CHAPTER SIX

LIMITS ON INDEPENDENT EXPENDITURES

There are two conceptual components of "independent expenditures." "Expenditures" constitute the first element. Prior to the Supreme Court's decision in *McConnell v. FEC*, 124 S. Ct. 619 (2003), "expenditures" were understood to refer to disbursements made for "express advocacy" – communications advocating in express terms the election or defeat of a clearly identified candidate. The Bipartisan Campaign Reform Act of 2002 ("BCRA," also known as the McCain-Feingold Bill) preserved that conception of "expenditures" and introduced a new term, "electioneering communications," which also could be financed independently in an effort to influence federal elections. "Electioneering communications" were defined as targeted broadcast advertisements referring to a federal candidate and run in the period immediately before an election.[1] Because the constitutional rules governing expenditures and electioneering communications are identical, this chapter uses the term "expenditures" broadly to include both express advocacy and electioneering communications.

The second concept embedded in the term "independent expenditure" is that of "independence." An expenditure is "independent" only if it is not in any way "coordinated" with a candidate, candidate committee, or political party (or an agent of the candidate or party). Coordinated expenditures are typically treated as contributions to the candidate or party, and they are subject to contribution limits.

[1]For further discussion of express advocacy and electioneering communications, see Chapter Seven ("Campaign Ads and Issue Advocacy").

I. The General Rule: No Monetary Limits on Independent Expenditures

TIPS

TIP: The Supreme Court has struck down monetary limits on independent expenditures by individuals, groups (other than corporations or unions), and political parties. Do not impose such limits unless you want to test the limits of Supreme Court precedent.

TIP: If you want to test the limits of the constitutional precedents, be sure to develop a strong factual record demonstrating the real or perceived corrupting influence of the expenditures on candidates and elected officials, the likelihood that the limits will help to alleviate those harms, and the generosity of the monetary ceiling. The evidence you present will have to demonstrate that the ceilings afford ample opportunity for political expression. You will also have to overcome a strong presumption that independent expenditures, unlike contributions to candidates, do not carry a substantial risk of actual or perceived corruption.

TIP: Reporting and disclaimer requirements may be imposed on entities making independent expenditures. See Chapter Eight for a discussion of these requirements.

TIP: A cap on contributions made to groups that make both contributions to candidates or parties and independent expenditures is permissible as a means of preventing the evasion of individual contribution limits. The Supreme Court has not decided whether it is constitutional to impose limits on contributions to groups that make only independent expenditures. See Chapter Four, section II, for further discussion of these issues.

LEGAL ANALYSIS

Placing monetary limits on independent expenditures — campaign spending that is not coordinated with a candidate or political party — is not a promising regulatory strategy, however desirable it may seem in principle. The Supreme Court has repeatedly invalidated Federal Election

Campaign Act ("FECA") provisions imposing monetary limits on independent expenditures. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) ("*Colo. Republican I*") (plurality opinion) (striking down FECA's limits on independent expenditures by political parties); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) ("*NCPAC*") (striking down limits on independent expenditures related to candidates who had accepted spending limits); *Buckley v. Valeo*, 424 U.S. 1, 45 (1976) (per curiam) (striking down FECA's limits on independent expenditures by individuals and groups). All other courts, state and federal, are bound by these precedents and are therefore likely to strike down any monetary limits on independent expenditures by individuals, political action committees ("PACs") and other unincorporated associations, and political parties in support of or opposition to state or local candidates.

In *Buckley*, the Court invalidated a $1,000 limit on independent expenditures by individuals, associations, and PACs. 424 U.S. at 39-51. After narrowly construing "independent expenditures" to mean independently conducted "express advocacy," the Court determined that none of the proffered state interests was sufficient to satisfy "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression."[2] *Id.* at 44-45. The expenditure limit could not be justified as a means of maximizing the effectiveness of the contribution limits, because anyone wishing to buy influence with a candidate could still sponsor advertising that did not expressly advocate the election or defeat of a candidate but clearly benefitted the candidate's campaign. *Id.* at 45. Moreover, the Court reasoned, independent expenditures present a "substantially diminished potential for abuse," because the very fact that they are not coordinated in any way with candidates

[2]For further discussion of the burden that expenditure limits place on rights of free speech and association, see Chapter Five, section II.

means that such expenditures "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Id.* at 47.

Buckley also rejected the government's asserted "interest in equalizing the relative ability of individuals and groups to influence the outcome of elections." *Id.* at 48. In a rousing defense of the rights of the rich, the Court stated:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . . The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

Id. at 48-49. The Court explicitly distinguished prior voting rights and ballot access cases that sought to eliminate economic barriers to participation in the electoral process. The principles that permitted the Court to invalidate restrictions on the franchise did not, so *Buckley* said, permit the Court to uphold restrictions on political expression. *Id.* at 49 n.55.

It is difficult to say whether the Court would have so vehemently opposed limits on independent expenditures if the limit imposed under FECA had been more generous. After all, as *Buckley* noted, $1,000 would not buy even a quarter-page ad in a major newspaper. *Id.* at 40. Under those circumstances, it was not unreasonable for the Court to conclude that the ceiling heavily burdened core First Amendment rights. *Id.* at 47-48. But the Court voiced its strong opposition to that limit in terms that reach much farther than the particular ceiling at issue in *Buckley*.

The Court reaffirmed its antipathy to limits on independent expenditures in *NCPAC*, 470 U.S. 480. In that case, the Court struck down a separate $1,000 limit on independent expenditures by PACs seeking to further the election of presidential candidates who accepted public funding and voluntary spending limits. On the record of that case, the Court determined that the risk of corruption by such expenditures was "a hypothetical possibility and nothing more," *id.* at 498, and

thus could not justify a "wholesale restriction of clearly protected conduct," *id.* at 501.[3] Under *NCPAC*, as under *Buckley*, there is a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." 470 U.S. at 497.

The Supreme Court later invalidated limits on certain independent expenditures by political parties in *Colo. Republican I.* The plurality invoked the constitutional distinction between contributions and independent expenditures and discounted the risk of corruption from the latter. 518 U.S. at 615-16. *Nixon v. Shrink Mo. Gov't PAC* also expressly reaffirmed that distinction. 528 U.S. 377, 386-87 (2000). The Court thus gives no sign of backing down from the analysis of independent expenditures it gave in *Buckley*.

In reliance on *Buckley*, the Nebraska Supreme Court invalidated a provision requiring groups intending to spend more than $2,000 on independent expenditures to provide notice at least 45 days before the election of how much they intended to spend and then to spend no more than 120% and no less than 80% of the announced amount. *State ex rel. Stenberg v. Moore*, 605 N.W.2d 440, 449 (Neb. 2000). The court found that the provision was not narrowly tailored to advance either of the state's interests in preventing corruption or encouraging participation in its public financing system.

II. The Lone Exception: Corporations and Unions

The Supreme Court has upheld an outright ban on independent expenditures funded by the general treasuries of corporations, where the law provided an alternative mechanism for corporate political activity. In *McConnell*, the Court upheld a ban on corporate and union electioneering

[3]The Court explained "that candidates and elected officials may alter . . . their . . . positions . . . in response to political messages paid for by the PACs can hardly be called corruption." *NCPAC*, 470 U.S. at 498.

communications, under circumstances where the covered organizations could conduct political activity through separate segregated funds established for that purpose.

TIPS

TIP: Where bans on independent expenditures by corporations or unions have been upheld, the affected entities have had the right to set up separate segregated funds, analogous to PACs, as an alternative mechanism for financing independent political expression, such as electioneering ads.

TIP: One category of non-profit corporation must be exempt from bans on corporate independent expenditures. Non-profits that were formed for ideological (not business) purposes, have no shareholders or other persons affiliated with the organization who have a claim on its earnings or assets, and were not established by a corporation or union and have a policy against accepting contributions from such entities are permitted to make expenditures directly from their treasuries.

TIP: Restrictions that apply to corporations do not necessarily have to be applied to unions. The Supreme Court upheld a Michigan ban on independent expenditures that applied only to corporations.

TIP: Include an exemption from the ban for media corporations. The Supreme Court has upheld such an exception, and the media will certainly challenge any law that does not exempt the press from a ban on corporate independent expenditures.

LEGAL ANALYSIS

FECA contains a ban on independent expenditures financed by general treasury funds of banks, corporations, and labor unions, *see* 2 U.S.C. § 441b, which has escaped the Supreme Court's general hostility to limits on independent expenditures. In addition, the Supreme Court has explicitly upheld a state ban on independent expenditures made directly from corporate treasuries.

Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990). But both the federal and state laws at issue offered an alternative outlet for independent political expression by the affected entities, allowing them to set up separate segregated funds analogous to PACs. The funds, which must be financed by individuals with certain close connections to the business or union, allow those individuals to exercise their associational rights. At the same time, "[b]ecause persons contributing to such funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors' support for the corporation's political views." *Id.* at 660.

The *Austin* decision, upholding Michigan's ban on corporate independent expenditures, is noteworthy in two principal respects. First, *Austin* identifies a new form of corruption that states may have an interest in preventing: "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* Second, based on this conception of the state's interest, the Court rejected a challenge to Michigan's failure to treat unincorporated labor unions the same as corporations. The Court reasoned:

> Whereas unincorporated unions, and indeed individuals, may be able to amass large treasuries, they do so without the significant state-conferred advantages of the corporate structure . . . . The desire to counterbalance those advantages unique to the corporate form is the State's compelling interest in this case; thus, excluding from the statute's coverage unincorporated entities that also have the capacity to accumulate wealth does not undermine its justification for regulating corporations.

Id. at 665 (internal quotations and citations omitted). Moreover, workers had the right to benefit from collective bargaining by a union without contributing to the union's political activity, so "the funds available for a union's political activities more accurately reflects members' support for the organization's political views than does a corporation's general treasury." *Id.* at 666.

The Court also rejected two equal protection claims. First, *Austin* permitted Michigan to distinguish in general between corporations and unincorporated associations with the ability to

amass large treasuries. *Id.* (holding that the focus on corporations was precisely tailored to eliminate from the political process "the corrosive effect of political 'war chests' amassed with the aid of the legal advantages given to corporations"). Second, the Court sustained a "media exception" because of "the unique role that the press plays in 'informing and educating the public, offering criticism, and providing a forum for discussion and debate.'" *Id.* at 667.

The Supreme Court reiterated *Austin*'s holding in *McConnell*. In addition to settling any doubt about whether the current Supreme Court continues to support *Austin*, the *McConnell* Court stated in sweeping terms that "Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." 124 S. Ct. at 694. The *McConnell* Court emphasized that corporations have the option to set up segregated funds that would not be subject to the prohibition on independent expenditures. *Id.* at 695. Although *McConnell* eliminated any doubt about whether bans on independent expenditures could be applied to unions, *Austin*'s conclusion that a state may choose to restrict only corporate expenditures remains good law.

Notwithstanding *Austin*, certain ideological non-profit corporations are entitled to an exemption from bans on direct corporate independent expenditures. *FEC v. Mass. Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238, 258-59 (1986); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 714 (4th Cir. 1999) (invalidating ban on corporate expenditures because: "Like the federal election law in *MCFL*, North Carolina's law makes no exception for nonprofits that present a minimal risk of distorting the political process."). The small non-profit in *MCFL* complained that FECA's administrative requirements were so burdensome as to chill its First Amendment rights. In accepting that claim, the *MCFL* Court listed three attributes of the corporation that were "essential" to the

exemption: (1) the group "was formed for the express purpose of promoting political ideas, and cannot engage in business activities;" (2) it had "no shareholders or other persons affiliated [such as union members giving dues] so as to have a claim on its assets or earnings;" and (3) it "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." 479 U.S. at 264. The corporate funds of such groups are thought to be a direct expression of the strength of their political ideas as opposed to their power in the economic market. The Court noted: "It may be that the class of organizations affected by our holding today will be small." *Id.*

Courts have split on how literally to interpret the three *MCFL* criteria with respect to whether a non-profit may accept any money from for-profit corporations, but the trend in the lower federal courts appears to be toward permitting a minor amount of corporate funding. *Compare Faucher v. FEC*, 743 F. Supp. 64, 69 (D. Me. 1990) (holding that exempt corporations must have a policy of accepting no corporate contributions), *aff'd*, 928 F.2d 468 (1st Cir. 1991), *and FEC v. NRA Political Victory Fund*, 778 F. Supp. 62, 64 (D.D.C. 1991) (same), *rev'd on other grounds*, 6 F.3d 821 (D.C. Cir. 1993), *with FEC v. Nat'l Rifle Ass'n*, 254 F.3d 173, 192 (D.C. Cir. 2001) (focusing on whether an absolute amount of corporate funds received annually turned a non-profit into a potential conduit for corporate contributions); *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 292-93 (2d Cir. 1995) (permitting non-profits whose corporate receipts are not "significant" to make independent expenditures directly from corporate treasuries); *Day v. Holahan*, 34 F.3d 1356, 1363-64 (8th Cir. 1994) (same); *and Beaumont v. FEC*, 278 F.3d 261 (4th Cir. 2002) (finding North Carolina's ban on corporate contributions and independent expenditures unconstitutional as applied to a non-profit deriving a small percentage of its revenues from for-profit corporate contributions), *rev'd on other grounds sub nom. FEC v. Beaumont*, 123 S. Ct. 2200 (2003) (recognizing corrupting potential of

MCFL-type corporations and finding ban on direct contributions constitutional as applied to non-profit advocacy corporation).

The cases precluding non-profit corporations that receive corporate or union funds or conduct business activity from benefiting from the *MCFL* exemption are truer to the language of *MCFL*. A strict interpretation of *MCFL* also avoids the difficult question of how much income or business-related activity is "significant" and thus provides a clear rule for non-profits. The Supreme Court has implied in several recent cases that the strict interpretation is correct, but has not yet directly addressed the issue.[4] *See McConnell*, 124 S. Ct. at 699 (noting that *MCFL* is limited to a "carefully defined category of entities"); *Beaumont*,123 S. Ct. at 2204 (describing a policy against accepting any corporate or union contributions as "essential to [the *MCFL*] holding"); *Austin*, 494 U.S. at 662 (rejecting application of *MCFL* to the Chamber of Commerce and recounting the "crucial" *MCFL* features).

III. "Independent" vs. "Coordinated" Expenditures

When an expenditure is coordinated with a candidate or party, it is usually treated as a contribution to the candidate or party. Under federal law, coordinated expenditures are thus subject to the amount and source limitations applicable to contributions — an individual may not spend more than $2,000 per election in coordination with a federal candidate, for example. But if an expenditure is truly independent, that same individual may spend an unlimited amount to support the candidate. Whether an expenditure is genuinely independent is therefore a matter of considerable importance.

TIPS

TIP: When defining "independent" expenditures, include clearly defined objective examples of activity that will defeat any claim of true independence. For example, spending should not be

[4] The question whether N.C. Right to Life was entitled to accept corporate funds was not presented

considered independent if it is for communications directed at the voting public, and the person making the expenditure:

- retains a consultant who is also providing campaign-related services to the candidate whom the person is seeking to help by making the expenditure;
- simply replicates a candidate's own campaign materials;
- uses information provided by candidate, campaign workers, or consultants with an understanding that the person is considering making the expenditure;
- notifies the campaign about the advertising in advance; or
- is actually working for the campaign at a high level.

These types of coordination would have to be defined more clearly in actual legislation. But the basic point is that it is easier to characterize expenditures that are obviously *not* independent than it is to provide a comprehensive definition of what *are* coordinated expenditures.

TIP: Merely obtaining information from a campaign that is otherwise publicly available or lobbying an elected official on a policy issue should not defeat the independence of a subsequent expenditure.

TIP: Any advertising coordinated with a candidate, even if not for narrowly defined "express advocacy" or "electioneering communications" should be treated as a contribution to the candidate.

LEGAL ANALYSIS

In 2001, the Supreme Court for the first time considered the constitutionality of limits on coordinated expenditures. *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) ("*Colo. Republican II*") held that coordinated expenditures were the functional equivalent of

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to the Supreme Court in *Beaumont*, and the Court declined to reach the issue.

contributions and that limits on them were a constitutionally permissible means of preventing evasion of individual contribution limits. Because independent expenditures cannot be limited, see section I *supra,* it is crucially important to know whether an expenditure is properly categorized as independent.

The most influential case attempting to distinguish between "independent" and "coordinated" expenditures is *FEC v. Christian Coalition,* 52 F. Supp. 2d 45 (D.D.C. 1999). Because the Christian Coalition is a corporation, it is not permitted to make contributions to federal candidates. 2 U.S.C. § 441b(a). Because coordinated expenditures are treated as contributions under federal law, any coordination of Coalition spending with its favored candidates would violate the law.

The *Christian Coalition* case is important for two reasons. First, the court recognized that election-related spending coordinated by candidates and supporters counts as a contribution, even if the funds are not spent on "express advocacy." "The fact that the candidate has requested or suggested that a spender engage in certain speech indicates that the speech is valuable to the candidate, giving such expenditures sufficient contribution-like qualities to fall within the Act's prohibition on contributions." 52 F. Supp. 2d at 92. This holding is very important, because a ruling to the contrary would allow those seeking to influence elections to coordinate unlimited amounts of spending as long as they craftily avoided certain kinds of advertising and thus open a huge new loophole in federal campaign finance law.

The second point of significance made in *Christian Coalition* was its adoption of an exceedingly narrow definition of what would count as "coordination," opening the door unnecessarily to unregulated collusion between candidates and big spenders. The court recognized that spending requested or suggested by a candidate counted as coordination, but determined that:

> In the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated;" where the candidate or her agents can exercise

> control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode or intended audience (*e.g.*, choice between newspaper or radio advertisement); or (4) "volume" (*e.g.*, number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners.

Id. According to the court, this standard limits regulation to cases where the candidate shows enough interest in the expenditure to show that it is perceived as valuable for the campaign. *See id.*

This standard, if adopted more widely, would open a new loophole in the law. Although the control, discussions, or negotiations described above should certainly be *sufficient* to show coordination, they should not be *necessary*. This definition would not rule out highly beneficial exchanges of important information between spenders and key insiders in a campaign, as long as the contact did not reach the level of a "partnership." True independence should mean more than *Christian Coalition* suggests.

To date, no other court has expressly adopted this definition.[5] Unfortunately, the FEC declined to appeal the *Christian Coalition* decision and adopted regulations, based largely on the decision, which allowed a new range of coordinated activity to pass as independent. BCRA rejected those regulations and directed the FEC to adopt a more rigorous definition of coordination. But the regulations that the FEC drafted in response to BCRA continue to treat a wide range of coordinated activity as independent. As a result, BCRA's congressional sponsors have brought a lawsuit challenging those new regulations in an effort to get new regulations that adequately cover coordination. That lawsuit is still pending.

[5]One state court commented favorably upon the *Christian Coalition* discussion of coordination, when deciding that Wisconsin could pursue an enforcement action against a group alleged to have coordinated spending with a candidate for Supreme Court Justice. *Wis. Coalition for Voter Participation v. State Elections Bd.*, 605 N.W.2d 654, 686 n.10 (Wis. Ct. App. 1999).

The plaintiffs in *McConnell* argued that Congress's decision to require new regulations was unconstitutional because it specified that the regulations could not "require agreement or formal collaboration to establish coordination." 124 S. Ct. at 704 (quoting BCRA). The Supreme Court rejected that argument, holding that an agreement is not necessary for expenditures to be coordinated. *Id.* at 705. But the Court deferred a full analysis of the new regulations for a future case, thus providing little concrete guidance on what rules defining coordination are constitutional.

The meaning of "independent expenditures" has been litigated in only a few other cases. In *FEC v. Public Citizen, Inc.*, the court properly concluded that obtaining publicly available information from a campaign was not alone sufficient for coordination. 64 F. Supp. 2d 1327, 1335 (N.D. Ga. 1999), *rev'd on other grounds*, 268 F.3d 1283 (11th Cir. 2001) ("Coordination . . . implies 'some measure of collaboration beyond a mere inquiry as to the position taken by a candidate on an issue.'") (quoting *Clifton v. FEC*, 114 F.3d 1309, 1311 (1st Cir. 1997)). Thus, campaign finance regulations may not bar such inquiries or insist that they be made in writing. *Clifton*, 114 F.3d at 1314, 1317.

Recently, the Kentucky Supreme Court narrowed its statute defining independent expenditures by construing the phrase "consultation involving a . . . candidate, slate of candidates . . . or agent" to have the same meaning as "consultation with a . . . candidate, slate of candidates . . . or agent regarding the content, timing, place, nature or volume of the communication for which the expenditure is made." *Martin v. Commonwealth*, 96 S.W.3d 38, 56 (Ky. 2003) (internal quotations omitted), *cert. denied*, 123 S. Ct. 2586 (mem.) (2003). The Kentucky Supreme Court upheld the statute as narrowed, rejecting arguments based on *Christian Coalition* that would have opened up enormous coordination loopholes.

Finally, a number of courts have found that the government may not *presume*, without actual evidence, that expenditures claimed to be independent are actually coordinated. In *Colo. Republican I*, the Supreme Court found no evidence of actual coordination between the state Republican Party and its not-yet-endorsed nominee and therefore refused to presume that coordination had occurred. 518 U.S. at 613-14, 619. More recently, *Republican Party of Minn. v. Pauly* invalidated a presumption of coordination even after the party endorsed its candidate. 63 F. Supp. 2d 1008, 1019 (D. Minn. 1999).[6] And the Eighth Circuit invalidated a presumption that an independent expenditure on behalf of a candidate was actually coordinated if the candidate failed to file a "statement of disavowal" and "take corrective action" within 72 hours of receiving a required report of the expenditure. *Ia. Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 967-68 (8th Cir. 1999). Some of the facts that ought to be considered evidence of coordination are set forth in the *TIPS* above.

McConnell struck down a provision of BCRA that would have required political parties to choose between making independent expenditures and benefiting from a higher limit on coordinated expenditures. 124 S. Ct. at 700-04. The Court invalidated the provision on the ground that it could not serve a "meaningful governmental interest" because it limited only express advocacy. *Id.* at 702-03. The Court also rejected the defense that the choice simply offered parties a benefit, by allowing them to choose whether to retain the ability to make independent expenditures or to make larger coordinated expenditures than would be permitted for other political committees. The Court concluded that this defense could not prevail because BCRA required all party committees to make the same choice, in effect allowing the first party committee in a given race to either make an independent expenditure or a coordinated expenditure to bind all other party committees. *Id.* at 703.

[6]It is not clear, however, that *Pauly* is consistent with the Supreme Court's ruling in *Shrink Mo.* on the government's evidentiary burden.

It is impossible to judge from the Court's opinion whether it would uphold a similar provision that was more carefully tailored either to cover a broader category of expenditures or to allow each party committee to make an independent choice.