CHAPTER TWO:
DRAFTING LAWS TO SURVIVE CHALLENGE

In today's political climate, virtually any new campaign finance law (and even some old ones) will be challenged in court. Some advocates seeking to press a reform agenda may tee up the challenge and accept the risk of defeat, hoping to push the envelope of permissible regulation. But others will prefer to meet current legal constraints, to maximize the chance of achieving durable reform.

In either case, reformers are far more likely to succeed if they keep the prospect of challenge in mind at all times. Even before drafting begins, there is much work that can and should be done in anticipation of litigation. If the work is done thoroughly, and publicized well, it may even forestall legal challenge or help to narrow the scope of any lawsuit. The *TIPS* offered in Part Two of this handbook will include suggestions for pre-drafting groundwork in addition to other practical advice.

Following certain basic guidelines for legislative drafting also can increase reformers' chances of success, whatever their goals. Careful drafting will enhance any law's likelihood of survival. Moreover, careful drafting will help to ensure that courts do not use sloppy draftsmanship as an excuse to avoid substantive issues in test cases. This chapter therefore flags some problem areas to which all drafters should be sensitive.

I. LEGISLATIVE FINDINGS

Many statutes begin with legislative Findings. The Findings recite facts that help to explain why the law has been enacted.

When a campaign finance law is constitutionally challenged, courts may look to the Findings for evidence of (i) a governmental interest that justifies the regulation and (ii) an appropriate fit between the particular measures adopted and the purpose to be achieved. The Findings should help to establish that the asserted interest is real and supported by empirical evidence (rather than illusory or merely a matter of conjecture) and that the measures adopted will promote the interest to a legally sufficient extent. For example, if the state asserts an interest in preventing corruption, the Findings could summarize evidence of corruption under the *status quo*.

To develop the facts that should be reflected in Findings, a state legislature can hold formal hearings on the need for a particular bill and the justification for its provisions. The legislature can also initiate formal investigations into issues of concern. These proceedings facilitate collection of at least some of the data the state will need to defend the new law, should it be challenged later.

Courts may look to Findings as proof that the drafters considered appropriate facts

before enacting the challenged law. Although statutes can survive without Findings, the prospects for survival are enhanced if the law includes them, and they are well supported. Courts may be more inclined to defer to the judgment of the legislature, for example, if the basis for that judgment is reflected in explicit and documented Findings.[1]

We therefore recommend including a Findings section in campaign finance laws. Reform-minded legislators should be encouraged to hold the hearings and conduct the investigations that will help to build the factual case for the new law. When ballot initiatives are the only avenue for reform, the drafters (and those working with them) need to develop the facts that can be included in a Findings section. It also will be helpful if those facts are widely publicized before the initiative appears on the ballot, so an argument can be made that they influenced the electorate's decision in passing the new law.

Findings may, in fact, be even more important when reform is introduced through a ballot initiative. Some courts have been more willing to second-guess the judgment of the voters than the judgment of the legislature, in part because the referendum process does not provide for formal hearings or other formal fact-finding proceedings.[2] To the extent that a Findings section provides evidence of fact development akin to that accomplished by legislatures, initiative proponents are likely to improve their chances of judicial deference.

As a practical matter, Findings may be presented as a series of numbered sentences, each stating a separate fact that justifies legislative action (or passage of a ballot initiative). Drafters must balance the need for completeness with the need for simplicity. The point is to group facts into a reasonably short list of Findings that explains the basis for the reforms adopted.

Finally, Findings are far more useful if they are attuned to the specific jurisdiction in question. Boilerplate "findings" that could be made without any real factual investigation will not necessarily hurt an effort at reform, but they are likely to be of limited

1 *See*, *e.g.*, *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985); *Rostker v. Goldberg*, 453 U.S. 57, 72-74 (1981).

2 *See Carver v. Nixon*, 72 F.3d 633, 645 (8th Cir. 1995) ("The process of enactment . . . includes deliberation and an opportunity for compromise and amendment, and usually committee studies and hearings. These are substantial reasons for according deference to legislative enactments that do not exist with respect to proposals adopted by initiative.") (footnote omitted); *California ProLife Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1299 (E.D. Cal. 1998) ("[G]iven that the statutes at bar are the product of the initiative process, their adoption did not enjoy the fact gathering and evaluation process which in part justifies deference."), *aff'd on other grounds*, 164 F.3d 1189 (9th Cir. 1999). *But see Daggett v. Webster*, 74 F. Supp. 2d 53, 63-64 (D. Me. 1999) (holding that an initiative is entitled to no more and no less deference than legislation), *aff'd on other grounds sub nom. Daggett v. Commission on Gov'tal Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000).

value. Drafting jurisdictionally specific Findings also provides an incentive to develop evidence that will be needed to defend the law if litigation ensues.

II. STATUTORY PURPOSES

Explicitly stating a statute's purposes may help to establish the governmental interest that the state seeks to advance in enacting a campaign finance law. Sometimes drafters include a separate section (usually following the Findings) with a statement of the statutory purposes. Sometimes the Findings section includes Declarations that identify the goals to be achieved with the law.

The statement of purposes should be carefully matched to the provisions adopted in the body of a campaign finance law. As the overview of *Buckley v. Valeo* , 424 U.S. 1 (1976) (per curiam), in Chapter One indicated, the Supreme Court initially recognized only a limited range of state interests justifying common types of regulation. That list has not grown substantially in the subsequent three decades (as Part Two of this handbook shows), and the Supreme Court firmly rebuffed a recent argument that the time saved by candidates who were freed from fundraising burdens was a new justification for spending limits. *Randall v. Sorrell*, 126 S. Ct. 2479, 2489-91 (2006). Nothing in *Buckley* forecloses judicial recognition of additional justifications for reform, of course, but some courts reject the legitimacy of any purpose not explicitly blessed by the Supreme Court.[3]

Goals that galvanize reformers and voters may not necessarily be the purposes accepted by the Supreme Court. Focus groups tend to report high positive responses to statutes aimed at equality, fairness, or "leveling the playing field," while *Buckley* rejected in no uncertain terms Congress's effort to limit spending by monied interests to enhance the relative voice of others. Even though *Buckley* permits leveling of the playing field through public funding systems that do not mandatorily limit spending but rather provide resources to candidates who accept voluntary spending limits, opponents of reform invariably trot out every reference to "leveling the playing field" as proof of an impermissible state interest. To promote survival of bills or initiatives, drafters who use that phrase should make clear that they are "leveling up" by providing public funding, not "leveling down" by limiting spending. Listing purposes that the Supreme Court has spurned is a recipe for disaster; and there is some risk in listing even purposes that are technically open for judicial consideration but have not yet been explicitly endorsed by the Court. To the extent that drafters wish to identify state interests that the Supreme Court has not considered, the statement should be clear that those interests are ancillary to, and not substitutes for, recognized governmental purposes.

3 *See California ProLife Council PAC*, 989 F. Supp. at 1294.

III. CLARITY AND PRECISION

A campaign finance law that is vague (difficult to understand) or ambiguous (subject to more than one interpretation) will be subject to constitutional attack. If individuals or groups cannot tell whether the law applies to them, or what types of conduct it covers, they may be deterred from engaging in certain activities that would actually be legal and in fact are safeguarded by the First Amendment.[4] The deterrence factor will be most serious if the law includes provisions for criminal penalties. To prevent this "chill" of protected speech and association, statutes must be drafted so that they are clear and precise.

If statutes are not clear and unambiguous, courts have two choices. First, they may construe the offending term to eliminate the problem, as the Supreme Court did in *Buckley* with respect to the definition of "relative to" a clearly identified candidate. There is no guarantee, of course, that courts will interpret vague or ambiguous terms to provide the meaning the drafters intended. And courts may create new problems when they eliminate the vagueness or ambiguity, as *Buckley* did.

The court's second option when statutory language is vague or ambiguous is simply to invalidate the affected provision. If the provision is not "severable" from the rest of the law, because the law would not have been enacted without the provision, the court may strike down the entire statute.

To avoid problems of vagueness or ambiguity, key statutory terms should be defined explicitly. Drafters should take care not to introduce definitions that are inconsistent with other statutes or, if different definitions are necessary, to make it clear that the new definitions govern only the new statutory provisions so as not to introduce problems in other parts of the law. The definitions should use plain English and should take care not to introduce new vague or ambiguous language. Minimizing the use of complex sentences can also help to improve the clarity of the statutory text.

IV. SCOPE

Obviously, the needs of each state should determine the scope of any campaign finance law governing its elections. But even when the system is deeply troubled, it is not necessarily a good idea to tackle everything at once. A simple, easily administered law that focuses on the state's most pressing problems has a better chance of withstanding assault than a long and complicated statute that seeks to close every conceivable loophole. If initial steps do not cure the problems, additional provisions can be added later.

Complicated statutes invite claims that the legal and bookkeeping costs groups must

4 *See Buckley*, 424 U.S. at 41 n.48 ("[V]ague laws may . . . inhibit protected expression by inducing citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.") (internal quotations omitted).

incur just to understand and comply with the law cut substantially into their electoral activity. If the "practical effect on [a political organization] is to make engaging in protected speech a severely demanding task," the group may be entitled to an exception from the law on First Amendment grounds.[5]

V. ENFORCEMENT

If a campaign finance law is to have any teeth, it must include enforcement provisions to deter violations. Reformers may choose to impose civil liability, criminal penalties, or both. Here, again, pulling punches (at least initially) may be the better part of wisdom. If violations abound notwithstanding consistent and vigorous enforcement of meaningful civil penalties, more punitive measures can be considered later.

Although reformers outraged by the undue influence of money on politics may want to throw the book at violators of campaign finance requirements, a statute imposing criminal liability on violators will draw more intense judicial scrutiny. A criminal record is no laughing matter, and reformers cannot simply assume that governmental authorities will use criminal enforcement powers reasonably. Where criminal penalties are a possibility, courts will take concerns about vagueness or ambiguity very seriously and are likely to give every benefit of the doubt to opponents of reform.[6] A punitive approach therefore can be self-defeating.

VI. RED FLAGS

Although the law of campaign finance is changing all the time, certain areas are better settled than others. In particular, there are some kinds of regulations that have been struck down, in whole or in part, either by the Supreme Court or by *every* lower court to consider them. Including such provisions in a new law, however attractive they may seem in principle, raises a red flag for opponents of reform.

To date, "red flag" provisions include the following:

- extremely low contribution limits that operate over an entire election cycle, are not indexed for inflation, and apply equally to individuals and groups (*see* Chapters One, Three);

- off-year fundraising bans (*see* Chapter Three);

5 *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 254-55 (1986) ("Detailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs . . . [and] require a far more complex and formalized organization than many small groups could manage.").

6 *See Buckley*, 424 U.S. at 40-41 ("Close examination of the specificity of the statutory limitation is required where . . . the legislation imposes criminal penalties in an area permeated by First Amendment interests.").

- mandatory limits on spending by candidates or their campaigns (*see* Chapter Five);

- monetary limits on independent expenditures (*see* Chapter Six); and

- bans on the use of corporate or union treasury funds for independent advertising that does not contain express advocacy or its functional equivalent (*see* Chapter Seven).

It is not *impossible* that a particular court could be induced to uphold such provisions, given compelling facts that distinguish the statute or initiative in question from others previously invalidated. But persuading a court to buck the clear legal trend (and perhaps to test the limits of a Supreme Court precedent) will mean a steep uphill battle. Challenges of such provisions, if unsuccessful in the lower courts, are especially likely to reach the Supreme Court, which is now far more hostile to campaign finance regulation than it has been since the enactment of the Federal Election Campaign Act in the 1970s. Moreover, including these measures in a larger reform package could undermine the entire statute, if a hostile judge treats them as evidence of insensitivity to constitutional concerns. Maximizing the chances of having your campaign finance law upheld therefore means avoiding these measures.

On the other hand, some jurisdictions may want to push the envelope of reform. In our first edition, we identified a contribution limit of less than $1,000 as a "red flag" provision. Until the decision in *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000), such limits—including Missouri's contribution limits of $275, $550, and $1,075—were routinely being invalidated by lower courts. But Missouri persevered in defending its limits, and won! As a result, Missouri's limits were reinstated and other courts have upheld contribution limits of less than $300 for legislative candidates in several states. Contribution limits under $1,000 per election might not have come off our "red flag" list if states had not been willing to risk having such limits overturned. On the other hand, low contribution limits of the sort enacted in Vermont and struck down in *Randall* have gone back on the list because one state went too far in pushing the constitutional limits.

Disclosure statutes that were not limited to "express advocacy" were red flags until recently. With the decision in *McConnell*, it is now clear that states can regulate campaign advertising in the pre-election period, even if the ads do not use "magic words." In this case, Congress took its new "electioneering communications" provisions to the Supreme Court and overturned adverse lower court decisions in most of the country. The Court's recent decision in *FEC v. Wisconsin Right to Life, Inc.,* 127 S. Ct. 2652 (2007), has carved an exemption into the electioneering communications provisions, but the exemption does not affect disclosure (and least not yet).

Similarly, the State of Vermont and the City of Cincinnati adopted mandatory spending limits for candidates, knowing that the laws would almost certainly be invalidated

by the lower courts, but hoping that the lawsuits would present an opportunity for the Supreme Court to reconsider *Buckley*'s ruling on expenditure caps. The Court did have that opportunity, and it struck down the limits in *Randall*, but the law does not progress if calculated risks are never taken.

VII. SEVERABILITY CLAUSES

A severability clause will express the drafters' intent to preserve parts of a campaign finance law that are constitutional even if other parts are invalidated. In deciding whether to include such a clause, or how it should be drafted, reformers should consider carefully the potential consequences of partial invalidation. Some critics of *Buckley* argue, for example, that the "arms race" created by contribution limits in the absence of expenditure limits is worse than no campaign finance regulation at all. Whether drafters want to implement any statutory provisions that survive scrutiny, or prefer instead to have certain provisions stand or fall together, the intent should be explicit in the text of the law.