certain regional editions.
(iii) Phone bank or Mail: A telephone-bank or direct-mail piece is targeted if it is delivered to an audience in the states or congressional districts in which the clearly identified candidates are running for office.	Phone banks and direct mail are by definition targeted.

"Political advertisement" does not include: **(i) News, editorials and entertainment programming**: The current exception for news stories, commentaries, or editorials ***should be expanded*** to include other programming purchased or created by a television or radio station; **(ii) Communication to an organization's own members;** **(iii) Non-partisan voter registration;** **(iv) Educational institution** - Appearances by candidates or representatives; **(v) Organizations sponsoring debates** (under limited conditions described in the Act.)	The Task Force applies the Campaign Act's current exemptions to the new disclosure proposal. The existing media exemption is at 2 U.S.C. 431(9)(B)(1). It should be extended to entertainment programming. There is no desire to regulate comedy or other entertainment as if it is electioneering, even if it does name candidates. The other exemptions, in order, are: 2 U.S.C. 431(9)(B)(ii); 2 U.S.C. 41 (9)(B)(iii); 11 C.F.R. 114.4 (b)(7); and 11 C.F.R. 100.7(b)21; 100.13 and 114.4 (f).

The constitutional support for this proposal is presented in the next table, followed by one that presents examples to show situations under which disclosure would or would not be required.

Table 2: Constitutional Analysis of Task Force Proposal

Public Interests	**Anti-corruption**: the disclosure will help deter and detect corruption, especially of coordinated, in-kind contributions of advertising. **Informational Interest:** disclosure will give voters information about sponsors. This will enable voters to judge the credibility of the message – and the messengers. Where voters may not know the sponsors, the media (or opposing candidates) will investigate and provide voters will still more useful information. **Anti-Fraud Interest**: Similar to the informational interest, disclosure, by identifying ad sponsors, will enable the media or opposing candidates to detect if the sponsors have motives to distort facts, or give them evidence as to the factual basis for advertisements' messages.
Narrow Tailoring	**60 Day Time Limit**: time limits were indicated as a useful narrow tailoring device by *McIntyre v. Ohio Elections Commission*. **$50,000 Threshold**: This "small spender" or "little person" exception ensures that only major spenders will be subject to disclosure. This exemption, directly related to the overbreadth problem where disclosure poses undue burdens on small actors, is drawn from *Buckley v. Valeo, Massachusetts Citizens for Life,* and McIntyre. **Lobbying Issue Ad Exemptions:** The proposal creates two implicit exemptions for lobbying, which is protected under the 1st Amendment right to petition government: • **National Lobbying Advertising**: an issue ad lobbying campaign that does not specifically target an officials' home district or state is exempt • **Generic Lobbying Advertising**: Lobbying advertisements which are non-candidate specific are exempt. An ad, for instance, that urges voters to "urge their Congressman and Senators to vote for bill X" is exempt. The lobbying exemptions follow *Buckley's* effort to distinguish between issue advertisements and campaign advocacy. **Traditional Exemptions:** The proposal also includes additional exemptions meant to further narrowly tailor the disclosure requirements, including: ○ News/Media/Entertainment exemption ○ University/Educational Institutions exemption ○ Membership/Internal Communications exemption (per 1st Amendment guarantee of freedom of association) ○ Non-partisan voter registration exemption ○ Debates exemption **Not Vague or Overbroad:** The sum total of these narrow tailoring provisions is that the proposal is neither overbroad, in that it carves out multiple exceptions, nor is it vague, in that it provides clear, bright-line rules that provide notice to political advertisers so they clearly know whether or not the disclosure rules apply to them, in accordance with the 5th/14th Amendment due process clauses.

DISCLOSURE PROPOSAL: EXAMPLES

	BACKGROUND	ADVERTISEMENT	Covered?	EXPLANATION
1	The Senate is voting on the budget on 11/2/02. Senator Johnson is in a very tough reelection campaign. A $1million ad buy runs nationally on 11/1/02.	"The budget showdown must end. Call Senators Johnson and Smith and tell them a vote for the President's budget is unforgivable."	NO	The ad is exempt because: □ it does not identify a specific candidate □ it is not targeted (it's a national buy). Note that this ad might be considered express advocacy under the magic words test.
2	Same as above, except ads target Senator Johnson's home state.	"The budget showdown must end. Call Senator Johnson and tell her a vote for the President's budget is unforgivable."	YES	The ad is targeted, falls within the 60 day election season, identifies the candidate, and exceeds the $50,000 trigger. Whether or not the sponsor intends for this ad to influence voters, it will. Therefore, the voters' right to information about the ad requires that disclosure be made.
3	Jay Leno, during his Tonight Show monologue, quips:	"Senator Johnson's mom wears combat boots."	NO	Network programming is covered by the media/entertainment exemption.
4	Margaret McIntyre spends $200 to produce and distribute leaflets to voters at the polls saying:	"Defeat Senator Johnson! She's a tax and spend moderate!!!"	NO	The leaflets are below the $50,000 threshold.
5	Acme corporation sends a newsletter to its executives; Acme union sends a newsletter to its members.	Acme letter: "Defeat Senator Johnson." Union letter: "Elect Senator Johnson."	NO	Both are exempt under the internal/membership communication exemption.
6	Software billionaire Smith runs for Congress. His arch-enemy from the software industry runs $1 million of ads in his district in October.	"Joe Smith takes pleasure torturing innocent puppy dogs. Email Smith and tell him – No More Doggy Torture. Paid for by Protect Our Puppies."	YES	The ad is targeted, falls within the 60 day election season, identifies the candidate, and exceeds the $50,000 trigger.
7	Same as #2. 5 unions and 5 corporations form a coalition to air ads opposing the budget. 6 of the 10 join because they think a united front is good lobbying. 4 join hoping to hurt Senator Johnson; they want the "cover" of the coalition to soften criticism of their spending.	"The budget showdown must end. Call Senator Johnson and tell her a vote for the President's budget is unforgivable."	YES	The ad is targeted, falls within 60 days, , identifies the candidate, and exceeds $50,000. Note that it is impossible to determine the "intent" o the coalition – there are mixed motives among members. Some members seek a coalition to enhance their message, while other members seek to obscure their involvement.

CONCLUSION

These recommendations represent the Task Force's best judgments about how to mark the activities that should trigger disclosure in the contemporary campaign environment. We recognize, however, that our approach, like others, could develop its own loopholes over time. For example:

- Our use of the targeting standard relies on geography for solving overbreadth problems. It can only apply, therefore, to media whose distribution patterns can be described geographically. That cannot be done for some methods of Internet distribution.
- The Task Force reviewed several advertisements during the campaign that did not mention a clearly identified candidate, but nevertheless seemed to us to be carrying an electoral message. (For example, an advertisement placed by People for the American Way Foundation that told readers to "urge all candidates and officials to oppose right-wing justices for the Supreme Court."[46])

For now, the use of candidate-free campaign ads seems relatively rare. Will it remain so? We do not know. We also do not know exactly how political use of the Internet will develop.

Should we try to capture these emerging phenomena? We thought it would be a serious mistake to write a proposal that knowingly was overbroad, to guard against developments that we cannot yet describe precisely. Policies should be fact-driven if Congress is to preserve the rights of speech and association while getting needed information out to the voters. Definitions in this field cannot be like geometric axioms. A good definition will be the best description we can muster, for now, of a changing reality. Such definitions can never be perfect. If you attempt to include everything, you will include too much. If you attempt to exclude all ambiguous cases, you will be left with no disclosure. The best that human nature can manage is to describe the world as it is, and then come back after a while, take another look, and describe it again. There are no perfect, permanent resting points in this world, but there are some resting places that can serve the public's interest well for a while. The old legal standards for disclosure may have once served a purpose. That day is over. It is time for a new start, based on the new facts we have presented.

[46] *The New York Times*, September 15, 2000.

APPENDIX:

SELECTED CASE STUDIES

American Family Voices

Shortly after the Republican convention in August, viewers in three key states saw an advertisement from a new group, American Family Voices.

The script for the advertisement:

VIDEO	AUDIO
(On screen: Paid for by American Family Voices) *(On screen: $4,323,750 in contributions – Source: Bush and RNC filings, Federal Election Commission; Center for Responsive Politics).* *(Source: The Dallas Morning News, 6/17/95).* *(On screen: $154,475 in contributions - Source: Bush and RNC filings, Federal Election Commission; Center for Responsive Politics).* *(Source: H.B. 2644, 6/17/95).* *(On screen:* *$2,337,232 in contributions* *Source: Bush and RNC filings, Federal Election Commission; Center for Responsive Politics).* *On screen: Call Bush 512-637-2000;* *www.checkforyourself.com)*	**ANNOUNCER**: The convention's over, and look who won. The insurance industry. They've invested millions in George W. Bush .... who vetoed a patients' bill of rights in Texas. Nursing home operators? They've given over $100,000 to Bush ... who weakened nursing home laws in Texas while patient complaints doubled. The big drug companies: They've kicked in millions for Bush ... Tell Bush when special interests win, America's families lose.

Source: Amy Braverman, "Bashing Bush on Special Interests," NationalJournal.com, September 5, 2000;www.nationaljournal.com/members/adspotlight/2000/09/0905afv1.htm

These ads ran in the battleground states of Pennsylvania, Missouri and Michigan. According to the Brennan Center for Justice, American Family Voices spent $628,219 in August on advertisements criticizing George W. Bush.[1] A study by David Magleby of Brigham Young University found that 89 percent of respondents who saw the American Family Voices ad thought it was primarily aimed at persuading them to vote either for or against a candidate, while only 6 percent thought it was meant to promote an issue.[2] Only three of more than 700 respondents identified the sponsor of the advertisement. No one was able to identify the ulimate source of the funds for the ad.

The respondents could not identify the source, because the ads did not say that American Family Services' main supporter was the American Federation of State, County and Municipal Employees (AFSCME). Nor is that information available on AFV's website (http://www.checkforyourself.com). AFSCME is one of America's largest and most politically active labor unions, with 1.3 million members. AFSCME's political action committee gave about $2.4 million to federal candidates in this election; roughly 95 percent to Democrats. AFSCME gave $4.4 million in soft money in the 1999-2000 cycle.[3] Not only was this more than any other entity gave in that campaign, but it set a new record for soft-money contributions.[4] AFSCME sent 270 delegates to the Democratic National Convention.[5] AFSCME president Gerald McEntee chairs the AFL-CIO political committee.[6]

AFSCME provided $800,000 to create American Family Voices in July 2000. American Family Voices is a social welfare organization organized under section 501(c)(4) of the Internal Revenue Code, so it does not have to disclose its donors. Michael Lux, AFV's president and a former Clinton White House staffer, claimed in August that he had already raised an additional $700,000 for the campaign.[7] Later numbers were not available at the time of this report.

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[1] "Candidates Come to Strategic Fork in California," Brennan Center for Justice, October 30, 2000. http://www.brennancenter.org/presscenter/pressrelease_2000_1030cmag.html

[2] David B. Magleby, *Dictum Without Data: The Myth of Issue Advocacy and Party Building*. 2000. Brigham Young University. http://www.byu.edu/outsidemoney/dictum/

[3] FEC Info. http://www.tray.com

[4] Susan Schmidt, "Last-Minute Donations a Boon for Both Parties," *Washington Post*, December 19, 2000

[5] Shawn Zeller, "A Gaggle of Government Workers," *National Journal*, August 17, 2000.

[6] James O'Toole, "Labor Seeks Rise in Political Clout," *Pittsburgh Post-Gazette*, August 14, 2000.

[7] John M. Broder, "Finding Another Loophole, a New Secretive Group Springs Up," *New York Times*, August 11, 2000.

Americans for Job Security

In April 2000, according to press accounts, Senate Majority Leader Trent Lott met with a group of high-tech lobbyists. He reportedly was concerned about ads attacking Senator Spencer Abraham (R-MI) for his views on immigration. The ads were sponsored by the Federation for American Immigration Reform (FAIR), a group that supports strict limits on immigration. Abraham was then serving as the chairman of the Senate Judiciary subcommittee on immigration. He was then sponsoring a bill that would grant more visas to highly skilled workers, legislation that was vital to the high-tech industry. Lott was reported to have urged the lobbyists to pay for ads responding to FAIR's attacks. But instead of donating to Abraham's campaign, Lott was said to have urged the lobbyists to donate to Americans for Job Security (AJS), a group few of them knew about. According to a lobbyist who attended the meeting, Lott said that AJS was about to run ads rebutting FAIR.[8] Although the overall response was said to have been "tepid," Microsoft and some other high-tech companies did donate to AJS.[9] Lott subsequently, through a spokesperson, called the reports "baseless."[10]

Americans for Job Security, a 501 (c)(6) trade association, grew out of the Coalition, a loose confederation of business groups that ran issue ads in 1996 to oppose the AFL-CIO's $35 million campaign. After the Coalition split in 1997 due to a dispute over strategy, Robert Vagley, president of the American Insurance Association (AIA), formed Americans for Job Security. The AIA contributed $1 million to found AJS; the American Forest and Paper Association also gave $1 million. David Carney, onetime political director in the Bush White House, serves as executive director of AJS. Michael Dubke, former head of the Ripon Society, is the president of AJS. Benjamin Ginsberg, counsel to AJS, was also counsel to George W. Bush's presidential campaign. Others associated with AJS include Republican consultant Eddie Mahe and Leigh Ann Pusey, a former aide to Newt Gingrich, who now serves as AIA's chief lobbyist.[11]

The AIA claims that it is no longer a member of AJS and does not contribute to the group.[12] As a 501 (c) (6) trade association, AJS does not have to disclose its donors. Since its ads do not engage in express advocacy, AJS does not need to form a political action committee. Dubke told the *Omaha World-Herald*, "We don't discuss our members. The reason is we find that in other groups that have attempted to do what we're doing, that their membership becomes the issue rather than the issue they're trying to advocate. ... We find that sticking to a strict mantra

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[8] Michael Isikoff, "The Secret Money Chase," *Newsweek*, June 5, 2000; Mike Allen, "GOP Pressures Tech Firms to Help Michigan Senator," *Washington Post*, May 16, 2000.

[9] Gebe Martinez, "GOP Tapped Tech Execs to Aid Abraham," *Detroit News*, May 17, 2000.

[10] "Washington in Brief: Ethics Panel Asked to Look at Sen. Lott," *Washington Post*, May 23, 2000, A6.

11[11] Jim VandeHei, "Republicans Divided on Issue Advocacy," *Roll Call*. April 20, 1998; Jim VandeHei, "Pro-GOP Group Plans $100 Million 'Issue Ad' Blitz," *Roll Call*, January 15, 1998; R.G. Ratcliffe, "Campaign 2000; Bush Accused of 'Getting Even,'" *Houston Chronicle*, November 5, 2000; Mike Allen, "Campaign Secrecy Law's Impact Doubted," *Washington Post*, July 1, 2000; Michael Isikoff, "The Secret Money Chase," *Newsweek*, June 5, 2000

[12] William March and Michael Fechter, "Ads, Tactics Growing More Shrill As Election Day Showdown Nears," *Tampa Tribune*, November 3, 2000

of not discussing our members allows our issue to come to the forefront."[13] *The American Prospect* claimed that pharmaceutical companies are among the "primary funders" of AJS.[14]

During a high-profile special House election in California in early 1998, AJS reportedly spent $50,000 on a television commercial praising the conservative economic record of GOP nominee Tom Bordonaro.[15] Bordonaro lost. Media reports show that AJS spent $2 million on television ads in the fall of 1998 that attacked Rep. Frank Pallone (D-NJ). The ads accused Pallone of supporting the tapping of the Social Security trust fund to pay for "wasteful programs" such as welfare. One ad featured a group of men playing poker and declared: "Call Congressman Frank Pallone and tell him to keep his hands off Social Security and stop gambling with our future."

AJS took the unusual step of placing these ads on highly-rated programs on New York television, in a district where candidates usually rely on radio, cable or direct mail. The Pallone campaign responded by reaching out to journalists to persuade them that their candidate was the victim of a well-financed effort by outside interests. They also mailed literature portraying AJS as a front for insurance companies that opposed Pallone's support for HMO regulation. Pallone won by a comfortable margin.[16] According to the *Wall Street Journal*, AJS spent at least $200,000 on ads criticizing Sen. Harry Reid (D-NV) and $100,000 against Sen. Ernest Hollings (D-SC). Both senators were re-elected.[17] AJS also ran ads criticizing Rep. Jay Johnson (D-WI) and praising Rep. Nancy Johnson (R-CT). Jay Johnson lost and Nancy Johnson won.[18]

AJS claims to have spent $10 to $12 million on political ads in 2000.[19] It played its most visible roles in three Senate races. AJS ran just over $700,000 in advertisements praising Sen. Spencer Abraham (R-MI) and attacking his opponent, Rep. Debbie Stabenow (D-MI).[20] This included an ad campaign in black newspapers accusing Stabenow of being racist and holding her responsible for the FAIR ads attacking Abraham.[21] It also included a radio ad that ran during summer criticizing Stabenow for opposing tax cuts.[22] The most widely covered aspect of AJS's activity was a

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[13] C. David Kotok and Jake Thompson, "Political Ad's Donors Are Kept Secret," *Omaha World-Herald*, October 27, 2000

[14] Nicholas Confessore, "Saving Private Abraham," *The American Prospect*, November 20, 2000.

[15] Peter H. Stone, "From The K Street Corridor," *National Journal*, March 14, 1998.

[16] Peter H. Stone, "Issue Ads, the Weapons of Choice," *National Journal*, October 31, 1998; Ruth Marcus, "The Advocates Pare Down the Ads," *Washington Post*, October 23, 1998; Philip D. Duncan, "Incumbent in the Cross Hairs," *Campaigns & Elections*, December 1999 / January 2000.

[17] Glenn R. Simpson, "Late Storm of Issue-Ad Spending Sweeps Places Like Wisconsin, Chills a Senator," *Wall Street Journal*, October 29, 1998.

[18] "New Member Biographies for Wisconsin," *National Journal*, November 7, 1998; Peter H. Stone, "Business Fills its War Chests," *National Journal*, July 18, 1998; Ruth Marcus, "When Opposition Isn't On The Ballot," *Washington Post*, June 30, 1998

[19] William March and Michael Fechter, "Ads, Tactics Growing More Shrill As Election Day Showdown Nears," *Tampa Tribune*, November 3, 2000

[20] Nicholas Confessore, "Saving Private Abraham," *The American Prospect*, November 20, 2000.

[21] Orlandar Brand-Williams, "Stabenow Supporters Want Abraham to Denounce Ads," *Detroit News*, May 9, 2000.

[22] "Two Radio Ads Running Against Stabenow," *Associated Press State & Local Wire*, July 28, 2000.

springtime television ad campaign defending Abraham against FAIR's charges that cost about $450,000.[23]

The *Omaha World-Herald* reported in October 2000 that AJS planned to spend $250,000 on ads criticizing Ben Nelson, the Democratic nominee for Senate in Nebraska. One spot featured Sen. Chuck Hagel and Gov. Mike Johanns questioning statements Nelson, a former governor himself, had made about federal regulation of drinking water.[24]

AJS was also active in Washington, supporting Sen. Slade Gorton (R). Eddie Mahe has been a consultant to AJS and a senior adviser to Gorton.[25] In March 2000, AJS ran spots on cable TV promoting Gorton's record on education. [26] AJS spent $105,000 on ads praising Gorton for his opposition to removing dams on the Snake River. The spots ran in June on television stations in eastern Washington, where dam removal is a major issue.[27] AJS also sponsored an advertisement attacking Democratic nominee Maria Cantwell that ran before she won her primary in September. The Tacoma *News Tribune* reported that AJS spent $800,000; the *Seattle Post-Intelligencer* claimed $548,000; while the *Washington Post* put the cost of the buy at $500,000.[28] Cantwell is an executive with RealNetworks, a firm that competes with Microsoft, a supporter of AJS. AJS also ran ads supporting Gorton in October. No data is available on the size of this buy.[29]

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[23] Gebe Martinez, "High-Tech Firms Help Abraham,"*Detroit News*, May 9, 2000; Nicholas Confessore, "Saving Private Abraham," *The American Prospect*, November 20, 2000; Mike Allen, "GOP Pressures Tech Firm to Help Michigan Senator," *Washington Post*, May 16, 2000

[24] C. David Kotok and Jake Thompson, "Political Ad's Donors Are Kept Secret," *Omaha World-Herald*, October 27, 2000

[25] Joel Connelly, "TV Ad Blitz Targets Cantwell," *Seattle Post-Intelligencer*, August 31, 2000.

[26] Joel Connelly, "Senn vs. Cantwell: $1 Million Foes," *Seattle Post-Intelligencer*, March 24, 2000.

[27] Kevin Galvin, "Gorton, Other Campaigns Benefit From Ads by Outside Groups," *Seattle Times*, June 19, 2000

[28] Helen Dewar, "Millionaire Cantwell Investing Heavily in Senate Race," *Washington Post*, September 18, 2000; Karen Hucks, "Cantwell Hit With Negative Ads by D.C. Group," Tacoma *News Tribune*, August 31, 2000; Joel Connelly, "Cantwell Rolls to Win," *Seattle Post-Intelligencer*, September 20, 2000.

[29] Dionne Searcey, "Cantwell Appears Ready to Spend Whatever It Takes," *Seattle Times*, October 19, 2000; Joel Connelly, "Cantwell Struggling To Meet Cash Crunch in Tight Senate Race," *Seattle Post-Intelligencer*, October 19, 2000.

Script for this advertisement:

VIDEO	AUDIO
(On screen: Roll Call Vote #199, H.R. 2264 Sec. 4081 – Congressional Record) *(On screen: Roll Call Vote #1999 H.R. 2264 Sec. 4446 – Congressional Record)* *(On screen: Roll Call Vote #406 H.R. 2264 Sec. 13125 – Congressional Record)* *(On screen: Call Maria Cantwell. Tell her to keep her hands off our Social Security: 206-674-2700 x2231;Paid for by Americans for Job Security; Americans for Job Security logo).*	**ANNOUNCER:** What is it with politicians like Maria Cantwell? They think with our pocket books. She voted for higher taxes on gasoline, home electricity… She even voted to raise tax rates on Social Security. Maria Cantwell actually voted to raise taxes on Washington state's retired working families by 70 percent. Politicians like Maria Cantwell think it's OK to tax our hard-earned Social Security. Maria Cantwell talks like she's from our Washington. Problem is, she votes like she's from the other Washington.

Source: Lauren Mandell, "Cantwell's Record On The Spot," NationalJournal.com, September 8, 2000; http://nationaljournal.com/members/adspotlight/2000/09/0908ajs.1.htm

Shortly before Election Day, AJS ran ads in ten media markets attacking Al Gore's prescription drug plan.[30] It also ran an ad linking Gore to higher gasoline prices.[31] The Brennan Center for Justice claims that AJS spent just under $1.8 million on these ads, making it the third most active outside group in the presidential race, after Planned Parenthood and the AFL-CIO, and the most active one supporting Bush. The leading markets for AJS's campaign were Spokane, Seattle, Portland (OR), Tampa-St. Petersburg and Knoxville. It also found AJS to be the fifth most active outside group in Senate races.[32] AJS was also active in several state races. It sponsored radio ads in November 1999 criticizing Ohio Supreme Court Justice Alice Robie Resnick, who was not up for re-election until 2000. Resnick wrote an opinion that overturned a 1996 law that limited the ability of Ohioans to collect damages in civil lawsuits.[33] AJS sponsored direct-mail campaigns against David Bradley and Bob Offutt, two conservative members of the Texas State Board of Education.[34] It ran an ad accusing Mark Meyer, a Democrat running for the Wisconsin state senate, of being soft on crime. Meyer's race was seen as being crucial to party control of the senate, and therefore of redistricting.

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[30] William March and Michael Fechter, "Ads, Tactics Growing More Shrill As Election Day Showdown Nears," *Tampa Tribune*, November 3, 2000.

[31] Michael Kranish and Yvonne Abraham. "Campaigns Unleashing Ad Barrage," *Boston Globe*, November 2, 2000.

[32] "2000 Presidential Race First in Modern History Where Political Parties Spend More than Candidates," Brennan Center for Justice, December 11, 2000. http://www.brennancenter.org/tvads2000.html

[33] James F. McCarty, "Radio Ads Target Justice Long Before 2000 Vote," Cleveland *Plain Dealer*, November 20, 1999.

[34] Melanie Markley, "Pro-Republicans Aim to Oust GOP Member of Education Board,"*Houston Chronicle*, November 4, 2000.

Michael Dubke, president of Americans for Job Security, on his group's activities:

"We don't discuss our members. The reason is we find that in other groups that have attempted to do what we're doing, that their membership becomes the issue rather than the issue they're trying to advocate. ... We find that sticking to a strict mantra of not discussing our members allows our issue to come to the forefront." (C. David Kotok and Jake Thompson, "Political Ad's Donors Are Kept Secret," *Omaha World-Herald*, October 27, 2000).

"We're not having the Lincoln-Douglas debates anymore. We don't beat around the bush and we name names." (Michael Isikoff, "The Secret Money Chase," *Newsweek*, June 5, 2000).

"The campaigns, whether they be in New York or Washington or wherever, do not control independent groups. It would be unconstitutional. Elections are not just for politicians and the news media. Elections are for citizens, and if citizens have the ability to make their voices be heard, they have every right in this country to be heard." (Karen Hucks, "Cantwell Urges An End to Soft Money Ads," Tacoma *News Tribune*, September 27, 2000)

Citizens for Better Medicare

The Pharmaceutical Research and Manufacturers of America (PhRMA) created Citizens for Better Medicare (CBM) in 1999 on the advice of its public relations firm, Apco Associates. Alan Holmer, president of PhRMA, assigned Timothy Ryan, the group's marketing director, to head CBM. Ryan put together a coalition of numerous business and health groups to support CBM.[35] CBM ran its first advertisements in July of 1999, which criticized the Clinton administration's plan to add a prescription drug benefit to Medicare.

CBM's organizational supporters include the National Association of Manufacturers, the U.S. Chamber of Commerce, Citizens Against Government Waste, the Healthcare Leadership Council, as well as numerous smaller groups. CBM's website (http://www.bettermedicare.org) lists 36 groups as members, but does not provide any information on financial support. In a report released in June, Public Citizen called three of CBM's members the Seniors Coalition, the 60 Plus Association and the United Seniors Association "direct mail specialists that have been denounced by Republicans and Democrats alike for their scare tactics." All three groups have ties to conservative fundraiser Richard Viguerie. Public Citizen also asserted that several other CBM members, such as the Association of Black Cardiologists, receive much of their funding from pharmaceutical companies.[36]

CBM reportedly spent about $50 million on television advertising during the 1999-2000 cycle.[37] In the 75 media markets monitored by Campaign Media Analysis Group (CMAG), CBM spent $13.8 million on advertisements praising House Republicans between June 1 and Election Day. It spent more on House races than any other interest group. According to the Brennan Center for Justice, CBM's top race was in the 49th district of California, between Rep. Brian Bilbray (R) and Susan Davis (D).[38] The *Wall Street Journal* reported that CBM spent close to $800,000 praising Bilbray, while CMAG estimated the spending at close to $1.5 million.[39] CBM ran advertisements praising several other incumbents for their record on Medicare, including Reps. Jay Dickey (R-AR), Charles Bass (R-NH), George Nethercutt (R-WA), James Rogan (R-CA), Steve Kuykendall (R-CA), Don Sherwood (R-PA), Ernie Fletcher (R-KY), Anne Northup (R-KY), Tom Tancredo (R-CO) and Collin Peterson (D-MN). CBM ran advertisements criticizing Reps. Bill Luther (D-MN), Mark Udall (D-CO), Leonard Boswell (D-IA) and Darlene Hooley (D-OR). They also targeted Montana Senate candidate Brian Schweitzer, who had made the prescription drug issue central to his campaign.[40]

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[35] Jeff Gerth and Sheryl Gay Stolberg, "With Quiet, Unseen Ties, Drug Makes Sway Debate," *New York Times*, October 5, 2000.

[36] Public Citizen, *Citizens for Better Medicare: The Truth Behind the Drug Industry's Deception of America's Seniors*, June 2000.

[37] Alan C. Miller and T. Christian Miller, "Election Was Decisive in Arena of Spending: Ever-Higher Sums," *Los Angeles Times*, December 8, 2000.

[38] Brennan Center for Justice, "2000 Presidential Race First in Modern History Where Political Parties Spend More on TV Ads Than Candidates," December 11, 2000.

[39] David Rogers and Jim VandeHei, "Hot Seats: Western States, Site of Many Close Races, Hold Key to the House," *Wall Street Journal.*, October 30, 2000; *CMAG Eye*, November/December 2000.

[40] Ibid.; John M. Broder, "Clinton's Drug Plan Attacked by Industry," *The New York Times*, June 27, 2000; Adam Clymer, " Special Interests' Ads Saturate a District," *The New York Times*, October 21, 2000; Andrew Donohue, "Latest

CBM was originally created as a 527 political organization; after the passage of disclosure legislation this summer, it changed its status to a 501 (c) 4 social welfare organization.[41] CBM stopped receiving contributions after the passage of the disclosure law, so its quarterly report submitted in October did not show any contributions. Alex Castellanos, CBM's media consultant, also worked for the George W. Bush campaign and for the Republican National Committee.[42]

Text of a Citizens for Better Medicare advertisement praising Rep. Ernie Fletcher (R-KY):

VIDEO	**AUDIO**
(On screen: Ardell DeCarlo)	**ARDELL DECARLO**: My mother came from a family of eight. They have all passed away from cancer. I have had cancer a total of five times. At this point it is my faith and my support from my family and my friends, and then there is the medicine.
	ANNOUNCER: Congressman Ernie Fletcher has voted to strengthen and improve healthcare for seniors. He is working to add a prescription drug benefit to Medicare and to make sure that medicines are available for every senior who needs them.
(On screen: Support Cong. Fletcher's Rx Plan for Seniors (606) 219-1366)	**DECARLO**: Without the medicine, I would not be where I am. And with people who have cancer those of us who are waiting, are looking for miracles.
(On screen: Paid for by Citizens for Better Medicare)	**ANNOUNCER**: Call Congressman Fletcher and see what you can do to support his prescription drug plan for seniors.

(Source: Aoife McCarthy, "Medicare Coalition Supports Fletcher," NationalJournal.com, October 2, 2000; http://nationaljournal.com/members/adspotlight/2000/10/1002cbm1.htm)

Ads for Lower Drug Prices Draw Heat," Minneapolis *Star Tribune*, September 10, 2000; Bob von Sternberg, "Dayton One of Many Candidates to Hop Drug Bus to Canada," Minneapolis *Star Tribune*, September 11, 2000; Patrick McGreevy, "Flood of Soft Money' May Be Key For Rogan Or Schiff," *Los Angeles Times*, October 22, 2000; Stacie Oulton, "A Shot in the Arm for Tancredo," *Denver Post*, September 14, 2000; Jean Merl, "Rogan Cites Role in Impeachment in Ad," *Los Angeles Times*, September 14, 2000; Greg Gordon and Andrew Donohue, "Luther-Kline Race Attracts Big Bucks," *Minneapolis Star Tribune*, November 5, 2000; Susan Schmidt, "Businesses Ante Up $30 Million," *Washington Post*, October 26, 2000; Ruth Marcus, "Hidden Assets: Flood of Secret Money Erodes Election Limits," *Washington Post*, May 15, 2000).

[41] Susan Schmidt, "Political Groups Change Status to Avoid Disclosure," *Washington Post*, September 15, 2000.

[42] Sara Fritz, "Consultant Bridges Ad Campaigns," *St. Petersburg Times*, July 31, 2000.

NAACP

The National Association for the Advancement of Colored People (NAACP) created two affiliates in August 2000: the NAACP National Voter Fund and Americans for Equality. They are both headed by Heather Booth, a veteran political organizer and Democratic operative. The NVF is a 501 (c) 4 social welfare organization, while Americans for Equality is a 527 political organization.[43] On its Form 8871 ("Notice of Section 527 Status"), Americans for Equality describes itself as a separate segregated fund of the NVF. In turn, the NAACP appoints 3 of the 5 directors of the NVF. Kweisi Mfume, president of the NAACP, and Julian Bond, chairman of the NAACP Board of Directors, serve as directors of Americans for Equality.

The NVF reportedly raised most of its funds from a single anonymous donor.[44] Because of its 501 (c) 4 status, the NVF was able to keep its donors secret. According to *USA Today*, the NVF spent $10.5 million during the 2000 campaign and targeted 13 states for efforts to boost black turnout. It hired close to 90 staff members and opened a dozen field offices.[45] Mfume estimates that it registered more than 2.5 million African-Americans to vote.[46] This campaign has been described as a "large factor" in strong black turnout in some key states such as Missouri and Florida.[47] The NVF also sent a phone message recorded by Bill Clinton to one million African-American families.[48]

The NVF reportedly spent $2 million on two commercials criticizing George W. Bush for vetoing a hate crimes bill. Both featured Renee Mullins, daughter of James Byrd, an African-American man dragged to his death in Jasper, Texas.[49]

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[43] Melanie Eversley, "NAACP Establishes Group for Registering Black Voters," *Atlanta Journal-Constitution*, September 21, 2000; Michael A. Fletcher, "NAACP Makes Leap to Big-Money Political Activism," *Washington Post*, August 4, 2000; Center for Public Integrity: http://www.publici.org

[44] John Mintz, "NAACP Affiliate's Ads Attack GOP Hopefuls," *Washington Post*, September 22, 2000; Center for Public Integrity (http://www.publici.org).

[45] Jill Lawrence, "Aggressive NAACP Urged African-Americans to Polls," *USA Today*, December 8, 2000.

[46] Susan Schmidt and John Mintz,, "Voter Turnout Up Only Slightly," *Washington Post*, November 9, 2000; John Mintz, "The Interest Groups; Liberals Mobilize Against Bush, GOP," *Washington Post*, November 3, 2000

[47] Jill Lawrence, "Aggressive NAACP Urged African-Americans to Polls," *USA Today*, December 8, 2000

[48] Massie Ritsch, "NAACP Complains of Pro-Bush Calls," *Los Angeles Times*, November 3, 2000.

[49] John M. Broder, "Emotional Appeal Urges Blacks to Vote," *New York Times*, November 2, 2000; Gregory Freeman, "Campaign to Get Out the Vote Among Black Voters is Likely to Help Gore More Than Bush," *St. Louis Post-Dispatch*, October 22, 2000

Text of NAACP Voter Fund commercial:

VIDEO	AUDIO
A chain being dragged from the back of a truck that has a Texas license plate.	**RENEE MULLINS:** I'm Renee Mullins, James Byrd's daughter. On June 7, 1998, in Texas, my father was killed. He was beaten, chained, and then dragged three miles to his death, all because he was black. So when Governor George W. Bush refused to support hate crimes legislation, it was like my father was killed all over again. Call George W. Bush and tell him to support hate crimes legislation. We won't be dragged away from our future.

(Source: Gia Fenoglio, "At the Races: A Weekly Review of Campaign 2000," National Journal, November 11, 2000.)

The NVF also sponsored radio advertisements that referred to "mobs, guns and Jim Crow." It ran newspaper advertisements urging readers to call George W. Bush to express their concerns about racial profiling. It also distributed literature on such issues as hate crimes and education.[50]

The NVF reportedly channeled $500,000 through Americans for Equality for a series of radio ads run jointly with the Sierra Club. The ads criticized the environmental records of Sen. Spencer Abraham (R-MI), Virginia Senate candidate George Allen (R) and Rep. Anne Northup (R-KY).[51]

After the passage of disclosure legislation, Americans for Equality filed three disclosure reports. It claims to have made expenditures of about $6 million between July 1 and November 27, but to have received contributions of only about $263,000. AFSCME Illinois gave $122,011, while the AFL-CIO gave $50,000.

Bond defended the NAACP's actions: "We're in an atmosphere where other groups, including some hostile to justice and equality, use these tools. We want to put our oar in the water."[52]

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[50] Michael A. Fletcher, "Working to Turn an Election Key," *Washington Post*, October 21, 2000; David Firestone, "Big Push Starts to Lift Turnout of Black Vote," *New York Times*, October 29, 2000; John Leo, "The Selma Mind-Set," U.S. News and World Report, December 18, 2000

[51] John Mintz, "NAACP Affiliate's Ads Attack GOP Hopefuls," *Washington Post*, September 22, 2000; Center for Public Integrity: http://www.publici.org

[52] John Mintz, "NAACP Affiliate's Ads Attack GOP Hopefuls," Washington Post, September 22, 2000.

Republican Leadership Council

The Republican Leadership Council was founded in 1997 to promote moderate Republican ideas. It grew out of the Committee for Responsible Government, a pro-choice Republican political action committee linked to New Jersey Governor Christine Todd Whitman. The RLC does not take a position on abortion. Its advisory board includes pro-life politicians such as Michigan Governor John Engler, former Senator Al D'Amato and Senator Pete Domenici, as well as pro-choicers such as Whitman, former California Governor Pete Wilson and Senator Arlen Specter. Its leading supporters have included Wall Street figure Henry Kravis, Seagram chairman Edgar Bronfman and former RNC finance chairman John Moran. Kravis and Moran are currently the RLC's co-chairs. Mark Miller, a leading fundraiser for Bob Dole's 1996 presidential campaign, serves as executive director.[53]

The RLC was reported to have spent $100,000 in November 1999 on TV ads urging Steve Forbes not to run negative ads as he had in 1996.[54] These ads ran in Iowa, New Hampshire and Washington, DC.

The script for the advertisement:

WOMAN: When Steve Forbes ran for president, I kind of liked him. But then he spent all his money tearing down his opponents. He hurt the Republican Party.

After the election, Forbes admitted that he'd spent too much time discussing his opponents' record. But now I hear he's starting with the same negative ads again. That's just going to help the Democrats.

Someone needs to tell Mr. Forbes: "If you can't say anything nice don't say anything at all."

(Source: "RLC Urges Forbes to Avoid Negative Ads," NationalJournal.com, November 17, 1999; http://nationaljournal.com/members/adspotlight/1999/11/1117rlc1.htm)

A Bush staffer said that this ad "made it more difficult for Forbes to attack Bush."[55] Forbes aides pointed out that eight top RLC officials were Bush "Pioneers," people who have agreed to raise at least $100,000 for the campaign.[56] Forbes filed a complaint with the Federal Election Commission alleging that this ad was an illegal contribution to the Bush campaign.[57] Forbes later ran an ad accusing the RLC of using "massive corporate contributions" to assist the Bush campaign.[58] The RLC later ran three more ads addressed to Forbes. One noted that Forbes had once belonged to the RLC's board of directors.[59] Another quoted Bob Dole on the effect of Forbes' negative ads in 1996.[60]

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[53] Brett Pulley, "Election-Minded Republicans Try to Join Together," *New York Times*, June 14, 1997; Michael Crowley, "Burying the Hatchet," *The New Republic*, November 13, 2000; Republican Leadership Council website: http://www.rlcnet.org

[54] Matthew Rees, "Independent Expenditures?" *Weekly Standard*, January 31, 2000.

[55] David B. Magleby, "Issue Advocacy in the 2000 Presidential Primaries," in David B. Magleby, ed., *Getting Inside the Outside Campaign*. 2000. Brigham Young University.

[56] Jim Drinkard, "Forbes Ready to Fight Negative Television Ads," *USA Today*, November 17, 1999.

[57] Leslie Wayne, "Forbes to File Complaint Over Group's Critical Ads," *New York Times*, November 17, 1999

[58] Clay Robison, "Forbes Ad Accuses Bush of Smear Tactics," *Houston Chronicle*, November 24, 1999

[59] "RLC Says Forbes Was on Board," NationalJournal.com, December 1, 1999; http://nationaljournal.com/members/adspotlight/1999/12/1201rlc1.htm

A third accused Forbes of distorting George W. Bush's record on taxes.[61] None of these ads used the specific words" ("vote for", "vote against," etc.) that clearly would qualify them as express advocacy under any current legal interpretation. In addition to the broadcast advertising, the RLC ran phone banks in New Hampshire. Callers attacked Forbes and asked voters if they would like to speak to the Forbes campaign. They would then patch the voters directly to the Forbes campaign. But Forbes staffers said that when they explained to voters that the group forwarding the call was pro-choice, the voters usually would no longer be angry at Forbes. The RLC also ran a series of ads during the primary season attacking Al Gore for exaggerating his role in the creation of the Internet and for imposing a "litmus test" that would require appointees to the Joint Chiefs of Staff to support ending the ban on gays in the military.[62]

The RLC also ran ads in three Republican congressional primaries. One praised ex-Rep. Dick Zimmer (R-NJ) as a fiscal conservative and a supporter of welfare reform.[63] Another called Rep. Marge Roukema (R-NJ) a "tax fighter" and cited her opponent Scott Garrett's record of supporting tax increases.[64] A third ad called Florida congressional candidate Ric Keller an "embarrassment" and linked him to prominent local Democrats.[65]

The RLC was also said to have spent $500,000 on television advertisements during the summer of 2000 praising Rick Lazio. One spot praised Lazio and Senator Daniel Patrick Moynihan for "fighting for New York." Moynihan denounced the ad, claiming that it implied that he supported Lazio.[66] The *New York Times* claimed that the RLC's total buy was going to be about $1 million, but the organization pulled its ads after Lazio and Hillary Rodham Clinton reached a pact to keep soft money out of the race.[67] In October, the RLC reportedly spent $770,000 on advertisements attacking New Jersey Senate candidate Jon Corzine (D-NJ).[68] The RLC also sponsored ads praising congressional candidates Mark Nielsen (R-CT) and Pat Tiberi (R-OH).[69]

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[60] "Dole Speaks Out Against Forbes," NationalJournal.com, January 28, 2000; http://nationaljournal.com/members/adspotlight/2000/01/0128rlc1.htm

[61] "RLC Says Forbes Distorting Truth on Bush's Tax Record," NationalJournal.com, Janaury 19, 2000; http://nationaljournal.com/members/adspotlight/2000/01/0119rlc1.htm

[62] Ronald Brownstein, "Gore Drawing Early GOP Fire on Visit to State," *Los Angeles Times*, April 5, 1999; Arthur Sanders and David Redlawsk, "Money and the Iowa Caucuses." In *Getting Inside the Outside Campaign*

[63] "RLC Adds Two Cents to N.J. House Races," NationalJournal.com, May 31, 2000; http://nationaljournal.com/members/adspotlight/2000/05/0531rlc1.htm

[64] *Ibid.*

[65] Julie Samuels, "RLC 'Embarrassed' by Keller," NationalJournal.com, October 2, 2000; http://nationaljournal.com/members/adspotlight/2000/10/1002rlc1.htm

[66] Joel Siegel, "Pat Rips Ad Pairing Him With Lazio," New York *Daily News*, July 26, 2000; Douglas Turner, "Moynihan Wants GOP Senate Campaign Ad Removed," *Buffalo News*, July 26, 2000; "RLC Pairs Lazio With Prez, Moynihan," NationalJournal.com, July 25, 2000, http://nationaljournal.com/members/adspotlight/2000/07/0725rlc1.htm

[67] Clifford J. Levy and David M. Halbfinger, "Torrent of Campaign Cash Both Helped and Backfired," *New York Times*, November 9, 2000.

[68] David M. Halbfinger, "Calling Corzine a Big Spender," *New York Times*, October 15, 2000; David M. Halbfinger, "Endorsements And a Poll Buoy Franks Campaign," *New York Times*, October 26, 2000

[69] Aoife McCarthy, "RLC Backs Nielsen's Reform," NationalJournal.com, October 24, 2000,

In late October, the RLC funded an advertisement that showed Ralph Nader denouncing Al Gore: "Al Gore is suffering from an election-year delusion if he thinks his record on the environment is anything to be proud of."[70] The spot ran in three states where Nader was attracting significant support: Oregon, Washington and Wisconsin.[71]

The RLC is a "527" political organization. Prior to the passage of disclosure legislation in June, it did not have to report its contributions or expenditures. Between July 1 and November 27, 2000, it raised just over $3 million and spent just under $3 million. The largest single contributor was Finn Caspersen, former chairman of the Beneficial Corporation, who gave $359,600. Caspersen also funded Citizens for a Better America, a 501 (c)(4) corporation, that conducted a $250,000 advertising campaign on Philadelphia television, criticizing New Jersey Senate candidate Jon Corzine for not releasing his tax returns.[72] Sam Wyly, one of the funders of Republicans for Clean Air, which attacked John McCain during the New York Republican presidential primary, gave $20,000. Three sugar producers Florida Crystals, the U.S. Sugar Corporation and the Sugar Cane Growers Cooperative of America gave a total of $275,000. Three telecommunications companies ATT, MCI and Verizon gave a total of $275,000.

Leading donors to the RLC, After July 1, 2000

NAME	BACKGROUND	AMOUNT
Finn Caspersen *	Former Chairman, Beneficial Corp.	$359,600
Stephen Distler *	E.M. Warburg Pincus	200,000
Joseph Plumieri*	Former Citigroup Executive	150,000
Verizon	Telecommunications company	150,000
AT&T	Telecommunications company	120,000
Florida Crystals	Sugar producer	110,000
U.S. Sugar	Sugar producer	110,000
Hushang Ansary	Former Iranian ambassador to the U.S. Chairman, IRI International, an oil field equipment manufacturer	100,000
John Moran	Former RNC finance chairman	100,000
Peter Novello *	President, Far Hills Securities	95,000
* On RLC steering committee		

http://nationaljournal.com/members/adspotlight/2000/10/1024rlc1.htm; Amy Braverman, "RLC Gives Tiberi a Hand," NationalJournal.com, November 2, 2000, http://nationaljournal.com/members/adspotlight/2000/11/1102rlc1.htm

[70] Peter Marks, "On Each Side, Accusing Fingers Over Nasty Turn in Campaign," *New York Times*, Oct. 28, 2000.

[71] Michael Cooper, "Republican Ads Use Nader's Comments in Bid to Hurt Gore," *New York Times*, October 28, 2000; Ken Foskett, "Accusations Fly on Sneaky Ads," *Atlanta Journal and Constitution*, October 28, 2000

[72] Center for Public Integrity: www.publici.org; David M. Halbfinger, "Franks Ally Comes Up With First Ad Attacking Corzine," *New York Times*, October 4, 2000

Sources: Forms 8872 (Political Organization Report of Contributions and Expenditures) filed by Republican Leadership Council for period from July 1, 2000 through November 27, 2000. Includes forms filed on October 13, October 23 and December 7.